Law Council
OF AUSTRALIA

Business Law Section

Merger law reform proposals – discussion paper

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About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Restructuring Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee

- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Greg Rodgers, Chair
- Mr Mark Friezer, Deputy Chair
- Mr Philip Argy, Treasurer
- Ms Rebecca Maslen-Stannage
- Professor Pamela Hanrahan
- Mr John Keeves
- Mr Frank O'Loughlin
- Ms Rachel Webber
- Dr Richard Dammery
- Dr Elizabeth Boros
- Mr Adrian Varrasso

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

For Further Information

This submission has been prepared by the Competition & Consumer Committee of the Business Law Section.

The Section would be pleased to discuss any aspect of this submission.

Any queries can be directed to the chair of the Committee Geoff Carter, Chair of the Competition and Consumer Committee (geoff.carter@minterellison.com or 0402 891 372).

With compliments



Greg Rodgers
Chair, Business Law Section

1. The current test

Section 50(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) prohibits a corporation from directly or indirectly acquiring shares in the capital of a body corporate, or any assets of a person, if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Section 50(3) of the CCA provides a list of non-exhaustive factors that must be taken into account when assessing whether an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition. These factors are the:

- actual and potential level of import competition in the market;
- height of barriers to entry to the market;
- level of concentration in the market;
- degree of countervailing power in the market;
- likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- extent to which substitutes are available in the market or are likely to be available in the market;
- dynamic characteristics of the market, including growth, innovation and product differentiation;
- likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- nature and extent of vertical integration in the market.

1.1 Changes to the test over time

The nature of the mergers prohibition has changed over time. The test as it was originally introduced in 1974 prohibited acquisitions where they were *likely to have* the effect of substantially lessening competition in a market for goods or services.

In 1977, following the Swanson Committee review, this test was replaced with a market dominance test, pursuant to which mergers were only prohibited where they resulted in, or substantially strengthened, a "position to control or dominate a market".[1] This change was made to address concerns including that the test of substantially lessening competition was preventing small business operators from exiting their business by way of sale to a large competitor, and stifled the realisation of economies of scale and international competitiveness. During its review, the Swanson Committee identified that there were two main purposes behind merger provisions: (a) preventing mergers which would achieve anti-competitive results prohibited elsewhere in Australia's competition laws; and (b) ensuring control of significant capital assets would not change hands in a way that disregarded the anti-competitive effects of the change.

In 1991–92, the current test of substantially lessening of competition was introduced, after recommendations by the Cooney Committee review.[2] To address concerns that returning to this test would result in a large number of acquisitions being captured, it was limited in its application to "substantial markets". In advocating for the change to the test, the Trade Practices Commission (**TPC**) (being the predecessor to the ACCC) argued that the dominance test enabled the acquisition of effective and vigorous competitors without triggering the merger prohibitions. The Cooney Committee

1 *Trade Practices Legislation Amendment Act 1977* (Cth).
2 *Trade Practices Legislation Amendment Act 1992* (Cth).

acknowledged that the appropriate test to adopt was dependent upon the underlying aim sought to be achieved, stating that:[3]

> [I]f the aim of merger policy is to enable firms to achieve sufficient size to compete successfully overseas, then it may be that the dominance test is to be preferred. However, if the policy is the enhancement of competition, then the substantial lessening of competition test is to be preferred.

The test remained unchanged until 2012, when amendments came into force that removed the requirement for a market to be "substantial" in order for the mergers provision to apply and replaced "a market" with "any market".[4] Broadening the application of the merger prohibition to any market (and not just substantial markets) was in response to concerns regarding "creeping acquisitions", particularly in the supermarket sector following the ACCC's Grocery Inquiry Report in 2008.

Notably, the Harper Review in 2014–15 made no recommendations for substantive changes to the mergers test, and the ACCC did not advocate for changes to that test or its application in its submissions to the review. However, the ACCC did advocate for changes to the process for authorising mergers, based on a net public benefit, and the then unused formal merger clearance process. The Harper Review recommended the changes and the Government accepted them, resulting in the ACCC becoming the first instance decision maker for all mergers.

1.2 Key legal principles from merger cases

There are a number of legal principles developed by the Courts that govern the interpretation of section 50 of the CCA. These principles are outlined below and have been summarised in the most recent contested merger cases – being *Vodafone Hutchinson Australia Pty Limited v Australian Competition and Consumer Commission*[5] and *Australian Competition and Consumer Commission v Pacific National Pty Limited*.[6]

(a) ***Balance of probabilities***: Contravention of section 50 of the CCA, as with other prohibitions in Part IV of the CCA, must be proved on the balance of probabilities. This is subject to the *Briginshaw*[7] principle (being essentially that stronger evidence may be required in cases where serious allegations have been made, or a finding is likely to produce grave consequences), given the very substantial penalties that apply to contraventions of the mergers prohibition.

(b) ***Substantially lessening competition***: Competition has been described as the "*dynamic process [which is] generated by market pressure from alternative sources of supply and the desire to keep ahead*".[8] The use of the term "substantially" requires that the relevant lessening of competition must be something that is meaningful and relevant to the competitive process. The Courts have also indicated that the concept of substantiality can encompass temporal aspects, whereby "*a short term effect readily corrected by market processes is not substantial … [b]ut a medium to long term effect not easily corrected may amount to a substantial lessening of competition*".[9]

(c) ***Likely***: The word "likely" means "a real chance".[10] This phrase is concerned with commercial likelihoods and must be applied at a level that is commercially relevant or meaningful.

(d) ***Assessing the competitive impact***: In order to assess the competitive impact of a proposed merger or acquisition, a comparison must be undertaken between the likely state of competition in

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3 Senate Standing Committee on Legal and Constitutional Affairs, "Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls", December 1991, 24 at [3.37].
4 *Competition and Consumer Legislation Amendment Act 2011* (Cth).
5 [2020] FCA 117 (***Vodafone***).
6 [2020] FCAFC 77 (***Pacific National***).
7 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
8 *Vodafone* at [48], quoting *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 (***Re QCMA***).
9 *Vodafone* at [70].
10 Ibid at [245], quoting *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317, at [1275].

a relevant market in the future *with* the merger (often described as the 'factual') and the likely state of competition in the future *without* the merger (often described as the 'counterfactual').[11]

(e) ***Market***: A market is "*an area of close competition*" between firms, being the "*field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution … if given a sufficient price incentive*".[12] For the purposes of section 50, a market means a market for goods or services in Australia or a State, Territory or region of Australia and can include a "*market for goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services*".[13]

Importantly, the jurisprudence as to what constitutes the likely effect of substantially lessening competition is currently equally applicable to all prohibitions to which the test applies. The overarching object of the CCA is to "*enhance the welfare of Australians through the promotion of competition*".[14] It does this by, among other things, prohibiting each of the following, if it has the effect, or likely effect, of substantially lessening competition: a provision of a contract, arrangement or understanding; a concerted practice; the unilateral conduct of a firm which has substantial market power; exclusive dealing conduct; and, finally, the acquisition of shares or assets.

Each of these prohibitions requires a forward looking analysis and a comparison of the likely future states of competition with and without the impugned provision/concerted practice/conduct/acquisition, as the case may be. It is unclear why the future state of competition without the unilateral conduct of a firm with substantial market power, or without a concerted practice, would necessarily be any easier to prove than future state of competition without an acquisition. It may be that the posited future state of competition without an acquisition is less likely to be the 'status quo'.

However, the Committee recommends that a careful analysis of all judgments concerning the substantial lessening of competition test and the nature and role of the counterfactual (including the extent to which it differed from the 'status quo') be undertaken before concluding that its application to acquisitions has been, in some way, different and deficient compared with its application in all other prohibitions.

2. The informal clearance process

Before turning to the substantive question of whether there is a problem with Australia's merger laws (and if so, what could sensibly be done to fix it), it is useful to put the operation of those laws into the context in which they in fact operate in Australia.

2.1 Overview

Unlike many other jurisdictions, Australia does not have a mandatory or suspensory notification regime for merging parties to notify or seek approval from the ACCC of a proposed transaction. This is, instead, done on a voluntary basis upon application by merging parties, most commonly through the informal clearance process.

The efficacy of Australia's merger laws and concerns about the ACCC's ability to enforce them, should not be confined to a review of the outcomes of contested merger cases. Very few proposed acquisitions reach the stage of contested court proceedings, and the vast majority are dealt with through the informal review framework. In reality, contested court proceedings for mergers are limited to a very small number of instances where the parties consider there are no real alternatives for their respective businesses other than the merger (in other words, only parties with no other real alternatives can withstand the time, costs, scrutiny and uncertainty of a contested court case).

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11 *Pacific National* at [103].
12 *Pacific National* at [101], quoting *Re QCMA*.
13 CCA, section 50(6), 4E.
14 CCA, section 2.

The informal clearance process exists outside of the CCA's statutory framework and involves the ACCC giving its view on whether a proposed transaction is likely to substantially lessen competition. A "green light" from the ACCC under this process does not mean that merging parties have statutory protection from court proceedings for a breach of section 50 of the CCA. Practically speaking, it does mean that the ACCC has indicated a level of comfort with the transaction that makes it unlikely that enforcement action would subsequently be pursued by the ACCC for a contravention of section 50, and gives merger parties confidence to proceed with the transaction in light of that knowledge. In fact, the Committee is only aware of two cases where informal clearance has been obtained and the Commission has subsequently opposed the merger. In one of those cases, a new bidder emerged and in the other, the Commission was concerned that the applicants had deliberately misled it about material facts. Consequently, a high degree of confidence to proceed is attached to a "green light" from the ACCC.

There are currently two main forms of informal merger assessment provided by the ACCC:

(a) *Pre-assessment*: Pursuant to which the ACCC considers information provided by the parties and indicates to the parties that it does not intend to conduct a public review of the proposed acquisition (based on it being satisfied that there is a low risk of the transaction substantially lessening competition). Pre-assessment can occur on a confidential or non-confidential basis and may include some limited market inquiries.

(b) *Public review*: Pursuant to which the ACCC seeks feedback from market participants and others in relation to the transaction prior to forming a view as to its likely competitive effects. Typically, a public review is considered necessary where the proposed transaction raises competition concerns or the ACCC requires information from the market to assist its decision making. Under this process, the ACCC may issue a Statement of Issues (**SOI**) if it considers the transaction may or does give rise to competition concerns. Following a public review, the ACCC makes a final decision to oppose the transaction, not to oppose the transaction or not to oppose the transaction subject to the acceptance of undertakings from one or more of the parties.

In addition, as Treasury would be aware, should an application to the Foreign Investment Review Board (**FIRB**) under *Foreign Acquisitions* and *Takeovers Act* (Cth) 1975 be required, FIRB will not provide a 'no objection letter' unless and until the ACCC has confirmed in writing to FIRB, on a confidential basis, that it does not consider the transaction would be likely to have the effect of substantially lessening competition in any market in Australia. The practical effect of this interaction between FIRB and the ACCC is that, for those acquisitions where it is mandatory for the acquirer to notify FIRB to obtain a notice of no objection from the Treasurer, filing with the ACCC operates as if it is mandatory and suspensory.

We also note that the temporary change introduced in response to the COVID-19 pandemic on 29 March 2020 to the application of existing FIRB rules (pursuant to which the monetary threshold applying to foreign investments in Australia has been reduced to zero) means that all foreign transactions are currently subject to ACCC consideration.

2.2 Analysis of ACCC reviews of mergers - 2009–2019

Number of mergers considered by the ACCC

Members of the Committee have conducted an analysis of the number of mergers contested by the ACCC in court or before the Australian Competition Tribunal (**ACT**), and the number of mergers considered by the ACCC under the informal clearance process between 2009 and 2019 (**assessed period**). This analysis is based on publicly available information published in the annual reports of the ACCC and the Australian Energy Regulator (**AER**) from 1 July 2009 to 30 June 2019 and on the ACCC's merger register and pre-November 2017 merger authorisations register (being authorisations granted by the ACT). It also takes account of the outcomes in the Vodafone/TPG and Pacific National/Aurizon

contested merger cases, in which judgment was handed down by the Federal Court in February 2020 (Vodafone) and the Full Federal Court in May 2020 (Pacific National).

Over the assessed period, only a very small number of proposed acquisitions considered by the ACCC ended up in contested court proceedings or were the subject of an authorisation application to the ACT (approximately 0.2%). The ACCC considered 3,165 proposed acquisitions over this period (being the total number pre-assessed or subject to public or confidential review), of which six were subsequently contested. These six cases account for approximately 1% of the 696 proposed acquisitions that were publicly or confidentially reviewed (i.e. excluding those that the ACCC pre-assessed).

