Law Council
OF AUSTRALIA

Business Law Section

8 February 2024

Competition Taskforce
The Treasury
1 Langton Cres
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Taskforce

Competition Review: Response to further ACCC submission

The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia refers to the recent, supplementary submission filed by the ACCC with the Competition Review (**Taskforce**) and published on 2 February 2024 (**Further Submission**).

In the Further Submission, the ACCC supports its call for sweeping changes to the Australian merger regime by raising several new matters that the Committee considers require a response. To assist the Taskforce, the Committee has set out in the **Annexure** to this letter the specific new arguments raised by the ACCC and our response to each.

The Committee is concerned that the nature of the ACCC's changes are unbalanced and are not supported either by robust evidence establishing the economic problem to be solved or that the ACCC's proposed solution would yield more economic benefits than harm.

Taken as a package, the ACCC's proposal would place Australia out of step with other global merger control regimes and introduce substantially more subjectivity, uncertainty and risk for Australian transactions (and global transactions with an Australian dimension).

Specifically, the current section 50 framework offers important discipline and accountability through an objective evidentiary standard coupled with a full and independent assessment of any contested decision before the Federal Court. Removing these checks and balances is likely to have a chilling effect on investment (domestic and global), increase the regulatory burden (and transaction costs) for deals that are productivity-enhancing and reduce consumer welfare. The Committee is also concerned that, over time, this lower threshold and lack of effective oversight will erode the quality and rigour of merger decision making by the ACCC.

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

In responding to the Further Submission, the Committee therefore makes the following general observations:

1. Merger activity is a critical driver of productivity, growth and dynamism in the economy. To assume, as the ACCC does, that current cost of living pressure and falling productivity "*indicate there should be a change in approach to merger control*"[1] begs the question: are these economic challenges improved or made worse by introducing reforms that—by design—would make significant Australian mergers more costly, uncertain and subject to substantial regulatory subjectivity and reduced review rights? The cost of getting merger policy settings imbalanced or wrong is especially high in times of economic uncertainty and transition when merger activity offers an important means for firms to respond quickly to their changing environment.

2. Committee members remain concerned that the current debate suffers from a lack of robust evidence demonstrating a problem with the merger regime in Australia. The Further Submission offers two additional forms of "evidence":

   (a) analysis undertaken by the Taskforce and referred to publicly by Minister Leigh that approximately 20–30% of the total number of mergers are notified to the ACCC each year (~350 out of 1,000–1,500) and that approximately half of mergers are undertaken by the largest 1% of firms; and

   (b) a report by former ACCC chief economist, Dr Graeme Woodridge, that uses a set of international studies and a post-merger review undertaken by the ACCC of Caltex / Milemaker in 2017 (without consultation) to conclude that mergers that are 'at the margin' are likely to give rise to increased prices and consumer harm.

3. Applying the principles of evidence-based policy (as advocated by the Productivity Commission,[2] amongst others) the Committee does not consider that this limited information can be regarded as a sufficient basis for the sweeping changes being proposed by the ACCC.

4. The Committee is also concerned at the veracity of the continuing claim by the ACCC that increased market concentration has, amongst other things, led to lower productivity. This overclaims as to even the existence of any potential link between the state of competition and poor productivity growth in the economy.

5. The Further Submission advocates strongly for economy-wide merger reform, with the ACCC referring to an observed "*ongoing and significant increase in market concentration…*",[3] the linking of a contended increase in market power to "*higher prices, less innovation and lower productivity...*"[4] as well as a *"noticeable weakening of the intensity of competition…"*[5] The ACCC cites these alleged negative effects of market concentration as justification for the need of merger reform.

[1] [4.2].

[2] Productivity Commission 2010, *Strengthening Evidence-based policy in the Australian Federation, Volume 2: Background Paper*, Productivity Commission, Canberra.

[3] [2.14]

[4] [2.14]

[5] [2.14]

6. On any reasonable view of the evidence, these contentions mischaracterise the links between innovation and productivity problems and the level of competition in the economy. For example, in a recent, peer-reviewed academic publication, Productivity Commissioner and former ACCC Commissioner, Dr Stephen King notes that:

   (a) productivity growth has declined in Australia and other developed countries over the past two decades;[6] and

   (b) that reduced dynamism and the failure of competition at an economy-wide level has been blamed by some, including the ACCC, for this lack of productivity growth.

