THE 2008 ACCC MERGER GUIDELINES: HOW AND WHY HAVE THEY CHANGED?

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I INTRODUCTION

In November 2008, the Australian Competition and Consumer Commission ('ACCC') released its updated *Merger Guidelines 2008* ('2008 Guidelines'). The release followed an extensive period of consultation with both Australian and international antitrust experts.

The 2008 Guidelines provide merging firms, their advisors and other interested parties with an insight into the way the ACCC analyses the legality of mergers under the *Trade Practices Act 1974* (Cth) ('*TPA*'). Section 50 of the *TPA* makes unlawful any merger or acquisition that has the effect, or is likely to have the effect, of substantially lessening competition in a market.

The 2008 Guidelines significantly differ from the ACCC's earlier *Merger Guidelines 1999* ('1999 Guidelines'). This paper discusses three of these differences, and looks at the underlying rationale for the changes.

In particular, this paper analyses the way in which the Guidelines deal with market concentration, the role of market definition in merger analysis, and the analytical approach adopted by the ACCC. While these are only some of the changes reflected in the 2008 Guidelines, they represent changes that involved significant debate among the legal and economic community. They also reflect how the ACCC's approach to merger analysis has evolved and improved over the last decade.

II MARKET CONCENTRATION IN THE 2008 MERGER GUIDELINES

Concentration measures are a key part of merger analysis in many jurisdictions. For example the European Union Merger Guidelines note that '[m]arket shares and concentration levels provide useful first indications of the market structure and competitive importance of both the merging parties and

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their competitors'.[1] Similarly, for the United Kingdom, '[t]he level of concentration in a market can be an indicator of competitive pressure within that market. … [T]he greater the increment to market share resulting from a merger, the more likely it is that the merger will lessen competition'.[2]

Section 50(3)(c) of the *TPA* specifies 'the level of concentration in the market' as one of the factors that must be considered when assessing whether a merger would be likely to substantially lessen competition.

The ACCC's 2008 Guidelines use concentration measures in two ways. First, they are part of the new notification threshold. Unlike many overseas jurisdictions, Australia does not require compulsory notification of 'large' mergers. The 2008 Guidelines recommend that merging parties notify the ACCC if 'the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s'.[3]

Second, the Guidelines note the importance of concentration analysis to determine the competitive effects of a merger. The Guidelines note that a range of concentration measures will be useful including simple market shares, concentration ratios and concentration metrics such as the Herfindahl-Hirschman Index ('HHI').[4] It also notes that market shares can be calculated in a variety of ways such as share of sales or share of market capacity.[5]

Paragraph 7.14 of the Guidelines states that:

> As part of its overall assessment of a merger, the ACCC will take into account the HHI, as a preliminary indicator of the likelihood that the merger will raise competition concerns requiring more extensive analysis. The ACCC will generally be less likely to identify horizontal competition concerns when the post-merger HHI is:
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> - less than 2000, or
> - greater than 2000 with a delta less than 100.[6]

The Guidelines note that this competition 'rule of thumb' is neither a substitute for the notification threshold nor a shortcut approach to competition analysis.[7] Rather it is simply a guide to the types of concentration levels and changes that might raise competition concerns, noting that other factors may enhance or reduce these concerns.

The approach taken in the 2008 Guidelines is different to the approach taken in the 1999 Guidelines. The latter did not use HHI measures and established a 'safe harbour' based on concentration.[8] While the ACCC always reserved the right to intervene in a merger,[9] it is fair to say that the 2008 Guidelines significantly reduce the emphasis placed on simple concentration measures. The

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1 *Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings* [2004] OJ C 31/5, 6.

2 Office of Fair Trading, *Mergers: Substantive Assessment Guidance* (2003) [4.2].

3 Australian Competition and Consumer Commission, *Merger Guidelines 2008* (2008) [2.9].

4 Ibid [7.9].

5 Ibid [7.10].

6 'Delta' refers to the change in the HHI due to the merger.

7 Australian Competition and Consumer Commission, *Merger Guidelines 2008*, above n 3, [7.15]–[7.16].

8 Australian Competition and Consumer Commission, *Merger Guidelines 1999* (1999) [5.103].

9 Ibid [5.96]–[5.97].

new HHI thresholds provide guidance to market participants but are not some form of 'safe harbour'.