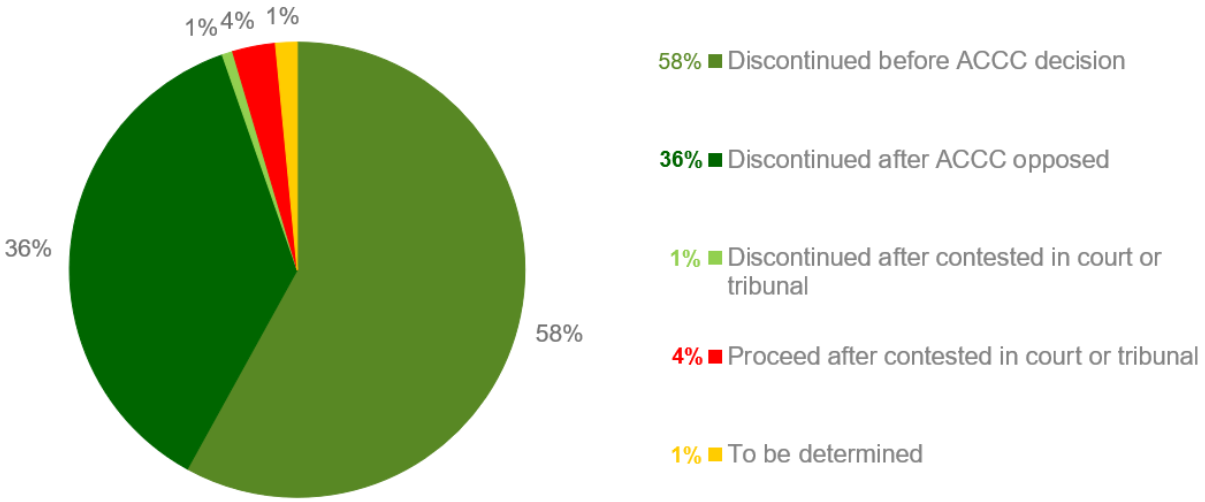
As these figures demonstrate, the vast majority of mergers considered by the ACCC were dealt with outside of the Courts or the ACT, through the informal clearance process.

Outcomes of ACCC merger reviews

Further, the ACCC's track record in preventing mergers in respect of which it has serious concerns as part of the informal clearance process is very strong.

Over the assessed period, the ACCC opposed or expressed concerns in relation to 131 proposed transactions (being the total number of mergers opposed by the ACCC after public or confidential review (55 mergers) and mergers discontinued during the course of or after public or confidential review (76 mergers)). These 131 proposed transactions represent 9% of the 696 proposed acquisitions that were publicly or confidentially reviewed, and 4% of the 3,165 proposed acquisitions considered by the ACCC over the assessed period.

In 95% of cases (being 125 of these 131 mergers), the relevant transaction did not proceed, as shown below.



Specifically:

(a) 58% (76 mergers) were discontinued before the ACCC reached a final decision as part of a public or confidential review. These matters were discontinued because the transaction did not proceed, was withdrawn before or after a SOI was published or was a confidential matter where the ACCC could not form a view without market inquiries;

(b) 36% (48 mergers) were discontinued after being opposed by the ACCC following a public or confidential review; and

(c) 1% (1 merger) was discontinued after being put before the ACT (being Murray Goulburn's application for authorisation of its proposed acquisition of the Warrnambool Cheese and Butter Factory, which was withdrawn).

The Committee notes that the above figures do *not* include mergers in respect of which the ACCC raised concerns and subsequently accepted enforceable undertakings from the merger parties to resolve those concerns. If these transactions were included, the ACCC's track record in securing outcomes to deal with mergers that it considers raise competition concerns would be even stronger.

This leaves six mergers that were contested in the Courts or the ACT over the assessed period. To date:

- 4% (five of 131 mergers) proceeded following the decision of the Court or ACT (being Metcash/Franklins, Macquarie Generation/AGL, Tatts/Tabcorp, Toll/Sea Swift and Vodafone/TPG).
- 1% (one of 131 mergers) is yet to be determined (being Pacific National/Aurizon, in which the Federal Court and Full Federal Court have both found there to be no contravention of section 50, with the ACCC seeking special leave to appeal to the High Court).

Annexure A contains the more detailed analysis of the ACCC's informal clearance reviews upon which the figures above are based.

3. The alleged problems

For the very small number of mergers that have been opposed by the ACCC and proceeded to a contested hearing since 2003, the ACCC has experienced difficulties in persuading the Courts and the ACT that the merger in question would result in a contravention of section 50.

There have been seven contested cases since 2003 (one more than the six referred to in section 2.2, being the AGL/Loy Yang case in 2003). Four cases occurred in the Federal Court and three in the ACT. They are:

Case	Forum	Year	ACCC case established?
AGL/Loy Yang	Federal Court	2003	X
Metcash/Franklins	Federal Court	2011	X
	Full Federal Court	2011	X
Macquarie Generation/AGL	ACT	2014	X
Toll/Sea Swift	ACT	2016	X
Tatts/Tabcorp	ACT	2017	X
	Federal Court (judicial review)	2017	✓
	ACT (returned)	2017	X

Case	Forum	Year	ACCC case established?
Pacific National/Aurizon	Federal Court Full Federal Court High Court (special leave sought by the ACCC)	2019 2020 TBC	X[15] X TBC
Vodafone/TPG	Federal Court	2020	X

The current Chair of the ACCC, Rod Sims, has asserted that, because the ACCC is winning cases in other areas of the law but not in mergers, "*it is clear there is a problem with the merger regime in Australia*".[16]

There have been several reasons put forward by the ACCC and/or other commentators for the difficulties experienced by the ACCC.

3.1 Evidentiary difficulties as to the 'counterfactual' – what will happen if the merger does not proceed?

The ACCC has expressed difficulties in obtaining evidence to prove that a merger would result in a breach of section 50 of the CCA. As described above, the current test requires a forward-looking analysis of the likely effect of the merger in a future "with" the merger (the factual) and a future "without" the merger (the counter-factual) to determine if the proposed acquisition substantially lessens competition. Several cases have grappled with the standard to which the ACCC must prove the counterfactual – which involves an assessment of the degree of likelihood of future events occurring that are relevant to the assessment of the effect of the merger on competition.

The ACCC stated in the Digital Platforms Inquiry Final Report (**DPI Final Report**) that it can be challenging to obtain probative evidence of what is likely to happen in the future, relative to the merging parties who have the knowledge and expertise inhouse in the relevant industry.

Rod Sims, in his address at the International Competition Network (**ICN**) conference in February 2020, stated:

> As we are all aware, proposed mergers can be extremely difficult to challenge. By their nature, cases involve predictions of the future state of competition with the merger. Competition authorities can sometimes feel like they are on the back foot when attempting to meet this challenge. We are seeking evidence about the unknown future world and much of the relevant knowledge and evidence rests with the parties to the transaction.

After the ACCC's loss appealing the Pacific National/Aurizon merger in the Full Federal Court, Mr Sims also stated that the "*ACCC should not have to prove who might want to use the freight hub one day"* and that merger laws should focus on a "*change in market power rather than predicting the future*".[17]

Underlying these concerns could be a view that there has been an undue focus on the counterfactual, which arguably takes the debate away from the assessment of the proposed acquisition and the impact the proposed acquisition is likely to have on competition. For example, if parties compete head to head (even involved in a price war), direct evidence on competition between them may be considered to be instructive. However, because the target made a commercial decision to announce its intention to exit,

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15 The Committee notes that the Federal Court found that Pacific National's acquisition of Acacia Ridge Terminal from Aurizon would have had the effect or likely effect of substantially lessening competition in the absence of a behavioural access undertaking offered by Pacific National to the Court.

16 Chanticleer, "Is the mergers test broker?", *Australian Financial Review*, 16 May 2019.

17 Jenny Wiggins, "Sims says merger law damages productivity", *Australian Financial Review*, 8 May 2020.

the ACCC may consider that it is put to the potentially difficult task of proving the existence of an alternative purchaser, rather than focus on the fact that the assets will stay in the market or that available assets may create opportunities for others to enter or expand (and therefore maintain the competitive process). By shifting the focus of the competition assessment to what is likely to happen in the future absent the merger, those advocating for merger reform may be concerned that the Court is distracted from the main issue it should be considering: the likely effect *of the merger* on competition and the competitive process.

3.2 Insufficient recognition of the potential harm from mergers that increase concentration in already concentrated markets

The ACCC has also expressed the view that there is "*definitely a problem*" with market concentration in Australia, and that Australia's merger regime is not adequately addressing or preventing it.[18] Rod Sims indicated before the Standing Committee on Economics in September 2019 that stopping problematic mergers from happening in the first place is the most effective way to address problems with market consolidation. This point was also made at the Competition Law Conference in 2019, where he expressed the view that Australia's competition law is in need of reform to stop the further concentration of market power.

Certainly, the ACCC has been conscious of what it has described as "*growing community expectation that the ACCC should oppose more acquisitions as the consequences of market power from increased concentration are exposed*".[19]

3.3 Insufficient recognition of the potential harm from mergers that provide a competitor with monopoly control over an essential input

Vertical mergers resulting in monopoly control over an essential service/input, which the Courts or the ACT have allowed to proceed, have been another focus of the merger reform debate.

The most recent of these transactions is the Pacific National/Aurizon merger, which the Full Federal Court found would not contravene section 50 of the CCA in May 2020. Following the Full Federal Court decision, Rod Sims stated that he "*would work up some suggestions to change existing merger laws"*, and that Australia needs to "*rethink how we do merger approvals"* if it wants to prevent further market concentration and monopoly control.[20]

Similar concerns arose when the ACT granted authorisation for AGL's acquisition of state-owned Macquarie Generation in 2014. Mr Sims has drawn comparisons between this transaction and the Pacific National/Aurizon merger, stating that the Macquarie Generation/AGL vertical merger ultimately led to higher electricity prices for retail customers.

3.4 Judicial deference to merger parties' lay evidence over other evidence

This involves concerns that the Courts favour merger parties' lay evidence over economic expert evidence in assessing commercial incentives post-merger. Judicial deference is allegedly shown to "self-interested" company executives, at the expense of economic theory and modelling.

For example, the ACCC noted in the DPI Final Report that "*the tribunal and the courts appear to give greater weight to evidence from the parties to the transaction who*" in its view "*have a vested interest in the acquisition proceeding, rather than from the evidence from third party witnesses*".[21] Rod Sims expanded on this more recently, observing that "*considerable weight [is given by the Courts] to the testimony of the merger parties' senior executives over internal company documents created before the*

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18 Commonwealth, *Parliamentary Debates,* Annual Competition and Consumer Commission Annual Report, Standing Committee on Economics, 18 September 2019, page 4 (Rod Sims).

19 Rod Sims, Address to the Law Council of Australia Competition Law Workshop, 30 August 2019.

20 Jenny Wiggins, "Sims says merger law damages productivity", *Australian Financial Review*, 8 May 2020.

21 ACCC Digital Platforms Inquiry Final Report, June 2019, page 108.

merger which show a different story", and that courts in other jurisdictions are "*more sceptical of self-serving testimony by the merger parties*".[22]

There may be a concern that, because of the focus on the counterfactual in the merger assessment, the evidence of past and current competition (which may include documents evidencing direct competition between the merging firms or expert economists who give evidence that prices are likely to rise or service, quality, or innovation is likely to reduce post acquisition) becomes secondary to the testimony of merger parties' executives as to what they are likely to do in the future and how they expect to run their business (and who the ACCC has indicated have a vested interest in getting their deals through).

4. Do the contested merger cases to date provide evidence of these problems?

The Committee considers that any case for reform of something as significant to the functioning of the Australian economy as section 50 of the CCA must be evidence based. To the Committee's knowledge, no post-merger analysis has been done of the operation and competitiveness of the markets in which the contested, or non-contested mergers, have taken place. Rather, to the extent that a case has been articulated that there is a problem with the merger provision, it has largely been through criticisms of the processes and reasoning of the Federal Court and ACT.

This section discusses each of the problems identified in section 3 above and the extent to which they are evidenced by the actual cases themselves, on the basis that if the suggested evidence for reform is what occurred in the contested cases to date, careful and thoughtful review of the reasoning of the Federal Court/ACT judgment in each of these cases should be the starting point for assessing the need for reform.

4.1 Evidentiary difficulties as to the 'counterfactual'

The counterfactual has been determinative in four of the contested cases to date: Metcash/Franklins, Toll/Seaswift, Vodafone/TPG and Pacific National/Aurizon.

An examination of the judgments makes it clear that, in each of these cases, the ACCC had the benefit of extensive section 155 document production and oral examinations of the parties and competitors, as well as the evidence of industry witnesses.

For example, in the Full Federal Court's decision on the Pacific National/Aurizon appeal, the ACCC submitted a wide range of evidence to the Court in support of its view of the relevant counterfactual (essentially, that if the acquisition of Acacia Ridge Terminal by Pacific National did not proceed, there was a real chance of new entry in the relevant market). This evidence included internal documents from Pacific National, testimony from Pacific National's expert economist, various facts about the operation and dynamics of the rail market and the sales process undertaken by Aurizon and testimony from senior employees of Qube Holdings Ltd (an industry participant).

Similarly, in Vodafone/TPG, the counterfactual put forward by the ACCC to the Federal Court was that, in the absence of the merger, TPG would roll-out a mobile network and be a vigorous and effective fourth competitor to the three existing mobile network operators (Telstra, Optus and Vodafone). Its evidence included testimony from industry experts and statements made by TPG (including its Chairman, David Teoh).

In Toll/Seaswift, the evidence relied on by the ACCC before the ACT in support of its view of the relevant counterfactual (being that, in the absence of the merger, whilst Toll would still exit its loss making

[22] Rod Sims, Address to the International Competition Network Merger Workshop", 27 February 2020 (available here); Chanticleer, "ACCC's TPG indignity gets worse", *Australian Financial Review*, March 5 2020 (available here).

business, this would leave space for Sea Swift's competitors to tender for major contracts previously held by Toll) ranged from testimony/affidavits from lay witnesses, expert evidence from three sources, as well as evidence from Sea Swift and from competitors/potential competitors.

The Committee acknowledges that, when a merger assessment focuses on what a firm is likely to do absent the acquisition, it is likely that the best evidence of a firm's future intentions and strategies, by its nature, lies with those who are making those decisions within the firm (assuming they are credible witnesses).