7. However, King finds that the theoretical and empirical evidence to support the contended link between competition policy settings and economy-wide productivity growth is "*ambiguous, at best*". He further explains there is "*no simple link*" between measurements of competition such as concentration levels and falling productivity growth.[7]

8. It is inaccurate for the Further Submission to link observations as to higher market concentration with a wide range of negative effects. In contrast, the Productivity Commission (PC) and the RBA have both stated that there is no simple link between concentration and competition. The PC finds that *"despite the persistent and high level of concentration, the RBA report an increase in competition in the retail sector"*. Further, the RBA explains that *"An industry can be very concentrated and highly competitive. An industry can be very dispersed and uncompetitive too."*

9. The report of Dr Woodbridge accompanying the Further Submission, and the inferences sought to be drawn from it by the ACCC, are also not a sound basis to find that current merger settings are resulting in increased market power, economic inefficiency or higher consumer prices in Australia.

10. The conclusion drawn in the Further Submission from the evidence canvased by Dr Woodridge overstates what can be said of that evidence. For example, a fundamental problem with all of the peer-reviewed, academic evidence set out by Dr Woodbridge is that none of it derives from Australia. This means that none of the harms or benefits of the mergers examined has been realised under the existing Australian system. At best, this evidence might be said to inform an assessment of the effect of the merger regime in the United States (and, to a lesser extent, Europe).

11. The Further Submission also concludes that *"available evidence indicates that mergers not only do not reliably result in efficiencies but, to the extent that they do, they are often outweighed by adverse competition effects, including from higher prices",*[8] with this statement made by reference to Dr Woodbridge's conclusion that *"The majority of mergers analysed resulted in higher prices…"*[9]

---

[6] Stephen P. King, 'Productivity, Economic Dynamism and the "Failure of Competition" Narrative (2023) 42(3) *Australian Economic Papers* 213

[7] Stephen P. King, 'Productivity, Economic Dynamism and the "Failure of Competition" Narrative (2023) 42(3) *Australian Economic Papers* 213, 213

[8] [2.17]

[9] [p.14]

12. Again, these conclusions mischaracterise the findings of the limited available evidence. In fact, the US and European academic evidence canvassed by Dr Woodridge shows that the price and efficiency effects of mergers give rise to highly diverse outcomes, from which no generic, empirical conclusions can be drawn.

13. For example, the overseas evidence does not support the generic conclusion that prices rise after mergers have taken place. As reported by Dr Woodbridge, Asker and Nocke (2021) conducted a review of 29 studies of completed mergers in top economics and industrial organisation journals. Asker and Nocke found that no generic conclusion can be made from the studies, stating that *"Some price[s] go up, at times by a lot. Others find no impact. Some find prices go down".*[10] Similarly, Mariuzzo et al (2015) surveyed 18 studies covering 25 mergers in Europe and found the *"overwhelming proportion of the estimated price effects were between −5% and +5%".*[11]

14. In any event, caution must be exercised when examining these empirical studies because the transactions they assess have not been conducted or chosen in a random manner. This implies that even if the studies are of a high quality, it is not possible to draw conclusions regarding mergers in general.

15. The results of the assessment of a single example of an Australian merger referred to by Dr Woodbridge and the ACCC, i.e., the Caltex/Milemaker case, should also not be given substantial weight because the analysis has neither been tested with the relevant parties nor peer-reviewed, and amounts to one individually selected case out of hundreds of mergers examined by the ACCC every year.

16. Examining the effect of a merger is a challenging task because it requires the estimation of what would have happened without the merger, an analysis of the conduct of the merger parties in addition to responses by other firms, and an assessment of all aspects of the price/quality/range/service package provided to consumers. Since the underlying data is not transparent, and in the absence of peer review, it is not possible to know if the analysis being reported is robust.

17. The ACCC concludes that the merger led to an increase in the price in local areas of around 0.8 cents per litre of petrol.[12] It is far from clear that such an outcome is either economically or statistically significant when contemporaneous prices of fuel regularly vary between service station sites by multiples of this magnitude, reflecting quality and brand differences between firms. Put another way, in the absence of a uniform market price for retail fuel, in combination with the number of sites operated by the relevant parties cited by the ACCC representing just 11 % of the market, post-merger, the strong implication is that consumers continued to have the ready ability to choose between competing fuel retailers and their differentiated brand/quality offerings.[13]

18. The Committee also fundamentally disagrees with the Further Submission's characterisation of the choice to be made by the Government regarding the merger control regime as being one in which the balance of risk is shifted towards either merger parties or consumers.

