Chapter 7

Defining and Determining a 'Substantial Lessening of Competition'

*Justice Mark Moshinsky**

I Introduction

The expression 'substantial lessening of competition',[1] or the corresponding expression, 'substantially lessening competition', is utilised in many of the provisions in pt IV of the *Competition and Consumer Act 2010* (Cth) ('*CCA*'). The provisions that use the expression 'substantially lessening competition' include ss 45, 46, 47, and 50, each of which is significant in the scheme of pt IV. The constituent parts of the expression are not exhaustively defined in the *CCA*, but there are inclusive definitions of 'competition' (in s 4) and of 'lessening of competition' (in s 4G), and s 50 contains a list of matters that must be taken into account in determining whether, for the purposes of that section, an acquisition would have the effect or likely effect of substantially lessening competition. It has thus been left to case law to elucidate, largely by example, the content of 'substantially lessening competition'. While the expression (in particular, the word 'substantially') may be imprecise, this provides flexibility to cover a range of facts and circumstances, including new markets that were not even envisaged when the expression was first adopted. This Chapter will first outline the provisions that use the expression 'substantially lessening competition'; second, briefly discuss the notions of purpose, effect, and likely effect; and third, consider the constituent elements of the expression 'substantially lessening competition'.

II The Statutory Provisions

Part IV of the *CCA* contains two divisions: div 1, dealing with cartel conduct; and div 2, containing other provisions. While the expression 'substantially lessening competition'

* Justice of the Federal Court of Australia. The author would like to thank his Associate, Anthony Middleton, for his assistance in reviewing and commenting on a draft of this Chapter.

1 See generally Arlen Duke, *Corones' Competition Law in Australia* (Lawbook, 7th ed, 2019) [2.320], [2.330], [2.460]; J Dyson Heydon, *Trade Practices Law: Competition and Consumer Law* (Thomson Reuters, online edition, accessed September 2020) [30.230], [30.345], [30.370]; Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated* (Lawbook, 41st ed, 2019) [45.280]-[45.340]; Peter Armitage, 'The Evolution of the "Substantial Lessening of Competition" Test: A Review of Case Law' (2016) 44 *Australian Business Law Review* 74; Stephen G Corones, 'Substantial Lessening of Competition: Twenty Years On' (1994) 22 *Australian Business Law Review* 239.

appears in some of the defences and exceptions to the cartel provisions (ss 45AO, 45AP, and 45AR), it is sufficient for present purposes to focus on the provisions of div 2.

Section 45 ('Contracts, arrangements or understandings that restrict dealings or affect competition') is one of the key provisions in which the expression 'substantially lessening competition' is used. Section 45(1), as amended in 2017,[2] provides:

> (1) A corporation must not:
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> (a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
> (b) give effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
> (c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

The section refers to a provision, or a concerted practice, having the 'purpose' of substantially lessening competition. It also refers to the provision or concerted practice having or being likely to have the 'effect' of substantially lessening competition. The nature of the 'purpose' and 'effect' elements will be discussed below.

It is interesting to note that, in amending s 45(1) in 2017 to extend to concerted practices, following the recommendations of the *Harper Review*,[3] the Parliament adopted the expression 'substantially lessening competition', which was used in many of the existing provisions (including s 45). This indicates a level of satisfaction with the expression as interpreted and applied by the courts.

The word 'competition' is specifically defined for the purposes of s 45 in s 45(3). This provides, in summary, that for the purposes of the section, 'competition' means competition in any market in which a corporation (or a related body corporate) that is a party to the contract, arrangement, or understanding containing the prohibited provision, or that is a party to the concerted practice, supplies or acquires goods or services or would, but for the provision or the practice, supply or acquire goods or services.

It is convenient at this point to note the general definition of 'competition' in s 4.[4] Section 4 relevantly provides that, unless the contrary intention appears:

> *competition* includes:
>
> (a) competition from goods that are, or are capable of being, imported into Australia; and
> (b) competition from services that are rendered, or are capable of being rendered, in Australia by persons not resident or not carrying on business in Australia.

