PART TWO

The Resolution of the Contradiction of Concentration

Chapter 3

Efficiency and the Social Relations of Capitalism

Mergers Law's Attempt to Mediate the Contradiction of Concentration

> *Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interest of economic efficiency.*
> Hilmer Report, 1993.[1]

In Part One of this thesis, I advanced two main arguments. Firstly, I contended that the contradiction of concentration is a persistent feature of mainstream economic theory. Secondly, I argued that this theoretical contradiction is articulated by Australian merger law, and thereby given a concrete existence. In this chapter, I explore the practical implications of these processes for the Australian social formation. Specifically, I suggest that the law's attempt to mediate the contradiction of concentration through the concept of economic efficiency serves to reproduce the antagonistic social relations of capitalism.

Pragmatism plays a significant role in economic policy. Indeed, the previous chapter demonstrated that the development of Australian competition law has been largely driven by government responses to specific socio-historic concerns. In this context, the following hypothesis can be made: the problems that may derive from the law's articulation of a theoretical contradiction will be significantly reduced if the state can be relied on to act pragmatically in pursuit of a clearly established set of goals. The purpose of Australian merger law is therefore a useful point of departure for evaluating the practical implications of the contradiction of concentration.

In this chapter, I demonstrate that Section 50 of the *Trade Practices Act 1974* (the "TPA") is supported by no clear purpose other than the "promotion of competition". Since competition is defined as a market structure in Australian merger law, policy directed by this goal necessarily confronts the contradiction of concentration. By mediating this contradiction through the concept of economic efficiency, merger law produces new

[1] Independent Committee of Inquiry into Competition Policy in Australia (1993) *National Competition Policy*, Canberra: AGPS, p6 (the "Hilmer Report").

contradictions. However, mainstream theory ignores these contradictions by concealing the social relations of capitalism. Consequently, it is only by locating capital and labour within the mainstream paradigm that we are able to fully appreciate the implications of merger law's attempt to mediate the contradiction of concentration through the concept of economic efficiency.

The Purpose of Section 50

According to the purposive approach to statutory interpretation, the goals of Australian merger law must be determined by reference to the underlying objective of the TPA as a whole.[2] Section 2 of the TPA holds that "the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." Three distinct aims are therefore identified in this section: competition, fair trading and consumer protection. Yet, as is conceded in a leading competition law textbook, "it is unclear whether all three specific objectives are intended to apply to all forms of conduct proscribed by the TPA, or whether the specific objectives are applicable to some proscriptions only and not to others."[3]

Based on the structure of the legislation, it is highly unlikely that each individual provision of the TPA is expected to advance all three aims. The legislation is divided into distinct components, each of which appears to preference one of these goals above the other two. For instance, Part IV contains the sections of the TPA known as the competition provisions, while Part V is entitled "consumer protection". Moreover, the three aims may be mutually exclusive in some cases. It is well established that the promotion of competition does not entail the protection of individual competitors, and the "tough business" of competition often damages or destroys rivals.[4] By contrast, the ambit of fair trading may include the protection of small business competitors.[5] Consequently, it would be unrealistic for each provision of the TPA to promote both

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[2] *Acts Interpretation Act 1901* (Cth), s15AA.
[3] Stephen Corones (2007) *Competition Law in Australia*, Fourth Edition, Sydney: Lawbook Co, p31.
[4] Warren Pengilley (2000) "Some Ramblings on How I Would Change Our Competition Law", in Ray Steinwall, ed., *25 Years of Australian Competition Law*, Sydney: Butterworths, pp 199-200. See also *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191, 194 and 213; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13; *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 at 411; *Universal Healthcare Pty Ltd v ACCC* [2005] ATPR 42-066 at [548].
[5] See ACCC (2008) *Small Business and the Trade Practices Act*, available at http://www.accc.gov.au/content/index.phtml/itemId/304583 (accessed 13 October 2009).

competition and fair trading.

Since the Chicago School revolution of the 1970s,[6] US competition law has been predominantly directed by the singular aim of economic efficiency. By contrast, Nagarajan argues that Australian competition legislation accommodates a range of interests through a diverse set of goals.[7] In demonstrating this point, she presents three examples from the TPA "that reveal a myriad of concerns other than economic efficiency."[8] Yet, by identifying the distinct concerns of specific sections of the TPA, Nagajaran's analysis ultimately supports the conclusion that the various objectives of the TPA are not advanced by all of its provisions universally, but correspond to particular sections. Consequently, the only consistent purpose uniting the different components of the legislation is the relatively vague aim of enhancing the welfare of Australians.

In this respect, it is legitimate to suggest that the competition provisions of the TPA do not directly aim to promote fair trading or provide for consumer protection. Rather, the purpose of these provisions is principally the promotion of competition.[9] Yet this thesis has consistently demonstrated that conception of competition implicit in Australian merger law is highly problematic. Consequently, the state is unable to simply mediate the contradiction of concentration through pragmatic economic policy guided by clear objectives. By contrast, the lack of a clear purpose in Section 50 allows the contradiction of concentration to be articulated in the practical application of Australian merger law. In the following section, the concept of economic efficiency is presented as the law's principal attempt to mediate this fundamental contradiction.

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[6] The rise of the Chicago School approach in the US was more than an academic revolution – it was largely facilitated by the infiltration of its proponents into key institutional bodies. Of particular note, Richard Posner, a principal advocate of the Chicago approach, has been a judge on the US Court of Appeals since 1981. Similarly, Robert Bork sat on the Court of Appeals between 1982 and 1988. The use of the term "revolution" here is intended to reflect the common perception of this juncture in the development of mainstream competition theory. As will be recalled from Chapter 1, I do not feel that the substantive contribution of the Chicago School warrants the use of the term revolution, considering the continuity between the structural conceptions of competition employed in Industrial Organisation theory and the Chicago School framework.

[7] Vijaya Nagarajan (2002) "The Accomodating Act: Reflections on Competition Policy and the Trade Practices Act", *Law in Context*, 20(1), 34-62.

[8] *Ibid.*, p34.

[9] Indeed, the significance of the competition provisions in the context of TPA as a whole has led some to reduce the multiple concerns of the legislation to this one aim. For instance, Brunt is certainly misrepresenting matters when she notes that "the explicit objective of the [TPA]…is to promote and regulate competition." See Maureen Brunt (1994) "The Australian Antitrust Law After 20 Years – A Stocktake", *Review of Industrial Organization*, 9(5), p484.

Competition and Efficiency

It is worth briefly restating the contradiction of concentration.[10] In the conceptions of competition generally preferred by mainstream economists,[11] competition is theorised with respect to the structural conditions of a market. In particular, competition is understood in relation to the number and size of competitors in a market, such that perfect competition is characterised as a market populated by a large amount of atomistic sellers. Mergers tend to increase the size, and reduce the number, of firms in the economy – and therefore move markets further from the ideal of perfect competition. In this framework, mergers should consequently be prohibited as a general rule. On the other hand, capitalist accumulation militates towards the expansion of capital, and therefore the growth of firms. Here, mergers may be considered a natural manifestation of capitalist accumulation and a key mechanism by which firms increase the scale and scope of their production; in short, mergers are desirable. This conclusion directly conflicts with a structural conception of competition. This tension has been termed the contradiction of concentration.

Yet, for reasons suggested at the conclusion of Chapter 1, mainstream economists are unwilling to part with a conception of competition that exists purely within market structures, and are therefore unable to avoid the contradiction of concentration. As a result, merger law – which is built on these conceptual foundations – is guided by a conflicted policy recommendation: prohibit mergers in some cases, encourage them in others. The only remaining option for curing this inaccuracy is to shift the goal posts: while mainstream theory originally positioned competition as a desirable goal in and of itself, the theory has been modified such that competition is merely the means to some higher end. That end is economic efficiency.

Much like the concept of competition, economic efficiency is a highly ambiguous component of mainstream theory. Also like competition, the TPA provides no definition of economic efficiency. In general, economic efficiency relates to the use of scarce resources in a way that maximises the welfare of society, and is divided into three main

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[10] Here the contradiction of concentration is presented in a simplified form. Chapter 1 provides a more comprehensive understanding of the contradiction.
[11] But also by neo-Marxian theorists, as demonstrated in Chapter 1. See the section "A Structural Critique of Capitalism: The Neo-Marxian Framework".

categories. *Allocative efficiency* refers to the distribution of resources throughout the economy, and is "a question of whether resources are employed in tasks where consumers value their output most."[12] By contrast, *productive efficiency* relates to the effective use of resources by firms. Economies of scale and scope are the most common forms of productive efficiency. Finally, *dynamic efficiency* refers to the efficient use of resources over time, and is achieved by investing in the development of new technology. Thus, not only is economic efficiency rarely defined on a general level, it is fragmented into three equally complex concepts. These concepts are difficult to measure in themselves, and even harder to compare to one another.

In this chapter, I do not intend to simply demonstrate that the law avoids one ambiguous concept (competition) by adopting another (efficiency) – although this is an important concern. Rather, the central argument of this chapter is that, by mediating the contradiction of concentration through the concept of economic efficiency, merger law ultimately produces new contradictions. In particular, I will reveal how the law's focus on economic efficiency serves to reproduce the antagonist relation between capital and labour that characterises the capitalist mode of production. In order to demonstrate this point, it is first necessary to establish the increasingly significant role of economic efficiency in Australian merger law.