The approach taken in the 2008 Guidelines is consistent with current economic thinking. As Kwoka notes, '[a]mong antitrust economists and policymakers, perhaps no issue has generated more controversy than the effect of concentration and market share on performance, and the implications of that relationship for merger policy'.[10] While some commentators view market shares as being a key indicator of the competitive effects of a merger, others argue that market shares are, at best, a crude and imprecise tool.[11] The 2008 Guidelines can be seen as reflecting the latter view – that market shares, by themselves, provide only limited information about whether or not a particular merger will substantially lessen competition.

A Why Are Market Shares Relevant?

A firm's market share often refers to its share of sales by value in the relevant market for merger analysis. For example, if the total sales in a market are given by 10 million, and one firm's sales are 2 million then its market share is 20 per cent. Obviously, the market shares of all firms in the market must sum to 100 per cent.

Market shares may also be calculated on the basis of sales volume or production capacity, and the relevant measures of market share when analysing the competitive effects of a particular merger will depend on the exact nature of the market where the merger is occurring.

Concentration in a market refers to the distribution of market shares between the firms that compete in that market. Concentration is generally higher if there are fewer firms in the market and lower if there are more firms competing in the market. A merger, which reduces the number of competitors in the market, will generally lead to an increase in concentration. However, it is the link between market concentration and the strength of competition that is important for merger analysis.

Market shares and concentration interact with competition through the structure of the market. All other things being equal, increased concentration due to an increase in the market share of a single firm will tend to increase that firm's ability to raise its profits by raising its own prices, lowering its service levels or otherwise engaging in less competitive activity. Of course, such unilateral behaviour by a firm may lead to a competitive response by its rivals. However, increased concentration in a market will also tend to lead to an increased

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10 John Kwoka, 'Some Thoughts on Concentration, Market Shares, and Merger Enforcement Policy' (Paper presented at the Federal Trade Commission and Department of Justice Workshop on Merger Enforcement, Washington DC, 17 February 2004) 1.

11 For example, on the former view, commentators note with respect to the United States Merger Guidelines, that if 'the guidelines were refocused mainly on market shares, they would be better aligned with valid economics, with fundamental market realities, and with the great majority of business experience': George Shepherd, Helen Shepherd and William Shepherd, 'Sharper Focus: Market Shares in the Merger Guidelines' (2000) 45 *Antitrust Bulletin* 835, 837. For a brief discussion on the limitations of market shares and how they may lead to 'very misleading conclusions', see Jeffrey Church and Roger Ware, *Industrial Organisation: A Strategic Approach* (2000) 604–5.

awareness of the strategic interdependence between firms, and an increased ability for all firms to maintain higher prices and increased profits. Thus increased concentration in a market as the result of a merger can lead to muted competition by changing the nature of the strategic interaction so that firms tacitly coordinate their actions.[12]

The relationship between increased market concentration and reduced competitive vigour is not simply a theoretical proposition. It has been subject to significant empirical study over many years. Thus Kwoka notes that:

> A large body of empirical studies finds a statistically significant relationship between market structure and prices. Even allowing for the inherent imperfections of empirical work, this represents a thoroughly established proposition.[13]

B Concentration Measures

While increased market concentration is generally associated with decreased levels of competition, measuring market concentration is not straightforward. While individual firm market share data gives an indication of market concentration, it cannot be unambiguously interpreted. For example, consider two markets, each of which has three firms. In market *A* the shares of the three firms are 50 per cent, 25 per cent and 25 per cent respectively. In market *B* the three firms have shares of 40 per cent, 30 per cent and 30 per cent respectively. It is not clear which of these markets is 'more concentrated'. More generally, differences in both the number of firms and individual firms' market shares mean that indications of concentration cannot usually be directly drawn from 'raw' market share data without making further assumptions.

The standard approach to inferring concentration from market share data is to use a concentration metric. This is a summary statistic created by combining some or all of the market share data for individual firms. Like all summary statistics, concentration metrics are designed to aid our ability to evaluate the raw data. But they have less information than the raw data. In this sense, different concentration metrics may highlight different aspects of the market share data.

Even if we just look at a simple horizontal merger in a well defined market there are a variety of potential concentration metrics. These measures differ according to their underlying assumptions and method of construction.[14]

The best-known concentration metrics are the HHI and the CR*x* measures but there are others as well, including the 'entropy index'.

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12 This broad relationship between concentration and competition is well recognised in economics. See, eg, Henry Ergas, 'Are the ACCC's Merger Guidelines Too Strict? A Critical Review of the Industry Commission's Information Paper on Merger Regulation' (1998) 6 *Competition and Consumer Law Journal* 171, 174 who notes that

> simple oligopoly theory suggests that increased levels of concentration raise concerns on two grounds: (1) because for a given pattern of interaction … higher concentration will yield higher margins of prices over costs; and (2) because as concentration rises, the pattern of interaction may change towards or to collusion.

