Law Council
OF AUSTRALIA

Business Law Section

23 May 2023

Mr David Pearl
Assistant Secretary
Competition and Consumer Branch
The Treasury
1 Langton Cres
PARKES ACT 2600

By email: David.Pearl@treasury.gov.au
Cc: Paul.Palisi@treasury.gov.au

Dear Mr Pearl

ACCC's updated merger law reform proposals – discussion paper in response

Thank you for the ongoing opportunity for the Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia to provide our thoughts on the developing proposals for merger law reform put forward by the Australian Competition and Consumer Commission (**ACCC**).

As you are aware, the Committee provided a discussion paper to Treasury in September 2020 setting out what we considered to be important context for the issues being raised at that time with respect to the adequacy of Australia's merger regime. Representatives of the Committee subsequently met with Treasury in November 2021 following the more specific proposals outlined by then ACCC Chair Rod Sims in August 2021, as part of the 'start of a debate' on the need for merger reform.[1]

On 12 April 2023, in a speech to the National Press Club, the current Chair of the ACCC, Gina Cass-Gottlieb, outlined the adjusted thinking of the ACCC following stakeholder feedback and its recent experiences with formal merger authorisations.[2]

The Committee understands that the ACCC is engaging with Treasury in response to its proposed reform package and that some of the details of that package remain to be explored. The aim of this discussion paper is to outline the Committee's comments and insights into these reform proposals, as the Committee understands them to be based on the public statements made by the ACCC Chair.

The paper is structured as follows:

- **Summary of key points**

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1 See https://www.accc.gov.au/about-us/media/speeches/protecting-and-promoting-competition-in-australia-keynote-speech.

2 See https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023.

- **Section 1** – Introduction of a mandatory and suspensory regime.
- **Section 2** – Changes to review rights.
- **Section 3** – Change to the substantive test for clearing and prohibiting mergers.

The Committee would also appreciate the opportunity to meet with Treasury representatives to discuss any proposed reforms at a time convenient to you.

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

Yours faithfully



Philip Argy
Chairman
Business Law Section

Law Council
OF AUSTRALIA

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ACCC's updated merger law reform proposals – discussion paper in response

The Treasury

23 May 2023

Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639
Email Jessica.Morrow@lawcouncil.asn.au

GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Law Council of Australia Limited ABN 85 005 260 622

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Executive Summary

1 Material costs and burden are associated with establishing and resourcing a mandatory merger regime – both for the regulator and for merger parties that are subject to the regime. Where there is evidence that companies on the whole respect the existing voluntary regime (and that only a very small number of mergers give rise to significant competition concerns), it is arguable that any additional costs of a mandatory regime are unnecessary such that any case proposing reform should be carefully and rigorously tested.

2 Close attention needs to be given to the details underlying the proposed reforms. In particular:

- The notification thresholds need to be carefully defined and appropriately set (and should not include market shares).
- The information requirements for mandatory applications must be as simple and targeted as possible (and should be less onerous than the current merger authorisation information requirements).
- The ACCC should be required to make a decision within 90 days of an application being lodged, with this timeframe being able to be extended by no more than an additional 60 days for more complex mergers, with the written consent of the applicant.
- Decisions of the ACCC, and the reasons for them, should be transparent. It is critical that merger parties and other stakeholders are fully informed of the basis for the ACCC's decisions and given the opportunity to respond to concerns as part of the review process.
- The 'suspensory' aspect of the regime should operate such that, if the ACCC has been unable to reach a decision during the required time period, the merger should be permitted.

3 The resources required to implement a mandatory regime effectively should not be underestimated. The Committee anticipates that any new merger process would likely involve significantly increasing staffing at the ACCC to review the large number of mergers notified under a mandatory process (as well as those the subject of notification wavier applications, those referred to the ACCC by FIRB etc).

4 The ACCC's proposal for a 'call in' power to allow it to formally assess mergers that do not meet the prescribed thresholds will create significant uncertainty for merger parties. Failure to provide certainty undermines one of the key benefits and trade-offs of a mandatory and suspensory process and is unwarranted in circumstances where most transactions are competitively benign. If a 'call in' power is to be introduced, it should be made subject to time limits for the exercise of the power, as well as clear guidance as to when the ACCC will exercise the power. There should also be limits on the ACCC's ability to sue post-completion for breach of section 50 of the *Competition and Consumer Act 2010* (**CCA**) in circumstances where the ACCC has elected not to exercise its call in power or has failed to do so within the time limit.