The Rise of Efficiency

The now relatively mainstream position that competition is only desirable in so far as it promotes economic efficiency first gained currency in Australia after the report of the Hilmer Committee was released in 1993.[13] In its report, the Hilmer Committee proclaimed that "competition policy is not about the pursuit of competition *for its own sake* [but] seeks to facilitate effective competition *in the interests of economic efficiency*" (emphases added).[14] Others have attempted to phrase this principle in more appealing terms. The former Treasurer, Peter Costello, suggests that competition policy should perhaps be called "'Consumer Policy' focusing on the end benefit – helping the consumer – rather than on the process: which is doing this through increased

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12 Robert Bork (1978) *The Antitrust Paradox: A Policy at War with Itself*, New York: Basic Books Inc, p91.
13 Hilmer Report, *op. cit.*
14 *Ibid.*, p6.

competition."[15] Although there is a wealth of case law supporting the proposition that consumers are the intended beneficiaries of the competition provisions of the TPA,[16] this result is only obtained by defining "consumers" broadly, to include – somewhat confusingly – producers.[17] Moreover, the preferred mechanism for measuring consumer welfare is neoclassical price theory, in which economic efficiency serves as the standard of reference. Therefore, an emphasis on consumer welfare effectively returns to the same principle: economic efficiency is the salutary effect that flows from competition.

This principle is most commonly presented in terms of the more general concept of the public interest.[18] It is through this concept that Australian merger law has accommodated an increasing emphasis on economic efficiency. Under the TPA, a merger that otherwise contravenes Section 50 may be authorised if it is likely to result in "such a benefit to the public that the acquisition should be allowed to occur".[19] Consequently, authorisations are conducted by weighing the substantiality of public benefits against any public detriments in order to determine whether the merger is in the public interest.[20]

Yet, once again, the legislation fails to define central concepts – specifically, public benefit, public detriment and public interest. A clear emphasis on economic efficiency emerges from the decided cases. A public benefit has been defined as "anything of value to the community generally, any contribution to the aims pursued by the society *including as one of its principal elements…the achievement of the economic goals of efficiency*" (emphasis added).[21] The sharp contrast between the extremely general "anything of value" and the

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[15] Peter Costello (2000) "25 Years of Competition Law – A Political Perspective", in Ray Steinwall, ed., *25 Years of Australian Competition Law*, Sydney: Butterworths, vii.
[16] See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44; *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 at 458-459; *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat Livestock Corp (No 2)* (1980) 44 FLR 455 at 460; *Davids Holdings Pty Ltd v Attorney-General of the Commonwealth* (1994) 49 FCR 211 at 248; *ACCC v Boral* [1999] ATPR 41-715 at [167]; *Universal Music Australia v ACCC* (2003) ATPR 41-947 at 47,381.
[17] This point is considered in more detail later in this chapter. See "Efficiency, Capital and Labour."
[18] For a comprehensive catalogue of the ambiguities of the term public interest in a more general administrative context, see Chris Wheeler (2006) "The Public Interest: We Know It's Important, But Do We Know What It Means?", *AIAL Forum*, 48, 12-25.
[19] Section 95AZH(1).
[20] This test was established in *Re Queensland Co-operative Milling Association Ltd and Re Defiance Holdings Ltd* (1976) 1 ATPR 40-012 at 17,245.
[21] *Re Queensland Co-operative Milling Association Ltd and Re Defiance Holdings Ltd* (1976) 1 ATPR 40-012 at 17,243. See also *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42,677. By extension, a public detriment is "any impairment to the community generally, any harm or damage to the aims pursued by the society *including as one of its principal elements the achievement of the goal of economic efficiency*" (emphasis added). See *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42,683. See also *Queensland Independent Wholesalers Limited* (1995)

specific reference to economic efficiency is indicative of the law's increasing focus on the latter.[22] Indeed, the Hilmer Committee had even suggested that "the authorisation provisions should be amended to *confirm* that economic efficiency is the primary consideration in assessing public benefits" (emphasis added).[23]

The institutional structure of Australian competition policy has facilitated the growing role of economic efficiency in the TPA. Competition policy in Australia is characterised by the "dual adjudication" system: courts are required to assess the competitive effect of conduct *without regard to efficiency*, while the administrative bodies of the Australian Competition and Consumer Commission (the "ACCC") and the Australian Competition Tribunal (the "Tribunal") are required to weigh the anti-competitive detriments of conduct against any public benefits, *including efficiency*.[24] In the last two decades, the ACCC has relied heavily on settling merger disputes administratively, rather than through court processes.[25] Consequently, the increasing centrality of the administrative bodies in the institutional structure of Australian competition policy has been coupled with the growing influence of economic efficiency in the TPA.

However, in recent times, the overwhelming majority of merger cases have been disposed of by the ACCC through the merger clearance process, in which the ACCC is required to evaluate the effect of a merger on the competitive process without regard to economic efficiency.[26] Nonetheless, there are indications that the ACCC considers economic efficiency in its determination of merger clearances. In general, the ACCC is responsible for granting authorisations for conduct that is otherwise prohibited by the competition provisions of the TPA. Initially, this power also extended to mergers, and

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132 ALR 225 at 276; *Media Council of Australia (No 2)* [1987] ATPR 40-774 at 48,419; *Re QCMA and Defiance Holdings Ltd* [1976] ATPR 40-012 at 17,244; *Re G & M Stephens Contractors Pty Ltd* [1977] ATPR 40-042 at 17,459-17,460; *Re John Dee (Export) Pty Ltd* [1989] ATPR 40-938 at 50,206.

[22] In addition to this explicit emphasis, the immense difficulty of measuring and comparing non-economic benefits and detriments has meant that the public interest is generally reduced to economic efficiency. Although non-economic benefits may be considered in the authorisation process, by far the majority of applications for authorisation have been determined in relation to economic efficiency, particularly in the context of mergers. See Brunt, *op. cit.*, p507 and Corones, *op. cit.*, p186.

[23] Hilmer Report, *ibid.*, p121.

[24] Maureen Brunt (2003) "Australian and New Zealand Competition Law and Policy (1992)", in Maureen Brunt, ed., *Economic Essays on Australian and New Zealand Competition Law*, The Hague: Kluwer Law International, pp 242-243.

[25] Corones, *op. cit.*, p357.

[26] *Trade Practices Act 1974* (Cth), s95AN(1). The 2003 Dawson Committee rejected a proposal to allow the ACCC to consider economic efficiency at the clearance stage of a merger evaluation. See Trade Practices Act Review Committee (2003) *Review of the Competition Provisions of the Trade Practices Act*, Canberra: AGPS.

the ACCC frequently disposed of merger authorisations. However, in 2006, the TPA was amended such that only the Tribunal had the authority to grant authorisations in relation to Section 50.[27] Since this change, not a single application for authorisation has been lodged with the Tribunal. Consequently, it is highly likely that the ACCC has broadened its scope of inquiry for the clearance process – albeit unofficially – since most cases are being disposed of at this stage.[28] Moreover, since the line between competition and economic efficiency has been considerably blurred, it is increasingly legitimate for the ACCC to consider issues of economic efficiency in its assessment of competition.[29]

Finally, the rise of the Chicago School in mainstream competition theory has undoubtedly bolstered the central position of economic efficiency in merger law. Although the Chicago School approach has not been universally adopted in Australian competition law as it has in the US, to discuss efficiencies in competition analysis is – at least implicitly – to lend support to the Chicago problematic. More specifically, the belief that competition should only be promoted to the extent that it achieves economic efficiency is a fundamental tenet of the Chicago School approach.[30]

It will be recalled from Chapter 1 that, despite the superficial disputes between Industrial Organisation theorists and the proponents of the Chicago School, both ultimately conceive of competition in relation to market structures, and therefore both are problematised by the contradiction of concentration. In this way, the focus on efficiency that characterises the Chicago School approach – and, increasingly, Australian merger law – is an unsuccessful attempt to bypass the contradiction of concentration, and ultimately the contradiction surfaces in a new form. Specifically, the emphasis on

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[27] *Trade Practices Amendment Act (No 1) 2006* (Cth).
[28] I acknowledge the seemingly counterintuitive nature of simultaneously suggesting that the authorisation regime played an instrumental role in facilitating the growing significance of economic efficiency in Australian competition policy, while conceding that the Tribunal has never actually disposed of a merger authorisation. However, the authorisation regime has been developing since the TPA's inception in 1974, and, as was noted in the body of the text, the ACCC has dealt with numerous merger authorisations since 1974. By contrast, the Tribunal has only played its current role in merger authorisation since 1 January 2007. In this context, the lack of correspondence between the significance of the authorisation regime generally and the Tribunal's authorisation of mergers does not undermine the conclusion that the authorisation process of the TPA has been instrumental in the growing centrality of economic efficiency in Australian merger law. By contrast, this lack of correspondence further indicates the likelihood that economic efficiency is being considered by the ACCC in the merger clearance process.
[29] As the 2003 Dawson Committee noted, "a test that prevents the substantial lessening of competition will generally be a good test of economic efficiency." See Trade Practices Act Review Committee, *op. cit.*, p56.
[30] Philip Clarke (1989) "Trade Practices Policy and the Role of the Trade Practices Commission", *Australian Business Law Review*, 17(5), p292.

economic efficiency in Australian merger law serves to reproduce the exploitative social relations of capitalism. In order to demonstrate this point, an analytical framework must be constructed through which the implications of economic efficiency – a concept generally understood within the neoclassical paradigm – can be determined for two categories that are commonly confined to Marxian theory, and concealed by the neoclassical model of pure exchange – capital and labour.

Capital and Labour, Producers and Consumers

The model of pure exchange preferred by mainstream economists precludes an analysis of the social relations that define capitalism as historically specific. In this ahistorical model, rational (and homogeneous) individuals are assumed to act purely in their self-interest. Consequently, the antagonistic relationship between capital and labour is concealed in this framework. Nonetheless, the pure exchange model ultimately depends on a basic classification of individuals – the division between profit maximising producers and utility maximising consumers. By problematising these classifications, capital and labour can be situated in the mainstream paradigm, thereby enabling an examination of how the emphasis on economic efficiency in merger law serves to reproduce the social relations of capitalism.