2 *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) sch 3.

3 Ian Harper et al, *Competition Policy Review* (Final Report, March 2015) 9, 60, 370-2 ('Recommendation 29 – Price signalling') ('*Harper Review*').

4 As inserted by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) sch 1, with effect from 6 November 2017.

Further, s 4G contains a general provision relating to 'lessening of competition':

> For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

The next substantive provision that uses the expression 'substantial lessening of competition' is s 45DA, which deals with secondary boycotts. The section refers to conduct that is engaged in for the purpose, or that would have or be likely to have the effect, of causing a substantial lessening of competition in any market as there described.

Section 46, as amended in 2017,[5] also adopts the expression 'substantially lessening competition'. Section 46(1) provides:

> (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
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> (a) that market; or
> (b) any other market in which that corporation, or a body corporate that is related to that corporation:
> (i) supplies goods or services, or is likely to supply goods or services; or
> (ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or
> (c) any other market in which that corporation, or a body corporate that is related to that corporation:
> (i) acquires goods or services, or is likely to acquire goods or services; or
> (ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

As with s 45, in amending this provision, the Parliament chose to adopt the expression 'substantially lessening competition'. This reflected the recommendations of the *Harper Review*.[6] In proposing this language, the Harper Review Panel stated: 'The proposed test of "substantial lessening of competition" is the same as that found in section 45 (anti-competitive arrangements), section 47 (exclusive dealing) and section 50 (mergers) of the CCA, and the test is well-accepted within those sections'.[7]

The expression 'substantially lessening competition' is used in connection with exclusive dealing in s 47. Section 47(10) provides that sub-s (1), which proscribes exclusive dealing, does not apply to the practice of exclusive dealing by a corporation unless, in summary, engaging in the conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition. The expression 'competition' is defined for the purposes of this provision as meaning competition in a market as described in s 47(13).

Section 49, which deals with dual listed company arrangements that affect competition, utilises the expression 'substantially lessening competition'. It also contains a specific definition of 'competition' in s 49(3).

5 *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth) sch 1.
6 Ian Harper et al, *Harper Review*, 9, 61-2, 348 ('Recommendation 30 – Misuse of market power').
7 Ibid 341.

Section 50, which prohibits acquisitions that would result in a substantial lessening of competition, provides in part:

> (1) A corporation must not directly or indirectly:
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> (a) acquire shares in the capital of a body corporate; or
> (b) acquire any assets of a person;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
>
> (2) A person must not directly or indirectly:
>
> (a) acquire shares in the capital of a corporation; or
> (b) acquire any assets of a corporation;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.[8]

The word 'market' is defined for the purposes of s 50 as meaning a market for goods or services in Australia, a state, a territory, or a region of Australia: s 50(6).

In contrast to ss 45, 45DA, 46, 47, and 49, s 50 does not refer to a 'purpose' of substantially lessening competition, but only to effect and likely effect.

Subsection (3) of s 50 contains a list of matters to be taken into account in determining whether the acquisition would have, or be likely to have, the proscribed effect or likely effect:

> (3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:
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> (a) the actual and potential level of import competition in the market;
> (b) the height of barriers to entry to the market;
> (c) the level of concentration in the market;
> (d) the degree of countervailing power in the market;
> (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
> (f) the extent to which substitutes are available in the market or are likely to be available in the market;
> (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
> (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
> (i) the nature and extent of vertical integration in the market.

While the list of matters in s 50(3) is directly applicable only to s 50, and reflects the subject matter of that provision, namely acquisitions of shares and assets, it nevertheless arguably provides guidance in considering, for the purposes of other provisions, whether relevant conduct would have the effect or likely effect of substantially lessening competition.[9]

8 Notes omitted.

9 See Stephen G Corones, 'Substantial Lessening of Competition: Twenty Years On' (1994) 22 *Australian Business Law Review* 239, 253.