13 Kwoka, above n 10, 3.

14 In general, concentration measures have been developed to examine competition and mergers between 'horizontally' related products. However, for concentration measures that can be used to analyse vertical mergers: see Joshua Gans, 'Concentration-Based Merger Tests and Vertical Market Structure' (2007) 50 *Journal of Law and Economics* 661.

To see how these concentration metrics are constructed, consider a relevant market with *n* firms in total. We denote an individual firm by *i* and denote that firm's market share by s_i. Then the HHI is given by the sum of the squares of all firms' market shares: $H = \sum_{i=1}^{n} s_i^2$. The CR*x* is given by the sum of the market shares of the *x* largest firms in the market. Thus, if firms are ordered in terms of their market share with firm 1 having the largest market share and firm *n* having the smallest market share, the $CR4 = s_1 + s_2 + s_3 + s_4$. The entropy index is given by the sum of each firm's market share times its logarithm: $E = \sum_{i=1}^{n} s_i \ln s_i$.[15] As these measures are simply summary statistics of firms' market shares, other indices can be easily devised.

Different concentration metrics summarise the market share data in different ways and as a result highlight different features of the data. For example, concentration measures differ according to the way that they treat 'increased' concentration.

To see this, consider a simple example of a duopoly. If the two firms each have a 50 per cent market share, is this more or less concentrated than a market where one firm has a 60 per cent market share and the other has a 40 per cent market share? The answer is not obvious. Some economists argue that a concentration metric should increase as firms become more asymmetric.[16] On this basis the duopoly market with a 60/40 split is more concentrated than the market with even shares. The HHI has this property. Thus in the market where the duopolists have equal market shares, the HHI is 5000. In contrast, in the market where the duopolists split the market shares 60/40, the HHI is 5200.

It is far from clear, however, that increasing asymmetry *always* increases concentration. Thus, Gal notes that:

> for any number of firms, the HHI is minimized when all firms are exactly equal. This prediction is not consistent with the notion that collusion is most likely to succeed when all firms are approximately the same size. Similarly, when firms cannot be assumed to be equally efficient, a greater dispersion of market shares may signal more rather than less competitive pressure and hence less concern for damage to consumers from the merger.[17]

The CR4 also has this asymmetry property if a firm that is one of the four largest firms gains market share at the expense of a smaller rival who is not one of the four largest firms. However, the CR4 ignores any increase in asymmetry if one of the four largest firms gains market share at the expense of another of the four largest firms, or where both the gaining and losing firms are not in the four

15 See Jean Tirole, *The Theory of Industrial Organization* (1988) 221–2.
16 See, eg, Alex Jacquemin, *The New Industrial Organization* (1987) 50.
17 Michal Gal, *Competition Policy for Small Market Economies* (2003) 233.

largest firms.[18] This distinction between the largest four firms and the rest of the market is arbitrary.

It is easy to construct concentration metrics that have the opposite property, so that concentration falls as firm share asymmetry rises. But it is not obvious that this is universally desirable. In many situations a duopoly will cause greater competitive concerns if it involves a dominant firm and a small rival rather than two equally sized competitors. This is particularly the case if dominance is not due to any cost efficiency or better product but rather rests on historic factors such as incumbency and customer switching costs.

The HHI has the theoretical advantage of using all relevant market share data. In contrast, a CRx measure is relatively crude in the sense that it completely ignores a significant part of the market share data. Any firms that are not in the *x* largest are simply ignored for the concentration metric. This can lead to unhelpful conclusions. For example, consider the pre-merger and post-merger data in Table One. The merger involves the second largest firm in the market acquiring the third largest firm and in so doing becoming the largest firm.