5 It is very important that merger parties to notifiable mergers retain the option of seeking a declaration from the Federal Court if the ACCC refuses to give formal clearance. The removal of a right to access the Federal Court declaration process –

and to limit merger parties and other stakeholders to a restricted form of merits oversight – would substantially erode the quality, transparency, and robustness of the Australian merger regime.

6 If any restriction is being considered on merger parties' direct access to the Federal Court and for review of the ACCC's decision to be confined to the Australian Competition Tribunal (the **Tribunal**), it is critical that any Tribunal review process involves a full merits review of the ACCC decision.

7 The ACCC's proposed test for clearance is inappropriate and should not be adopted. It is effectively a reversal of the onus of proof that currently applies to contraventions of the CCA. The ACCC's proposed test warrants thorough consideration (including as to its potential chilling effect on merger activity) as it would constitute a fundamental change to merger control policy in Australia and would put Australia at odds with most other comparable jurisdictions, which do not prohibit mergers based on a mere possibility of a substantial lessening of competition (nor an administrative decision that such a possibility may exist).

In the context of a mandatory regime, the Committee considers that the test applied by the ACCC in determining whether a transaction can proceed should mirror the legislative prohibition – that is, a transaction should only be prohibited (and clearance should only be refused) if it is positively established that the merger *would* have the effect or likely effect of substantially lessening competition in a market in Australia. If the ACCC is not so satisfied, it should not refuse clearance.

Importantly, the ACCC is uniquely and best placed to assess (and prove) whether a substantially lessening of competition is likely, as it has the ability to consult industry participants, customers and government stakeholders broadly and take into account confidential information from a range of parties. This is the key way that the ACCC is able to evidence and test potential competition concerns. Unless there is a similarly burdensome evidential process to that occurring for merger authorisation (and even then it will be difficult due to confidentiality considerations) it is very hard to see how merger parties will be in the same position as the ACCC to assess the evidence and **positively** satisfy the ACCC than a substantially lessening of competition is unlikely – meaning that the risk of false positives is materially exacerbated by this proposal.

8 The two-stage test for clearance proposed by the ACCC (whereby the potential public benefits of a transaction would only be considered once it has been determined that the transaction gives rise to competition concerns) may give rise to inefficiencies and unnecessary delays. The ACCC should be able to grant clearance on either competition-benign or public benefits grounds, as part of a single process.

9 More detail is needed on how the ACCC proposes the CCA be amended to reflect that the substantial lessening of competition test includes "*entrenching, materially increasing or materially extending a position of substantial market power*" so that the impacts of such a change can be properly assessed.

Submission

1. Introduction of a mandatory and suspensory regime

> *'We propose adopting measures common in overseas merger regimes. These include a mandatory requirement for the ACCC to be notified of mergers above specified thresholds, a requirement for transactions to be suspended from completion without ACCC clearance, and upfront information requirements.'*
> (ACCC Chair, National Press Club speech, 12 April 2023)

The ACCC proposes to move away from the current informal clearance regime (which is used in the vast majority of mergers reviewed by the ACCC) and to introduce a formal, mandatory and suspensory regime that more closely resembles the merger clearance processes internationally.

1.1 Snapshot of the current regime in Australia - voluntary notification and no suspension

Informal clearance process

Under the current merger clearance regime (which has no statutory basis), there is no mandatory requirement for merger parties to notify the ACCC of a proposed merger or acquisition. Instead, under the ACCC Merger Guidelines, merger parties are encouraged to notify the ACCC prior to completion of a transaction where both of the following apply:[3]

- 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 per cent in the relevant market(s) affected by the merger.

Further, 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 seek to impose remedies (either through court enforceable undertakings provided to the ACCC or court action initiated by the ACCC). These include penalties (in the case of court action) or divestiture (in the case of either undertakings or court action).

However, the ACCC can request that merger parties voluntarily provide an undertaking 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). If this undertaking takes the form of a court enforceable undertaking under section 87B of the CCA and the merger parties breach that 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.