Section 50A, which concerns acquisitions that occur outside Australia, also refers to acquisitions having the effect or likely effect of substantially lessening competition.

The expression 'substantially lessening competition' is also used in ss 90, 91A, 93, 93AC, 95AA, and 95AB, which fall within pt VII ('Authorisations and notifications'), and s 102, which falls within pt IX ('Review by Tribunal of Determinations of Commission'). For example, s 90, which deals with the determination of applications for authorisations, provides in sub-s (7) that the Australian Competition and Consumer Commission must not make a determination granting an authorisation under s 88 in relation to conduct unless it is satisfied that, inter alia, 'the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition'.

III 'Purpose'

Each of ss 45, 45DA, 46, 47, and 49 refers, inter alia, to a *purpose* of substantially lessening competition. In relation to these provisions other than s 45DA,[10] s 4F(1) of the *CCA* is relevant. It provides that a provision (of a contract, arrangement, or understanding) shall be deemed to have a particular purpose if the provision was included in the contract, arrangement, or understanding for purposes that included that purpose, and that purpose was a substantial purpose; and that a person shall be deemed to have engaged in conduct for a particular purpose if the person engaged in the conduct for purposes that included that purpose, and that purpose was a substantial purpose.

It is established that, in referring to 'purpose', the relevant provisions are concerned with the subjective – rather than the objective – purpose of the relevant person.[11]

IV 'Effect' and 'Likely Effect'

Each of ss 45, 45DA, 46, 47, 49, 50, and 50A refers to an *effect* or *likely effect* of substantially lessening competition. It is beyond the scope of this Chapter to discuss the meaning of 'likely'.[12] In some cases, the provisions are expressed in the present tense. For example, s 45(1)(b) states that a corporation must not give effect to a provision of a contract, arrangement, or understanding if that provision 'has or is likely to have the effect' of substantially lessening competition. In other cases, the provisions adopt the conditional future tense. For example, s 45(1)(a) states that a corporation must not make a contract, arrangement, or understanding if a provision 'would have or be likely to have the effect' of substantially lessening competition.

It is established that, whether expressed in the present or conditional future tense, the provisions require a comparison between the nature and extent of competition in

10 Section 4F(1) does not apply for the purposes of s 45DA(1): s 4F(2).

11 See *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, [18], [41]-[43], [62]-[63], [212], cf [130]; *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 37-8; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460, 474-7 ('*ASX Operations*'); *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, 134.

12 Ruth C A Higgins SC, 'A Likely Story: Future Counterfactuals in Competition Law' in Michael Gvozdenovic and Stephen Puttick (eds), *Current Issues in Competition Law – Vol I: Context and Interpretation* (Federation Press, 2021).

the relevant market *with* and *without* the impugned provision or conduct. This requires, in relation to provisions expressed in the future tense, a comparison between a future *with* and a future *without* the relevant provision or conduct. In the context of s 50, in *Australian Competition and Consumer Commission v Pacific National Pty Ltd* ('*Pacific National Appeal*'),[13] Middleton and O'Bryan JJ stated:

> The prohibition in s 50 uses the conditional (or hypothetical) future tense: the prohibition applies if the acquisition would have the effect or would be likely to have the effect of substantially lessening competition. The test is in relevantly the same form as ss 45 and 47 and, since 6 November 2017, s 46. It is well settled that the test requires a comparison between the nature and extent of competition in any market potentially affected by the acquisition in the future with the acquisition and without the acquisition …[14]

In referring to both the *effect* and the *likely effect* of substantially lessening competition, the provisions present two alternative thresholds. It may be said that the first alternative is practically superfluous in light of the second, but the drafting style may have been adopted to make clear that both alternatives are covered by the provisions.

V 'Substantially Lessening Competition'

Next, it is useful to consider the constituent elements of the expression 'substantially lessening competition'. Although the expression 'substantially lessening competition' is a compound expression that needs to be construed as a whole, it is convenient to address separately each of the words in the expression. The elements of the expression will be examined in the following order: competition; lessening; and then, substantially.