Some would argue that the exercise of reconciling fundamental categories of Marxian theory with key concepts of mainstream economics is ill-conceived, and serves to dissipate the strength of the Marxian framework in understanding the antagonistic relationship between labour and capital. In direct contrast, failing to locate capital and labour in the mainstream paradigm directly reinforces the conceit of mainstream ideology in concealing the exploitative relations of capitalism.

In mainstream economics, the term producer does not refer to the person who physically produces a commodity, but rather the person who brings that commodity to the market for sale. As such, "producer" is generally considered synonymous with "supplier" or "seller". This simple definition is derived from the model of pure exchange, in which the process of production is neglected, or at best presupposed.[31] Accounting for the production process, a more complete definition of producer would be the person who

[31] Luigi Pasinetti (1977) *Lectures on the Theory of Production*, New York: Columbia University Press, p24.

controls the process of production for a commodity, and therefore has exclusive agency over that commodity in exchange. Consequently, the only real distinction between the mainstream "producer" and the Marxian "capitalist" is that the former is defined exclusively in reference to exchange, while the latter accounts for the totality of the moments of production.[32] Accordingly, the subsequent analysis proceeds on the assumption that, in virtually every case, a producer is equivalent to a capitalist.

However, it would be incorrect to suggest that the producer/consumer dichotomy is therefore synonymous with the capital/labour relation. Since capitalists also consume, it is inaccurate to equate consumers with labour. Nonetheless, it is legitimate to conclude that labour must always be classified as the consumer in the mainstream dichotomy, because labour is never the producer.[33] Thus, while the term consumer may encompass both labour and capital, labour is only ever a consumer. Applying the Marxian framework, this conclusion is supported by a more technical argument. According to Marx, wages tend towards a socially-determined subsistence as a result of the competitive struggle between workers.[34] As such, workers tend to consume the majority of their wages. Consumption is therefore an essential characteristic of labour.

On the other hand, the law of value drives capitalists to re-invest the surplus value appropriated from labour in the production process. Thus, in general, capitalists are only consumers in markets for capital goods – commodities which are employed in the production process. In these markets, capitalists (producers of capital goods) interact with other capitalists (consumers of capital goods). Consequently, these markets may be abstracted from in an analysis of merger law's implications for the relation between capital and labour. So, while it would be simplistic to reduce the capital/labour relation of Marxian theory to the producer/consumer dichotomy of the mainstream economics, a change in the dynamics between producers and consumers has important implications for the relation between capital and labour. Applying the framework established in this section, the following section will reveal how the emphasis on efficiency in Australian merger law serves to reproduce the exploitative social relations of capitalism.

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[32] Production, distribution, exchange and consumption. See Karl Marx ([1858] 1973) *Grundrisse: Foundations of the Critique of Political Economy*, London: Allen Lane, p99.

[33] In the Marxian framework, labour is in actuality the direct producer, in the sense that value is only produced by labour. However, the definition of producer employed here is not the person who physically produces a commodity, but rather the person who *controls* the production process for that commodity.

[34] Karl Marx ([1894] 1909) *Capital*, Volume 3, Chicago: Charles H Kerr & Company, pp 168-169 and 206.

Efficiency, Capital and Labour

In neoclassical theory, Pareto efficiency refers to an outcome for which the welfare of any individual cannot be improved without reducing the welfare of another individual. Total social welfare is therefore maximised under conditions of Pareto efficiency. In neoclassical price theory, perfect competition is a Pareto efficient outcome since the income of a producer cannot be increased without reducing the income of consumers. In other words, any move away from the conditions of perfect competition leads to an increase in the price paid by consumers, as demonstrated by Figure 3.1. Following this logic, the law is hamstrung by the contradiction of concentration: any reduction in the number of firms in a market, or any increase in their size, generates higher prices in this model. Yet, instead of re-evaluating the usefulness of an analysis of competition based purely within market structures, mainstream theory simply modified the goals of this analysis.

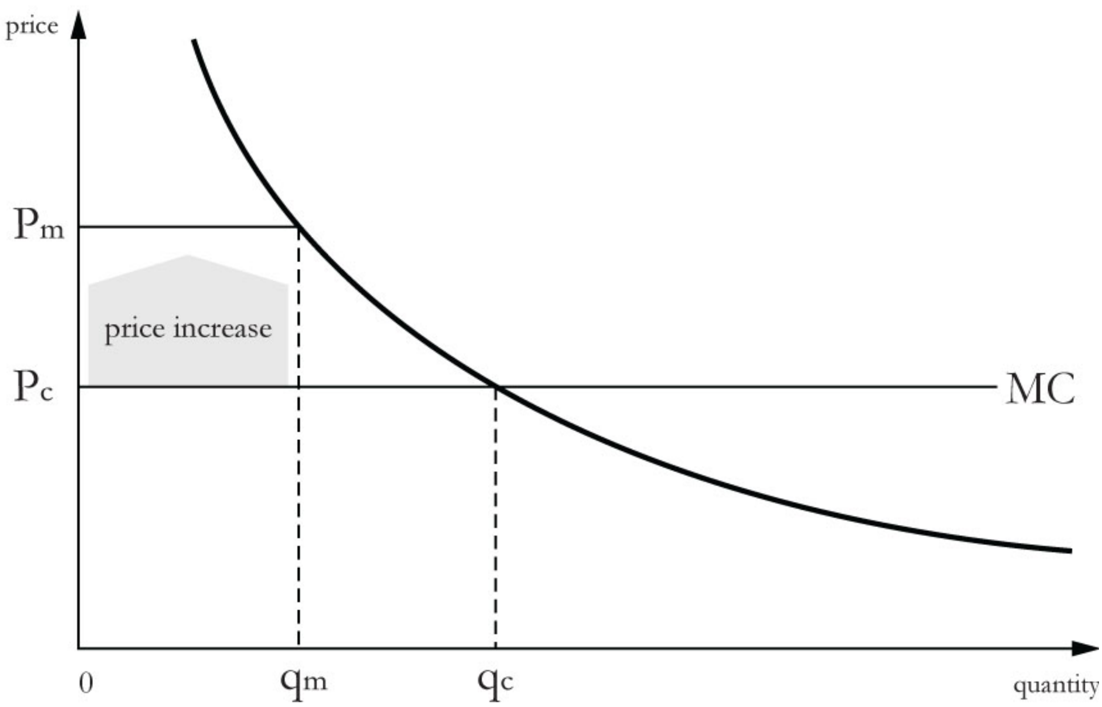

Figure 3.1: Neoclassical Price Theory, Competition and Monopoly

The restrictive conditions of Pareto efficiency lead to the construction of an alternative principle known as Kaldor-Hicks efficiency.[35] According to this principle, an outcome is considered efficient if any reduction in the welfare of individuals can be offset by corresponding increases in the welfare of other individuals, such that there is at least no net change in total social welfare. In order to apply this principle to competition policy, consumer welfare must be understood broadly, to include the welfare of producers.[36] This definition abstracts from the effect of mergers on income distribution. Influential Chicago School theorist, Bork, attempts to explain why this is a legitimate sleight of hand:

> Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, *who are also consumers*. This is not deadweight loss but merely *a shift in income between two classes of consumers* (emphases added).[37]

Strictly speaking, it is true that producers also consume. However, in the specific scenario described by Bork, the producers are not consuming. If these producers are indeed a different "class of consumers", then they too will benefit from competition *in their capacity as consumers*. As such, Bork fails to present a legitimate reason to modify the standard by which competition is measured. In spite of this point, the total welfare standard has been incorporated into Australian competition policy.[38]

In 1968, Williamson applied the Kaldor-Hicks principle to the context of two merging duopolists.[39] In the resulting model, Williamson demonstrated that a decrease in consumer welfare generated by the formation of a monopoly could be sufficiently offset by a reduction in the marginal costs of the merged firm.[40] As can be seen by comparing Figures 3.1 and 3.2, Williamson's model did not attempt to deny the well-established conclusion of neoclassical value theory that prices increase under conditions of monopoly. Instead, Williamson simply identified a new component of consumer welfare

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[35] See Nicholas Kaldor (1939) "Welfare Propositions of Economics and Interpersonal Comparisons of Utility", *The Economic Journal*, 49(195), 549-552 and John R Hicks (1939) "The Foundations of Welfare Economics", *The Economic Journal*, 49(196), 696-712.
[36] See for instance Robert R Officer and Philip L Williams (1995) "The Public Benefit Test in an Authorisation Decision", in Megan Richardson and Philip L Williams, eds., *The Law and the Market*, Sydney: Federation Press, p162.
[37] Bork, *op. cit.*, p110.
[38] *Re Qantas Airways* [2005] ATPR 42-065.
[39] Oliver E Williamson (1968) "Economies as an Antitrust Defense: The Welfare Tradeoffs", *American Economic Review,* 58(1), 18-36.
[40] Here it is assumed that the merger will lead to economies of scale.