Merger authorisation process

Under the formal merger authorisation process (which is set out in the CCA), merger parties are effectively required to suspend completing a transaction. As part of the applicant's (acquirer's) application for authorisation, it must provide a section 87B undertaking to the

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

ACCC that it will not complete the transaction while its application is being considered.[4] The ACCC can only review proposed and not completed acquisitions under the merger authorisation process.[5]

1.2 Proposal to introduce a mandatory and suspensory regime

The ACCC proposes that both of the current informal merger clearance and the formal merger authorisation regimes be replaced with a new single formal regime. This would mean that:

(a) **Mandatory notification:** Mergers meeting certain thresholds must be notified to the ACCC for its review.

(b) **Mandatory suspension to closing:** Merger parties cannot complete a merger or acquisition meeting the thresholds until the ACCC has completed its review.

(c) **Upfront information requirements:** Merger parties will be required to provide certain information before an application for clearance is considered valid for assessment.

The ACCC has also proposed that it be able to 'call in' for formal assessment mergers that do not meet the prescribed thresholds but nonetheless raise potential competition concerns that the ACCC wishes to examine.

In addition, the ACCC proposes to introduce a 'notification waiver' process, which would allow parties to non-contentious transactions (that otherwise meet the thresholds for mandatory notification) to apply for a waiver from the requirement to make a full formal application for clearance and have their transaction cleared through some form of more streamlined process. In her speech to the National Press Club on 12 April 2023, Ms Cass-Gottlieb stated that the ACCC would expect the 'overwhelming majority' of transactions to be dealt with in this manner.

1.3 Arguments for and against a mandatory and suspensory regime

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 summarised below.

Importantly, these potential advantages and disadvantages need to be assessed in the context of the ACCC's own acknowledgement that '*only a small sub-set of mergers give rise to significant competition concerns'*, and '*based on past experience, 1-2% of acquisitions considered by the ACCC are likely to be contentious and may ultimately be opposed'*.[6] The Committee agrees with the statement by the ACCC Chair that '*the vast majority of acquisitions are competitively benign and should proceed easily, without a significant regulatory burden'*.

Advantages

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4 Section 89(1AA) CCA.

5 Merger Authorisation Guidelines, at [3.10].

6 See https://www.accc.gov.au/about-us/media/speeches/protecting-and-promoting-competition-in-australia-keynote-speech.

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 creating efficiencies by allowing the regulator to focus its resources on reviewing those transactions most likely to raise competition concerns. If a mandatory regime is to be introduced, safeguards need to be put in place to ensure it in fact provides transparency and certainty in order for the associated benefits of such a regime to be delivered.

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 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 impacts of a merger once completed may not be reversible, even if the ACCC is subsequently successful in seeking divestiture or other remedies, and this risk increases the longer the ACCC takes to consolidate its case post-completion.

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.[7]

The relatively recent example of Virtus Health's proposed acquisition of Adora Fertility from Healius Limited in 2021 has been referred to by the ACCC as an example of merger parties '*showing complete disregard*' for merger assessment processes.[8] In that case, Virtus notified the ACCC of its intention to acquire Adora Fertility on 30 August 2021 and, on 21 September 2021, the ACCC commenced a public review of the transaction after notifying Virtus that it had concluded that it was not possible to grant early merger clearance. In the first week of October 2021, the merger parties notified the ACCC that they intended to complete the transaction on 15 October 2021, prior to completion of the ACCC's review. The ACCC successfully obtained an urgent interim interlocutory injunction on 14 October 2021 to prevent the transaction completing, which was later extended until the ACCC brought further proceedings. The parties abandoned the transaction in December 2021.

This case therefore seems to demonstrate that the current process does enable the ACCC to successfully obtain an injunction where it deems it necessary. Indeed, in considering the application for an interlocutory injunction, and in granting an injunction, Justice O'Bryan expressly took into account the extent to which Virtus had engaged with the informal ACCC process and the practical 'risk' that his Honour found had been accepted by Virtus in relation to completion. The ACCC stated that the case should be a warning to other parties that '*the ACCC will not hesitate to take appropriate action in the Federal Court to prevent completion of a transaction if it is concerned that the transaction is likely to substantially lessen competition*'[9] and thus failure to engage with the ACCC under the existing informal process exposes parties to significant and commercial risks.

The ACCC has also indicated that a mandatory regime would deal with the issue of it being notified late and being given less time for its own review in international transactions which are being reviewed by agencies around the world. In the Committee's view, there may be

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7 See, eg, https://www.accc.gov.au/media-release/5m-court-award-for-illegal-acquisition; see also *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299.