A 'Competition'

As has been adverted to above, the notion of 'competition' is central to the *CCA*. The object of the *CCA*, as stated in s 2, is to enhance the welfare of Australians through the promotion of *competition* and fair trading and provision for consumer protection.

As noted above, there is an inclusive definition of 'competition' in s 4. This clarifies that competition includes competition from goods imported or capable of being imported into Australia, and competition from services rendered or capable of being rendered in Australia by persons not resident or not carrying on business in Australia. Further, as noted above, 'competition' is defined as meaning competition in a market as described in some of the substantive provisions.

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13 (2020) 277 FCR 49 ('*Pacific National Appeal*'). Special leave to appeal was refused: *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] HCATrans 213.

14 (2020) 277 FCR 49, [103], referring to: *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* [1982] FCA 193; 44 ALR 173, 191-2 ('*Dandy Power*'); *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38, [113] (approved on appeal in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 1381, [12]); *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317, [352]; *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967, [130], [343] (upheld on appeal in *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297).

In a seminal passage, the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* provided the following description of 'competition':

> Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand it was put to us that price competition is the most valuable and desirable form of competition. On the other hand it was said that if there is rivalry in other dimensions of business conduct – in service, in technology, in quality and consistency of product – an absence of price competition need not be of great concern.
>
> In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.
>
> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:–
>
> (1) the number and size distribution of independent sellers, especially the degree of market concentration;
> (2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
> (3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;
> (4) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and
> (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.
>
> Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.[15]

This passage was cited with approval by Bowen CJ and Fisher J in *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd.*[16] In the context of exclusive dealing contrary to s 47 of the then *Trade Practices Act 1974* (Cth) ('*TPA*'), their Honours stated:

> It would seem that 'competition' for the purposes of s 47(10) must be read as referring to a process or state of affairs in the market. In considering the state of competition a detailed evaluation of the market structure seems to be required.[17]

The notion of competition has been discussed by the High Court of Australia in several cases. In *NT Power Generation Pty Ltd v Power and Water Authority* ('*NT Power v PAWA*'),[18] McHugh A-CJ, Gummow, Callinan, and Heydon JJ stated:

15 (1976) 8 ALR 481, 512.

16 [1982] FCA 285; 44 ALR 667, 669. See also *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317, [349].

17 [1982] FCA 285; 44 ALR 667, 669.

18 (2004) 219 CLR 90 ('*NT Power v PAWA*').

> 'Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away'.[19] Competition is also dynamic. It tends to create conditions of constant turbulence. It generates instability. These circumstances trigger the emulation and striving which produce competitive benefits.[20]

It is established that the *CCA* is concerned with competition in a market, rather than with the ability of individual buyers or sellers to compete.[21] However, as Corones has noted, the general proposition that competition is not concerned with the fate of individual competitors needs some refinement.[22] In particular, although conduct directed at a particular dealer is unlikely to give rise to a substantial lessening of competition, it may do so in special circumstances.[23]

B 'Lessening'

The word 'lessening' is not exhaustively defined in the *CCA*. However, as noted above, s 4G provides that, for the purposes of the *CCA*, references to the lessening of competition shall be read as including references to preventing or hindering competition. The definition does not appear to add much, if anything, to the ordinary meaning of the word 'lessening'.

C 'Substantially'

The meaning of 'substantially', in the context of the expression 'substantially lessening competition' in s 45, was considered by the High Court in *Rural Press Ltd v Australian Competition and Consumer Commission* ('*Rural Press*'),[24] but the High Court did not there need to, and did not, settle definitively upon a particular construction. In a joint judgment, Gummow, Hayne, and Heydon JJ stated that the question in the case was whether the effect of the relevant arrangement was substantial 'in the sense of being meaningful or relevant to the competitive process'.[25] While that statement, which adopts language used by French J in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*,[26] may appear to offer a particular construction, it is noteworthy that it was followed by a footnote (n 67) in the following terms:

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19 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 191. See also *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, [160].