---

[10] [p.40]

[11] [p.40]

[12] [2.15]

[13] [p.43]

19. The ACCC states that *"… it is appropriate to place the risk and costs of uncertainty about the future with the merger parties rather than consumers and the economy, and for this to happen, there needs to be a policy and law shift"*.[14] The basis for this statement appears to be derived from the conclusion of Dr Woodbridge that *"it may be prudent to allocate more of the risk of error in merger control to the merger parties".*[15]

20. Rather, in the view of the Committee, a soundly based merger control regime, with low costs and few errors will lead to benefits for both consumers and firms. There is no trade-off between consumers and firms, because mergers and acquisitions lead to many benefits that are good for consumers. However, those benefits have not been adequately recognised in the analysis set out by Dr Woodbridge. For example:

    (a) mergers facilitate increased innovation, leading to benefits for consumers and increases in productivity—for example, Entezarkheir and Moshiri (2017) find that mergers are *"… positively and significantly correlated with firms' innovation",*[16] while Dezi et al (2018) conduct a literature review of the empirical studies between mergers and innovation and find that the consensus of the literature is that merger transactions can positively influence the innovation of the acquired firm[17]—whilst Dr Woodbridge does acknowledge the innovation benefits of mergers, it is not taken into account in the ACCC's assessment of the benefits and risks of mergers;[18]

    (b) mergers facilitate competition in markets for corporate control, which increases the productivity of assets across the economy, but this critical dimension of a market economy is not captured by the assessments of either the ACCC or Dr Woodbridge;

    (c) mergers they lead to economies of scale and scope—the economies of scope would not be captured by the analysis of Dr Woodbridge because the benefits are partly felt in markets where the merger does not take place; and

    (d) mergers can lead to improvements in quality, which are not able to be captured by an assessment of price effects alone.

21. Shifting the balance towards preventing more mergers (as the ACCC's proposal seeks to achieve) can be expected to lead not only to fewer anti-competitive mergers being allowed but also to more pro-competitive, pro-innovation mergers being blocked. The net effect of such changes cannot be of presumptive benefit to consumers. Rather, it will turn on the extent to which error rates are altered and the net harm that each form of error causes to consumers.

22. To the extent that robust and empirical evidence is available, including evidence relied upon by Dr Woodbridge himself, it supports the Committee's position that the current model works well to prevent mergers that raise competition concerns. For example, of the 26 mergers over the last 3 years identified by the ACCC as 'at the margins' in Table A1 of Dr Woodbridge's report, ***none*** proceeded over the objections of the ACCC. All were either withdrawn or proceeded only subject to divestment or other

---

[14] [3.1]

[15] [p.51]

[16] Mahdiyeh Entezarkheir and Saeed Moshiri, 'Mergers and Innovation: Evidence from a Panel of U.S. Firms' (2017).

[17] Dezi et al 'The link between mergers and acquisitions and innovation. A systematic literature review' (2018) 41(6) *Management Research Review* 716.

[18] [p.26]

undertakings agreed with the ACCC. This is consistent with the evidence provided by the Law Council's Business Law Section in its submission that over the last 20 years, the ACCC has been successful in restraining well over 90% of deals it had concerns with, including a reasonable level of success in merger matters before the Federal Court.[19] Mostly, however, in the face of ACCC concerns, merger parties choose not to litigate, preferring either to agree to a remedy with the ACCC, such as an undertaking to divest, or withdraw their merger proposal.

23. In the absence of any mergers proceeding over its objections, the ACCC in the Further Submission has instead shifted its position to argue that there are anti-competitive mergers that it did *not* oppose because of the difficulty of establishing that those mergers were likely to substantially lessen competition, to the evidentiary standard.[20]

24. This is a surprising statement and does not reflect Committee members' experiences in dealing with the ACCC. The Committee has consistently found the ACCC to be a robust merger regulator with a well-deserved, global reputation. The ACCC is not known to pull its punches or avoid opposing deals or taking action to investigate and/or block completion, where it holds legitimate concerns. It opposed six deals in CY2023 alone, the highest number in a single year since 2016 (when it also opposed six deals).

