"LIKELY" IN THE HARPER SECTION 46

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The Harper Review proposes a new version of s 46 which would prohibit conduct which has "the purpose, or would have, or be likely to have, the effect of substantially lessening competition …".

As has been argued, the addition of an "effect" test produces a new layer of uncertainty in business decision–making. What is likely to be the effect of the decision? And will that effect "substantially lessen competition" in what a court decides is the relevant market?

What has received little attention thus far is that still more uncertainty is provided by the word "likely".

The ordinary meaning of the word is "probably" (Shorter Oxford). This would accord with the usual rule in civil litigation that the party claiming relief has to establish that the case it alleges is more likely than not to be true.

But Federal Court cases, in the context of s 50, which prohibits the acquisition of shares or assets if the acquisition "would have the effect, or be likely to have the effect, of substantially lessening competition" have held that "likely" means only "a real chance".[1]

In other words, a case might be made out even if the chance of substantially lessening competition was less than 50 per cent, perhaps a lot less, provided only it was "real".

The concept of a "real chance" has nothing to do with the degree of probability. A chance may be nevertheless "real" ("having a foundation in fact": Shorter

[1] Particularly *Australian Gas Light Company v ACCC (No 3)* (2003) 137 FCR 317 at [320] - [348]

Oxford, “existing or occurring as fact”: Macquarie) even if it is substantially less than 50 per cent.

That is not how the common law, or statutes imposing civil liability, usually work. Courts do not say that because there was a “real chance” that the defendant drove through a red light, the plaintiff should recover damages. Legislators, in providing for civil liability for contravention of statutes, must be taken to recognize that most forms of relief, if granted, will be unpalatable and burdensome for the party against whom the relief is granted. It is a matter for those seeking such relief to a make out a case. Those who assert must prove.

In the particular case of s 46, like s 50, there is this further consideration. Both commercial conduct in general by firms having a substantial degree of market power (s 46) and conduct involving mergers and acquisitions (s 50) are not *per se* offences. Unlike, for example, price-fixing, such conduct is not by nature inherently anti-competitive. On the contrary, it can be highly beneficial for the community, as well as the parties, improving productivity, and creating jobs and wealth.

In the context of the proposed s 46, the “real chance” interpretation will mean that business people debating whether to engage in some proposed business conduct will face, in addition to the usual risks attending any business decision, the following prospect. Years later a court may be persuaded, perhaps by economic experts after lengthy and expensive trials and appeals, that at the time of the decision there was a chance, perhaps as low as 20 or even 10 per cent, but nevertheless “real”, of the proposed conduct substantially lessening competition.

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