20 *NT Power v PAWA* (2004) 219 CLR 90, [138].

21 *ASX Operations* (1990) 27 FCR 460, 478; *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, [242].

22 Stephen G Corones, 'Substantial Lessening of Competition: Twenty Years On' (1994) 22 *Australian Business Law Review* 239, 244.

23 Ibid, referring to *Dandy Power* (1982) 44 ALR 173 and *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581.

24 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 ('*Rural Press*').

25 Ibid [41].

26 [2000] FCA 38, [114].

> *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR ¶41-752 at 40,732 [114]; *Australian Competition and Consumer Commission v Australian Medical Association, Western Australia Branch Inc* (2003) 199 ALR 423 at 483 [329]. The test set out in these cases was advocated by the Commission and not disputed by the Rural Press parties. In the *Stirling* case French J referred to three authorities. In *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at 348; 27 ALR 367 at 382, Deane J said he inclined to the view that 'substantial loss or damage' as used in s 45D(1) meant 'real or of substance and not insubstantial or nominal'. In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557 at 564, Lockhart J said that in s 45(2) 'the lessening of competition must be at least real or of substance', and said that he saw 'considerable force in the view ... that, in the context of s 45, the word means substantially in the sense of considerably'. In *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 at 420-422 Wilcox J rejected the view that an effect on competition which was more than insignificant was for that reason alone substantial. While the Commission favoured the less demanding of these tests and the Rural Press parties the more demanding, it is not necessary to decide between them in order to determine this appeal. What is plain is that those authorities do not support the proposition that it would be sufficient for liability if the relevant effect was quantitatively more than insignificant or not insubstantial. That proposition does not follow from the test stated by French J.[27]

As this footnote indicates, their Honours did not resolve which of the various formulations is to be preferred. The other members of the High Court in *Rural Press* agreed with the relevant part of the judgment of Gummow, Hayne, and Heydon JJ.[28] Thus the High Court did not fully resolve the construction of the word 'substantially' in the relevant provisions.

The construction of the word 'substantially' was recently considered by Middleton and O'Bryan JJ in *Pacific National Appeal*. In the context of s 50 of the *CCA*, Middleton and O'Bryan JJ stated:

> The word 'substantially' as used in the section is imprecise. However, the Courts have consistently said that, in each of ss 45, 47 and 50, the word does not connote a large or weighty lessening of competition, but one that is 'real or of substance' and thereby meaningful and relevant to the competitive process: *Stirling Harbour* at [114] per French J (approved on appeal at *Bunbury Port* at [13] per Burchett and Hely JJ); *AGL (No 3)* at [351] per French J; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; 203 ALR 217; [2003] HCA 75 (*Rural Press*) at [41] per Gummow, Hayne and Heydon JJ.[29]

Their Honours returned to the point later in their judgment:

> 'Substantial' is an evaluative, rather than a precise, legal standard. In *Rural Press*, in the context of s 45 of the Act, Gummow, Hayne and Heydon JJ adopted with apparent approval the statement of French J in *Stirling Harbour* that the relevant question is whether the effect is substantial in the sense of being meaningful or relevant to the competitive process (at [41]). However, at footnote 67, their Honours

27 *Rural Press* (2003) 216 CLR 53, [41] n 67.
28 Ibid [2], [108].
29 *Pacific National Appeal* (2020) 277 FCR 49, [104].