– the cost savings of the merged firm. Williamson's model underpins the now widespread efficiency approach to merger evaluation, in which allocative efficiency is trade against productive efficiency.[41]

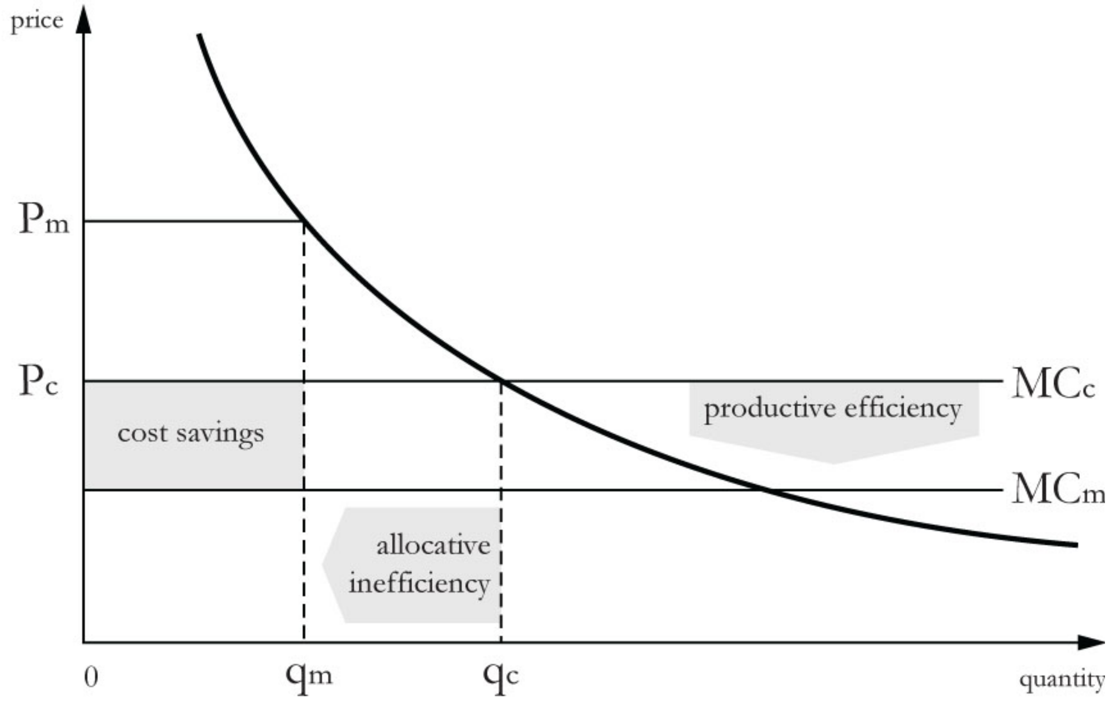

Figure 3.2: The Williamson Trade-Off Model

Crucially, merger law following this approach serves to reproduce the subordinate position of labour in the capitalist mode of production. In the context of mergers, it is invariably the prospect of productive efficiency that is promised as compensation for a loss in allocative efficiency, and never the opposite. This pattern is partly explained by the fact that a potential increase in allocative efficiency is relatively difficult to substantiate, but mainly because mergers tend to reduce allocative efficiency according to the logic of the structural conception of competition employed in merger law.[42] By contrast, it is relatively simple to demonstrate that cost savings are a likely by-product of production on an increased scale.

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41 As the most extreme, Bork suggests that "*the whole task of antitrust* can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare" (emphasis added). See Bork, *op. cit.*, p45.
42 As was demonstrated in relation to Figure 3.1.

Consumers are the principal beneficiaries of allocative efficiency, as the most valued goods become available at the lowest prices. A reduction in consumer welfare therefore directly impacts on the consumption of workers. Put differently, a loss in allocative efficiency leads to an increase in prices and therefore a reduction in the real value of wages paid to workers. In sharp contrast, productive efficiency relates to the ability of individual firms to produce at the lowest possible cost, with no requirement that the savings are passed on to consumers. Consequently, productive efficiency predominantly benefits producers. More specifically, productive efficiency increases the capitalist's rate of profit by lowering her costs of production. Thus, as Schmidt and Rittaler conclude, under the efficiency approach to merger law "it would be more correct to speak of supplier instead of consumer welfare."[43] By applying the framework established in the previous section, their point has been taken further: by preferencing productive efficiency over allocative efficiency, Australian merger law serves to reinforce the subordination of labour to capital.

In addition, the process of comparing productive and allocative efficiency in merger evaluation neglects the third main category of economic efficiency – dynamic efficiency.[44] This result is perhaps unsurprising, since Chapter 1 has already demonstrated that the static model of pure exchange is unable to account the dynamic elements of competition. Yet, by ignoring dynamic efficiency, merger law further erodes the potential for competition to benefit consumers – and by extension, labour. Dynamic efficiency is the process by which competition generates desirable outcomes for consumers in the future. In other words, dynamic efficiency relates to the efficient allocation of resources over time. Once again, by emphasising productive efficiency, the rate of profit on capital is preferenced above the consumption potential of labour – in this case by denying the importance of socially progressive innovation.

Australian merger law's emphasis on productive efficiency serves to intensify the antagonistic social relations of capitalism on one further, fundamental level. Although this point does not depend on the analytical schema established in the previous section, it

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[43] Inglo L O Shmidt and Jan B Rittaler (1989) *A Critical Evaluation of the Chicago School of Antitrust Analysis*, Dordrecht: Kluwer Academic Publishers, p47.

[44] The explanation of this taxanomy of economic efficiency was provided earlier in the chapter. See "Competition and Efficiency".

is nonetheless conceptualised within the Marxian theoretical framework. As has been demonstrated in this section, Australian merger law mediates the contradiction of concentration through the concept of efficiency, such that mergers are generally permitted if they are likely to result in an increase in productive efficiency. Yet, in the Marxian framework, labour ultimately bears the burden of productive efficiency. Marx heavily criticised what he referred to as the "Trinitarian formula" – the perception that land, labour and capital all produce value which is measured by their respective factor incomes – on the grounds that "value is labour" and thus surplus value can only be produced by labour power.[45] The expectation that a firm will produce more efficiently after a merger is therefore borne out through the increased exploitation of labour, while capital – which controls the production process – reaps the benefits of productive efficiency. Moreover, the law does not expect these benefits to be returned to workers – in their capacity as consumers – in the form of lower commodity prices.

Conclusion

It is undeniable that pragmatism can serve as an appropriate remedy for the contradictory theoretical foundations of economic policy. However, for this to be the case, policy must be guided by clear aims. No such clarity is evident in Australian merger law. Consequently, the contradiction of concentration is manifest in the practical application of Section 50. In recent years, the law has increasingly relied on the concept of economic efficiency to mediate the conflicting policy recommendation generated by the contradiction of concentration. However, the theory of competition based purely on market structures has not been re-evaluated in the concept of economic efficiency, but rather the desired outcomes of this theory have been modified. As such, the contradiction of concentration remains unresolved, and ultimately emerges in new forms. Critically, this chapter has revealed how the emphasis on economic efficiency in Australian merger law serves to reproduce the subordinate position of labour in the capitalist mode of production – as both consumer and worker.

In the introduction to this thesis, I explained that the central aim of the work was to critically evaluate the way in which contradictions of economic theory are articulated by the law. In this context, I acknowledged that the significant and complex role that the

[45] Marx ([1894] 1909), *op. cit.*, p498.

law plays in reproducing the social relations of capitalism would necessarily be implicit throughout the thesis, rather than the explicit focus of the work. However, in this chapter, these two important themes have converged: by articulating the contradiction of concentration, merger law serves to reproduce the antagonistic relation between capital and labour. Both facets of this argument militate strongly towards the construction of a Marxian theory of competition. On one hand, this chapter has demonstrated that the contradiction of concentration cannot be resolved while maintaining a structural conception of competition. Thus, resolution depends *prima facie* on the construction of a distinct problematic. On the other, the significant role played by the law in reproducing the social relations of capitalism suggests that the conceptual framework for regulation must be able to account for the dynamic relationship between capital and labour. These two points provide the motivation for the construction of an alternative framework in the final chapter of this thesis.

Chapter 4

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Mergers of Capital

A Marxian Theory of Competition as a Process in Accumulation

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> *Competition subordinates every individual capitalist to the immanent laws of capitalist production, as external and coercive laws. It compels him to keep constantly extending his capital, so as to preserve it, and he can only extend it by means of progressive accumulation.*
> Karl Marx, *Capital*, Volume 1, 1867.[1]

The analysis of the previous three chapters has revealed that the regulation of mergers in Australia has reached an impasse. Section 50 of the *Trade Practices Act 1974* (the "TPA") articulates a fundamental contradiction of mainstream economic theory. Furthermore, the law's attempt to mediate that contradiction generates significant implications for the social relations of capitalism. It is now abundantly clear that the contradiction of concentration will not be resolved by further legislative amendments to the TPA, such as those examined in Chapter 2. Resolution of the contradiction is contingent on a re-evaluation of the conceptual foundations of Australian merger law.

The purpose of this final chapter is to construct an alternative theoretical framework for the regulation of capitalist competition. This exercise is motivated by what have been identified as two key deficits of the mainstream paradigm: an inability to situate competition in the wider process of capitalist accumulation, and a propensity to ignore the central role of state regulation in the reproduction of capitalist social formations. In both respects, Marxian political economy provides the foundations for a suitable alternative.

In this chapter, I contend that Marxian political economy is unified and distinguished by its method. Applying this method, I suggest that competition must be theorised on an abstract level of analysis before the concrete interaction between firms can be considered. At a high level of abstraction, competition is the process by which value

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[1] Karl Marx ([1867] 1954-1959) *Capital*, Volume 1, Moscow: Progress Publishers, p554.

expands in the circuit of social capital. Capital is therefore identified as the unit of analysis for a Marxian theory of competition. In this framework, competition is not determined by the location of firms in market structures, but by the movement of capital in the process of accumulation. This approach reveals the dialectical relationship between competition and concentration: while competition propels the growth of capital, the expansion of capital conditions the process of competition.

By situating mergers within the theoretical framework established in this chapter, I argue that market structures are not a suitable focus for the regulation of capitalist competition. Mergers do not modify the inherent character of capital as self-expanding value, and therefore do not undermine competition. In fact, this chapter demonstrates that mergers tend to facilitate capital movements, and are therefore a key mechanism in the concrete process of competition. This conclusion supports a dialectical conception of competition and concentration as complementary forces in the process of capitalist accumulation. These points are illuminated by examining two controversial areas of Australian merger law – the failing firm defence and the issue of creeping acquisitions.