8 See https://www.accc.gov.au/media-release/accc-seeks-urgent-injunction-to-halt-virtus-acquiring-adora-fertility-clinics

9 See https://www.accc.gov.au/media-release/virtus-abandons-proposed-acquisition-of-adora.

very valid reasons why a transaction would be notified later in Australia, particularly because there may be a greater number and more complicated issues to review in the other jurisdictions, since those jurisdictions are almost always larger than Australia. If remedies need to be submitted to deal with those issues, it makes sense that the parties wish to obtain comfort that any undertakings are acceptable in those jurisdictions first (given the significance in terms of deal value of those jurisdictions), so as to give the deal greater certainty of proceeding. Moreover, in those cases that the ACCC has publicly identified as having been notified "late", it has undertaken post completion investigations without identifying any contravention or bringing any action.

Disadvantages

More broadly, mandatory, and suspensory notification regimes come with their own drawbacks. Material costs are associated with establishing and resourcing a mandatory merger regime, both for the regulator, and also for merger parties that are subject to it. Where there is evidence that companies on the whole respect the existing voluntary regime, it is arguable that any additional costs of a mandatory regime are unnecessary.

There are also significant challenges in 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 review thresholds on a periodic basis to ensure they remain relevant).

In particular, the ACCC and Government will need to grapple with the fact that mandatory notification regimes are arguably not designed to allow regulators to intervene in minority or creeping acquisitions due to the prescriptive nature of thresholds. This means that a mandatory and suspensory regime would not necessarily solve the ACCC's concern over 'killer acquisitions'[10] (that is, large companies acquiring nascent businesses that may grow into being their rigorous competitors one day) as a notification threshold based on turnover or transaction size may not capture these acquisitions unless the threshold was set solely on the basis of the size of the acquirer.

Should the regime proceed on this basis, however, an overwhelming number of mergers would require notification, creating an undue administrative burden for the ACCC as well as for large organisations wishing to undertake transactions that do not give rise to any competition concerns.

Finally, if the ACCC retains the ability to investigate mergers which do not exceed notification thresholds (as is proposed through a 'call in' power), a mandatory and suspensory regime is unlikely to deliver one of the key benefits for merger parties, being greater certainty as to whether their transaction is subject to regulatory review. This is discussed further in section 1.5 below.

A more detailed analysis of the advantages and disadvantages of mandatory and suspensory regimes was canvassed in Annexure B of our Discussion Paper dated 28 September 2020.

[10] See, eg, Competition and Markets Authority, Australian Competition and Consumer Commission and Bundeskartellamt, '*Joint statement on merger control enforcement',* 20 April 2021. Available here: https://www.accc.gov.au/publications/joint-statement-on-merger-control-enforcement.

1.4 Details underlying the ACCC's proposals are important and should be consulted upon

Further details of the proposed process under a mandatory and suspensory regime have not been publicly provided by the ACCC, including the nature of thresholds that will trigger mandatory and suspensory notification, the criteria and process for 'waivers' of non-contentious transactions, how the proposed 'call in' power will operate in practice, and various other formalities under the regime.

The Committee believes the following considerations to be relevant when developing these details.

Notification thresholds need to be carefully defined and appropriately set

It is important that the notification thresholds triggering mandatory and suspensory notification are appropriately defined to ensure they effectively capture mergers that are likely to be anti-competitive, whilst at the same time filtering out transactions that are unlikely to result in any appreciable negative competitive effects.

The International Competition Network (**ICN**) recommends that regulators ensure that their merger notification thresholds are, at a minimum:

- clear and understandable;
- incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction;
- based on objectively quantifiable criteria; and
- based on information that is readily accessible to the parties to the proposed transaction.[11]

Looking to international regimes for inspiration, mandatory notification thresholds may be set based on:

- the size of the acquirer (ie, its assets and global revenue);
- the size of the transaction;
- market share thresholds; and
- the industry in which the parties operate.

These thresholds differ between jurisdictions. For example:

- In the **US**, mergers are subject to a 'size of the transaction test' as well as a 'size of the person test'. This means that parties must notify the Federal Trade Commission (**FTC**) and the Department of Justice (**DOJ**) of their merger if the transaction value is between US $111.4 million and $445.5 million (as adjusted annually), *and* the parties meet certain worldwide sales and assets thresholds.[12]

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[11] ICN Recommended Practices for Merger Notification and Review Procedures, 2018. Available here: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[12] Federal Trade Commission, *Revised Jurisdictional Thresholds* (Notice), 88(17) Fed Reg 5004, 5004 (26 January 2023). Available here: https://www.govinfo.gov/content/pkg/FR-2023-01-26/pdf/2023-01533.pdf.