> noted that French J had referred to three authorities: *Tillmanns* in which Deane J expressed the view that 'substantial' (in s 45D) meant 'real or of substance and not insubstantial or nominal'; *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557; 62 FLR 437 in which Lockhart J said that (at ALR 563; FLR 445) '[in s 45] the lessening of competition must be at least real or of substance', and said that he saw 'considerable force in the view … that, in the context of s 45, the word means substantially in the sense of considerably'; and *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385; 103 ALR 41 in which Wilcox J rejected the view that an effect on competition which was more than insignificant was, for that reason alone, substantial (at FCR 420-2; ALR 73-5). Their Honours observed that it was not necessary to decide between the foregoing statements, but concluded that it is plain that the authorities do not support the proposition that it would be sufficient for liability if the relevant effect on competition was quantitatively 'more than insignificant' or 'not insubstantial'. *The current state of the authorities shows that 'substantial' means 'real or of substance' and, in that sense, meaningful or relevant to the competitive process*.[30]

In this passage, Middleton and O'Bryan JJ analyse the authorities as supporting the proposition that the word 'substantially' in the relevant provisions means 'real or of substance'. The meaning of 'substantially' was not expressly considered in the separate reasons for judgment of Perram J.

The expression 'substantially lessening competition', in the context of s 50, was also considered in *Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission*.[31] In that case, Middleton J, sitting at first instance, made the point that the concept of substantiality may also have a temporal aspect,[32] referring to the following observations of Beach J at first instance in *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)*:

> the concept of *substantially* lessening competition does not require a large or weighty lessening of competition, but only one that is meaningful and relevant to the competitive process. A short term effect readily corrected by market processes is not substantial in this respect. But a medium to long term effect not easily corrected may amount to a substantial lessening of competition.[33]

The way in which the s 45(2) issue was dealt with in the joint judgment of Gummow, Hayne, and Heydon JJ in *Rural Press* provides useful guidance as to the meaning of 'substantially' in the expression 'substantially lessening competition'. The facts of *Rural Press,* in brief outline, were as follows.[34] Rural Press Ltd, through a wholly-owned subsidiary ('Bridge'), published a regional newspaper called the *Murray Valley Standard* ('the *Standard*'). It was published in the town, Murray Bridge, two days a week. It published news and advertising about, and solicited advertising from, the Murray Bridge district. Within the prime circulation area was the township of Mannum.

30 Ibid [219] (emphasis added).
31 [2020] FCA 117.
32 Ibid [70].
33 [2019] FCA 669, [1262] (emphasis in original). Although the Full Court of the Federal Court of Australia in *Pacific National Appeal* allowed a cross-appeal from this judgment, the judgments of the Full Court did not express any disagreement with this statement.
34 See *Rural Press* (2003) 216 CLR 53, [16]-[26].

Also relevant to the facts of the case was the Riverland area, which includes the township of Waikerie. In that town, Waikerie Printing House Pty Ltd published a regional newspaper, the *River News*. This was sold weekly. Before July 1997, it was circulated around Waikerie, including townships that were about halfway between Murray Bridge and Waikerie. It sold a few copies in Mannum, but this was not regarded as part of its prime circulation area.

John Pick was the managing editor of the *River News* and a director of Waikerie Printing. Paul Taylor and Darnley Taylor were directors and controllers of Waikerie Printing.

In July 1997, following a restructure of the councils in the area, Mr Pick conceived the idea of causing the *River News* to circulate not only in the northern and central parts of the new council area (where the *River News* was already circulated) but also its southern part around Mannum. This would make the *River News* a competitor with the *Standard* for readers and advertisers in the part of the *Standard*'s prime circulation area which was around Mannum. Mr Pick put in place arrangements to procure news and advertisements in the Mannum area. The *River News* expanded in size in order to publish articles about the Mannum area. As a result of introducing this competition into the Mannum area, the circulation of the *River News* in that area increased by between 100 and 500 copies.