Competition, Accumulation and Marx's Method

There is no single Marxian theory of competition. Indeed, with respect to the theory of monopoly capitalism, this thesis has already considered a Marxian theory of competition that is distinct from the framework presented in this chapter.[2] There are three main explanations for the lack of a coherent and unitary Marxian theory of competition. Firstly, Marx's various comments on competition have been interpreted in a range of ways. In the first chapter of this thesis, I acknowledged the similarity between the neoclassical theory of perfect competition and Marx's observation that "competition rages in direct proportion to the number, and in inverse proportion to the magnitudes, of the antagonistic capitals".[3] Yet Williams points out that there is no indication that Marx had "read Cournot's book", and therefore suggests that it is dubious to identify the concept of perfect competition in Marx.[4] Secondly, Marx's principal attempt to develop a comprehensive theory of competition and profit rates in Volume 3 of *Capital* was left

[2] See Chapter 1, at the section "A Structural Critique of Capitalism: The Neo-Marxian Framework".
[3] Marx ([1867] 1954-1959), *op. cit.*, p587.
[4] Philip L Williams (1982) "Monopoly and Centralisation in Marx", *History of Political Economy*, 14(2), p238.

unfinished. As such, this component of Marx's theoretical framework has been left largely open to interpretation. Finally, within the Marxian tradition, competition has frequently been dismissed as a veil for exploitation or a category of exclusively neoclassical concern.[5] A significant attempt was made to change this perception in the 1980s, predominantly by contributors to the periodical, *Capital and Class*.[6] Despite these important contributions, a Marxian theory of competition has not been substantially progressed in the decades since. Consequently, critical studies of competition law tend to suggest that large firms are innately anticompetitive, and therefore lend tacit support to the neoclassical ideal of perfect competition.[7]

These ambiguities suggest that a Marxian theory of competition must be guided by something more than Marx's many passages relating to competition. Such a guide can be found in Marx's method of political economy. In sifting through Marx's various notes on competition, theorists have too often resorted to asserting that some passages are *more Marxian* than others.[8] Ultimately, no single passage or text can completely encapsulate Marxian theory. However, this principle does not undermine the centrality of Marx to Marxian theory. Marxian theory is unified and distinguished by Marx's method – specifically, the two "united but distinct disciplines" of historical materialism and dialectic materialism.[9] So, while Marx's work on competition may not provide a unitary and coherent Marxian theory of competition, there must necessarily be equivalence between *Marx's method* and a *Marxian method*. The Marxian theory of competition

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[5] Richard Bryan (1985) "Monopoly in Marxist Method", *Capital and Class*, 26, p72.
[6] For the *Capital and Class* contributions see Willi Semmler (1982) "Theories of Competition and Monopoly", *Capital and Class*, 18, 91-116; Jane Wheelock (1983) "Competition in the Marxist Tradition", *Capital and Class*, 21, 18-47; Bryan (1985), *op. cit.*; Jane Wheelock (1986) "Competition and Monopoly: A Contribution to Debate". *Capital and Class*. 30. 184-191; Paul Burkett (1986) "A Note on Competition Under Capitalism", *Capital and Class*, 30, 192-208; Richard Bryan (1986) "Competition and Monopoly: A Reply", *Capital and Class*, 30, 209-214. In addition, see James A Clifton (1977) "Competition and the Evolution of the Capitalist Mode of Production", *Cambridge Journal of Economics*, 1(2), 137-151; John Weeks (1981) *Capital and Exploitation*. London: Edward Arnold; Williams, *op. cit.*; Willi Semmler (1984) *Competition, Monopoly, and Differential Profit Rates*, New York: University of Columbia Press.
[7] See for instance John Quiggin (2001) "Business as Usual", *Arena*, 55, 55-57; Caner Bakir (2004) "Bank Powers and Public Resistance to Mega Bank Mergers", *Journal of Australian Political Economy*, 54, 67-93; Evan Jones (2005) "Liquor Retailing and the Woolworths/Coles Juggernaut", *Journal of Australian Political Economy*, 55, 23-47; Alistair Davey (2003) "Business and Mergers Law in Australia: Never the Twain Shall Meet", *Journal of Economic and Social Policy*, 8(1), 17-34. Indeed, this position is also apparent in the neo-Marxian framework – in which monopoly is the antithesis of competition, and the "giant corporation" is the typical economic unit of monopoly – as well as the work of institutional economists such as Galbraith. See J K Galbraith (1973) *Economics and the Public Purpose*, Middlesex: Penguin.
[8] See for instance John Bellamy Foster (1986) *The Theory of Monopoly Capitalism*, New York: Monthly Review Press, pp 55-59; Clifton, *op. cit.*, p145; Williams, *op. cit.*, pp 238-239.
[9] Nicos Poulantzas (1973) *Political Power and Social Classes*, London: NLB and Seed and Ward, p11.

presented in this chapter is compatible with Marx's method of political economy. By constructing a theory of competition from these foundations, I will demonstrate that competition is a *process of capital* and not a market structure populated by a specific number of firms.

Historical materialism, the study of objective relations of production in their socio-historical specificity, is incompatible with an understanding of competition as a market structure for two related reasons. Firstly, structural theories of competition[10] are static, and therefore unable to explain "how competition is generated by the social relations which define capitalism as historically specific".[11] Secondly, by confining competition to the sphere of exchange, structural conceptions of competition neglect, or at best presuppose, the process of production – and by extension, the social relations of production.

Applying an historical materialist approach, capitalist competition cannot be theorised separately from capitalist production and accumulation. A Marxian theory of competition must therefore be constructed from more basic categories of the Marxian framework.[12] In particular, a Marxian theory of competition must examine how competition is generated by the process of capitalist accumulation, rather than by particular market structures. Accordingly, competition must be theorised on an abstract level, before the concrete modalities of the competitive struggle between firms are considered. This point can be elaborated by analysing Marx's dialectic method.

According to Marx's dialectic, the social totality can only be understood through an analytical movement between the abstract and the concrete.[13] At the most abstract level of analysis of capitalism, the logic of capital is central. Yet analysis at this level will be "relatively indeterminate" in its implications for specific social formations.[14] This indeterminacy "can be progressively eliminated through the concretization…of the

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10 The term "structural theories of competition" is used in this chapter, as it has been throughout the thesis, to refer to theories that conceive of competition as a market structure. These theories were explored in Chapter 1. Although this chapter is centred on a discussion of the Marxian method, the use of the term "structural" must not be confused with the structural school of Marxian theory, characterised by the early work of Louis Althusser. See Louis Althusser and Étienne Balibar (1979) *Reading Capital*, London: Verso.
11 Burkett, *op. cit.*, p192.
12 Bryan (1985), *op. cit.*, p74.
13 Karl Marx ([1858] 1973) *Grundrisse: Foundations of the Critique of Political Economy*, London: Allen Lane, p100.
14 Bob Jessop (1990) *State Theory: Putting the Capitalist State in its Place*, Cambridge: Polity Press, p77.

theoretical object."[15] In this schema, each level of analysis presupposes and articulates all levels that have come prior to it in the dialectic sequence.[16]

Applying a dialectic method, competition and monopoly cannot simply appear for analysis at the level of concrete interactions between firms in a market, but must first be theorised on an abstract level. As Weeks explains, since neoclassical theory initiates its analysis of competition at a relatively low level of abstraction, "the forms the competitive struggle take [*sic*] under capitalism do not derive from the concept [of competition] itself, but appear as exceptions to it."[17] By contrast, a Marxian theory of competition recognises that an analysis of "competition in general" comes logically prior to an analysis of "competition between capitals",[18] and therefore the latter must articulate the conditions established by the former.[19]

In its most abstract form, Marx defined capital as self-expanding value.[20] According to this definition, capital predates capitalism, as it existed in the form of interest-bearing capital and merchant capital. In the circuit of interest-bearing capital, money is advanced in order to obtain more money, while in the circuit of merchant capital, money is used to purchase commodities which are then sold for a greater amount of money. These two circuits can be expressed as follows (respectively):[21]

(1) M – M'

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15 *Ibid.*, p77.
16 Robert R Albritton (1984) "The Dialectic of Capital: A Japanese Contribution", *Capital and Class*, 22, p165. It should be noted that Albritton works within the Unioist tradition of Marxian theory. This tradition has been criticised for implying a determinsitc construction of the social totality, in which conrete processes simply play out the abstract determinants of capitalism. However the principle expounded in the body of the text is not exclusive to the Uno school. It is in fact of universal applicability to Marxian theory, as it recognises the dialectic interaction between levels of analysis without reducing those distinct levels of abstraction to one another.
17 Weeks, *op. cit.*, p160.
18 This method is explicit in the structure of *Capital*. In Volume 1, Marx lays out the inherent laws of capitalist accumulation, and therefore the object of his analysis is the relatively abstract "capital in general". However, in Volume 3, Marx examines the concrete interaction of "many capitals". Indeed, the distinction between the abstract "capital in general", and the concrete "particular capitals" or "many capitals", was evident throughout Marx. See, for instance, Karl Marx ([1858] 1973), *op. cit.*, p449.
19 Ben Fine and Laurence Harris (1979) *Rereading Capital*, London: Macmillan, Chapter 1; Bryan (1985), *op. cit.*, pp 76-77; Bryan (1986), *op. cit.*, p210; Weeks, *op. cit.*, pp 155-158.
20 Karl Marx ([1867] 1954-1959) *op. cit.*, Chapter IV; Karl Marx ([1885] 1909) *Capital*, Volume 2, Chicago: Charles H Kerr & Company, Chapers I-IV.
21 In circuits (1) and (2), M and M' represent different sums of money, such that M' > M. In circuit (2), C represents commodities.

(2) M – C – M’

Yet capitalism is historically specific in that capital penetrates the production process, such that accumulation is expressed not simply in exchange, but in a circuit of industrial capital, including both production and exchange:[22]

(3) M – C…P…C’ – M’

Here, capital expands as it circulates between its money, commodity and productive forms in the circuit of social capital. At this level of analysis, competition is understood as the process by which value moves between these forms.[23]

Capitalist competition is therefore fundamentally underpinned by the competition between labour and capital as expressed by the wage-relation. Capital finds the most adequate basis for its self-expansion in circuit (3): the production of surplus value through the commodification of labour power.[24] The competition between labour and capital determines the rate of surplus value, and therefore the potential rate of expansion for capital in general. Furthermore, since competition is the movement of value, it necessarily exists at all stages in the circuit of capital. It is therefore unnecessary to restrict a theory of competition to the interaction of firms in the sphere of exchange, as is the case in the structural conceptions of competition considered in Chapter 1.

