# Chapter 5

# The committee's view

5.1 This chapter gives the committee's view on the three issues of key concern relating to this legislation. The first—the basis for the bill—is the claim that nearly all merger applications are approved and section 50(1) is too permissive. The second and third issues relates to the two key provisions of the bill: replacing the word 'substantially' with 'materially' in section 50(1); and the additional prohibition on acquisitions by companies that have a substantial share of the market where that acquisition is likely to have the effect of lessening competition.

## The mergers approval rate

5.2 Chapter 3 discussed the relevance of Associate Professor Frank Zumbo's claim that the ACCC approved nearly all (97 per cent) merger and acquisition applications in 2008–2009. It detailed both the Treasury's and the ACCC's critique of this claim.

5.3 The committee agrees that Associate Professor Zumbo's claim is misleading. It excludes mergers that are not assessed because they do not substantially lessen competition and those that are not proposed because they so clearly have this effect. It also includes the many routine merger clearances that come to the ACCC through the Foreign Investment Review Board as a matter of courtesy. If these factors were taken into account, the merger approval estimate would be significantly less.

5.4 The committee therefore does not regard the statistic that the ACCC approves 97 per cent of a subset of possible merger applications as in itself constituting proof that the merger regime in Australia is too permissive. But nor does criticism of the statistic imply that the regime is appropriate. A closer look at whether the degree of market concentration which the regime has allowed to emerge is desirable would be a sounder basis for making such a judgement.

## Replacing 'substantially' with 'materially'

5.5 Chapter 4 noted the potential for disagreement by the courts in the interpretation of the phrase 'materially lessen competition'. Associate Professor Zumbo claimed the word would set a lower threshold than 'substantially lessen competition'. However, various submitters argued the interpretation—and therefore the impact—of the word 'materially' would be uncertain and would create confusion. They claim there is a possibility that 'materially' may in fact set a higher bar than 'substantially' in the context of section 50(1), or the words may be interpreted synonymously.

5.6 The committee believes that the concept of 'substantially lessening competition' has been well-established both in Australia and overseas. It is

deliberately imprecise and vague to enable adaptation to the circumstances of particular cases.[1]

## A market share 'cap'

5.7 Chapter 4 also discussed the bill's creeping acquisition provision. Associate Professor Zumbo claimed that a prohibition from further acquisitions based on a corporation's existing market share is necessary to prevent companies from circumventing the current provisions of section 50(1). The bill's critics argue that setting a percentage market share threshold would be both arbitrary and contentious. If the threshold were set too low, it would prevent small firms from merging to increase their efficiency and competitiveness. Even with a moderate threshold, there is a risk that a market share provision would stop small business people from gaining a good price for their business.[2]

5.8 The bill's critics go too far, however, in saying the bill sets an absolute market share 'cap'. It only limits firms from increasing their market share through takeovers, not by providing cheaper or higher quality goods and services.

5.9 The Government announced in January 2010 that it intends to introduce legislation that will clarify that a 'market' as defined in section 50(1) relates to a national, regional or local market. It is unclear as to whether this amendment would have any significant ramifications or whether the 'substantial lessening of competition' test in section 50(1) is already applied to a local market by the ACCC and the courts.

## Conclusion

5.10 The committee believes that the bill should be rejected. The committee argues that the existing test of 'substantially lessening competition' in section 50(1) has been interpreted by the courts and it is important not to alter this test with a term that is uncertain in both its legal meaning and application. Moreover, any change to this test must be based on sound evidence of a problem, which in the committee's opinion, the proponent of the bill has not provided (see chapter 3).

5.11 In terms of creeping acquisitions, the committee rejects the bill's proposal to prohibit a firm with a substantial market share from acquiring shares or asset than has the effect of lessening competition. Setting a percentage market share threshold would be both arbitrary and contentious. Moreover, if set too low, the threshold may prevent relatively small firms with a sizeable share of a local market from merging to increase efficiency and competitiveness.

### Recommendation 1

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1 See Stephen Ridgeway, *Proof Committee Hansard*, 9 April 2010, p. 13.

2 See the Hon. Chris Bowen, 'Reviewing Federal Government's Amendment to the Trade Practices Act 1974', Keynote Address to the 4th Annual Trade Practices and Corporate Compliance Summit The Grace Hotel, , 28 April 2008.

**5.12 The committee recommends that the Senate reject the bill.**

**Senator Annette Hurley**
**Chair**