

The Warehouse: Three comments

James Every-Palmer

1. Commission's new option: Deal with uncertainty outside the normal analysis

- Section 66 requires the Commission to grant a clearance if satisfied that an acquisition will not have the effect (or likely effect) of substantially lessening competition
- The Court of Appeal held that this means that the Commission should decline to grant a clearance if the Commission either:
 - is satisfied that the acquisition will have the effect (or likely effect) of substantially lessening competition; or
 - is in doubt as to the likely effect of the acquisition so that it cannot be satisfied one way or the other (the "gap")
- In the High Court's view, providing the Commission had received sufficient information, it is obliged to make up its mind one way or the other. Court of Appeal disagreed with this binary approach.

- **Commission can now bypass the normal factual-counterfactual analysis and deal with uncertainty in the "satisfied" part of the test**
- **Example: A and B plan to form A&B and apply for a clearance**
 - Low probability adverse outcomes from the merger are usually excluded from the factual and counterfactual. So previously clearance granted even though a 10% chance that (a) the A&B might cause archrival C to exit the market in the factual; or (b) B is a fringe competitor that might grow mighty if left alone in the counterfactual.
 - As *The Warehouse* illustrates, the Commission can now bypass the normal SLC analysis and use the existence of these uncertainties to determine that it is not satisfied that an SLC would not occur.

2. However, things may not change much in practice ...

- Commission has always been able to decline for insufficient information, and uncertainty about the future can be reframed as a problem of having insufficient information in the present
- Appeal option (Court will decide whether it is satisfied)
- Since *The Warehouse* decision, 22 clearances granted, 3 pending, 2 declined

3. *The Warehouse* decision may adversely affect due process for other reasons

- Appeals are by way of rehearing with additional evidence only admitted if special reasons
- High Court admitted updating factual evidence, evidence from 6 economists and held a "hot tub"
- Court of Appeal was critical of this approach -- thought it turned the appeal into a de novo hearing
- **But:**
 - Clearance decisions are usually determinative
 - Appeal may be the first chance for the applicant to respond to the Commission's economic reasoning
 - High Court can sit with a lay member