25. Moreover, the objective evidentiary test of "*likely to substantially lessen competition*" is not a particularly high threshold (and requires only a 'real chance' to be proved to the balance of probabilities—which taken together requires the ACCC to demonstrate materially less certainty than 50%). The ACCC has strong evidence-gathering powers, which it uses extensively to gather evidence from both merger parties and other stakeholders (customers, suppliers and competitors). By the end of a public merger review, the ACCC typically holds substantially greater evidence and market insight in relation to the likely effects of the deal than the merger parties have available to them (including because of the ACCC's practice of protecting the confidentiality of submissions and other documents and evidence obtained from stakeholders during the review process). In those circumstances, if the ACCC at that point does not consider it has evidence sufficient to meet this modest section 50 threshold, it is not clear why it should still have the ability to block a transaction.

26. As the Committee noted in our earlier submission (at [87]–[91]),[21] the handful of anecdotal examples routinely pointed to by the ACCC as a basis for its concern (e.g. TPG / Vodafone, Aurizon / Pacific National) do not demonstrate any systemic failure in the capacity of the ACCC to obtain and lead evidence in the Federal Court. They are just a small number of merger cases the ACCC lost over two decades. At most, in those few cases only, it demonstrates that the ACCC has not always been able to convince the Federal Court or Competition Tribunal of its theory of harm. It is also worth noting that each of those cases concerned transactions where the likely competitive effects of the merger were debatable, and open for reasonable minds to differ. That the ACCC's case was not upheld is certainly not evidence that the Federal Court outcome was incorrect.[22]

---

19 (Law Council of Australia's Business Law Section, *Response to Competition Review Merger Reform Consultation Paper*, Submission to the Treasury,19 January 2024 (**Original BLS Submission**), [82] to [86].

20 At [2.10]

21 Original BLS Submission [87]-[91].

22 It must be remembered that the current section 50 test also works by discouraging many potential mergers from ever getting as far as an application to the ACCC for clearance, because parties obtain advice that the deal would not

27. Moreover, robust merits review by an independent body is a key feature of an effective regulatory framework and provides important discipline and accountability for ACCC decision making and supports the credibility of a regulator's decision-making process.

28. The Committee reiterates its strongly held view that the current and conventional legal test for section 50 remains appropriate, is well understood, and ensures consistency within Part IV of the CCA and should therefore be retained.

29. If, despite these concerns, the Taskforce recommends moving the Australian regime to an administrative process:

    (a) the test should place the onus on the ACCC to be satisfied that a merger would be likely to substantially lessen competition (i.e. the ACCC must[23] approve a merger unless the ACCC is satisfied that the merger would SLC);[24]

    (b) there must be certainty about the nature (and the extent) of information that merger parties are required to provide the ACCC in order for it to make a decision under the satisfaction standard, and the timelines for it to do so;

    (c) there would need to be substantially improved rights of transparency granted to merger parties during the ACCC process (which is an important issue not addressed in the Further Submission); and

    (d) the need for full merits review rights is critical. A merger decision that is subject only to the reasonableness of the state of mind of the ACCC must be able to be tested and fully reconsidered, on the merits, by an independent body. For the reasons set out in our earlier submission, the current 'limited merits review' process before the Tribunal would not offer a full or appropriate means of merits review and would not be fit for purpose.

30. Finally, the Committee does not understand why the ACCC proposal must necessarily be dealt with '*as a package*', as argued.[25] There are two distinct aspects to the concerns raised by the ACCC:

    (a) First, as a procedural matter, the ACCC is concerned it may not currently see all mergers which it should or that it otherwise receives notification with insufficient time to properly assess them.

    (b) Second, in those rare cases that are contested, the ACCC sees the task of establishing a merger is likely to substantially lessen competition to a conventional, evidentiary standard, as being too difficult and uncertain.

    With respect, these are quite distinct issues with different proposed solutions.

---

survive robust assessment by the ACCC. In other cases, merger parties elect not to challenge a 'red light' received from the ACCC because the prospects of success before the Federal Court are found to be low. By self-selection, therefore, those cases that come before the Federal Court tend to be those where reasonable and contested positions are open and careful, independent assessment of the evidence is needed.