From July 1997, executives of Rural Press and Bridge began to worry about the move of the *River News* into the Mannum area. In August 1997, Beryl Price, the manager of Bridge, recommended distributing a free regional newspaper throughout the Riverland area. She repeated this proposal over the following months. She and her superiors at Rural Press repeatedly indicated to Mr Pick and the Taylors that, unless Waikerie Printing reversed the move of the *River News* south, Rural Press would have to consider reacting commercially, perhaps by establishing a rival newspaper in the Riverland area. This was communicated in conversations and in letters. The Taylors thereafter decided to withdraw. This was in circumstances where the officers of Rural Press had told them that if they did not withdraw, a new newspaper in the Riverland area would be started and, if they did withdraw, it would not be. Waikerie Printing told Rural Press that the *River News* would revert to a line 40 km north of Mannum. Waikerie Printing ceased to promote the paper in the Mannum area, ceased its focus on Mannum news, ceased to seek advertising revenue in Mannum, and caused the paper to revert to its previous prime circulation area, which stopped about 40 km north of Mannum. A significant fall in circulation in the Mannum area resulted.

In contending that there had not been an arrangement with the purpose or effect of substantially lessening competition in contravention of s 45(2) of the then *TPA*, Rural Press submitted that: the incursion by *River News* was for a trial period of 12 months only; Waikerie Printing had no intention of further extending the prime circulation area of the *River News*; the circulation numbers, readership, and areas of circulation were very small; and the incursion involved increased production costs of only $15,333, increased total revenue of less than $20,000, and profits of only $5000 to $10,000. These submissions were rejected. Gummow, Hayne, and Heydon JJ stated that it was not decisive that the *River News* circulated in only part of the Murray Bridge regional newspaper market, or that the overall trading activities of participants in the Murray

Bridge regional newspaper market were not extensive.[35] Their Honours also stated that, while neither the area nor the increases in sales, advertising revenues, and profits achieved were large, it did not follow that the *River News* did not achieve a substantially pro-competitive impact by its move south, or that the arrangement did not have a substantially anti-competitive impact in causing its retreat north. It was observed that the move was profitable and there was no reason to suppose that it would not remain profitable or that Waikerie Printing would not seek to continue gaining those profits. The following passage from the reasoning of Gummow, Hayne, and Heydon JJ provides useful guidance as to available modes of analysis:

> The Rural Press parties did not answer a fundamental question. If they had not seen the competitive impact of the *River News* as actually or potentially substantial, why did they fear it? They paid extremely close attention to the new activities of the *River News*, they recorded them, they communicated about them orally and in writing and they exhibited adamantine opposition to them. In itself that can be the conduct of a bona fide competitor, and in limited respects the Rural Press parties did respond competitively, but they coupled this with much conduct which was not bona fide competition on the merits. Price pressed her superiors incessantly about the problem from July 1997. McAuliffe, her immediate superior, paid equally close attention to the problem, and kept his superiors, Watson and Law, informed. All four executives made threats to Waikerie Printing directors to retaliate in the Riverland areas. Even McCarthy, the managing director of Rural Press, felt it necessary to give the matter personal attention. That is significant. Rural Press was a national company publishing itself, or through its subsidiaries, thirty agricultural magazines and 147 regional newspapers throughout Australia. It had interests in New Zealand and the United States of America. It had sales in 1999-2000 of $438 million and a pre-tax profit of $99 million. It had net assets of $410 million as at 30 June 2000. The managing director of so large a company must have had heavy burdens and clamant demands on his time. The role McCarthy played must negate any suggestion that the advance of the *River News* was insignificant or that the competitive impact of its retreat was merely trivial. Though he rightly saw problems under the Act, he did not inquire into or disavow what had been happening. He was apparently content to let his subordinates solve the problem by forcing the *River News* to contract its activities. The views and practices of those within an industry can often be most instructive not only on the question of achieving a realistic definition of the market, but also on the question of assessing the quality of particular competitive conduct in relation to the level of competition and the impact of its cessation.[36]

Their Honours continued by stating that what Mr Pick had done could not be ignored.[37] In summary, he had introduced rivalrous conduct into a part of a market that had previously not known it. He had caused the *River News* to become a small but potentially significant competitor: 'The presence of even one competitor of that kind tended to dilute the impact of the existing monopoly'.[38] In that context, the arrangement between Rural Press and Waikerie Printing 'almost totally negated the beneficial effects

