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Question 3

Mark: 84

To determine whether the acquisition by T of SOS will breach s50 of the TPA, it must be determined whether the provision applies, and if so whether the conduct would substantially lessen competition (SLC).

Application
Firstly, s50(1) requires that a corporation must not directly or indirectly acquire shares of another body corporate (s50(1)(a)). A corporation is defined in s4(1)(a) as including a foreign corporation. A foreign corporation is defined as a foreign corporation within the meaning of s51(xx) of the Constitution. As T was incorporated overseas, it falls within the definition. Thus, s50(1) will apply to T.

Secondly, for the act to acquire, the acquisition must be in a substantial market, s50(6) in Australia or in an area within it. To answer this question, it is imperative to define the market in which T and SOS, and thus the merged entity, compete and produce.

A market is an area of close competition between firms where there is a close substitution of one product for another, and one supplier for another, *Re QCMA*. The s4E definition of market likewise encapsulates this idea of substitutability. With this and the notion that market definition is purposive to see whether the merged entity has substantial market power, the four major aspects of a market ought to be considered, *AMH Case*.

Product
Look at the end use and substitutability with other goods. Here, the end use of the product that T and SOS are producing, that is eyeglasses, is to help people see. Thus it is arguable that substitutability may include eyepieces, contacts and glasses frames made of various substances. The physical and technical characteristics of the good ought to be considered. Glasses frames need to be comfortable, light and potentially aesthetically pleasing. Given that contacts may not be suitable for some people, and they don’t have the same technical and physical characteristics as frames, as frames don’t help people see without lenses in them, contacts may not be a good substitute.

The views and behaviour of customers needs to be considered. From the facts it is clear that T has a strong consumer basis. It is unclear what SOS’s customer basis is like, but given that they
have such a large market share, it may be assumed it is strong. This suggests that customers would not swap away to other products if T or SOS engaged in discretionary behaviour. Price movements and levels of eyeglasses ought to be considered. The facts are silent, however, the above reason of consumer loyalty suggests that a price increase by either company would not force consumers away to other products or suppliers. The issue of other suppliers introduces discussion of the geographic market in question.

**Geographic**
The facts indicate that there is not a lot of interstate trade, suggesting that the market is confined to NSW. The availability of other sources of supply in other areas would increase the geographic market, meaning that any conduct by T or SOS would be less influential as customers could source eyeglasses from other areas. However, the market ought to be confined to NSW with the possibility of sourcing small amounts from other areas.

**Functional**
The functional level at which the acquisition takes place ought to be considered. T is a manufacturer, and markets and sells its goods worldwide. But the facts alone do not suggest that it is involved in wholesale or retail. SOS is a manufacturer. Thus, the acquisition will have a definite impact at the manufacturing level. However, there is a likely to be a trickle down effect on any wholesalers or retailers that deal with the merged entity if T and SOS engage in discretionary behaviour.

**Temporal**
The temporal market at issue is the long term, as T has dealt in Australia for 20 years and eye glasses are unlikely to go out of fashion.

Thus, it may be concluded that the market which must be considered for assessing whether the merger would SLC is the NSW manufacturing market for eyeglasses.

To determine whether competition would be substantially lessened, the level of market concentration must be considered. According to the ACCC, if the acquisition would result in the merged firm having a share of 40% or more of the market, the ACCC will scrutinise the acquisition carefully. Here, the merger would result in T’s 40% share of the NSW market combining with SOS’s 45% share to give the merged entity an 85% share. Given this high percentage, other factors must be considered to see whether the merger will breach s50 of the TPA.
Firstly, the level of imports must be assessed. The facts are unclear as to whether there is any competition from imports, however, the merger would be less likely to SLC if imports constituted 10% of the market for the last 3 years or so.

Secondly, the barriers to entry into the eyeglasses market ought to be considered. The facts are unclear as to whether there are any substantial regulatory or economic factors, however, given that T and SOS have such a high market share and there are a few other Australian producers and Sunray, it suggests that barriers to entry are high.

The above discussion also impacts on consideration of the concentration of the market. There are only a few firms, thus concentration is high, and other firms are unlikely to act as a constraint on T and SOS as a merged entity. Given the small size of competitors, it is unlikely they will act as a restraint on discretionary behaviour.

The availability of substitutes must be considered, for substitutes act as a curb on discretionary pricing behaviour. As discussed in the market definition, there are not many substitutes as glasses frames cannot be made out of too many different substances, contacts do not perform the same function and are therefore unsuitable to many customers, and T has strong customer loyalty.

The dynamics of the market may suggest that there is room for the merged entity, however the facts are silent as to the growth and development of the industry. I would guess that it is fairly static, and thus there would not be much room for new competitors to enter the market and act as a constraint on T and SOS’s power.

Given the analysis of the above factors, it may be considered that the dominance that the merged entity would have of the market would give T and SOS the ability to behave in a discretionary way due to their market power. As market power and competition are inversely related, it is also likely that competition in the eyeglasses market in NSW would be lessened.

Having regard to the Sterling Harbour ‘with and without’ test, it may be considered that competition would be lessened by the merger.

Important to the assessment of the level of competition in the market is the structure of the market, Re QCMA. Thus, regard ought to be had to the level of concentration in the market, which as discussed before would become higher. Barriers to entry would become greater due to the intimidatory effect of competition against such a large firm. Product differentiation or innovation, would be likely to stagnate as there would be no incentive for T and SOS to compete. It is unclear on the facts whether there are any vertical and stable relationships, or whether the merger would have any impact on these.

By all indications, the market with the merger would be substantially less competitive. For a ‘substantial’ lessening of competition occurs when the lessening is ‘real’ or ‘of substance’, O’Brien.
Thus, T would be advised to seek authorisation from the ACCC under s88(8) of the TPA for the acquisition as it is most likely that it will breach s50 of the TPA. However, given that the acquisition will probably substantially lessen competition, it is unlikely that the ACCC will see any public benefit and grant the authorisation.