23 As proposed by the ACCC at [3.11]

24 Consistent with the UK model, consideration might also be given to expressly clarifying that satisfaction is on the balance of probabilities per *Tobii AB (pulb) v CMA* [2020] CAT 6 at [341], referred to at [68] of the Committee's earlier submission.

25 At [3.3].

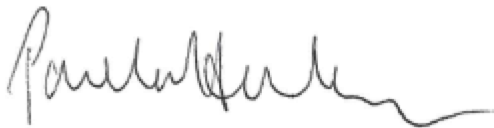
31. While noting that questions remain about the merits of the ACCC's first concern (i.e. that it may not be seeing a sufficient number of mergers, or has insufficient time to review difficult deals), the Committee submits that a mandatory and suspensory framework would largely address these issues.

32. Questions of the substantive test and review rights raise substantially greater risks for the balance and operation of the regime and appear to be distinct. We have addressed these at length in our earlier submission and above in this letter and the Annexure.

We are grateful for the Taskforce being open to receiving this supplementary submission so late in its process and would welcome the opportunity to expand or discuss the issues raised with the Taskforce, if that would assist.

Please contact Lisa Huett, Chair of the Competition and Consumer Committee (lisa.huett@au.kwm.com or + 61 3 9643 4163) in the first instance.

Yours faithfully



Dr Pamela Hanrahan
Chair, Business Law Section

Annexure Committee response to issues raised in ACCC Further Submission

1.	**ACCC Further Submission [2.5]—[2.6]: Of the 1,000–1,500 mergers in Australia each year, the ACCC is notified of ~330 (20–30%) and this suggests the voluntary informal clearance process is not fit for purpose.**
	The Committee supports basing any reform agenda on robust empirical evidence. However, the limited results that have been published by the Taskforce of its 'worker flow' analysis are neither surprising nor do they provide any basis to support the ACCC's proposals. They certainly do not indicate any cause for concern. It is not clear to the Committee the basis on which mergers have been included in the 1,000–1,500 figure in the Taskforce's 'database' on mergers, however, it is possible that it is overcapturing statistics. The data available in Mergermarket, which is routinely recognised as a reliable source for deal and M&A data, indicates that in the past three financial years the number of announced deals involving an Australian-based target were 777 in FY21, 1,358 in FY22, and 1,269 in FY23. It is an inevitable feature of any merger regime that many (if not most) mergers in an economy are not brought to the regulator's attention. That includes mandatory notification regimes—any sensible threshold will, while over-capturing to a degree, exclude either small-scale mergers or mergers that are otherwise unlikely to have any competition effect. By way of international comparison: • In the United States, under the mandatory filing requirements of the Hart-Scott-Rodino Act, there were 3152 mergers notified in FY2022. While any comparison is difficult because it is difficult to identify the total number of mergers in the US over the same period, the US economy (by GDP) is approximately 16 times larger than Australia. Proportionally, using relative GDP as a proxy for the relative total number of mergers, there were ~40% **more** mergers filed under the voluntary Australian system than the mandatory HSR Act as a share of the total. • Under the mandatory EU regime, only 371 mergers were notified in 2022. While this does not capture mergers separately notified under the regimes of individual Member States, it highlights the limited number of mergers notified in the EU, given its size. • Under the voluntary regime in the United Kingdom, in 2019–20 the CMA estimated that it considered 62 of a total of 881 mergers in the UK worth more than £1 million, or only 7%. The ACCC appears to see more mergers under the Australian voluntary model than its counterparts in the US, UK or EU, as a proportion of total merger activity. This is consistent with figures publicly available and obtained from Mergermarket on the number of announced deals,[26] which has the benefit for allowing comparison on a 'like for like' basis between jurisdictions. That data indicates that the ACCC is already reviewing on average over the past 3 years 38% of all deals, a far greater proportion on average than the European Commission (3.44%), FTC (28.82%) and CMA (24.28%).

[26] In each case, the number of deals for the relevant period was obtained based on searching for any deal involving a target based in either the EU27, UK, USA or Australia. The 'relevant period' corresponds to the period for each competition authority reported mergers notified to it. Reported statistics are based on reports published by the relevant agency. Data for 1 October 2022 to 30 September 2023 for the US has not been reported by the FTC.