Table One

Pre-merger shares	22.6	18.4	18.2	16.9	3.7	3.5	3.3	3.2	2.8	2.3	2.3	2.1	0.7
Post-merger shares	22.6	36.6	0	16.9	3.7	3.5	3.3	3.2	2.8	2.3	2.3	2.1	0.7

Prior to the merger, the four largest producers dominated the industry. As such, a merger between two of these largest producers is likely to raise significant competition concerns. However, such a lessening of competition due to the merger is not reflected by the change in the CR4. Prior to the merger the CR4 was 76.1. After the merger the CR4 is 79.8, an increase of only 3.7. This reflects the fact that the fifth largest firm pre-merger only had a market share of 3.7 per cent, well below any of the 'big four' firms in the industry. This relatively small firm is drawn into the CR4 post-merger and represents the only change in the CR4 despite the merger of two of the largest firms in the market. A rise in the CR4 by only 3.7 misleadingly tends to suggest that the merger has only a small effect on concentration.[19]

A practical limitation of the HHI relative to the CR4 is the requirement for data on all firms in the market. This data may be difficult for merging parties to obtain. However, the practical problem is usually easily avoided by making simple assumptions about the smallest firms. For example, using the data in Table One, suppose the merging parties knew that there were nine small

18 This assumes that the market share changes are not large enough to change the composition of the four largest firms.

19 In contrast, using the HHI, the merger leads to an increase of 669.36 from 1536.56 to 2206.32, highlighting the significant increase in concentration in the market due to the merger.

competitors of about equal size but did not know the exact size of each one. Then simply dividing the almost 24 per cent total market share of the small firms by nine gives a simple approximation.[20]

C The Limits of Concentration Measures

The reduced emphasis on concentration measures in the 2008 Guidelines reflects modern economic understanding of the limitations of using market shares and concentration metrics when analysing competition. Some of these limitations are:

- *Concentration is endogenous*. Market shares of firms are not exogenous to the competitive process. Rather, concentration levels and, thus, concentration metrics, are an endogenous outcome of market interactions. A firm's share of a market does not simply come out of thin air, but depends on the underlying features of the competitive interaction between firms in that market, including the nature and characteristics of the products produced and the technology of each firm. For example, a firm could gain a high market share by adopting more efficient technology, lowering its costs and reducing prices. The origin of the market shares matters for their interpretation and, in particular, for determining whether or not they raise policy concerns.[21]

  The endogenous nature of market shares means that concentration in a market may increase while, at the same time, competition may either increase or decrease. The competitive effect depends on the reason for the increase in concentration. Indeed, even if concentration increases due to a merger this does not automatically imply a decrease in competition. For example, if a more efficient firm takes over a poorly performing rival, the result may be more vigorous and effective competition in the relevant market.

- *Concentration and inputs*. The information that can be drawn from a concentration measure depends on the nature of both the sellers and the buyers in the relevant market. In many situations, most obviously when firms are selling an intermediate product that is an input to further production, the economics of the buyer side of the market will feed into any interpretation of market concentration. For example, concentration on the selling side might be offset by concentration on the buying side. Where both sides of the market are reasonably highly concentrated and involve sophisticated parties, increased seller concentration may be less

20 Using the approximation changes the pre-merger and post-merger HHI measures by less than seven, which is a trivial amount.

21 See, eg, Dennis Carlton, 'Using Economics to Improve Antitrust Policy' (Speech delivered at the Milton Handler Lecture, Chicago, 9 December 2003) who notes that 'industries become concentrated *because* competition is intense' (emphasis in original). See also, Jonathan Baker and Timothy Bresnahan, 'Empirical Methods of Identifying and Measuring Market Power' (1992) 61 *Antitrust Law Journal* 3, 4, who note that 'a firm could have a large market share and the market could appear concentrated, not because the firm has market power but because it has low costs or sells superior products'.

of a concern than if the buyers are a multitude of price-taking consumers. Concentration metrics in intermediate product markets may also be misleading because they fail to take account of competition across functional levels in a vertical production chain.

- *Concentration and differentiated products*. Concentration measures and market share analysis are based on economic theory for homogeneous product markets. If the relevant market involves products that are differentiated then market share measures become more difficult to interpret. As Church and Ware note, '[t]he use of market shares which fail to distinguish between products that substitute in different degrees can lead to very misleading conclusions'.[22] Because concentration metrics assume that all products are equally good substitutes, simple analysis must be treated with caution in differentiated product markets where there is a range of degrees of substitutability.

The 2008 Guidelines reflect current economic understanding of both the limitations of individual concentration metrics and the benefits of the HHI compared with the CR4 when providing guidance to merger parties on the threshold for competition concerns.

III MARKET DEFINITION

The 2008 Guidelines update the way in which market definition feeds into merger analysis. The Guidelines make it clear that, while market definition is a necessary step in determining the competitive effects of a merger, it is only an input to the competition analysis. Thus '[m]arket definition establishes the relevant "field of inquiry" for merger analysis … [but] by itself it cannot determine or establish a merger's impact on competition'.[23] The Guidelines also make it clear that just because third-party firms are in a market, this does not mean that these firms provide an effective competitive constraint post-merger.