This means that mergers with a transaction value of *below* US $111.4 million are not subject to mandatory notification. The thresholds also provide exceptions for foreign-to-foreign mergers (ie, those without a nexus to the USA). However, the DOJ and FTC have the power to still investigate and challenge transactions that do not meet the thresholds, even after they are consummated. In addition, transactions in some industries may require review by both the antitrust agencies and the agency more specifically charged with overseeing the industry (for example, the Federal Communications Commission for telecommunications mergers). A similar threshold regime exists in Canada.

- In the **EU**, parties must notify the European Commission if their transaction has a 'community dimension'.[13] A concentration has a community dimension where i) the combined aggregate worldwide turnover of all the entities concerned exceeds EUR 5,000 million and ii) the aggregate EU-wide turnover of each of at least two of the entities concerned exceeds EUR 250 million. Secondary thresholds also apply requiring mergers to be notified where the worldwide turnover exceeds EUR 2,500 million, the combined turnover of all merger firms exceeds EUR 100 million in each of at least three EU member states, and each of at least two of the entities concerned has turnover exceeding EUR 25 million in each of those three EU member states.[14]

- The **UK** generally has a voluntary notification regime. That being said, the CMA has a duty to obtain and review information relating to certain mergers and to refer them for in-depth investigation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market. The CMA's duty is triggered where there is a 'relevant merger situation' which is defined as two or more enterprises ceasing to be distinct (or which if carried into effect would lead to enterprises ceasing to be distinct) and either the UK turnover of the target exceeds GBP 70 million (the 'turnover test') or the enterprises which cease to be distinct together supply or acquire at least 25 per cent of all of those goods or services of that kind supplied in the UK or a substantial part of it (which requires an increment) (the 'share of supply test').

The share of supply test operates in a broadly similar way to a 'market share' test but without the legal and economic principles applicable to competition law notions of 'market definition'. However, the share of supply test (as with other jurisdictions with market share thresholds) creates considerable confusion and uncertainty given that reasonable minds can differ on the appropriate scope of the product and/or geographic market.

The Committee would therefore strongly discourage the adoption of thresholds which incorporate a share of supply or market share component.

In addition, while it may be necessary to consider the assets and revenue of the parties at a global scale, it would also be important to ensure that the merger has a nexus to Australia.[15] For example, in the US, merger notification is only required if either the acquiring or acquired party are engaged in US commerce or in any activity

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13 Merger Regulation, Article 1(2).

14 Except that the EU dimension is not met if each of the firms achieves more than two thirds of its EU-wide turnover within one and the same EU member state.

15 OECD, Directorate For Financial and Enterprise Affairs Competition Committee, Working Party No. 3 On Co-Operation And Enforcement, Local Nexus And Jurisdictional Thresholds In Merger Control, *Background Paper By The Secretariat*, June 2016.

affecting US commerce (and there are a number of exceptions that only mergers with sufficient local nexus are filed).

Any threshold introduced in Australia may also benefit from taking into account the size of the transaction as well as the size of the parties.

Finally, given the wide diversity of regimes globally and the considerable knowledge developed in particular regimes, if a mandatory regime is to be adopted, there may be benefit in Australia adopting the specific approach of an established and long-standing overseas regime (rather than creating entirely new criteria, or taking parts from several different regimes), so as to create greater certainty and understanding of how the regime will in fact apply in Australia. For example, the USA and EU have well developed law, case law and guidance around the mechanics of how their respective thresholds operate in practice, including the specifics of how revenue is calculated and allocated geographically, the time periods applicable to capturing revenue and the scope of the corporate 'group' (see, for example, the EU's Jurisdictional Notice[16]). Similar guidance would need to be provided in Australia if a mandatory regime is to deliver appropriate certainty and consistency across different mergers over time.

Applications for waivers for non-contentious transactions must be streamlined

As mentioned at section 1.2 above, the ACCC proposes that parties to a non-contentious transaction could apply for a notification waiver that, if granted, '*would mean the parties would not have to make a full formal application and the merger could be dealt with expeditiously*'.[17]

The Committee welcomes this proposal as a means of reducing the administrative burden both for merger parties and the ACCC. Assuming the 'full' mandatory notification process requirements in terms of information will be similar to the current formal merger authorisation regime, those requirements would be overly burdensome for parties to transactions in respect of which the mandatory clearance requirement will ultimately be waived, as well as a waste of the ACCC's finite resources.