Year	2021	2022	2023	Average
EU 27	**405**	**371**	**356**	
(1Jan-31Dec)	9,961	12,172	11,122	
	4.07%	3.05%	3.20%	3.44%
USA	3,520	3,152		
(1Oct-30Sep)	9,999	14,045		
	35.20%	22.44%		28.82%
UK	600	827	700	
(1Apr-31Mar)	1,842	2,897	5,970	
	32.57%	28.55%	11.73%	24.28%
Australia	424	463	305	
(30Jun-1Jul)	777	1,358	1,269	
	54.57%	34.09%	24.03%	37.57%

Moreover:

(a) The Committee disputes the ACCC conclusion that "*available evidence indicates that mergers do not reliably result in efficiencies, and to the extent that they do, these are often outweighed by adverse competition effects.*" [4.7] There is no sound basis for this claim. It is directly inconsistent with the findings of the Productivity Commission and, to date, has not been supported by any robust Australian analysis.

(b) Mergers are an important feature of an efficient and well-functioning economy (and the Minister's speech on 30 Jan 2024 expressly recognises their importance). They drive dynamism, investment and growth. They provide opportunities for founders and family businesses to generate returns on their investments and income for retirement. Regulatory scrutiny of a merger is only justified where there is a reasonable basis for considering a potential risk may arise. Given that ~93% of mergers notified are pre-assessed by the ACCC, there is no basis to assume that the ~80% of mergers that are not notified give rise to competition concerns.

(c) The fact that ~80% of mergers were not notified to the ACCC more likely reflects that the merger parties considered the ACCC's notification thresholds in its merger guidelines which encourage parties to notify the ACCC of a proposed merger only if the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s. The ACCC recognises in its guidelines that *"[M]ergers that fall outside the notification threshold will rarely require investigation by the ACCC.*"[27] Indeed the ACCC generally does not welcome mere 'courtesy notifications' of mergers, unless merger parties consider that some form of clearance is actually required.

The second finding referred to by the ACCC is that the largest 1% percent of firms make approximately half of all acquisitions. This is an interesting, but not intrinsically meaningful statistic. The Committee notes:

(a) It is not particularly surprising that larger and better capitalised firms are more likely to be acquisitive than smaller firms (which are more likely to be targets).

(b) The data does not indicate that the current merger regime is failing to identify transactions by large firms that warrant ACCC review. Indeed, it may be assumed that many, if not most, of the transactions undertaken by large firms of this kind were notified to the ACCC under the current process.

(c) Finally, the statistic reveals nothing of the balance of the acquisitions in the data set. It may be the case that the largest 10–20% of firms collectively account for 90%+ of transactions, so that the role played by the largest firms is neither unsurprising nor

27 ACCC Merger Guidelines, paragraph 2.

	necessarily problematic. This is especially the case in a small economy such as Australia. The Committee reiterates its request that, to the extent possible, the Taskforce release the substantive data and modelling for comment to enable stakeholders to better and more effectively engage in this process. The Committee notes the growing emphasis in ACCC advocacy for merger reform that economic activity by large firms in the Australian economy is of its very nature problematic or warrants substantial regulatory oversight. This is not warranted or supported by credible economic analysis.
2.	**ACCC Further Submission [2.10]: The challenge of supporting a decision to block a merger with evidence to the civil standard has meant the ACCC has 'reluctantly' not opposed mergers in the past, which it otherwise considered were anti-competitive.**
	The ACCC states that (at [2.10]), *"As a result [of the difficulty of the evidentiary standard], the ACCC is not always able to oppose mergers that it considers are likely to adversely affect competition. When reviewing mergers under section 50 of the CCA, the ACCC considers its ability to prove a substantial lessening of competition before the Federal Court. This means that there are mergers that we have had to reluctantly not oppose due to a lack of admissible evidence, but have later identified as having had an adverse impact on competition."* The Committee is surprised by this submission. (a) The ACCC does not give any examples and provides no empirical evidence to support the claim that there are deals that it has reluctantly 'not opposed' that later had an adverse impact on competition. (b) To the contrary, the Committee's experience is that the ACCC is a strong and robust merger regulator with experienced staff and Commissioners. The agency routinely uses its extensive powers to obtain evidence and to investigate and block transactions where it identifies credible concerns. In our experience, it is not a regulator that pulls its punches. In the last full calendar year, the ACCC blocked 6 substantial transactions—the most in a single year since 2016 (when it also blocked 6 transactions). In addition, there are a number of transactions which are withdrawn from review when parties receive indications from the ACCC that it intends to oppose the transaction (eg, through a 'red light' statement of issues or other indications from the ACCC case team). (c) As a legal standard, the "likely to substantially lessen competition" test requires only that the ACCC establish a 'real chance' of an anti-competitive effect, to the balance of probabilities. That modest level of likelihood must itself be proved only to the balance of probabilities. When taken together, this amounts to an effective evidentiary standard materially less than 50%. If, following an extensive market inquiry process, deploying strong evidence-gathering powers, the ACCC cannot satisfy this standard, it is not clear why it should still be free to block a transaction. (d) The 'forward-looking' nature of the SLC test is not unique to s.50 or to Australian competition law. It is a fundamental feature of all developed, antitrust regimes. The appropriateness of a forward-looking competition test and its openness to being established with evidence has been explored and acknowledged by Justice O'Bryan.[28]
3.	**ACCC Further Submission [3.10]: The ACCC does not accept that a 'satisfaction' test provides it with more discretion and considers any such concern can be addressed by**