However, in all four cases, the Court/ACT made findings of fact that did not support the ACCC's counterfactual theory. For example, in the Pacific National/Aurizon appeal, the Full Federal Court noted that "*the prospect [of new entry could not] be put higher than a mere possibility … [and] the evidence adverted to by the ACCC on appeal only serves to confirm that finding*".[23] The ACT also observed in Toll/Seaswift that "*[its] factual findings fatally undermine much of the ACCC's theory of harm*".[24]

In Vodafone/TPG, the Court stated, *"In these proceedings the Court has reached a sufficient level of persuasion on the relevant factual issues to reach the ultimate conclusion that the merger would not have the effect, and would not likely have the effect, of substantially lessening competition in the retail mobile market. The Court has been left in no relevant uncertainty, after reviewing the evidence, as to the future of the retail mobile market which will not involve Mr Teoh or TPG entering the Australian retail mobile market in the next five years.*" [25]

This indicates that, rather than the ACCC not being able to obtain probative evidence of what was likely to happen in the future, there was in fact probative evidence on this issue put before the Court/ACT (by both parties), but the evidence that was ultimately viewed as persuasive by the Court/ACT went against the ACCC's position.

4.2 Insufficient recognition of the potential harm from mergers that increase concentration in already concentrated markets

In four of the contested cases (AGL/Loy Yang, Macquarie Generation/AGL, Tatts/Tabcorp and Pacific National/Aurizon), material horizontal market concentration issues were not raised.

In relation to the other three contested cases:

(a) In the Metcash/Franklins case, the ACCC alleged that there was a horizontal concentration issue but the market definition relied on by the ACCC in support of that allegation was rejected by the Federal Court at trial and on appeal (being the "independent wholesale grocery market"). The trial judge held that "*the Commission's pleaded case as to market definition has not been made out … [and it] follows that the proceeding must fail*"[26] – and this was upheld on appeal.

(b) In Toll/Sea Swift and Vodafone/TPG, the question of whether or not there was a horizontal concentration issue was determined on the basis of findings of what would happen in the future (i.e. the counterfactual). Having failed to establish its view of the counterfactual, the ACCC's expressed concerns about horizontal concentration were rejected by the Tribunal.

4.3 Insufficient recognition of the potential harm from mergers that provide a competitor with monopoly control over an essential input

This criticism is principally directed at the Court's decision in the Pacific National/Aurizon case in relation to which the ACCC has stated that it gives Pacific National "*monopoly control to send a freight container*

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23 *Pacific National* at [261].
24 *Application by Sea Swift Pty Limited* [2016] ACompT 9, at [249].
25 *Vodafone* at [33].
26 *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967, at [342].

up and down the east coast of Australia",[27] resulting in higher freight costs for Pacific National's customers that would increase the prices of goods for consumers.

At first instance, Beach J found that the behavioural undertaking given by Pacific National sufficiently addressed these vertical/monopoly issues – being that Pacific National, as the new owner of Acacia Ridge Terminal, would have the ability and incentive to discriminate against potential competitor rail line haul service providers (of which it was also one) which required access to the Terminal, and raise barriers to entry. Beach J did not have the same concerns as the ACCC with respect to the effectiveness of behavioural undertakings – finding that the ACCC's criticisms where "*underwhelming"* and its "*evidence is only opinion evidence at best and in most respects amounts to speculation*".[28] On appeal, the Full Federal Court permitted Pacific National's acquisition of Acacia Ridge Terminal without the behavioural undertaking. The Court's substantial lessening of competition analysis (which was confined to a five-year window, after which a new terminal would be built and would act as an alternative to the Acacia Ridge Terminal) found that in both futures, with and without the merger, new entry was a speculative prospect. Given that the competitive constraints facing Pacific National in the factual and counterfactual were the same, the Court found that the acquisition was not likely to substantially lessen competition – even in the absence of the undertaking.

4.4 Judicial deference to merger parties' lay evidence over economic expert evidence

A careful review of the judgments indicates that:

(a) in a number of cases, the evidence of the ACCC's expert economist was in fact preferred/accepted (but the ACCC failed on factual grounds) – this includes the Pacific National/Aurizon case;

(b) in a number of cases, economic expert evidence played a significant role in the ultimate decision, but the Court/ACT preferred the evidence of the economists retained by the merging parties and rejected that brought by the ACCC (AGL/Loy Yang (Ergas/Price v Wolak), Metcash (Pleatsikas v Hay), Macquarie Generation/AGL (MacLeod v Price/Gray), Tatts/Tabcorp (Houston v Smith) and TPG/Vodafone (Padilla &/v Smith)). In Vodafone/TPG, the Court found the evidence of the ACCC's economist in significant respects to be "*of no utility*" and "*not persuasive*".[29] Further, in Vodafone/TPG the evidence of the ACCC's industry expert was relied on by the Court to find for the applicants; and

(c) in all five cases where the lay evidence of executives and managers of the merging parties arguably played a significant role in the ultimate decision (Metcash/Franklins, Toll/Sea Swift, Macquarie Generation/AGL, Vodafone/TPG, and Pacific National/Aurizon):

- those witnesses were subject to aggressive and extensive cross-examination by senior counsel engaged by the ACCC; and
- the ACCC led lay witnesses who were senior executives and managers of competitors and customers of the merging parties.

5. If there is a problem, what are the possible solutions?

Despite the above observations, the Committee acknowledges that a contrary view is being put, and put strongly, by the ACCC and other commentators (as noted in section 3). To advance beyond debate as to the existence or otherwise of a problem, the Committee has also considered the possible solutions that have been identified in merger reform discussions to date, and the advantages and disadvantages of each, being:

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27 Jenny Wiggins, "Sims says merger law damages productivity", *Australian Financial Review*, 8 May 2020.
28 *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669, at [1434]–[1435].
29 *Vodafone* at [587], [887].

(a) a reversed onus of proof for merger participants;

(b) a rebuttable presumption;

(c) some form of specialist courts/review body; and

(d) the introduction of a mandatory and suspensory notification regime.

5.1 Reversed onus of proof

A cardinal principle of the Australian system of justice is that, in criminal trials, the prosecutor bears the burden of proof. Although the CCA prohibitions on provisions/concerted practices/conduct and acquisitions are not criminal, they are civil penalty provisions which involve very severe penalties. They are enforced by a statutory agency with extensive investigative powers and are intended to deter contraventions. These features make them similar in nature to criminal penalties, but the standard of proof required is lower.

This is reflected in the fact that, consistent with the cardinal principle, the burden of proving a contravention of any of these prohibitions is currently borne by the ACCC.

Reversing the burden of proof would be contrary to that principle and should only be contemplated if the arguments in favour are compelling. It might be appropriate to reverse the burden of proof in a civil penalty prohibition if most, or all, of the following criteria were satisfied:

(a) the reversal is reasonable and proportionate;

(b) there is a significant resource/power imbalance in favour of the defendant;

(c) there is a significant information asymmetry in favour of the defendant; and/or

(d) in reality the burden of disproving the allegations falls on the defendant.

In relation to the application of those criteria to section 50 of the CCA, the following observations can be made:

- Until the nature of the problem with the current prohibition (and not merely some apparent symptoms) can be clearly articulated, it is not possible to determine whether the reversal of the burden of proof is reasonable and proportionate.
- The ACCC is powerful, well-resourced and has available to it top-tier solicitors, barristers and experts. There appears to be no imbalance of power in favour of merger parties in legal proceedings.
- The merger parties are very familiar with their industry but the ACCC has extensive investigative powers with which it can obtain documents and information from the merger parties and also from any person or firm which may have relevant information or documents. There appears to be no information asymmetry in favour of the merger parties that cannot be overcome by the use of the ACCC's powers to compel the production of information/documents and/or conduct examinations.
- Subject to the comments below concerning decided cases, the burden of proving that an acquisition contravenes the section 50 prohibition falls, in practice, on the ACCC.

It might be argued that these propositions are less applicable to proceedings for contravention of the acquisition prohibition in which the ACCC does not seek a penalty. However, reversing the burden of proof only in proceedings in which an injunction but not a penalty is sought appears to be artificial and unprincipled.

In addition, it is instructive to consider which party bore the burden of proof in each of the seven concluded contested cases concerning acquisitions. In those cases:

- the ACCC had the burden of proof in two of the Federal Court proceedings (Metcash/Franklins and Pacific National/Aurizon) because it sought injunctions to prevent those acquisitions completing;
- the merger parties had the burden of proof in the other two Federal Court proceedings (AGL/Loy Yang and Vodafone/TPG) because they sought declarations to enable their acquisitions to complete; and
- the merger parties effectively had a burden of proof in the three ACT proceedings (Macquarie Generation/AGL, Toll/Sea Swift, Tatts/Tabcorp) because of the way the authorisation test is formulated, but not exclusively in relation to the substantial lessening of competition test.

In other words, a reversal of the burden of proof could not have made a difference in five of the seven concluded cases.

5.2 Rebuttable presumption

The ACCC has proposed a rebuttable presumption, along the lines of the approach adopted in the United States, as a possible reform to merger laws.

The US presumption to which the ACCC refers is structural, because it uses information on the structure of the market (and specifically on the degree of concentration in the market) to make predictions about the effects of a merger. If a merger results in a significant increase in market concentration, it is presumed that the merger is inherently likely to lessen competition substantially.

The presumption is rebuttable, meaning that the merging parties can rebut the structural presumption by showing that market shares do not accurately predict competitive effects. Generally, in the US, the merging parties do that by showing (1) that the market is poorly defined or that the market shares exaggerate the merger's anticompetitive potential, (2) that entry into the market or expansion by firms already in the market will discipline any price increase, or (3) that the merger produces offsetting efficiencies.

Origin of the presumption in the United States

The rebuttable presumption adopted in US courts was created by the Supreme Court in the Philadelphia National Bank (**PNB**) case[30] in 1963 at a time when there was intense congressional concern with the trend toward concentration and at a time when the central rationale for merger control was to prevent mergers that led to collusion (or what we now call coordinated effects). The presumption used information on the structure of the market (and specifically on the degree of concentration in the market) to make predictions about the effects of a merger.

That case involved the proposed merger of PNB and the Girard Trust Corn Exchange Bank (**Girard**), which were the second and third largest commercial banks respectively with head offices in the Philadelphia metropolitan area. The proposed merger was assessed in the context of concern from law makers in the US about increased concentration generally as well as specifically in the banking sector. The judgment noted that the number of commercial banks in the Philadelphia area had already declined from 108 in 1947 to 42 at the time of the proposed merger. The judgment also noted that in the period between 1950 and the time of the proposed merger, PNB had acquired nine formerly independent banks and Girard had acquired six formerly independent banks. During that period (since 1950), the market share of the largest seven banks had grown from 61% to around 90%.

The Supreme Court noted that:

> [T]he intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behaviour, or probable anticompetitive effects.

[30] *United States v Philadelphia National Bank* 83 S.Ct. 1715 (1963) (***PNB***).

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[31]

The market share from a merger that the Supreme Court in the PNB case felt would result in a "*significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially*" that it should be opposed was 30%.[32] The Court also argued that "*such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in section 7 [of the U.S merger law] to prevent undue concentration*".[33]

The rebuttable presumption was supported by the economic theory prevailing at that time which was that collusion was inevitable in concentrated markets, and that there was a systematic relationship between structural variables (eg. market concentration) and performance (eg. prices and profitability) across all markets.

The reliance on and use of the presumption in the US has waned over the past 30 years as the economic support for the presumption has fallen away, and as recent developments in industrial organisation have shown that collusion in concentrated markets is far from inevitable.

Importantly, by the end of the twentieth century the main concern of competition agencies switched from coordinated effects to unilateral effects. While market shares and the level of concentration might have been capable of providing a very preliminary indication of the competitive position of the market following a merger if the concern was around coordinated effects, those structural features are much less relevant if the concern is that a merger between two firms producing differentiated products might enable them to unilaterally increase the prices of those goods or services following the merger.

Which problem would a rebuttable presumption potentially address?

The rebuttable presumption would address two related problems, if they are demonstrated to exist:

(a) It would help to prevent the economic harm that the ACCC argues comes from concentrated markets. For example, Rod Sims has stated:

> It seems to me that, absent a clear and convincing economic and evidence based explanation of how a merger will avoid harming consumers the standard economic wisdom should prevail. This wisdom is that mergers resulting in high levels of concentration in markets with substantial barriers to entry will usually reduce competition and cause harm to consumers and our economy.[34]

At a hearing of the House of Representatives Standing Committee on Economics on 18 September 2019, ACCC representatives also questioned whether Australia's merger regime was working appropriately and flagged the potential drag on the economy from the economic rents generated from firms in concentrated markets.

(b) It would make it easier for the ACCC to convince courts that mergers in highly concentrated markets are likely to lead to economic harm. Again, Rod Sims has argued that the ACCC has tried and failed to stop mergers in a range of industries including electricity, transport and supermarkets and that it has had trouble convincing courts of the problems associated with increasingly concentrated industries. He then proposed a presumption of illegality for mergers in highly concentrated markets on the basis that they will usually lead to economic harm, noting that "*the*

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31 *PNB*, at [1741].
32 Ibid.
33 Ibid.
34 ACCC media release, ACCC Chairman discusses the increasing concentration in Australia's economy, 27 October 2016.

economic arguments actually say that most of the time it [concentration] does [cause economic harm], so why don't we start with that?"[35] and

> [W]e need to consider something similar to the approach adopted by US courts where once markets are defined and the merger is likely to result in a significant increase in concentration, there exists a "rebuttable presumption" that the merger should not proceed absent evidence to the contrary?[36]

It could be said that the existence of a presumption of this nature sends a public signal that protecting competition and the competitive process is so important that, where an acquisition will result in a significant increase in concentration, the starting point needs to be that there is a competition problem unless there is clear evidence to the contrary.