However, to ensure there remains effective enforcement, the ACCC and Government will need to closely consider when a transaction can be treated as 'non-contentious' and qualify for a possible notification waiver, and what the application and assessment process for seeking that waiver might look like.

Simplified procedures for non-contentious transactions are not uncommon in mandatory and suspensory regimes internationally, and may provide some guidance for the Australian regime:

- In **Canada**, for example, parties to a transaction may apply for an Advance Ruling Certificate (**ARC**) in lieu of, or in addition to, submitting a notification. Where an ARC is issued, paragraph 113(b) of the *Competition Act* exempts the named transaction from notification. ARC requests in respect of a non-complex transaction with minimal overlap requires

16 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08).

17 See https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023.

significantly less information than one relating to a non-complex transaction with moderate overlap.[18]

- In the **EU**, the European Commission has recently introduced new rules to streamline its pre-existing simplified procedure. In particular, the new rules clarify which cases can be treated under the simplified procedure and further simply the information requirements for simplified cases (eg, a notification form that primarily includes multiple-choice questions and tables and streamlined questions for both the jurisdictional and substantive assessment of cases). The new changes follow from the European Commission's 2021 review of merger control, which found that while the pre-existing simplified process had reduced the administrative burden on business and the European Commission, there were still typically non-contentious cases which were falling outside the simplified procedure and being reviewed under the more onerous notification regime. The review also showed that in certain cases the information requirements may still have been too extensive.

- In other jurisdictions, eg, **Germany**, the volume and nature of the information required for different kinds of transactions is left largely to the discretion of parties, much as is the case in the informal merger regime in Australia, with the agencies working with the parties and requesting further information on an iterative basis. This allows parties to tailor and provide the authority with the level of information appropriate for the particular transaction instead of providing documents which are 'formally' required but not substantively helpful (as is currently one of the problems with the formal authorisation process in Australia - for example, the current authorisation process requires the provision of formal documents such as annual reports and statements, which can often be largely irrelevant or of little probative value to an examination of competitive effects of mergers).

Application requirements must be clear and not burdensome

Careful consideration must be given to the information and documentary requirements for applications for formal clearance.

For example, the completion of the required Form CO for notifications to the European Commission requires very detailed information and is generally an onerous and time-consuming exercise. In complex cases, the completion of Form CO can take several months.

The Committee also considers the current merger authorisation information requirements to be overly burdensome and inappropriate for this purpose, and that they should not be used as a basis for any mandatory process. A mandatory notification process that would require all mergers above the threshold to file all such information upfront is likely to be extremely burdensome, involve high costs and cause significant delays for merger parties.

It is the Committee's strong recommendation that the information requirements required for any mandatory application be as simple and targeted as possible. The Committee considers that any proposed information and pre-consultation requirements

[18] https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/procedures-guide-notifiable-transactions-and-advance-ruling-certificates-under-competition-act#s3_0.

should be clearly outlined and consulted upon with stakeholders prior to finalisation, and that they then be set out in Regulations that become effective at the same time as any amendments to the principal Act (rather than be left for determination by the ACCC). This will ensure that possible issues with the design and function of the mandatory and suspensory regime are considered in the context of the regime as a whole, rather than in isolation – or left to the ACCC's discretion. These are important matters to be determined by Government.

Incorporating them in Regulations will also allow for these particulars to be updated to respond to changing economic conditions without having to go through the parliamentary process.

Further, the Committee strongly believes that the mandatory notification filing fee should not be prohibitively high. For example, the Committee would support a filing fee that more closely reflects the current application fee for merger authorisation[19] as compared to the fees involved in Foreign Investment Review Board applications, for which the current maximum fee cap is $1,045,000.

Timeframes need to be set and adhered to

It will be important for there to be statutory timeframes within which the ACCC must make its decision to grant or not to grant clearance. The Committee considers the current statutory timeframes for formal merger authorisation to be appropriate, namely, that the ACCC must make a decision within 90 days of an application being accepted. The Committee would support this timeframe being able to be extended for more complex mergers with the written consent of the applicant, provided there is a limit on the overall timeframe of no more than an additional 60 days.