This change in emphasis for market definition reflects developments in the economic understanding of competition between firms producing differentiated products. When products are imperfect substitutes then the boundaries of the relevant market for competition analysis can be blurred. Further, just because a particular product is included in the market, this does not mean that firms producing this product will necessarily constrain any anti-competitive effects of a merger involving other products in the same market. In this sense, the Guidelines capture the key concept that market definition lays out the boundaries of

22 Church and Ware, above n 11, 605. See also Ergas, above n 12, 175–6.

23 Australian Competition and Consumer Commission, *Merger Guidelines 2008*, above n 3, [4.2]–[4.3].

analysis.[24] It is not an attempt to determine any potential lessening of competition directly.

The recognition in the Guidelines that market definition will often involve some degree of judgement, particularly at the boundaries of the relevant market or markets, is in line with recent Australian jurisprudence.

> Market definition is not an exact physical exercise to identify a physical feature of the world; nor is it an enquiry after the nature of some form of essential existence. Rather, it is the recognition and use of an economic tool or instrumental concept related to market power, constraints on power and the competitive process that is best adapted to analyse the asserted anti-competitive conduct. … Thus, once one appreciates the integrated legal and economic notions involved in the concept of a market and its purposive role … one is unlikely to find utility in a debate about the precise physical metes and bounds of a market.[25]

The 2008 Guidelines adopt a different analytical approach to market definition when compared with the 1999 Guidelines. The 2008 Guidelines state that '[a] market is the product and geographic space in which rivalry and competition take place'.[26] This contrasts with the four dimensions – product, geographic, functional and time – outlined in the 1999 Guidelines.

This change reflects international best practice. The characteristics of the relevant product, including its functionality and physical location, are the key factors that drive both demand and supply-side substitution, and hence competition. Market definition is an attempt to identify products that are strong substitutes so a focus on the product and geographical dimensions makes significant sense.

This does not mean that the functional and time dimensions are ignored. Rather, as the 2008 Guidelines note, they enter market definition as part of the product and geographic dimension analysis.[27] The functional dimension is considered as part of vertical integration and the purchase of a bundle of products. The time dimension has been incorporated into the broader competitive analysis and focuses on the competitive harm that can arise over a one to two year period. Thus when considering entry, the Guidelines note that '[w]hile the ACCC's starting point for timely entry is entry within one to two years, the appropriate timeframe will depend on the particular market under consideration'.[28] Similarly, 'the ACCC's starting point for timely expansion is within one to two years'.[29]

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24 See David Scheffman and Pablo Spiller, 'Geographic Market Definition under the U.S. Department of Justice Merger Guidelines' (1987) 30 *Journal of Law and Economics* 123, 127–8, who say '[m]arket definition … merely specifies a relevant universe within which a complete antitrust analysis should be focussed'. See also, Franklin Fisher, 'Market Definition: A User's Guide' (Paper presented at the Finnish Competition Authority Workshop on Market Definition, Helsinki, 2002), which states that 'market definition should be considered an organizational first step in antitrust analysis': at 41.

25 *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* (2006) ATPR ¶42-123, [429]–[430] (Allsop J).

26 Australian Competition and Consumer Commission, *Merger Guidelines 2008*, above n 3, [4.6].

27 Ibid [4.8].

28 Ibid [7.22].

29 Ibid [7.44].

IV ANALYTICAL RIGOUR

The 2008 Guidelines represent a significant increase in analytical sophistication compared to the 1999 Guidelines. This is reflected in three ways. First, throughout the 2008 Guidelines, the ACCC stresses the need for relevant qualitative and quantitative information. The type of information that the ACCC might require from merging parties or other market participants is summarised throughout the Guidelines. For example paragraph 4.27 provides comprehensive examples of the type of information the ACCC may require when considering market definition. Similar examples are provided in the Guidelines for many of the section 50(3) merger factors.

The type of information that the ACCC lists is qualitative as well as quantitative. For example, when considering the availability of substitutes, the Guidelines note that the ACCC may require 'internal company strategy, marketing and sales documents'.[30] This reflects international best practice as well as practical limitations on data. Qualitative evidence, such as information from market inquiries is necessarily at the heart of any ACCC merger investigation. It is only by going 'out to the market' and asking questions of customers, competitors and suppliers that the ACCC can understand the competitive impact of a merger. Of course, if the ACCC is going to oppose a merger, then these inquiries need to be supported by hard evidence including formal witness statements and relevant documents.