Section 7 of this paper examines the question of whether Australian markets are in fact becoming more concentrated and, if so, whether this is a problem in economic terms.

What are the potential advantages and disadvantages of a rebuttable presumption?

Merger control in Australia requires a wide-ranging factual analysis of the likely competitive effects of a merger, even in highly concentrated markets characterised by high barriers to entry and/or expansion. The main advantages of a rebuttable presumption is that it replaces the need to undertake such an analysis with a strong presumption based on market concentration.

As with any decision rule, a strong presumption based on market concentration makes it considerably easier for agencies to administer and enforce merger control and provides guidance to firms contemplating mergers that mergers in highly concentrated markets with high barriers to entry will be treated as inherently likely to lessen competition substantially.

Because it is rebuttable, the presumption does not provide quite as clear or as simple a rule as, say, a *per se* prohibition on cartel conduct. Merging parties are able to present evidence that the market definition or the market shares do not reflect the nature of competition in the market or that there would be entry or expansion in the relevant market. In the US, merging parties are also able to argue that the merger will create efficiencies that would offset any potential anti-competitive effects, but the current structure of the test in Australia does not allow that here (although merging parties can seek to have the merger authorised on public interest grounds if they want to make an argument around efficiencies).

However, a key disadvantage of any simple (or relatively simple) decision rule such as the rebuttable presumption is that it can generate more errors in determining whether a particular merger is harmful than would occur with a wide-ranging, fact-based inquiry.

In this case, a rebuttable presumption could give rise to 'false positives' which is a finding that a merger would substantially harm competition when it would actually either be benign or pro-competitive. One way of minimising that risk is to ensure that the presumption has a sound economic grounding.

As noted above, the strength of, and reliance upon, the rebuttable presumption has steadily eroded over the past 30 years in the US as the economic wisdom has evolved in a way that seriously undermined the presumption. Three key developments were:

- *The move away from the structure-conduct-performance (**SCP**) model of competition as the dominant paradigm to explain competition*: The SCP model of competition held that the structure of the industry – the number of firms in a market and the degree of concentration – determines their conduct (the way that those firms compete) and that, in turn, determines the performance in the market in terms of prices and profitability. The clear implication of the SCP model of

[35] Commonwealth, *Parliamentary Debates,* Annual Competition and Consumer Commission Annual Report, Standing Committee on Economics, 18 September 2019, at [5] (Rod Sims).

[36] Ibid.

competition was that as markets become more concentrated, the less competitively firms behaved mainly because it enabled firms in concentrated markets to successfully coordinate. The SCP model of competition was criticised on two grounds:

(a) there was growing recognition that high market shares may be the result of efficiency rather than collusion. This finding was supported by empirical work which found that there was no straight line between the concentration levels in an industry and the performance of firms in those markets; and

(b) industrial organisation economists – drawing on insights from modern game theory – which showed that collusive outcomes were not inevitable in concentrated markets.

- *Increased focus on unilateral theories of harm*: The rebuttable presumption was developed when the central rationale for merger enforcement was to limit market concentration to reduce the incidence of cartels and other forms of coordination among oligopolists (that is, to deal with what we now refer to as coordinated effects concerns). By the turn of the century in the US, most mergers gave rise to a unilateral effects theory of harm rather than a coordinated effects theory of harm. Market shares – and the levels of concentration that follow from those shares – are less relevant to the unilateral theories of harm raised in modern US merger control.
- *Less weight placed on market definition*: Competition agencies are resisting the need to draw clear boundaries around products and services and trying to focus more on the nature of competition in the relevant market. This means that the agencies' resources are typically spent trying to identify the nature of and the strength of any constraints operating on the merging firms and testing the extent to which those constraints would be lessened as a result of the merger. This was driven in large part by the fact that most mergers dealt with differentiated products or services and meant that less weight was placed on rigorously defining markets which, in turn, means that less weight or reliance can be placed on the market shares coming from those markets.

The result of these developments was a shift away from a mechanical, concentration-based approach to merger control based on a view (supported by economic theory at that time) to a more wide-ranging, factual-based analysis of the nature and strength of the competitive constraint that the merging parties actually impose on each other, as well as the need for agencies to set out and test a clear theory of harm that goes beyond the inevitability of collusion in a concentrated market.

That said, US agencies and courts continue to rely on the rebuttable structural presumption in litigated horizontal merger cases, and there remains ongoing debate in the US as to the usefulness and relevance of the structural rebuttable presumption.[37]

Would a rebuttable presumption have changed the outcome of any of the contested cases to date?

A rebuttable presumption that relies on changes (increases) in concentration to predict the competitive effects of a merger only apply to horizontal mergers and would not help in a vertical merger case where there may be no changes to market shares at the same level of the value chain. Given that four of the contested merger cases did not raise horizontal issues (see section 4.2 above), the introduction of a rebuttal structural presumption would not have changed the outcome in most of these cases.

In addition, as noted above, the rebuttable presumption in the US was introduced at the time when the central rational of merger control was to prevent mergers that led to coordinated effects. None of the contested mergers in Australia have involved theories of harm that considered coordinated effects.

[37] See, for example, the recent debate between antitrust economists Carl Shapiro and Josh Wright (available at https://techpolicyinstitute.org/2020/06/15/carl-shaprio-and-josh-wright-debate-antitrust-and-competition-policy-two-think-minimum/).

5.3 Specialist courts/review body

The fact that the CCA is a piece of economic regulation has led some commentators to suggest that section 50 cases require some form of specialist court or review body to determine them. In the Committee's view, there appears to be no basis for supposing that a specialist court or review body could be established which would have more expertise in the adjudication of competition law issues than the Federal Court and the ACT.

Federal Court

The Federal Court has had jurisdiction over proceedings involving the competition law prohibitions in the *Trade Practices Act (Cth) 1974* (**TPA**) and then the CCA since 1975. The decisions of the Federal Court have been subject to appeals to the High Court. A very significant body of law, including in relation to the substantial lessening of competition test, has been developed over the past 45 years. Many of the judges in the Federal Court have played significant roles in the development of that body of case law and in the development of expertise when dealing with competition law and economic concepts.

The Federal Court has been structured into practice areas and sub-areas to which judges are allocated (one sub-area being Regulation and Consumer Protection). Judges can rotate between areas and hold concurrent positions across different groups. This allows for the development of specialised knowledge but does not confine judges to one particular area of law, in a way that a specialist court might. The Committee believes that this strikes the right balance of allowing judges to build subject matter expertise, whilst avoiding the narrowing of perspective that may arise from a specialist court.

Additionally, a generalist court, such as the Federal Court, is equipped to determine not only straight competition law cases, but also competition law cases that intersect with other areas of law. Competition law has private and public law components and can raise legal issues in other areas of law (including constitutional law). The Full Federal Court's decision on the ACCC's appeal regarding Pacific National/Aurizon is evidence of this, whereby it was required to consider whether the Court's power to accept undertakings was subject to certain constitutional limitations. It would be problematic to silo the handling of competition law cases to a specialist court, which may not have broader expertise in handling these types of cases.

ACT

The Trade Practices Tribunal, now the ACT, was established by the TPA and was a continuation of the already existing Tribunal. The ACT is primarily responsible for the review of a range of decisions made by the ACCC – it exercises administrative (not judicial) functions. In the past, proposals were made to refer economic issues, arising in a competition law context, to the Tribunal. Namely, this suggestion was made to the Inquiry into National Competition Policy in 1993 (chaired by Professor Fred Hilmer). However, Hilmer's Committee, in its National Competition Policy Report, did not entertain the idea of referring issues to the Tribunal, noting that a more robust role by the Tribunal could raise constitutional issues "*with the performance of judicial functions by non-judicial bodies*".[38] Similar concerns could arise if an enhanced role, as a part of the merger reform proposal, is contemplated for a separate specialist review tribunal.

Additionally, similar to the Federal Court, the Committee believes that decisions of the Tribunal/ACT, in its current iteration and scope of powers, have played a seminal role in the development of Australian competition law jurisprudence. Those Tribunals have had, since their inception, judges of the Federal Court as presidential members (acting in their personal capacity). Currently there is a President and seven Deputy Presidents. The current President and a number of the Deputy Presidents have been involved in most of the seven contested cases in the Federal Court and the ACT.

[38] Commonwealth, National Competition Policy Review – National Competition Policy (1993) (Hilmer Report) at 171-2.

5.4 Mandatory and/or suspensory notification regime

The ACCC has questioned, including in its DPI Final Report, whether the current merger notification regime is adequate. In particular, it has questioned whether the current non-mandatory regime is effective in capturing incremental acquisitions and supports its ability to review transactions concurrently with other global regulators.

The Committee anticipates that the question of whether it is necessary or beneficial to alter Australia's current informal clearance regime by altering the CCA to implement a statutory notification regime to address concerns may be put before Treasury, noting that these concerns were expressed predominantly in the context of Google and Facebook in the DPI Final Report.

Recommendations of the DPI Final Report

The ACCC's DPI Final Report recommended that large digital platforms, including Google and Facebook, each agree to a protocol to provide advance notice to the ACCC of proposed acquisitions that may impact competition in Australia.[39] The DPI Final Report envisages that the protocol will:[40]

- be agreed between the ACCC and each large digital platform;
- specify the types of acquisitions requiring notification (including any minimum transaction value); and
- specify the minimum advance notification period prior to completion of the proposed transaction to enable the ACCC to assess the proposed acquisition.

The ACCC is proposing to implement the protocol by obtaining undertakings from the relevant parties. However, if such a commitment is not forthcoming from the large digital platforms, it will make further recommendations to the Government to address this issue.[41]

The ACCC's rationale is that mandatory notification of acquisitions by large digital platforms will allow its reviews of transactions to occur concurrently with reviews by overseas regulators, and to address some specific concerns that:

> Strategic acquisitions contribute to Google's and Facebook's market power in the relevant markets and the sizeable effects on competition of past acquisitions by Google and Facebook (such as Facebook's acquisition of Instagram and Google's acquisition of DoubleClick), the ACCC considers it critical to establish processes that ensure the ACCC is notified early of potential acquisitions.[42]

In most other countries in the Organisation for Economic Co-operation and Development (**OECD**), competition regulators mandate that mergers are notified to them where certain thresholds are exceeded, usually relating to the turnover of the merger parties (within the jurisdiction or sometimes worldwide), the value of the assets or shares being acquired and/or the relevant market shares of the merger parties. Merger parties may also be required to suspend completion of a transaction until the regulator completes its review. In such regimes, violations of merger parties' obligations to notify a merger or complete the transaction prior to obtaining regulatory clearance, amount to unlawful "gun-jumping", which can be subject to significant penalties.[43]

The DPI Final Report recommendations raise a number of broader issues for consideration in the Australian context including:

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39 DPI Final Report, at 10.
40 Ibid at 30.
41 Ibid at 30.
42 Ibid at 109.
43 OECD, 'Suspensory effects of merger notifications and gun jumping' 20 February 2019 '(http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2018)11&docLanguage=En), at 2.

- whether the current voluntary merger notification regime operated by the ACCC is inadequate and if so, what its shortcomings are; and
- the pros and cons of mandatory and/or suspensory merger control regimes versus voluntary systems like Australia's.

Overview of merger notification regimes in other jurisdictions

The below table contains a high level overview of how Australia's merger notification regime compares to other comparable jurisdictions.

Jurisdiction	Mandatory notification?	Notification threshold	Obligation to suspend transaction?
Australia	No – voluntary	No formal threshold for notification. Guidance recommends notifying the ACCC where goods or services supplied are substitutes / complements and the merged firm's market share >20%.	No
Canada	Yes – where thresholds exceeded	Size of transaction test (based on book value or turnover exceeding CDN $96m). Size of assets test (based on assets or turnover exceeding CDN $400m).	Yes – mandatory
European Union (European Commission)	Yes – where thresholds exceeded	Merger parties must notify if they meet at least one of two tests based on turnover (based on worldwide and EU-based turnover thresholds).	Yes – mandatory
New Zealand	No – voluntary	No formal threshold for notification. Guidance suggests safe harbours where mergers are unlikely to raise competition concerns, based on market share in New Zealand.	No
Singapore	No – voluntary	Guidance recommends notifying transactions where certain market share thresholds in Singapore are exceeded.	No
United Kingdom	No – voluntary (but reforms proposed by the CMA)	Guidance recommends notifying transactions where the target's turnover in the UK exceeds £70m and the merged firm's market share > 25% in any relevant market(s). A lower turnover threshold applies to some designated sectors.	No
US	Yes – where thresholds exceeded	A party to the transaction must be engaged in US commerce or an activity affecting US commerce, and the transaction exceeds certain thresholds relating to worldwide turnover and/or value of securities acquired.	Yes – mandatory

The Committee notes that, while the merger notification in the UK is currently voluntary, the Chair of the Competition and Markets Authority (**CMA**) is advocating for reforms to be introduced post-Brexit which would see the UK move to a mandatory and suspensory notification regime.[44] One of the key drivers for this proposed change is the anticipated increase in merger case load that the CMA is likely to face post-

[44] CMA, Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy, (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf) at 41-2.

Brexit, as it will now need to review a large number of multi-jurisdictional mergers which were previously reviewed by the European Commission. This driver for reform is obviously specific to the CMA's situation.