[28] *Section 50: Should the Burden of Proof be Shifted?*, chapter 8 in M Gvozdenovic and S Puttick, *Current Issues in Competition Law*, Practices and Perspectives (Vol II, 2021) at 175.

	expressly stating that it 'must' grant approval if satisfied that a merger is not likely to SLC.
	The ACCC rejects the Committee's submission that the proposed 'satisfaction' test introduces greater discretion and uncertainty. The Further Submission states, *"The ACCC does not agree with some stakeholders that a 'satisfaction' test gives the ACCC a high degree of discretion and creates uncertainty as to the standard the ACCC must apply. This is plainly wrong.* With respect, this response misconstrues the concern raised by the Committee. The Committee's concern with the satisfaction standard is that, fundamentally, it replaces an objective legal and evidentiary standard, with a subjective, administrative standard. This subjectivity, coupled with the weaker rights associated with judicial review (rather than a full merits rehearing), inherently allows greater discretion for the decision maker. As noted above, this is one of the justifications given by the ACCC in support of its proposal—that the 'satisfaction' test permits it greater room to move and to block mergers, without being restricted by the need to establish its concerns based on evidence. The ACCC response also fails to distinguish between uncertainty as to the standard of the decision-making <u>*process*</u> which must be applied, and uncertainty as to the nature of the substantive competition evaluation that the ACCC will undertake before it is 'satisfied' that a merger will not SLC. The standard judicial review examples offered by the ACCC are the conventional administrative law principles applying to decision making <u>*processes*</u>. They are a low threshold and offer limited protection to merger parties. However, uncertainty remains as to what is meant by 'satisfaction' in the context of a substantive merger evaluation. How confident must the ACCC be that a merger is likely to lessen competition, before it is relevantly 'satisfied'? Is it sufficient that the ACCC did not consider that it had enough time to pursue all avenues of inquiry irrespective of the importance of those? This was debated, most recently, in ANZ / Suncorp. In that matter, the ACCC submitted (at [7–8] of its Outline of Submissions): *The word "satisfied" requires that the Tribunal reach "an affirmative belief" as to a matter in s 90(7)(a) or (b). "Satisfaction" is a state of mind that has been formed reasonably and upon a correct understanding of the law. The Tribunal's factual findings must have a basis in the evidence, other supporting material, common sense, or its own specialised knowledge.* *No particular standard of proof, such as the balance of probabilities, applies, save that the Tribunal must be "satisfied" of a matter in s 90(7)(a) or (b) before it may authorise the Proposed Acquisition.* This submission highlights the extent to which the ACCC sees the change in test as converting the evidentiary onus of proof into a subjective administrative decision, where the relevant standard is one that tests the reasonableness of its state of mind and the procedural correctness of its decision-making process—rather than testing whether the ACCC's decision is substantively the right one, based on the evidence. Indeed the ACCC states that *"[t]his is not a reversal of the 'onus of proof' as this is an administrative decision being considered outside of the court context."* This submission concedes that, while the ACCC formulation does reverse the onus in a practical sense, the ACCC under its preferred standard would no longer bear <u>***any***</u> formal burden of proof on the evidence. For the same reason, while the Committee acknowledges that shifting from 'may' to 'must' would to some extent improve any satisfaction test (as proposed by the ACCC at [3.11])—this does not address the source of practical discretion created by the ACCC proposal, which results from a combination of the lower, subjective and uncertain statutory threshold, coupled with removal of judicial oversight. Overall, the Committee accepts that administrative processes often involve the exercise of a degree of regulatory discretion. However, the ACCC proposal is expressly directed at extending the degree of regulatory flexibility afforded the ACCC, and lowering evidentiary standards, in order to permit greater lenience within the Australian merger model for 'Type 2'