Mainstream theory attempts to analyse competition without first explaining why there should be competitors.[25] Competition among capitals arises from the integration of production and exchange in the circuit of social capital – which is ultimately predicated on the relations between capital and labour.[26] Thus, competition between capitals is the process by which the law of value is expressed, as each individual capital fights for the greatest possible share of the total surplus value extracted from labour. As Marx explained, “competition merely *expresses* as real, posits as an external necessity, that which

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[22] In circuit (3), M and M’ represent different sums of money, such that M’ > M. C represents commodity inputs, including labour power and the means of production, while C’ represents commodity outputs, such that the value of C’ is greater than the value of C. P represents the production process. The dotted lines simply indicate that capital has temporarily moved out of circulation.
[23] Weeks, *op. cit.*, p164; Burkett, *op. cit.*, p194; Bryan (1986), *op. cit.*, p213; Bryan (1985), *op. cit.*, pp 77-78.
[24] Burkett, *op. cit.*, p194.
[25] Weeks, *op. cit.*, p159.
[26] Fine and Harris, *op. cit.*, p4.

lies within the nature of capital."[27] Crucially, therefore, competition is not specific to atomistic firms; it is a process inherent in capital.

At this level of abstraction, mergers do not appear to undermine competition. While capitalist mergers serve to redistribute existing social capital, they do not modify the internal character of capital as self-expanding value. However, since mergers are a concrete process between firms, it is necessary to complete the theoretical framework before attempting to situate mergers within a Marxian theory of competition. Accordingly, the next section presents competition as a concrete process in accumulation.

Competition as a Process in Accumulation

Conceptualising competition at a high level of abstraction does not preclude an analysis of the concrete process of competition. Nonetheless, the Marxian framework constructed in the previous section reveals that such analysis must not focus on the rivalry between firms in a market structure, but on the movement of capital in the process of accumulation. Thus, at a more concrete level of analysis, competition is theorised as the process by which movements of capital tend to equalise differentiated profit rates in the economy.[28]

Within industries, the process of competition plays two roles. Firstly, competition between capitals promotes the equalisation of prices within sectors, and therefore enables varying rates of surplus value to be realised by firms employing different techniques of production. Secondly, competition acts in a Smithian fashion to generalise the most profitable technique of production.[29] Thus, within industries, competition produces differential profit rates, as well as a tendency towards their equalisation. The movement

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[27] Karl Marx ([1858] 1973), *op. cit.*, p651.

[28] In this respect, the classical-Marxian lineage is apparent. Nonetheless, the starting-point for Marx's analysis is a sharp rejection of Smith's contention that the value of a commodity resolves into the sum of the revenues of its constituent parts. For Marx, the value of a commodity is defined as the amount of socially necessary abstract labour expended in its production.

[29] Smith's theory of competition was explored in Chapter 1. In that chapter, the following passage of Smith was cited: "the establishment of…any new branch of commerce…is always speculation, from which the projector promises himself extraordinary profits…If the project succeeds, [profits] are commonly at first very high. When the trade or practice becomes thoroughly established and well known, the competition reduces them to the level of other trades." See Adam Smith ([1776] 2003) *The Wealth of Nations*, New York: Random House, Book 1, Chapter X, p159.

of capital, rather than the interaction of firms *per se*, produces this tendency. Within an industry, capital "moves" in the sense that it is taken out of less efficient production, and employed in more productive techniques.

Despite rejecting Smith's theory of value,[30] Marx retained the concept of a gravity centre for market prices in his theory of production prices. The price of production of a commodity is given by its cost price,[31] plus the average rate of profit. The latter is determined by the total surplus value appropriated by social capital as a whole, and is therefore conditioned by the competition between capital and labour. Thus, as Wheelock explains, "for the individual capitalist, the average rate of profit is present as a regulating element in the form of a wish to place herself in an exceptional situation."[32] In this way, capital is attracted to industries with profit rates greater than the average rate of profit. Consequently, capital movements between industries – and not the movement of atomistic firms – tend to equalise rates of profit at the average level.

There are clear similarities between Marx's analysis of how movements of capital tend to equalise profit rates, and Smith's theory of perfect liberty, which was considered in Chapter 1. However, Marx placed greater emphasis on the persistence of disequilibrium in the competitive system. For instance, both Smith and Marx agreed that extraordinary profits gained by an *individual capitalist* due to a technical advantage in production are only ever temporary, as competition acts to generalise this technique and thereby equalise the rate of profit. However, in the Marxian framework, these surplus profits have a permanent existence at the level of *total capital*, since capitalists will constantly seek out new technical advantages in production.[33] Thus, a Marxian analysis of concrete competition reveals that the process of competition produces two contradictory but coexisting tendencies – the tendency towards the equalisation of profit rates, and the tendency towards their differentiation.[34] The competitive system is therefore characterised by disequilibrium.[35] In this framework, the emergence of capitals of different magnitudes and industries populated by varying numbers of firms is an

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[30] See footnote 28.
[31] The total of the constant and variable capital employed in the production of the commodity.
[32] Wheelock (1983), *op. cit.*, p23.
[33] Bryan (1986), *op. cit.*, p210.
[34] Wheelock (1983), *op. cit.*, pp 23-24; Semmler, *op. cit.*, p97.
[35] Weeks, *op. cit.*, p172; Clifton, *op. cit.*, p150; Semmler, *op. cit.*, p97.

expected outcome of the competitive process. In other words, monopoly is not conceptualised as the antithesis of competition.

Competition and Monopoly

In sharp contrast to the structural conceptions of competition considered in Chapter 1, Marx recognised that the formation of monopolies was a "natural" outcome of the competitive system.[36] Here, the term monopoly refers to an expansion of capital, rather than a firm which holds a position of dominance in a market structure – although Marx's definition could include such a firm. Crucially, Marx's conceptions of competition and monopoly are not contingent on market structures, and therefore the two are not conceived of as opposite forms. For Marx, monopolies "naturally arise out of the capitalist mode of production",[37] in that they are a direct consequence of the dual processes of concentration and centralisation inherent in capitalist accumulation.

In this respect, Marx understood the dialectical relationship between competition and monopoly.[38] Although the concentration of capital may create barriers to the movement of capital, it also helps to overcome those barriers. The capitalist firm originally emerged as the most effective mechanism for the expansion of capital. However, since fixed capital is a necessary element of the capitalist firm, the concentration of capital generated by the capitalist firm in itself produced barriers to the movement of capital required to equalise profit rates. Nonetheless, as Clifton argues, "with its own growth…the capitalist firm has been able to overcome the limits to free capital mobility inherent in the nature of fixed capital."[39] The capitalist firm has achieved this by increasing its scale of production, and by operating across a "wider spectrum" of industries.[40]

However, Clifton's argument must not be reduced to the piecemeal principles of economies of scale and scope that have been used by mainstream economists in an attempt to accommodate the growth of the capitalist firm in their analysis. These

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[36] Karl Marx ([1894] 1909) *Capital*, Volume 3, Chicago: Charles H Kerr & Company, p231.
[37] *Ibid.*, p231.
[38] In *The Poverty of Philosophy*, Marx noted: "We all know that competition was engendered by feudal monopoly. Thus competition was originally the opposite of monopoly and *not monopoly the opposite of competition*. So that *modern* monopoly is not a simple antithesis, it is on the contrary *the true synthesis*." See Karl Marx ([1847] 1936) *The Poverty of Philosophy*, London: Martin Lawrence Limited, p128.
[39] Clifton, *op. cit.*, p146.
[40] *Ibid.*

principles focus purely on the way in which expansion reduces the costs of a firm, and are therefore unable to conceptualise the dynamic process of competition inherent in capitalist accumulation. By contrast, Clifton's argument reveals precisely this process. By expanding within and across industries, large capitalist firms are able to internally direct *capital* to areas of high return within their enterprise, and therefore satisfy the inherent conditions of capital accumulation. As Semmler explains, large corporations "have such resources at their disposal" that they can easily "allocate capital to different industries…and…shift resources from one industry to another."[41]

This analysis sheds new light on Baran and Sweezy's contention that

> today the typical economic unit in the capitalist world is not the small firm producing a negligible fraction of a homogeneous output for an anonymous market but a large-scale enterprise producing a significant share of the output of an industry, or even several industries.[42]

As I noted in the introduction, this thesis accepts Baran and Sweezy's empirical observation. However, by conceptualising competition as a process of capital rather than as a market structure, I arrive at a conclusion that is very different from that reached by Baran and Sweezy, and the rest of the monopoly capital school: the "large-scale enterprise" is no less competitive than the "small firm" as both are subject to the inherent determinants of capitalist accumulation.

Clifton concludes that "the capitalist mode of production has become far *more* competitive" with the emergence of large firms who are able to easily direct financial capital to areas of production with high rates of return.[43] Here, he has taken the point too far – but not because capitalism has necessarily become *less* competitive, as the neo-Marxians suggest. Since competition is a process inherent in capital, it is spurious to assess whether one institutional form of capital is more or less competitive than another. As Marx observed, "conceptually competition is nothing other than the inner nature of capital."[44] Competition is therefore not specific to a stage or sector of capitalism.

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[41] Semmler, *op. cit.*, p110.
[42] Paul A Baran and Paul M Sweezy (1966) *Monopoly Capital: An Essay on the American Economic and Social Order*, New York: Monthly Review Press, p6.
[43] Clifton, *op. cit.*, p146.
[44] Karl Marx ([1858] 1973) *Grundrisse: Foundations of the Critique of Political Economy*, London: Allen Lane, p414.