Voluntary notification and suspension in Australia

As described in section 2.1, there is no mandatory requirement for merger parties to notify the ACCC of a proposed merger or acquisition. However, the ACCC currently has a high level of compliance by business of notifying proposed merger transactions voluntarily. The ACCC Merger Guidelines contain notification thresholds set by the ACCC, namely, that merger parties are encouraged to notify the ACCC prior to completion of a transaction where both of the following apply:[45]

- the products of the merger parties are substitutes or complements; and
- the merged firm will have a post-merger market share of greater than 20% in the relevant market(s) affected by the merger.

Under the informal clearance process, merger parties are not obliged to suspend a transaction while the ACCC completes its review. There are no penalties for merger parties completing a transaction prior to an ACCC review being completed, but they bear the risk that the ACCC may subsequently investigate and impose remedies (either through court enforceable undertakings or court action), including penalties or divestiture if competition concerns are identified.

However, the ACCC can request that merger parties voluntarily provide a court enforceable undertaking under section 87B of the CCA not to complete a transaction while it completes its informal clearance review (noting that merger parties are not required to provide such an undertaking and, in some cases, refuse to do so).[46] If merger parties breach a section 87B undertaking, the ACCC can seek redress in the Federal Court. The ACCC also has the ability to seek injunctive relief from the Federal Court to stop a transaction from proceeding.

Under the formal merger authorisation process, merger parties are effectively required to suspend completing a transaction. The applicant (acquirer) is required to make an application for authorisation to provide a section 87B undertaking to the ACCC that it will not complete the transaction while its application is being considered. This is specifically provided for by section 89(1AA) of the CCA. The ACCC can only review proposed and not completed acquisitions under the merger authorisation process.[47]

What are the potential advantages and disadvantages of mandatory and/or suspensory merger notification regimes?

There are a number of arguments for and against the introduction of mandatory and/or suspensory merger notification regimes. The Committee's views on the potential advantages and disadvantages of mandatory and/or suspensory merger notification regimes are captured in Annexure B and summarised below.

Principally, the arguments for mandatory and/or suspensory regimes focus on generating transparency and certainty for merger parties around when transactions need to be notified to the competition regulator and efficiency, by allowing the regulator to focus its resources on reviewing those transactions most likely to raise competition concerns.

Mandatory and suspensory regimes are also considered to address the problem of the "midnight merger" which may arise in voluntary regimes, whereby merger parties may seek to complete a potentially

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45 ACCC, Merger Process Guidelines, at [2.5].

46 For example, the ACCC obtained section 87B undertakings from the acquirer in relation to Qube's proposed acquisition of Maritime Container Services (2017) and from Dometic Group in relation to its proposed acquisition of Atwood (2015).

47 Merger Authorisation Guidelines, at [3.10].

anti-competitive merger in the hope that it will go undetected by the competition regulator. Theoretically, there is a greater risk of this occurring where there is commercial pressure for the merger to proceed as soon as possible – including where, for example, the target firm will enter liquidation if it is not acquired in the near future. It may be difficult for the ACCC to prepare a thorough assessment of the merger when placed under time pressure. Moreover, the changes implemented may not be reversible, even if the ACCC is successful in seeking divestiture or other remedies, and this risk increases the longer the ACCC takes to consolidate its case.

Arguably, the potential costs and inconvenience of reversing the merger if the ACCC is successful acts as a deterrent to merger parties proceeding without the ACCC's clearance. It is difficult to obtain any precise statistics as to the number of mergers which proceed without notification to the ACCC. However, the Committee understands there have only been two court cases taken in response to midnight mergers in Australia.

The first was in 1996, when the TPC took action against the acquisition by Pioneer International Limited and its subsidiary of a vigorous competitor, after finding that prices had risen significantly in the South East Queensland concrete masonry market. The merger parties subsequently co-operated with the ACCC's investigations, and the Court awarded penalties and costs totalling $5 million for breach of the merger laws.[48]

The second was in 1988, which involved the acquisition by Australian Meat Holdings (**AMH**) of Thomas Borthwick & Sons' abattoir operations in the northern Queensland fat cattle market. The TPC sought an interlocutory injunction requiring AMH to withdraw its offer to purchase the assets, which was declined after AMH accepted the risk of divestiture if its bid was successful. The TPC was successful in obtaining a court order requiring divestiture of the shares if the transaction was completed, on the basis that the merger placed AMH in a position to dominate the relevant market.[49]

In recent times, the ACCC has reviewed a number of completed mergers. In some cases, it has required undertakings which had the effect of restoring market structure to its pre-acquisition state. For example, Primary Health Care acquired certain pathology assets previously operated by Healthscope in Queensland in 2015, without notifying the ACCC. The ACCC subsequently required Primary Health Care to divest those assets.[50] Nonetheless, even in circumstances where problematic mergers proceeded without ACCC notification, the merger parties have subsequently cooperated with the ACCC to restore competition to the relevant market. The ACCC has not been required to take legal action to unwind the merger and seek remedies.

More broadly, mandatory and suspensory notification regimes are not without some drawbacks, with challenges associated with appropriately defining notification thresholds which are workable and effective in capturing anti-competitive mergers across all industries (not to mention additional administrative burden for agencies to reviewing thresholds on a periodic basis to ensure they remain relevant). In many mandatory regimes, competition regulators still retain the ability to investigate mergers which do not exceed notification thresholds - therefore they may not necessarily deliver greater certainty to merger parties.

6. Is there a role for ex-post merger reviews in Australia?

An alternative approach to changing Australia's merger laws would be to initiate a systematic review of past merger decisions – both where the ACCC has opposed and allowed mergers – to test the

[48] See, eg, https://www.accc.gov.au/media-release/5m-court-award-for-illegal-acquisition.
[49] *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299
[50] See, eg, https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/primary-health-care-limited-acquisition-of-pathology-assets-previously-operated-by-healthscope-in-queensland.

robustness of the merger regime. These reviews can help identify what an agency is doing well and what it could be doing better when investigating mergers. These reviews – known as *ex-post* merger reviews – can also help answer questions such as:

(a) why the ACCC may be having difficulties convincing courts of the merits of its case;

(b) whether the ACCC's competitive assessment is appropriate; and

(c) whether the interventions it makes in some mergers – in terms of merger remedies – are working.

Of the seven contested merger cases since 2003, two have occurred very recently, and so an *ex-post* review is not likely to be possible (being Pacific National/Aurizon and Vodafone/TPG). That leaves five cases since 2003 that could be candidates for an assessment of whether they were false negatives.

This section sets out some of the methodological issues that any agency would face in undertaking *ex-post* reviews and then summarises key insights from the US, UK and New Zealand in response to the three questions posed above.

6.1 Methodological issues with *ex-post* reviews

Determining when a consummated merger has or has not harmed competition is challenging. If the relevant agency seeks to assess the effect of the merger on prices in the market, identifying the relevant price will not be straightforward and data may not always be available to undertake the assessment. It will be even more challenging to estimate what prices might have been *but for* the merger.

A "difference-in-differences" methodology can overcome some of these difficulties. This approach identifies two separate markets – a "treatment" market which has been affected by the merger and a "control" market, which has not been affected by the merger. The methodology estimates the merger effect as the difference between any price changes in the treatment market and the price change in the control market. So if, for example, prices have increased by 10% in the treatment market and only 5% in the control market, then the impact of the merger may have been to increase prices by 5%.

A difference-in-differences methodology could be used if a merger took place in some local markets rather than other markets. Those local markets could then be categorised as either a control or a treatment market, although further assumptions are still needed. For example, the demand and cost factors will need to be identical across the control and treatment markets and those demand and cost factors will also need to affect prices in the same way across those markets. If, on the other hand, the merger took place in a national market, it will be harder to identify a control market that was unaffected by the merger (and which faced the same demand and cost factors as the treatment market).

6.2 Insights from international experience with *ex-post* reviews

Despite the methodological challenges associated with undertaking robust quantitative *ex-post* reviews and although the objectives behind the *ex-post* reviews undertaken in different jurisdictions differ, there are a number of insights from the experience in those jurisdictions which can help answer the questions set out above (and below).

Why the ACCC may be having difficulties convincing courts of the merits of its case

Ex-post reviews of merger should not *only* be undertaken when an agency has failed to convince a court that a merger is likely to substantially lessen competition. Reviews of mergers that are not opposed or which are allowed with remedies can often provide insights that can help an agency improve its performance and a regular review of these types of mergers should become a tool that is regularly used by an agency to review its effectiveness and continuously improve its performance.

However, reviews of high-profile cases could be an important way of identifying if there are any blind spots and how those blind spots could be addressed. For example, between 1995 and 2002, the Federal Trade Commission (**FTC**) and the US Department of Justice (**DOJ**) lost all seven hospital mergers that

were litigated in US federal courts during that time. That losing streak was in contrast to the period between 1984 and 1995 where the FTC and DOJ won five of the six contested mergers relating to hospitals.[51]

In 2002, the then Chairman of the FTC, Timothy Muris, responded to those losses by announcing the following two institutional reforms:

(a) First, he established a new merger litigation task force to screen targets, select the best cases, and develop new strategies for trying them. The merger task force was also asked to take a "hard look" at which strategies worked and which did not in the prior hospital merger cases.

(b) Second, he initiated a series of *ex-post* reviews – which are called retrospective studies in the US – of consummated hospital mergers which would evaluate the effects of hospital mergers in several cities.

Importantly, the reviews were not aimed at assigning blame about why the agencies were unsuccessful in the seven contested hospital merger cases. Instead, they were aimed at understanding what had happened and how the agencies could improve their performance in selecting and litigating *future* cases. Timothy Muris also indicated that he would announce the results of these studies regardless of the outcome:

> [I]f the studies find efficiencies associated with some or all of the mergers, the staff will say so. If, on the other hand, the studies indicate that the mergers were anticompetitive, then Commission will carefully consider whether administrative litigation is appropriate. Whether or not there is an appropriate remedy will obviously influence the Commission's analysis of whether to pursue such a proceeding. In either event, the agency will obtain useful real-world information, allowing the Commission to update its prior assumptions about the consequences of particular transactions and the nature of competitive forces in health care. In California Dental, the Supreme Court emphasized the importance of relying on real-world empirical evidence, instead of hunches, guesswork, and theoretical predictions. The retrospective study represents an effort to meet this challenge. To the extent ex-post data reveal a real problem in some of these mergers, that data may bolster the Commission's position the next time it seeks a preliminary injunction against a proposed merger in federal district court.[52]

As a result of those studies two changes were made to the way that future hospital mergers were litigated.

- First, a different approach was taken to define the geographic boundaries of the relevant market in response to the view that the approach previously taken frequently generated markets that were too large.
- Second, a change was made to the way that the evidence concerning the pricing incentives facing not-for-profit hospitals was presented to the courts. Prior to the reviews, courts were receptive to the argument that not-for-profit hospitals lacked the incentive to increase prices post-merger. Data from the *ex-post* reviews showed that this was not always the case and that data was presented to the Court in subsequent contested mergers.

The current Chairman of the FTC, Joseph J Simons has argued that the *ex-post* reviews undertaken by his predecessor in response to the seven consecutive losses were critical in subsequent hospital merger challenges.[53] Since 2008, the FTC's track record in contested cases has been reversed with

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51 See Thomas L. Greaney, *Whither Antitrust? The Uncertain Future of Competition Law in Health Care*, 21 HEALTH AFF, 2002, at 185-6.

52 Timothy Muris (2002), "Everything Old is New Again: Health Care and Competition in the 21st Century" available at: https://www.ftc.gov/news-events/press-releases/2002/08/federal-trade-commission-announcesformation-merger- litigation.

53 Prepared Opening Remarks of Chairman Joseph J. Simons at Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives.

at least seven hospital mergers now having being blocked or abandoned, without any changes to US merger laws.

Whether the competitive assessment in mergers that are not necessarily contested is appropriate

The insights that enabled the FTC to identify flaws in the ways that hospital mergers were litigated between 1995 and 2002 were collected largely because detailed data was available to assess how prices changed (or did not change) as a result of those hospital mergers.

In many cases, however, data may not be available to undertake a pricing study to assess whether a merger has actually had an anti-competitive effect in the market. The NZ Commerce Commission identified this limitation as a reason for changing the way it conducted its reviews of past mergers.

In the past, the Commerce Commission undertook one investigation a year of a cleared merger that had raised significant competition issues, based largely on extensive interviews of industry participants to determine the likely competitive consequences of the merger.

That approach was, however, seen as falling short of the "gold standard" of *ex-post* reviews, which was the use of difference-in-differences modelling discussed above. As a result, the Commerce Commission changed its approach to *ex-post* reviews and now seeks to determine whether anticipated market developments that were critical to its decision, such as entry or increased imports, did in fact take place and if not, why not.

In other words, the Commerce Commission reviews whether certain market conditions developed as predicted. This is done with the aim of refining and improving the tools and techniques used in making those predictions. A review in 2015 contained the following insights around the market conditions predicted by the Commerce Commission in 18 mergers:

(a) Of the 17 markets in which the Commerce Commission *relied on entry occurring* to discipline any substantial lessening of competition, entry occurred in 12 of them.

(b) Of the 20 markets where *existing competition was relied on* as a key reason for the clearance, in 18 of them those competitors remain. In the two markets where effective competition did not remain, in one there was exit by the sole remaining market participant because of concerns around its product. There was subsequent entry two years after that exit by a third party. In the second market, the effectiveness of import competition varied depending on fluctuations in the exchange rate.

(c) In the two clearances where *a business line was divested as part of the merger*, the divested business has managed to maintain a similar market share as to when the business was owned by a merging party.