	errors (i.e. allowing the ACCC more scope to block transactions where the likely effect is uncertain and where the deal may therefore ultimately have been efficient and pro-competitive). For the reasons set out in the covering letter, this means deals will more often be lost to the Australian economy due to regulatory error that ordinarily would have benefited consumers. This more restrictive environment is likely to also have a chilling effect on investment and productivity. This desire by the ACCC to make the system more discretionary and accepting of such “Type 2” errors is also not justified where it has failed to empirically demonstrate that there is any problem with “Type 1” errors (i.e. anticompetitive mergers being permitted) occurring under the current, more rigorous process. The revised formulation proposed by the Law Council’s Business Law Section above still allows the ACCC regulatory discretion in arriving at a decision that it is satisfied there **is** an SLC. In that event it could block the merger. There is no reasonable basis on which the ACCC should be able to block a merger simply because it is **not** satisfied that the merger does **not** SLC.
4.	**ACCC Further Submission [3.3]: The preferred ACCC option is a ‘package’. The effectiveness of any individual component depends on adopting the entire package.**
	The Committee does not accept that the features of the ACCC proposal are necessarily a ‘package’ that must be adopted in its entirety. The Committee agrees with the approach adopted by the Taskforce in its consultation paper, which properly acknowledged that different issues were being addressed and that there was some optionality. The ACCC in the Further Submission is raising two distinct concerns: (a) The ACCC is concerned it does not currently see all of those mergers which it should or that the voluntary nature of the informal clearance process results in the ACCC receiving notification of deals with insufficient time to properly assess them. (b) Separately, in those rare cases which are contested, the ACCC sees the task of establishing a merger is likely to substantially lessen competition to a conventional, evidentiary standard, as too difficult and uncertain. This “skews” decision making process towards clearance (at [2.9]). The Committee considers that these are distinct issues with different proposed solutions and they should not be conflated for the purpose of determining the appropriate policy response. As noted in our earlier submission, the Committee’s preference remains a combination of Options 1 and 2 set out in the Committee’s original consultation. Nonetheless, the Committee does not strongly oppose the development of a workable mandatory and suspensory regime, with appropriate thresholds and a fast-track exemption process. However, the Committee remains strongly concerned by shifting to a ‘satisfaction’ standard for the reasons set out in our earlier submission and above. If, despite these concerns, this were to be contemplated by Treasury, the Committee submits that: (a) the test should place a positive onus on the ACCC to be satisfied that a merger would be likely to substantially lessen competition (i.e. the ACCC must approve a merger unless the ACCC is satisfied that the merger would SLC);[29] (b) there must be certainty about the nature (and the extent) of information that merger parties are required to provide the ACCC in order for it to make a decision under the satisfaction standard; and the timelines for it to do so;

[29] Consistent with the UK model, consideration might also be given to expressly clarifying that satisfaction is on the balance of probabilities per *Tobii AB (pulb) v CMA* [2020] CAT 6 at [341], referred to at [68] of the Committee’s earlier submission.

	(c) there must be substantially improved rights of transparency granted to merger parties during the ACCC process (which is an important issue not addressed in the Further Submission). This should include rights for full access to the ACCC's case file and modelling (including submissions, documents and evidence of third parties) in a timely manner and before its decision is made as well as oral hearing rights; and (d) the need to retain merits review rights becomes particularly important. A merger decision that is subject only to the reasonableness of the state of mind of the ACCC must be able to be examined, tested and fully reconsidered, on the merits, by an independent body. For the reasons set out in our earlier submission, the current 'limited merits review' process does not offer a full or appropriate means of merits review and is not fit for purpose.