Capitalism is, in essence, competitive.

In *The Poverty of Philosophy*, Marx observed:

> Monopoly produces competition, competition produces monopoly. Monopolists are made from competition; competitors become monopolists…The synthesis is such that monopoly can only maintain itself by continually entering into the struggle of competition.[45]

There are distinct similarities between this position, and the position of some of the theorists considered in Chapter 1. For instance, Baumol et al suggest that "monopolists…who populate [contestable] markets are sheep in wolves' clothing, for under this arrangement potential rivals can be as effective as actual competitors."[46] As such, these monopolists still engaged in the competitive process. Robinson also recognised that the relationship between competition and monopoly was not as simple as binary opposition: "the chief cause of monopoly (in a broad sense) is obviously competition…At the same time it is true that monopoly…at one stage in an industrial structure fosters competition at other stages."[47]

Yet, by remaining in the mainstream problematic, Robinson and Baumol were unable to realise the significance of these insights. For them, "entering into the struggle of competition" ultimately resolves into an analysis of the firms that populate market structures, and thereby must return to a conception of competition and monopoly as opposing forms. But for Marx, "entering into the struggle of competition" simply refers to the way in which the law of value acts as the regulating force on each individual capital – regardless of whether it is big or small. In this context, mergers do not threaten the competitive system, as they do not alter the character of capital as self-expanding value. Merged entities must continually enter into the competitive struggle of capitalism, as determined by the law of value.

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[45] Marx ([1847] 1936), *op. cit.*, p128.
[46] William J Baumol, John C Panzar, and Robert D Willig (1982) *Contestable Markets and the Theory of Industry Structure*, New York: Harcourt Brace Jovanovich Inc, p350.
[47] Joan Robinson (1953) "Imperfect Competition Revisited", *The Economic Journal*, 63(251), p592.

Mergers of Capital

By situating mergers within the theoretical framework established in this chapter, this section demonstrates that market structures are not a suitable focus for the regulation of capitalist competition. This argument is advanced on a general level and is elaborated through an examination of two components of Australian merger law – the failing firm defence and the issue of creeping acquisitions. These areas of the law are conducive to an evaluation of competing conceptual frameworks because they are the subject of ongoing debate. In both instances, legal principles are contested, and therefore the theoretical foundations of the law are brought into sharp relief.

Centralisation is the redistribution of existing social capital into fewer independent capitals. A merger, on the other hand, is a transaction between multiple firms that facilitates their mutual integration. Capitalist mergers may therefore be considered a concrete mechanism through which the process of centralisation is affected. In the introduction to this thesis, I contended that the centralisation of capital is a specific expression of the way in which the law of value compels individual capitals to expand, and is therefore inseparable from the process of concentration. Accordingly, centralisation was identified as a process inherent in capitalist accumulation. By extension, mergers cannot be properly understood outside a theory of accumulation. Similarly, the framework constructed in this chapter is centred on the contention that competition must be conceptualised as a process in accumulation. From these points alone, a tentative conclusion can be drawn: mergers do not threaten competition because both are processes inherent in capitalist accumulation. This conclusion is borne out by situating mergers in the conceptual framework established in this chapter.

Capital – as distinct from firms – is the unit of analysis in the theory of competition presented in this chapter. Under this theory, competition is determined by the inherent character of capital, rather than its ownership by, or organisation in, a particular firm. Accordingly, the relationship between mergers and competition must not be considered by examining the effect of mergers on the number and size of firms in a market, but rather by examining their implications for the circuit of social capital. In this respect, the effect of mergers on competition is relatively insignificant, since mergers purely serve to redistribute existing capital between firms. Importantly, mergers do not alter the inherent character of capital as self-expanding value. A firm is unable to escape the regulating force of the law of value by merging its capital with the capital of another firm. Consequently, mergers do not "substantially lessen competition".[48]

This point can be explored further in relation to the failing firm defence. According to one perspective, a merger that contravenes Section 50 of the TPA should not be prohibited if one of the merger parties is likely to exit the market in the foreseeable future. Thus, "once a firm has been identified as failing…the [Australian Competition and Consumer Commission (the "ACCC")] should take no further interest in merger proposals by other market participants".[49] This argument, known as the failing firm defence, conflicts with a structural conception of competition, as it implies that market concentration is acceptable in certain circumstances. Accordingly, mainstream opinion – including the ACCC's *Merger Guidelines* – is decidedly noncommittal on the issue of the failing firm defence.[50] By contrast, the failure of firms creates no such difficulties for a Marxian theory of competition and mergers.

It is often forgotten that the failure of firms is an integral part of the competitive process. At the most extreme, no competitive process actually takes place in the static model of the perfectly competitive market,[51] and consequently the atomistic firms of this schema never fail. By contrast, the failure of firms is embedded in the Marxian framework. Implicit in the circuit of capital is the recognition that any firm unable to adhere to the fundamental law of capitalist accumulation – the law of value – will ultimately fail.

At this point, it is crucial to make an important distinction: when a firm is unable to generate surplus value in the production process, it is the *capitalist* – rather than the *capital* – that fails. While a particular capitalist may go out of business, the capital of a failed firm will generally be devalued and returned to the circuit of social capital in the form of money capital. This scenario is not fundamentally different from the case of a merger involving a failing firm. In such mergers, the capital of a failing firm is subsumed by

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48 To use the expression in Section 50 of the TPA.
49 Jim Rose (1998) "Failing Companies and the Revised Merger Guidelines", *Competition and Consumer Law Journal*, 6(1), p12.
50 Martin Howe (1998) "The Failing Firm and the Trade Practices Act", *ACCC Journal*, 14, p3; ACCC (2008) *Merger Guidelines 2008*, available at http://www.accc.gov.au/content/index.phtml/itemId/809866, (accessed 17 September 2009), paragraph [3.23].
51 Yanis Varoufakis (1998) *Foundations of Economics: A Beginner's Companion*, London: Routledge, p163.

another firm, and is thereby retained in the circuit of social capital. In both cases, a particular capitalist may fail, but her capital remains in circulation.

The failure of firms is particularly problematic for a structural theory of competition. Although it is generally accepted that "competition may eliminate a competitor",[52] the failure of a firm necessarily reduces the number of firms in a market, and therefore takes the market further from the ideal of perfect competition.[53] The same result is achieved if a failing firm is allowed to merge with a fellow competitor. However, in the Marxian framework, competition is determined by the inherent character of capital. As such, the fact that a firm is likely to exit a market in the foreseeable future does not modify the relationship between mergers and competition.

Thus far, this section has analysed the relationship between competition and mergers on the relatively abstract level of capital in general. In order to comprehensively situate mergers in the Marxian theory of competition presented in this chapter, it is necessary to also examine the implication of mergers for the concrete process of competition – that is, the movement of capital according to different rates of profit.

Through mergers, efficient firms tend to subsume firms employing less efficient techniques of production. In such cases, the merged entity may then use the capital of the less productive firm to expand the scale of the more efficient technique of production. Consequently, mergers are a key mechanism by which capital is moved into more efficient production, thereby generalising the most efficient techniques of production – and by extension, equalising profit rates. Yet, by enabling production on an increased scale, mergers also tend to generate even more efficient techniques of production. As Marx explained:

> The world would still be without railways if it had to wait until accumulation had got a few individual capitalists far enough to be adequate for the construction of railways. Centralisation, on the contrary, accomplished this in the twinkling of an eye.[54]

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[52] *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 at 411.
[53] It is interesting to note that this contradiction essentially mirrors the contradiction of concentration – in which the process of accumulation (and the growth of firms) conflicts with the structure of perfect competition. However, since the failure of firms is an integral part of accumulation, the two contradictions are in fact one and the same.
[54] Karl Marx ([1867] 1954-1959), *op. cit.*, p588. This point is also recognised by mainstream economists, in the principle of economies of scale.

This analysis reveals that capitalist mergers are entirely consistent with a conception of competition as a process characterised by two contradictory but coexisting tendencies – the tendency towards the equalisation of profit rates, and the tendency towards their differentiation. This argument can be illustrated by examining the issue of creeping acquisitions.

The term creeping acquisitions describes the accumulated effect of a number of small merger transactions involving the same party. Although each incremental merger may not breach Section 50 of the TPA, the cumulative result of the mergers may be a substantial lessening of competition in a market. As such, "acquisitions by stealth" are considered to be a potential loophole in Australian merger law.

Parliament has debated whether provisions should be introduced into the TPA to deal with creeping acquisitions.[55] This debate can be seen to be generated by the contradiction of concentration. Competition and accumulation are conceived of as conflicting forces in Australian merger law. Consequently, the law must accept some degree of compromise between the growth of firms inherent in the process of accumulation, and the promotion of competitive market structures. However, in a series of consecutive mergers, an acquisition at the margin may result in a firm crossing the desired point of compromise, and must therefore be prohibited. The problematic implication of this analysis is that an incremental merger can obliterate competition. Since the Marxian framework shifts the analysis from firms to capital, it does not produce such arbitrary conclusions.