(d) In the one matter where *buyer sponsorship of entry was relied upon*, such entry had not occurred but the identified sponsor indicated that it would still do so were prices to become too high.

The key finding from the NZ review was that even when data is limited and there is insufficient information that allows for a thorough assessment of how markets developed following a merger (let alone a sensible way to assess how markets would have evolved absent the merger) *ex-post* reviews can still produce useful insights. The benefit is in understanding whether aspects of the market relied upon in that decision proved correct, rather than whether the decision to oppose or allow the merger was correct or not. This allows for the identification of deficient techniques that can be improved and good techniques that can be relied upon.[54]

[54] Lilla Csorgo and Harshal Chitale, Targeted ex-post evaluations in a data poor world, 2015 accessed at the following link: https://comcom.govt.nz/__data/assets/pdf_file/0026/74744/Targeted-Ex-Post-Evaluations-in-a-Data-Poor- World.pdf.

Ex-post reviews that do not rely on modelling of the price effect following the merger have also been undertaken in the UK. In May 2019, the CMA hired the economic consultancy, Lear, to undertake an independent ex-post evaluation of some past merger cases. Lear assessed potential competition theories of harm in technology sector mergers focusing on four previous Office of Fair Trading (**OFT**) merger inquiries – Facebook/Instagram, Google/Waze, Priceline/Kayak, and Amazon/ The Book Depository.

As with the *ex-post* review in NZ, no detailed analysis was made of the price changes following the mergers. Instead, the project drew lessons from economic theory and literature on technology markets, and from reviews of past technology merger decisions, to understand whether the CMA should re-think its approach in assessing mergers in the technology sector.

Lear found that there were certain gaps in the way these cases were analysed. These included an undue focus on consumers when dealing with two-sided markets and a lack of understanding of certain digital markets. For example, in *Facebook/Instagram*, the agencies might have neglected to analyse the factors that drive advertisers' choices, how the merging parties fared with respect to each of them, and how their combination could have resulted in competitive harm. Similarly, in *Amazon/The Book Depository*, the agencies neglected the existence of a possible vertical relationship between the merging parties, which may have called for the investigation of foreclosure theory of harm.[55]

Ultimately, however, Lear found that these gaps did not undermine the legitimacy of the decisions made by the agencies and were based on the best knowledge available at that time in the relevant agencies of how digital markets operated.

Whether the interventions the ACCC makes in some mergers are working

Ex-post reviews can also help to assess whether the remedies that an agency might impose on certain mergers that it feels would lessen competition actually achieve their objectives.

For example, in 2017, the FTC undertook a review of the effectiveness of its merger remedy programme, which studied all of its merger orders from 2006 to 2012. The review built on an earlier study completed by the FTC in 1999,[56] and used a mix of case studies, questionnaires, and internal and publicly available information and data.

The main findings of the review were that all of the divestitures involving an ongoing business succeeded, while divestitures of limited packages of assets in horizontal, non-consummated mergers fared less well (although these still achieved a success rate of approximately 70%). Remedies addressing vertical mergers also succeeded. Overall, with respect to the 50 orders examined, more than 80% of the Commission's orders maintained or restored competition. The review also identified certain areas in which improvements can be made. Specifically, some buyers expressed concerns with the scope of the asset package, the adequacy of the due diligence, and the transfer of back-office functions.

In June 2019 in the UK, the CMA produced a similar report aimed at developing the CMA's expertise, policy and practice on merger remedies. Its aim was to set out some of the evidence underpinning the CMA's approach to merger remedies, provide a backdrop for wider policy and legislative discussions, and help the CMA to develop and implement remedies that have an effective and timely impact on competition concerns.

The CMA reported that the findings of the merger remedy evaluations have been used to inform the way in which the CMA approaches remedy design and implementation in subsequent cases.

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55 Lear for the CMA, Ex-post assessment of merger control decisions in digital markets, 9 May 2019.

56 Federal Trade Commission, January 2017, The FTC's Merger Remedies 2006-2012: A report on the Bureaus of Competition and Economics.

6.3 Other observations

Merger analysis is a predictive exercise. It requires the ACCC to compare two likely future states — the future with the merger and the future without the merger. Both are uncertain and require assumptions to be made based on incomplete information.

Ex-post reviews are a way for the ACCC to test whether the predictions that it is making about the future state with the merger and the future state without the merger are appropriate. The insights from the FTC's reviews into hospital mergers – which were used to help overturn a seven case losing streak – demonstrates their utility in helping the agency to be confident that its predictions are accurate which in turn can increase its chances of convincing courts of the merits of its case.

The insights used by the FTC from its *ex-post* reviews of hospital mergers were possible because of the detailed pricing data that was readily available in that industry. That information will typically not be available in many other industries. However, agencies in the UK and New Zealand have shown that *ex-post* reviews can still be undertaken that also produce useful insights that can help ensure that the merger regime remains fit for purpose.

7. Are Australian markets becoming more concentred, and if so, is this a problem?

7.1 Overview

In section 3 above, we observe that the ACCC has said that there are a number of difficulties in successfully opposing merger cases. This would imply that some mergers that were likely to cause a substantial lessening of competition have gone ahead. Such a lessening of competition would presumptively be bad for the welfare of Australians, leading to lower output, higher prices and poorer quality of service.

If the ACCC is correct that there are difficulties in proving that some mergers are anti-competitive, we would expect to be able to observe evidence of these outcomes in markets. The gathering of such evidence requires in-depth investigations of what has happened in markets after mergers have gone ahead. However, as far as we are aware, no such analysis has been undertaken in Australia. We set out in section 6 of this paper our observations on the role that *ex-post* merger reviews may play in this regard.

There have been recent calls to change merger laws overseas, most notably in the US, in response to increases in concentration and pricing mark-ups over the past 20 years or so. However, despite a great deal of research, a convincing case has not yet been made that greater concentration is *causing* weaker competition in the US because:

(a) concentration is usually measured in this research at an industry and national level, which does not reflect the way that markets are defined for the purpose of examining competition;

(b) pricing mark ups (i.e. the extent to which prices are above marginal cost) are difficult to measure and likely do not reflect economic profits;[57] and

(c) there are a number of reasons why levels of concentration and mark-ups may both rise that do not involve the concentration *causing* the higher mark-ups, such as:

[57] A firm's accounting profit is the difference between its revenues and operating expenses, which includes an allowance for the allocation over time of the cost of past investments, i.e., depreciation. In contrast, economic profit is the difference between a firm's revenues, operating expenses and the opportunity costs of inputs used to make its sales, where the opportunity cost of using a unit of resource is the maximum amount that a unit could earn elsewhere. Economic profit rather than accounting profit is relevant for evaluating market power.

- an increase in the degree of fixed costs, which would lead to higher mark-ups to allow firms to recover the greater fixed costs, and also perhaps fewer competitors because the efficient scale of firms may increase if there are higher levels of fixed costs;
- more sales or greater competition in 'winner-take-all' markets, giving the winners a high market share and level of mark-up;[58] and/or
- an increase in barriers to entry.

The little research that has been conducted regarding concentration in Australia shows that Australian industries are not particularly concentrated, on average. Some research has found that, on average, the market shares of Australia's large firms have not changed much in recent times. However, other research has found a small increase in concentration from around 2008 to 2016 amongst industries that were more concentrated to begin with. This is a limited evidence base, but it does not indicate that Australia has a substantial problem with levels of concentration.

Even if concentration levels are high, this alone does not necessarily indicate that there is weak competition. Indeed, high levels of concentration can come about through the competitive process, whereby firms that supply better products at cheaper prices grow at the expense of other firms.

The research from the US demonstrates that it is very difficult to draw conclusions about the suitability of merger law from studies of concentration and profit measures across the whole economy. We have provided with this paper the outcomes of research and analysis conducted by Houston Kemp Economists on this issue.

Undertaking more work examining concentration at an aggregate level in Australia is therefore unlikely to help establish whether merger law is appropriate. In the Committee's opinion, the most productive analysis would be to examine whether mergers that the ACCC tried unsuccessfully to block can subsequently be said to have lessened competition.

7.2 Existence of an economic case for a change to merger laws

As far as the Committee is aware, the ACCC has yet to put forward substantive economic evidence supporting a change to the merger law.

A perfect system of merger control would block every anti-competitive merger and allow all other transactions. In practice, merger control systems operate imperfectly, allowing some false positives (blocking a merger that is not anti-competitive) and false negatives (allowing an anti-competitive merger). A taxonomy of possible outcomes is presented in the table below.[59]

[58] The mark-up for the "winner" is high because many firms do not win and make a loss, so the "winner" needs to make a high mark-up so that the expected profit is sufficiently high for firms to attempt to supply the product or service.

[59] In statistic hypothesis testing, a type I error is the rejection of a true null hypothesis, or a "false positive". A type II error is the non-rejection of a false null hypothesis, or a "false negative".

		Effect of merger	
		Benign or pro-competitive merger	Anti-competitive merger
Decision	Merger allowed	Correct decision	False negative (anti-competitive merger allowed)
	Merger blocked	False positive	Correct decision

In general, there will be a trade-off between the risk of false negatives and false positives, i.e.:

(a) a more lenient system may lead to fewer false positives, but more false negatives; whereas

(b) a stricter system will have fewer false negatives, but more false positives.[60]

Both forms of incorrect outcomes are likely to be associated with welfare losses, i.e.:

- allowing an anti-competitive merger could lead to lower output, higher prices, or less innovation; and
- blocking a pro-competitive merger may prevent synergies that cannot otherwise be achieved and would have led to lower costs and/or prices, and greater output or higher levels of quality.

The relative concern and weight placed on false positives and negatives has a significant bearing on the normative position on how merger law 'should' be designed and whether Australian merger control arrangements 'should' be reformed.

The case for merger reform is implicitly predicated on the position that there is an undesirably high level of anti-competitive mergers (false negatives) taking place, and proponents would presumably be willing to trade off a higher number of false positives to reduce the number of false negatives.

One natural starting point for assessing the need for reform would be to evaluate the number and nature of the false positives and false negatives it has produced. Such evidence would involve an assessment of the outcomes of actual mergers.

False negatives should be readily observable. If anti-competitive mergers were taking place, we would expect there to be industries in which the ACCC has failed to prevent a merger with prices, margins, or profits increasing post-merger, and remaining so for a material period of time. This requires a review of whether market outcomes reflect a lessening of competition post-merger, in other words, an *ex-post* merger review.

7.3 Economic research on concentration and levels of concentration

In the last few years there has been a debate amongst economists and others regarding whether concentration has increased, whether this is a problem, and what should be done if there is indeed a problem. Most of this work has focussed on the US.

The main stylised facts discussed in this research are that, over the last 10-20 years in the US:

- concentration at a national industry level has increased;
- average (mean) margins have increased; and

[60] This is not always the case. For example, receiving better information on merger cases could reduce both types of errors.

- some measures of business dynamism have fallen, e.g., the rate of firm exit and labour mobility.

However, there are a number of problems with measuring these stylised facts:

- measures of concentration typically use publicly listed firms only, omitting privately traded firms;
- competition analyses examine the level of concentration in a *market*, and this may be a smaller geographic area than nationally and also involve a narrower range of products than those supplied across a whole industry – indeed, Rossi-Hansberg et al (2018)[61] found that local measures of concentration have been falling in the US, even as national measures have increased;
- there are a number of ways to estimate mark-ups, but none are perfect and a recent analysis of these found that two of the three commonly used approaches provided results that were too large to be credible;[62] and
- mark-ups may not represent economic profits, which are the relevant measure for assessing market power.[63]

Despite these measurement problems, the increase in industry concentration has been linked to rising mark-ups, market power, the increasing profits of large firms, declining competition, labour market dynamism, firm entry and labour share of income.[64] For example, the Council of Economic Advisers in 2016 said that "*competition appears to be declining in at least part of the economy*".[65]

In John Kwoka's recent book "Controlling Mergers and Market Power", Kwoka proposed some changes to the way in which mergers were examined in the US, in part due to the evidence of increasing concentration and margins.[66] Kwoka derives his conclusions from the evidence of increasing concentration and mark-ups, but also from "*what types of mergers are mistakenly being approved [and analysis of] the reasons for those erroneous policies*".[67] In other words, he also examined the false negatives.

Setting aside whether mark-ups and concentration have been properly measured, there are a number of problems with drawing a conclusion that greater concentration has weakened competition, leading to higher mark-ups in the US:

(a) even if the levels of *market* concentration did reflect those of industry concentration, they are generally not very high, even after the recent increase. The US Government has said that its agencies and other economists "…*often find evidence of robust competition in markets with only a few firms engaged in head-to-head competitio*n";[68]

(b) the relevance of concentration to the degree of competition is not uniform across markets – it depends on the form of competition, the nature of the product/service and barriers to entry, amongst other things; and

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[61] Rossi-Hansberg, E, Sarte, P-D and Trachter, N, *Diverging trends in national and local concentration*, NBER Working Paper No. 25066, September 2018

[62] Basu, S, *Are Price-Cost Markups Rising in the United States? A Discussion of the Evidence*, Journal of Economic Perspectives, Volume 33, Number 3, Summer 2019, at 19.

[63] See, for example: Bork, R H and Sidak, J G, *The misuse of profit margins to infer market power*, Journal of Competition Law and Economics, at 9(3), 2013; Fisher, F M and McGowan, J, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, American Economic Review, at 73(1), 1983.