When considering quantitative evidence, it is important to note that even relatively simple quantitative evidence can be useful for market definition and competition analysis. As the International Competition Network notes:

> useful quantitative evidence does not always involve complex statistical or economic analysis. It may involve something as simple as sorting customer databases by customer size, location of customer, or types of product sold, by customers, to reveal important customer characteristics.[31]

For example, simple measures of customer switching costs or records of customer 'churn' between different products can provide useful information about the product dimension of a market.

Second, the increased analytical rigour in the 2008 Guidelines is reflected in the technical tools that the ACCC will bring to bear on merger analysis, and on the explanation of exceptions and presentation of counterexamples throughout the Guidelines. For example, when considering demand-side substitution and market definition, the Guidelines outline the use of the Hypothetical Monopolist Test ('HMT'). This test is used in a wide variety of jurisdictions when considering market definition. This test was also outlined in paragraphs 5.44 and 5.45 of the 1999 Guidelines. However, the 2008 Guidelines significantly tighten the presentation of this test and explicitly limit it to demand-side analysis.

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30 Ibid 46.

31 International Competition Network, *ICN Investigative Techniques Handbook for Merger Review* (2005) 50 <http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Investigative_Techniques_Handbook.pdf> at 2 April 2009.

Similarly, the 2008 Guidelines include an entire section on issues that may arise in market definition. It covers, for example, asymmetric substitution and indirect substitution in significantly more detail than the 1999 Guidelines. The issues highlighted in the 2008 Guidelines have significant practical importance. For example, when considering 'Quay Cruises Pty Ltd proposed acquisition of assets of Matilda Cruises Pty Ltd' the ACCC determined that the relevant markets were asymmetric, and included a charter services market and a scheduled cruise market.[32] The charter services market included operators of scheduled cruises as they imposed a competitive constraint in this market. The scheduled cruise market, however, did not include charter services operators. As noted in the Public Competition Assessment:

> While such asymmetric market definition is not uncommon, its emergence in a single acquisition such as this highlights the ACCC's purposive approach to market definition and emphasizes that market definition cannot be simply inferred from previous matters.[33]

Third, the 2008 Guidelines include two sections that comprehensively summarise the different 'theories of competitive harm' that apply to merger analysis. These are divided into unilateral and coordinated effects. Roughly speaking, this division aligns with the different methodological tools that economists bring to bear when considering competition in a particular market. Unilateral effects represent the analysis that flows from what economists call 'one-shot' games. Coordinated effects reflect analysis using 'infinitely-repeated' games.[34]

The sections on competitive harm allow merging parties and their advisors to better understand the economic basis for any competition concerns that the ACCC might raise. These two sections are important in that they make the 2008 Guidelines an explanatory document that will assist merging parties rather than simply an analytical document that establishes a series of steps for merger clearance.

The 1999 Guidelines did not ignore theories of competitive harm but they did place significantly less emphasis on them. For example, coordinated effects were simply summarised in four paragraphs under 'other factors' in the 1999 Guidelines.

V CONCLUSION

The ACCC's revised 2008 Guidelines represent a significant increase in sophistication compared with the 1999 Guidelines. The 2008 Guidelines are meant to reflect existing ACCC practice rather than representing any change in

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32 Australian Competition and Consumer Commission, *Quay Cruises Pty Ltd proposed acquisition of assets of Matilda Cruises Pty Ltd*, Public Competition Assessment (2005).

33 Ibid [21].

34 Both of these names are historic and can be misleading. It is more useful to think of the two approaches as focusing on different elements of the incentives that face firms competing in a market. They are complementary and both shed light on the competitive implications of any particular merger.

the way that the ACCC analyses mergers. Thus, in the media release accompanying the Guidelines, the Chairman of the ACCC stated:

> Rather than signalling a new approach to merger analysis by the ACCC, the revised Merger Guidelines provide a better reflection of the approach that has developed in recent years, in line with international best practice, contemporary views on anti-trust analysis and the ACCC's experience.[35]

While it may take time for members of the legal profession to be comfortable with some of the concepts in the 2008 Guidelines, they represent international best practice. Of particular importance, the Guidelines clearly outline the type of information that the ACCC requires so that merging parties can be fully prepared when they approach the ACCC. This should help improve the timeliness of the merger clearance process to the benefit of the business community.

35 Australian Competition and Consumer Commission, 'Revised Merger Guidelines Issued' (Press Release, 21 November 2008).