By "buying-out" less productive firms, efficient firms are able to expand their scale of operation. As such, incremental acquisitions facilitate the movement of capital towards more efficient techniques of production. Grocery and liquor retail are the two most commonly cited examples of industries plagued by the problem of creeping

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[55] See Trade Practices Act Review Committee (2003) *Review of the Competition Provisions of the Trade Practices Act*, Canberra: AGPS, Chapter 2; Senate Economic References Committee (2004) *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Canberra, Recommendation 12; *Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*; Senate Standing Committee on Economics (2008) *Inquiry into the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*, Canberra: Senate Printing Unit; Treasury (2008) *Discussion Paper – Creeping Acquisitions*, available at http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1409 (accessed 10 September 2009); Treasury (2009) *Creeping Acquisitions – The Way Forward*, available at http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1530 (accessed 10 September 2009).

acquisitions.[56] In these industries, the persistent expansion of Woolworths and Coles is often assumed to be a *prima facie* indictor of excessive market power. Rarely is it considered that the operational structure of these corporations may be more conducive to capital accumulation than other firms in these two industries. It is beyond the scope of this thesis to consider this complex issue. However, it suffices to note that, by shifting the emphasis of a theory of competition from firms in a market, to capital in accumulation, creeping acquisitions do not emerge as a threat to competition. By contrast, incremental expansion is simply a specific expression of the way in which the law of value compels capital to expand; and competition "subordinates every individual capitalist" to this law.[57]

Conclusion: The Dialectical Contradiction of Concentration

In this chapter, I used Marx's method of political economy to construct a theory of competition that is compatible with the process of capitalist accumulation, and therefore avoids the contradiction of concentration. In this theory, competition is a process of capital, rather than a market structure populated by a particular number of firms. As such, competition and concentration are not conceived of as conflicting forces, but rather as complementary processes inherent in capitalist accumulation. Applying this theoretical framework, I demonstrated that mergers do not threaten competition, as they simply serve to redistribute capital between firms. Furthermore, I contended that mergers facilitate the concrete process of competition, through which movements of capital tend to equalise differentiated profit rates. This chapter therefore demonstrates that market structures are an inappropriate focus for the regulation of capitalist competition.

However, it would be wrong to suggest that nothing is lost in the construction of this distinct problematic. Crucially, a distinguishing feature of the Marxian theory of competition presented in this chapter is that it does *not* depend on an analysis of market structures. As such, this framework is at risk of ignoring the way in which market structures condition the different forms of concrete interaction between capitals. In this

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[56] *Inquiry into the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*, Canberra: Senate Printing Unit, paragraph [2.3].
[57] Marx ([1867] 1954-1959), *op. cit.*, p554.

respect, Wheelock has attempted to categorise the different "types" and "levels" of the competitive struggle within a Marxian framework.[58] Yet, in doing so, she unwittingly returns to a structural theory of competition by conceptualising competition and monopoly "in the institutionalist categories of relations between enterprises of different sizes".[59]

In suggesting that competition and concentration are complementary processes inherent in capitalist accumulation, I am cautious not to reduce both processes to the law of value. Competition posits the law of value as an "external necessity",[60] while concentration is the natural result of that law. As such, competition must not be equated with concentration. Equally, by critically evaluating the conceptual foundations of Australian merger law, this thesis has demonstrated that competition and concentration must not be considered contradictory forces. In this chapter, I have contended that the relationship between competition and concentration is in fact dialectical: while competition propels the growth of capital, the expansion of capital shapes the process of competition. In applying this framework, we must be willing to consider how the growth of individual capitals in the circuit of social capital conditions the way in which each individual capital adheres to the inherent determinants of capital accumulation imposed on it by competition. This approach permits – but does not restrict us to – an analysis of market structures.

In the theoretical framework established in this chapter, we finally escape the contradiction of concentration. However, this does not mean that we must also avoid an analysis of the relationship between the processes of competition and concentration inherent in accumulation. By contrast, this theoretical framework allows us to analyse how capitalist accumulation is conditioned by the *dialectical contradiction of concentration*.

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[58] Wheelock (1983), *op. cit.*, pp 35-39.
[59] Bryan (1985), *op. cit.*, p72.
[60] Marx ([1858] 1973), *op. cit.*, p651.

Conclusion

In the last two decades, the regulatory bodies of Australian competition policy have increasingly considered issues of international competitiveness in their evaluation of mergers. Consequently, consolidations between Australian firms have been judged as desirable if they lead to an increase in the international competitiveness of an Australian industry.[1] This approach to mergers is entirely consistent with the increasingly global nature of capitalist accumulation. However, since competition is conceptualised as a market structure in the *Trade Practices Act 1974* (the "TPA"), it is considerably difficult to incorporate this approach into Australian merger law. The position that consolidations reduce competition is embedded in the conceptual foundations of Section 50. This tension has produced a peculiar legal principle: a merger that is likely to *substantially lessen competition* may nonetheless be in the public interest because it *increases international competitiveness.*[2]

The Marxian theoretical framework presented in Chapter 4 does not rely on a semantic distinction between "competition" and "competitiveness" to accommodate the global dynamics of accumulation. In this framework, competition is conceptualised as a process of capital, and is therefore an inherent component of capitalist accumulation. Accordingly, competition is not negated by the formation of national monopolies, but renewed on a different level. This process reflects the dialectical relationship between competition and concentration.[3]

This component of Australian merger law has not been highlighted in order to engage the role of mergers in the *global* process of accumulation, as an analysis of this complex dimension of my subject matter is beyond the scope of this thesis. Rather, this component has been flagged because it exemplifies two important and complementary themes of this thesis.

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[1] See for instance *Pasminco Ltd* [1988] ATPR 50-082; *Ardmona Fruit Products Co-op Ltd Letond Co-op Co Ltd & SPC Ltd* [1988] ATPR 50-068; *TRW Australia Ltd* [1989] ATPR 50-087.
[2] See Section 95AZH(2) of the TPA.
[3] As Lenin suggested in *Imperialism*, "monopolies, which have grown out of free competition, do not eliminate the latter, but exist over it and alongside it." See V I Lenin ([1917] 1999) *Imperialism: The Highest Stage of Capitalism*, Sydney: Resistance Books, p105.

On one hand, it demonstrates that Australian merger law is underpinned by the contradiction of concentration. In its most basic form, the contradiction of concentration is the tension between the *structure* of competition and the *process* of accumulation. In Chapter 1 of this thesis, I established that this contradiction is a persistent feature of mainstream economic theory, and is articulated by Australian merger law. Although Parliament has attempted to mediate this contradiction through numerous legislative amendments to the TPA, Chapter 2 suggested that these attempts have ultimately failed because the contradiction is embedded in the conceptual foundations of Australian merger law. Moreover, in attempting to reconcile the contradiction of concentration, merger law serves to reproduce the antagonistic social relations of capitalism. In Chapter 3, this argument was explored in relation to the growing significance of economic efficiency in the TPA.

On the other hand, the example suggests that the regulation of capitalist competition would be better informed by an alternative conceptual framework – more specifically, a theory of competition that is compatible with the process of accumulation. Such a theory can be constructed from Marx's method of political economy. By situating mergers in this alternative theoretical framework, I have reached the following conclusion: merger laws are an ineffective form of regulation for capitalist competition.

The logical policy recommendation flowing from this conclusion is that the Australian Competition and Consumer Commission should not regulate merger activity. This recommendation is similar to the position advocated by theorists of the Chicago School.[4] However, this thesis should not be interpreted as lending any support to the hyper-free-market ideology of the Chicago School. Chicago School theorists arrive at the recommendation that mergers should not be regulated through an axiomatic imposition of the benefits of a self-regulating market. In sharp contrast, I reached the same conclusion through a recognition of the central role of the state in the reproduction of economic space. Although a critical evaluation of merger law was essential to arriving at the alternative theoretical framework considered in Chapter 4, that framework does not lead to the singular conclusion that mergers should not be regulated by the state. It was

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[4] See Chapter 1, at the section "The Continuing Legacy of Market Structures: Modern Competition Theory".

only by constructing a theory of competition from Marx's method of political economy, that I have been able to investigate the conceptual foundations of an alternative framework for the regulation of capitalist competition more generally.

A detailed description of this alternative regulatory framework is beyond the scope of the thesis, primarily because the interface between economic theory and law is highly complex. Nonetheless, I will suggest three guiding principles for an alternative competition policy informed by the conceptual framework presented in Chapter 4. *Firstly*, competition policy must regulate the competitive struggle between capital and labour. Capitals compete in order to secure the greatest possible portion of surplus value extracted from labour by total social capital. Consequently, a law which seeks to regulate capitalist competition must recognise that the competition between capitals is fundamentally underpinned by the competition between capital and labour.[5] *Secondly*, since competition is the movement of value, it necessarily exists at each stage of the circuit of social capital. Competition policy must therefore not be restricted to the sphere of exchange. Importantly, competition in production is integral to the process of accumulation. In the sphere of production, individual capitals compete by constantly improving productive techniques. Competition policy must promote socially progressive innovation by facilitating competition in production. *Finally*, although I have posited the regulation of market structures as ineffective, competition policy must nonetheless regulate the interaction of capitals in the sphere of exchange. There is nothing in this thesis to suggest that the TPA should cease its regulation of restrictive trade practices. Such practices inhibit the competitive process – regardless of whether that process is conceptualised in relation to firms in a market, or capital in accumulation.

This primary aim of this thesis has been to examine the complex relationship between economic theory and law through the prism of Australian merger policy. Economic laws such as the TPA provide a particular economic theory with the force of legal principle. Nonetheless, alternative theoretical frameworks are present, but silent, in the law. By

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[5] Some might suggest that the legal system already incorporates this principle in the form of industrial relations ("IR") law, and that the difference between my alternative competition policy and the combined effect of the TPA and IR law is purely semantic. However, through the division of the law into different limbs, specific regulatory bodies are restricted from considering a plurality of concerns. Indeed, Chapter 3 demonstrated how the aims of competition policy were fragmented even within the one piece of legislation. The fundamental interaction between the wage-relation and the competition between capitals is ignored through the fragmentation of the law into "competition law" and "IR law".

critically evaluating the theoretical foundations of Australian merger law, the thesis has intended to bring one such alternative to the fore. In doing so, this thesis has investigated an alternative theory of competition that could inform a more socially progressive framework for the regulation of capitalist competition. Central to this framework is the recognition that mergers, and the growth of capital more generally, do not reduce competition. In applying this framework, we are able to move away from the assertion that large capitals are innately anticompetitive, and thereby start to investigate the potential progressive effects of concentration and centralisation.

Compete, Compete! That is Moses and the prophets!

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