[64] See, for example, Rossi-Hansberg, E, Sarte, P-D and Trachter, N, *Diverging trends in national and local concentration*, NBER Working Paper No. 25066, September 2018, at 2; United States Government, *Economic report of the President*, February 2020, at 201, 209.

[65] Council of Economic Advisers, *Benefits of competition and indicators of market power*, May 2016, at 4.

[66] Kwoka, J, *Controlling mergers and market power: a program for reviving antitrust in America*, Competition Policy International, Boston, 2020, at 21-2.

[67] Ibid at 20.

[68] United States Government, *Economic report of the President*, February 2020, at 211.

(c) there are a range of reasons why mark-ups and levels of concentration may have increased, including some that do not relate to a lack of competition, including:

- there may now be more (or larger) markets where competition is 'for the market', giving some firms a large market share and mark-up;
- fixed costs may be increasing leading to higher mark-ups, whilst greater economies of scale and scope associated with those fixed costs lead to firms efficiently increasing their market share; and
- barriers to entry may have increased, leading to fewer entrants and higher mark-ups.

The combined research reviewed shows that there are substantial difficulties with reaching conclusions about the causes of concentration from cross-industry studies. For example, some recent cross- industry studies have been described as "*problematic and incomplete, and their implications for competition remain speculative*".[69]

In summary, after a substantial amount of research in the US on levels of concentration, mark-ups and market power, a clear causal link between concentration and mark-ups has not been established. A number of authors have noted that further work is required, despite evidence of higher margins and levels of concentration.

The US Government has suggested that conclusions about the state of competition should be made on the basis of careful research about specific industries.[70] We agree with this approach.

7.4 Have Australian markets become more concentrated?

Concentration can be measured in a number of different ways:

- it can measure the share of sales value, employment, volume sold, or other measures for each firm; and
- the share may be of all firms in a market or an industry.

However, the analysis of competition usually measures *market concentration*, being, what share of a properly defined antitrust market does each firm supply? In contrast, research on levels of concentration usually measures some form of *industry* concentration across the whole country, being, what share of an industry in Australia, such as construction, does each firm supply?

Market concentration may not be correlated with measures of industry concentration, as has been found to be the case in the US. In other words, industry concentration may increase, whilst market concentration falls.

Australian evidence on concentration

In contrast to the US position, there is much less evidence regarding the degree of concentration in Australia. A summary of the existing evidence is below.

In 2016, Rod Sims stated that the rise of large corporations in the Australian economy has been substantial.[71] Using analysis by Port Jackson Partners, Rod Sims said that "*the revenue of Australia's largest 100 listed companies increased from 27% of GDP in 1993 to 47% of GDP in 2015. This compares to the US figures of 33% to 46%.*"[72]

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69 Ibid at 201.

70 Ibid.

71 ACCC media release, ACCC Chairman discusses the increasing concentration in Australia's economy, 27 October 2016.

72 Ibid. Note that the Grattan Institute found that "*[t]he observation of ACCC Chair Rod Sims … relied on analysis that appears to have included only firms that were still listed on the ASX at the end of the time period examined, and to have excluded firms that delisted in years prior, leading to an incorrect finding that the revenues of the largest ASX listed firms have grown faster than GDP over time.*": Grattan Institute, *Competition in Australia. Too little of a good thing?*, December 2017, at 31.

The Grattan Institute published a report in 2017 that examined whether competitive pressure in Australia was weakening.[73] It came to a number of conclusions, including that:[74]

- large firms are not unusually dominant in Australia, given the size of its economy;
- some large Australian markets are highly concentrated, but few are much more concentrated than in other economies of Australia's size;
- the market shares of Australia's large firms have not changed much lately, on average;
- revenues of large listed firms have not grown faster than the GDP;[75]
- a few large sectors (such as banking) have become more concentrated, while others (such as supermarkets) have become less concentrated. In a few sectors (such as media), once-mighty firms have been disrupted by new, online competitors; and
- the profitability of firms in Australia has not risen much since 2000 or become more dispersed.

This report supports the proposition that Australia is not more concentrated than other OECD countries[76] and found that "*there is no evidence that competitive pressure in Australia has systematically deteriorated*".[77]

A staff paper published by the Department of Industry, Science, Energy and Resources in 2019 examined trends in the concentration of Australian industries.[78] It found that the mean Herfindahl-Hirschman Index (**HHI**)[79] at the industry and national level was relatively stable from 2002 to 2008, and then increased from around 800 in 2008 to 900 in 2016.[80] This is only a small increase. For example, the HHI would increase from 850 to 950 if there were initially six firms with a 5% market share and seven firms with a 10% share, and subsequently there were two mergers so that there were two firms with a 5% share and nine with a 10% share.

Most of the increase in mean HHI over the last few years is caused by industries that are more concentrated than average (but not the most concentrated), whilst industries with less than the mean HHI experienced little if any change in their concentration, on average.[81]

Leigh and Triggs (2016) found that the weighted four firm concentration ratio (**CR4**) for Australia in 2016 was 36%.[82] In other words, on average, the four largest firms supplied 36% of the industry. This is not particularly concentrated. For example, a CR4 of 36 would result from three firms having a 10% share, one firm having 6%, and a large number of smaller firms.

Similarly, Hambur and La Cava (2018) examined the CR4 in each four digit Australian and New Zealand Standard Industrial Classification (**ANZSIC**) industry using the value of sales.[83] Examples of these industry groups include iron and steel forging, car retailing, clothing retailing, cafes and restaurants, rail freight transport, newspaper publishing, software publishing and health insurance.

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73 Grattan Institute, *Competition in Australia. Too little of a good thing?*, December 2017.
74 Ibid at 3.
75 Ibid at 20.
76 Ibid at 18.
77 Ibid at 19.
78 Bakhtari, S, *Trends in market concentration of Australian industries*, Department of Industry, Innovation and Science staff paper, September 2019.
79 HHI is the sum of the squared market shares for all firms in a market. It can be written as a number from 0 to 1 if the market shares are taken to be a number from 0 to 1, or from 0 to 10,000 if the market shares are taken to be a number from 0 to 100. A HHI of 0.1 from Bakhtari (2019) is the same as a HHI of 1,000 in the way that most competition lawyers and economists use it in Australia.
80 Bakhtari, S, *Trends in market concentration of Australian industries*, Department of Industry, Innovation and Science staff paper, September 2019, at 1.
81 Ibid at 2, 8, 9.
82 Leigh, A and Triggs, A, *Markets, monopolies and moguls: the relationship between inequality and competition*, Australian Economic Review, vol 49 no 4, 2016.
83 Hambur, J and La Cava, G, *Business concentration and mark-ups in the retail trade sector*, RBA Bulletin, December 2018, at 3.

Hambur and La Cava (2018) found that in 2014/15, the top four largest firms in each industry accounted for about 42% of total industry output on average (and 37% in the median industry). They say that most industries have become more concentrated:

> [A]bout 78 per cent of Australian four-digit ANZSIC industries are estimated to have recorded an increase in concentration between 2001/02 and 2014/15. The industries that became more concentrated are typically in services sectors, including information, media & telecommunications, retail trade, and education services (Graph 2). The industries that became less concentrated over this time are generally in the mining, accommodation & food services, and rental, hiring and real estate services.[84]

Hambur and La Cava (2018) also found that the retail trade sector accounts for much of the overall increase in business concentration in Australia, but this sector has become more competitive since 2011, with falling mark-ups from that point, despite growing concentration.[85] This helps to demonstrate that examining concentration alone does not provide information regarding the competitiveness of an industry or market.

Although it is not the purpose of this paper to provide a detailed assessment of this evidence, there is an important observation to be made in relation to references by both the ACCC and the Grattan Institute as to increases in the total revenue of Australia's largest companies, relative to GDP. In contrast to research by other parties cited above that seek to measure individual company shares at an industry or sectoral level, the ratio of large company revenues to GDP is *not* a measure of concentration.

Firm revenue and GDP are quite different economic concepts: one reflects 'turnover' while the other is a measure of 'value added', i.e., the value of outputs net of inputs. Further, in an open economy such as Australia, a significant proportion of listed companies' revenue (and profits) will be derived from overseas activity, so that any apparent change in the size of this metric may simply represent the increasing internationalisation of Australian corporations.

Finally, listed companies – as distinct from those whose capital is derived from alternative, unlisted sources – represent a subset of all firms participating in the Australian domestic economy, and the relative size of this subset can be expected to fluctuate for reasons unrelated to the level of concentration.

Irrespective of the merits of the above evidence, to the extent that there has been an increase in the concentration of markets in Australia, it is not caused in any significant way by anti-competitive mergers that the ACCC has unsuccessfully attempted to block. As discussed in section 2, there have only been a very small number of mergers that the ACCC opposed but which ultimately went ahead.

7.5 Is greater concentration a problem?

Concentration in markets can increase for a number of reasons, including:

- anti-competitive mergers taking place;
- pro-competitive mergers taking place;
- changes to technology that increase the efficient scale of firms;
- increasing barriers to entry;
- changes to the types of products or services supplied in an economy; or
- increasing competition, such that firms supplying better products grow more quickly.

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84 Ibid at 5.

85 Hambur, J and La Cava, G, *Business concentration and mark-ups in the retail trade sector*, RBA Bulletin, December 2018, at 5-6,12,18.

It follows that even if concentration could be accurately measured, an increase concentration would not itself establish that there was a problem with the merger law. A great deal of other information would be needed to establish the causes of greater levels of concentration.

As stated by the US Government:

> The assessment of the competitive health of the economy should be based on studies of properly defined markets, together with conceptual and empirical methods and data that are sufficient to distinguish between alternative explanations for rising concentration and mark-ups.[86]

The strong economic conclusion arising from these considerations is that the best way to examine whether there is a problem with merger law is to undertake detailed industry studies to examine what has happened after mergers have taken place that the ACCC opposed.

8. Are there any merger issues arising in the context of COVID-19?

There is the clear potential for an increase in failing firm acquisitions as a result of the economic impact of COVID-19. However, failing firm arguments are not new, and the Committee considers that the current test, and the ACCC's approach to that test, are already flexible enough to be able to consider and deal with them as part of a holistic assessment of potential competitive impacts.

Ultimately, the ACCC must be satisfied that the failing firm will exit the market in a future "without" the merger. The ACCC tends to closely scrutinise failing firm arguments and, in circumstances where the argument has been accepted in the past, the ACCC has needed to be satisfied that the failing firm (or its assets) were unlikely to be acquired by another company.

For example, in September 2019, prior to COVID-19, the ACCC opposed the proposed acquisition of Jewel Fine Foods by B&J City Kitchen. Jewel was in administration and the ACCC conducted a truncated public review in five weeks. It concluded that the deal would be likely to substantially lessen competition on the basis that Jewel and B&J City Kitchen were the two largest manufacturers of chilled ready meals in Australia and that, if the proposed acquisition did not proceed, an alternative purchaser was likely to buy Jewel and compete strongly with B&J City Kitchen. The ACCC subsequently cleared the acquisition of Jewel by Coles in March 2020, and noted that, by that stage, the likely alternative to the proposed acquisition would be liquidation of the Jewel assets.

COVID-19 will continue to result in more financially distressed businesses and could lead to opportunities to acquire distressed businesses/assets at lower prices. The ACCC has foreshadowed this and stated that such mergers will be assessed on a case by case basis. It has also said that it will continue to be focussed on the longer term impacts of deals on competition, beyond the immediate impacts on profits and share value of the merger parties during the pandemic.

More broadly, Rod Sims has commented not to "*expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anti-competitive increases in market power, or the rise of so-called 'national champions'.*"[87]

This is consistent with the approach taken by the ACCC to mergers during the global financial crisis. During that period, the ACCC stated, "*Merger regulation is not part of the current problem and any attempt to ease merger regulation may instead worsen the problem by maintaining inefficient companies and delaying the recovery.*"[88]

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86 United States Government, *Economic report of the President*, February 2020, at 215.

87 Rod Sims, Will competition survive the current crises?, Address to the Australian Financial Review Banking & Wealth Summit Crisis Briefing, 30 March 2020.

88 Sarah Court, Cartels, consumers and the role of the regulator – proposed changes to the Trade Practices Act, 12 March 2009.

We think that the current test is flexible enough to enable consideration to be given to issues such as whether:

(a) there is an imminent danger of the target exiting the market completely;

(b) there is any potential for the business to be successfully restructured;

(c) there are realistic alternatives to the merger that will provide a less problematic competitive outcomes, such as purchase of the firm by an alternative buyer or allowing the firm to fail;

(d) the prevailing economic and market conditions, including whether the firm is likely to be able to raise funds or any alternative bidders would be able to obtain finance; and

(e) the ACCC needs to form a view quickly, given the importance of overall timing in a failing firm scenario.

Schedule A – Analysis of ACCC reviews of mergers – 2009-2019

Note: the figures referred to in section 2.2 of the paper are highlighted in the tables below.

1 Number of mergers considered by the ACCC

The table below sets out the total number of acquisitions assessed by the ACCC over the assessed period.

Form of ACCC assessment		2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Total	%
1.	Mergers pre-assessed (i.e. not opposed and no public review)	153	236	250	213	242	278	287	253	252	305	2469	78%
2.	Mergers reviewed (i.e. subject to public or confidential review) ***Note:*** *see section 2 for the outcomes of these reviews*	168	141	90	76	55	44	32	35	29	26	**696** *(see section 2 below)*	22%
3.	**Total mergers assessed**	321	377	340	289	297	322	319	288	281	331	**3165**	100%

2 Outcomes of ACCC's public and confidential merger reviews

The table below sets out the outcomes for the 696 mergers that the ACCC publicly/confidentially reviewed over the assessed period (see row 2 above). Some outcomes contain sub-categories. The statistics for each merger outcome also include an analysis of these figures as against the total numbers of acquisitions assessed by the ACCC (being 3165 proposed transactions – see item 3 above).