35 Ibid [43].
36 Ibid [45] (footnotes omitted).
37 Ibid [46].
38 Ibid.

of Pick's competitive behaviour over the previous nine months'.[39] That was why, their Honours stated, the arrangement had the purpose and effect of substantially lessening competition in the Murray Bridge regional newspaper market.[40]

The reasoning in *Rural Press* demonstrates that a reduction in competition may be 'substantial' even though it is small in quantitative and/or monetary terms. It also demonstrates that, in undertaking a *qualitative* assessment of the character of an arrangement, the views and practices of those within the industry may be instructive. Ultimately, the assessment that the arrangement in *Rural Press* had the purpose and effect of substantially lessening competition turned on a close examination of the facts, including the nature of the conduct and views of the relevant individuals.

Another useful example of the application of the test is provided by *Pacific National Appeal*. In the context of s 50 of the *CCA*, the Full Court of the Federal Court of Australia emphasised that the applicable legal standard is whether the evidence establishes on the balance of probabilities that the acquisition would have the likely effect of substantially lessening competition.[41] Section 50 requires a comparison between the nature and extent of competition in a relevant market in the future *with* and *without* the acquisition. Middleton and O'Bryan JJ explained that that enquiry requires predictions about various facts and circumstances in the future, which will have different degrees of likelihood or probability.[42] Their Honours stated that '[n]one of those facts must be proved to any particular degree of likelihood as a matter of law'.[43] In particular, they stated it is wrong to assume that each relevant fact must be shown to be 'likely' within the meaning of s 50 in order to take the fact into account in assessing whether s 50 has been contravened. Their Honours continued:

> What must be shown to be 'likely' is that the acquisition would have the effect of substantially lessening competition. That assessment is to be made on the basis of an overall evaluation of the evidence, taking account of the significance of the predicted facts and circumstances to competition and the likelihood of such facts and circumstances occurring in the future.[44]

Accordingly, a finding by the primary judge that there was a *possibility* that a new entrant would enter the market in the relevant timeframe (if the acquisition did not proceed) was insufficient to support a conclusion that the proposed acquisition would have the likely effect of substantially lessening competition.[45]

The other member of the Full Court, Perram J, considered that the primary judge erred in his conclusion relating to substantial lessening of competition because his Honour answered the relevant question in the affirmative 'only after asking himself whether he could exclude the possibility that there might be a new entrant in the market down the track'.[46] This involved, in Perram J's view, a reversal of the onus of proof.[47] Perram J also stated:

39 Ibid.
40 Ibid.
41 *Pacific National Appeal* (2020) 277 FCR 49, [254].
42 Ibid [255].
43 Ibid.
44 Ibid.
45 Ibid [263], [268].
46 Ibid [386].
47 Ibid.

> The question of whether a heightening of barriers to entry is likely to result in a substantial lessening of competition falls therefore to be decided on ordinary principles. One examines the acquisition in question and asks whether the heightening of the barriers to entry has the likely effect of substantially lessening competition. If there is no real commercial chance of any new entrant even before the barriers to entry are heightened it will be difficult to see that there can be a realistic commercial chance that competition will be substantially lessened once they are.[48]

VIII Concluding Observations

The expression 'substantially lessening competition' is used in most of the key provisions of pt IV of the *CCA*. While the word 'substantially' does not have a precise meaning, the courts have given sufficient content to the word to enable it to be applied in practice. There are good reasons in policy terms to eschew a more detailed and technical test. The provisions in which the expression 'substantially lessening competition' is used may need to be applied to a range of different facts and circumstances, not all of which can be predicted in advance. In these circumstances, a relatively flexible test is best placed to ensure that the purposes of the provisions are given effect. The cases that have applied the expression do not suggest that a more detailed and technical standard would offer any advantage to the present, broadly expressed test. To the contrary, they indicate that the current test is workable in practice and suitable to give effect to the purposes of the relevant provisions.

48 Ibid [414].