Outcome	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Total of 3165 mergers review	% (approx)
Outcome: Not opposed												

Outcome		2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Total of 3165 mergers review	% (approx)
4.	Not opposed after public or confidential review	131	110	60	55	36	35	17	23	17	17	501/3165	15.83%
5.	**Total not opposed/total assessed**	131	110	60	55	36	35	17	23	17	17	**501**/3165	15.83%
Outcome: Opposed													
6.	Public review – opposed outright	8	3	1	6	4	0	2	0	1	2	27/3165	0.85%
7.	Confidential review – opposed or concerns expressed	6	4	6	5	2	0	1	2	1	1	28/3165	0.88%
8.	**Total opposed/total assessed**	14	7	7	11	6	0	3	2	2	3	**55**/3165	1.73%
Outcome: Discontinued before final decision													
9.	Discontinued because transaction did not proceed/was withdrawn[89]/no decision[90]	16	14	17	4	2	1	6	8	7	1	76/3165	2.4%
10.	**Total discontinued/total assessed**	16	14	17	4	2	1	6	8	7	1	**76**/3165	2.4%
Overall total mergers opposed or discontinued/total assessed		168	141	90	76	55	44	32	35	29	26	**131**/3165 *(see section 3 below)*	Approx 22%

[89] These statistics do not identify whether a merger did not proceed/was withdrawn before or after a SOI was published.
[90] I.e. no decision because it was a confidential review and the ACCC could not form a view without market inquiries.

3 The ACCC's track record in respect of mergers it opposed or were discontinued

The table below set out the outcomes for the 131 transactions the ACCC opposed or expressed had concerns about and which were discontinued – which is comprised of the 55 mergers it opposed after public or confidential review (see row 8 above) and the 76 mergers that were discontinued during public or confidential review (see row 10 above).

Outcome		Total	% (approx)
Transaction did not proceed, on the following basis:			
11.	Discontinued before ACCC reached a decision during public or confidential review (transaction did not proceed/withdrawn/no decision)	76	58.02%
12.	Discontinued after being opposed by the ACCC following public or confidential review	48	36.64%
13.	Discontinued after being put before the Court/ACT	1	0.76%
14.	**Total that did not proceed/total that the ACCC opposed or had concerns about**	**125**/131	95.42%
Transaction proceeded after contest or is to be determined			
15.	Proceeded after being contested in the Court/ACT	5	3.82%
16.	Contested in the Court/ACT and are to be determined	1	0.76%
17.	**Total that proceeded or that are TBD/ total that the ACCC opposed or had concerns about**	**6**/131	4.58%

Sources: The above is based on the following sources:

1 ACCC's Annual Reports 2009 – 2019 for number of mergers assessed, opposed, discontinued and contested.

2 ACCC's informal merger review register 2009 – 2019 to confirm mergers reviewed, opposed, discontinued and contested – specifically, for each year checking the names of mergers reviewed against their corresponding status in the register.

3 ACCC's pre-November 2017 merger authorisations register (authorisations from the ACT) for mergers, reviewed, opposed, discontinued and contested.

Schedule B – Mandatory and/or suspensory notification

Pros (for mandatory and/or suspensory notification)	Cons (for voluntary notification)	Application to current ACCC scheme
Transparency and certainty: mandatory notification can provide certainty to merger parties and the ACCC of which transactions need to be notified by publishing clearly defined thresholds relating to the merger parties' turnover and/or size of the transaction (as applicable).	**Defining thresholds:** correctly defining the types of transactions that should be subject to mandatory notification has challenges, particularly in designing a one-size fits all approach across industries. • Setting a mandatory notification threshold based on worldwide turnover without a sufficient nexus of the transaction to Australia could result in transactions without a competitive impact on Australian markets requiring notification, creating greater compliance costs for businesses and potentially penalties for non-compliance. • Setting relevant thresholds too low could result in transactions without any meaningful competitive impact on Australian markets being notified, creating a greater compliance cost on companies and burden on the ACCC to review. • Setting relevant thresholds too high could exclude the notification of some transactions that could have an anti-competitive impact (e.g. transactions where a target may be small, but may be a driver of competition on price, quality and/or innovation).	**Significant compliance with merger notification:** the ACCC already has a high level of compliance within business of notifying proposed merger transactions. A report by the Organisation for Economic Co-operation and Development (**OECD**) considered that the ACCC's merger notification threshold is "*relatively low*" by international standards and "*with the exception of minor acquisitions that clearly raise no competition issues, the entrenched practice in Australia is for parties to voluntarily notify the ACCC of a proposed transaction*."[91] The ACCC also has flexibility in its merger control regime. With the benefit of most merger proposals being notified to it prior to completion, it can decide which mergers require review on a case-by-case assessment, without the limitations of prescriptive notification thresholds.

[91] OECD, *Country Studies Australia – The Role of Competition Policy in Regulatory Reform*, 2009 (https://www.oecd.org/competition/sectors/45170413.pdf), at [2.6.2].

Pros (for mandatory and/or suspensory notification)	Cons (for voluntary notification)	Application to current ACCC scheme
	Investigations can occur below thresholds in any event: in some jurisdictions where mandatory notification applies, the regulator may still have the power to investigate mergers or acquisitions which do not exceed mandatory thresholds.[92] Merger parties may therefore not obtain complete certainty that a merger or acquisition proposal will not be investigated because it does not need to be notified.	**ACCC can investigate all mergers:** there is no threshold shareholding for the purposes of section 50 of the CCA, therefore all acquisitions are subject to the CCA.[93] Mandatory notification thresholds will therefore not necessarily provide real certainty to merger parties. The current entrenched practice of merger parties notifying almost all transactions to the ACCC, including courtesy notifications for those acquisitions not necessarily requiring review, may not continue if transaction thresholds are introduced. The current practice does provide merger parties with certainty of whether or not a review will be required given merger parties are engaging directly with the ACCC.
	Minority or creeping acquisitions: acquisitions involving minority interests may not trigger turnover or size of transaction thresholds used in mandatory merger notification regimes, but could still have an impact on competition (e.g. where an acquirer is already significant supplier in a concentrated industry with few competitors). Similarly, mandatory notification is unlikely to address creeping or iterative acquisitions by merger parties if the target is small and transaction thresholds are not exceeded.	**ACCC has flexibility:** the ACCC's current regime provides it with the flexibility to review minority interests where these have an impact on Australian market(s).[94] Under a voluntary regime, merger parties may be inclined to notify the ACCC as a courtesy of minority acquisitions, but may not do so if formal thresholds are introduced, and not exceeded.
Efficiency: in a mandatory regime, thresholds are implemented to exclude from review mergers that are not likely to have a material impact on competition. This increases efficiency by reducing the number of merger applications the regulator needs to consider and allowing it to dedicate resources to those mergers more likely to raise competition issues. It also minimises the costs to	**Monitoring still required:** even in a mandatory notification system, monitoring is still likely to be required to ensure that merger parties are complying with the mandatory notification system and that mergers that do not exceed thresholds are reviewed where they could have an anti-competitive impact on markets.	The ACCC is still likely to be involved in monitoring transactions, noting comments above that the CCA does not prescribe a certain shareholding below which mergers are not likely to raise competition concerns.

92 OECD, 'Merger Control in Dynamic Markets', 2020 (http://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf), at page 15.
93 ACCC. 'Merger Guidelines', November 2008 (https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF), at page 55.
94 ACCC, 'Merger Guidelines', November 2008 (https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF), at pages 55-56.

Pros (for mandatory and/or suspensory notification)	Cons (for voluntary notification)	Application to current ACCC scheme
the regulator associated with ongoing monitoring of transactions in a voluntary regime.[95]		
Prevents "midnight mergers": mandatory regimes ensure that transactions which are likely to have an anti-competitive impact are notified to the regulator prior to completion, otherwise fines may be imposed on the merger parties if they complete. A voluntary regime does not adequately capture those firms that consummate a "midnight merger" in the hope that they will not be detected.[96]	**Defining thresholds**: unless notification thresholds are appropriately cast, mergers that may have an anti-competitive impact may not meet mandatory notification thresholds, for the reasons outlined above.	**Significant compliance with merger notification:** the ACCC's *Informal Merger Review Process Guidelines* (September 2013) (**Process Guidelines**) state that the vast majority of informal merger reviews are initiated at the request of the merger parties. It is also not uncommon for the ACCC to request details of transactions from firms contemplating proposed mergers which have not been notified to the ACCC, which it has become aware of via complaints, referrals from other agencies or via its own monitoring activities.[97] The ACCC conducts reviews of completed acquisitions. We are not aware of any central statistics reported by the ACCC on how many completed acquisitions it reviews each year. However a search of the ACCC's public register suggests it has completed at least 50 reviews of completed acquisitions since 2010. The threat of the ACCC investigating a completed acquisition and instituting Federal Court proceedings (which could result in significant penalties or divestiture orders) already provides a significant discipline on merger parties to notify proposed transactions to the ACCC.

95 OECD, 'Merger Control in Dynamic Markets', 2020 (http://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf), at page 15.
96 Julia Clark, International Merger Policy: Applying Domestic Law to International Markets, at page 96.
97 ACCC, Process Guidelines, at [2.8].

Pros (for mandatory and/or suspensory notification)	Cons (for voluntary notification)	Application to current ACCC scheme
Avoids costly remedies to undo completed transactions: mandatory and/or suspensory regimes can more easily avoid a situation where a completed merger has to be "undone" by means of remedies and/or costly or lengthy litigation by the regulator to obtain a divestiture order or penalties.	**Risk of undoing completed acquisitions not wholly avoided by a mandatory regime:** unless notification thresholds are appropriately cast, mergers that may have an anti-competitive impact on competition may not meet mandatory notification thresholds. Therefore the risk still exists that the ACCC may need to review completed mergers under a mandatory notification regime, and would remain subject to the same costs and challenges of obtaining remedies to undo the merger.	**ACCC has the tools:** in practice, most merger parties seeking informal clearance from the ACCC refrain from completing a transaction while the ACCC informal merger review is undertaken. Within the informal merger review process, the ACCC has the ability to request that parties provide a section 87B undertaking not to complete a transaction while a review is being completed. This strategy is often used in merger reviews once a Statement of Issues has been published.[98] In merger authorisation processes, parties are required to provide a section 87B undertaking not to complete as part of their merger authorisation application form. We are not aware of any significant non-compliance issues with current processes which are in place.
		ACCC can investigate and achieve remedies for completed acquisitions: the ACCC has demonstrated it can investigate and obtain remedies for completed acquisitions. For example, the situation which occurred in Primary Health Card Ltd's acquisition of certain pathology assets of Healthscope Ltd in 2016. The parties completed the transaction without giving notice to the ACCC and the ACCC commenced a public review after the completion of the merger. The ACCC closed its investigations after accepting divestment undertakings which effectively unwound the transaction.[99]

[98] For example, the ACCC obtained s87B undertakings from the acquirer in relation to Qube's proposed acquisition of Maritime Container Services (2017) and from Dometic Group in relation to its proposed acquisition of Atwood (2015).

[99] https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/primary-health-care-limited-acquisition-of-pathology-assets-previously-operated-by-healthscope-in-queensland. See also: Geoff Carter and Miranda Nobel, 'Australia: Merger Control 2020', The International Comparative Legal Guide, https://iclg.com/practice-areas/merger-control-laws-and-regulations/australia

Pros (for mandatory and/or suspensory notification)	Cons (for voluntary notification)	Application to current ACCC scheme
Sector specific approach: as proposed by the DPI Final Report, a sector specific approach to mandatory notification can be taken by the ACCC, in consultation with the key suppliers in that industry. This is likely to lead to better outcomes for merger parties and the ACCC – the ACCC will be able to tailor notification requirements to address specific concerns it has identified in an industry (e.g. acquisitions involving start-ups or data holdings as was a concern in the DPI Final Report) rather than taking a "one-size-fits all" approach to all industries, which may mean that mergers or acquisitions of a particular kind which are concerning in some industries but not others, may not be caught by merger notification thresholds.	**Inconsistency across sectors:** a case-by-case approach could raise some concerns about inconsistency or complexity of the merger notification regime if different standards are applied to different industries. It may be more difficult in particular for international applicants to understand what notification requirements apply, without a uniform or consistent approach. This ultimately creates uncertainty.	The ACCC has already contemplated a sector specific approach to merger notification in its DPI Final Report.
Cross-jurisdictional mergers: in a submission regarding proposed reforms to the merger notification regime in the UK, the CMA advocated that mandatory notification is most appropriate to deal with multi-jurisdictional mergers. Merging parties in multi-jurisdictional mergers are likely to prioritise dealing with jurisdictions with mandatory notification (in particular the EU, the US and China), before turning to those with voluntary regimes. This reflects that merger parties do most business in those jurisdictions, and may also reflect their legal adviser's judgment that the approach of the EU and US competition authorities will influence the approach taken by other agencies.[100]	**Flexibility:** voluntary regimes provide some flexibility in the sense that they can take advantage of remedies obtained by regulators in mandatory jurisdictions, which could assist in resolving competition concerns in Australia (e.g. where divestitures are involved). This may minimise the length and breadth of an ACCC review.	ACCC will typically consider remedies to address concerns in its jurisdiction and global remedies may not necessarily address its concerns.

[100] CMA, Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf), at 41- 42