A related observation is that the timeframes under any new regime should be substantively fair to all relevant stakeholders – for instance, the ACCC should be required to ensure that its own careful consideration of an merger clearance application does not come at the expense of interested third parties being provided a meaningful opportunity to provide submissions and evidence as to a merger.

The process and reasons for decision must be transparent

Decisions of the ACCC, and the reasons for them, should be transparent. It is critical that merger parties and other stakeholders are fully informed of the basis for any ACCC decision and given the opportunity to respond to concerns as part of the review process.

Of particular concern is that the mandatory process must afford a degree of procedural fairness that is appropriate to a formal decision under statute. Any mandatory process should set out the degree to which the ACCC is required to have developed, and must disclose, its 'in progress' substantive views by a particular point in the process in the form of something akin to the Draft Determination required for general authorisations under section 90A(1) of the CCA.

The Committee would support a confidentiality regime (via regulation) that would apply to both the ACCC and any Tribunal review. The regime should seek to balance the

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[19] The lodgement fee for merger authorisation is currently $25,000. However, the Committee notes that, if the mandatory notification thresholds were set by reference to factors other than the merging parties' turnover/deal size etc (and, for example, including market shares), a filing fee of this magnitude could deter or contribute to deterring parties from undertaking otherwise pro-competitive mergers (for example, if the thresholds captured relatively low value pro-competitive mergers in small markets such as localised markets in rural areas).

principle of transparency with the need to protect the confidential information of all parties and could be based on the processes currently adopted by the Tribunal in relation to authorisation matters, with refinements to improve the effectiveness and efficiency of the regime.

In addition, the ACCC should be required to publish detailed reasons for its decision on the day that it is made, to enable the merger parties and other stakeholders to understand the basis for that decision so as to consider the appeal options available to them.

'Suspensory' aspect of the regime should be carefully considered

The details of how a merger that meets the thresholds will be suspended in practice are, as yet, unclear. The Committee considers the appropriate position to be that, if the ACCC has been unable to reach a decision during the required time period, the deal should be permitted to proceed.

This position would be consistent with a number of overseas regimes. For example:

- In the **US**, parties to a transaction captured by the mandatory regime cannot complete until the end of a defined waiting period after filing (eg, 30 days after an initial filing). If the DOJ or FTC does not initiate proceedings against the parties by the end of that waiting period, the deal can complete.

- In **Japan**, merger parties must not complete for 30 days after notifying the Japan Fair Trade Commission (**JFTC**). If the JFTC fails to reach a decision to initiate a Phase II review within the initial 30-day suspension period, the transaction is automatically cleared.

- In **Brazil**, merger parties must not complete and must keep their competitive conditions and physical structure unmodified, until the Administrative Council for Economic Defense (**CADE**) makes a final decision. Under the 'non-fast track' process, CADE has 240 days to reach a decision (which period may be extended). If CADE fails to analyse the merger within this timeframe, automatic clearance is given to the merger.

Appropriate ACCC resourcing needs to be in place

As is apparent from the above, the ACCC would need to be appropriated resourced and funded to ensure that it is able to review mergers in a meaningful way within the relevant timeframes. Otherwise, there is a real risk that the ACCC could make its decision based on underdeveloped inquiries/analysis, or that an anti-competitive merger could be permitted to proceed because the ACCC was not able to make a decision in time.

The resources required to implement a mandatory regime effectively should not be underestimated. The Committee anticipates that any new merger process would likely involve significantly increasing staffing at the ACCC to review the large number of mergers notified under a mandatory process (as well as those the subject of notification wavier applications, those referred to the ACCC by FIRB and those notified to the ACCC under any form of parallel 'informal' process as may be envisaged with respect to the proposed call in power).

1.5 Proposal for a call in power undermines certainty for merger parties

The ACCC proposes to introduce a call in power to allow it to formally assess mergers that do not meet the prescribed thresholds but nonetheless raise potential competition concerns that the ACCC wishes to examine.

Speaking to this proposed reform in 2021, former ACCC Chair Rod Sims said a call in power '*would bring [potentially problematic acquisitions that fall below the thresholds] under the formal process and, importantly, [would] discourage transactions being structured in ways to avoid notification*'.[20] Ms Cass-Gottlieb has affirmed this view, stating '*[f]or situations where a transaction doesn't meet the notification threshold, but nonetheless raises competition concerns, the ACCC should be able to call in the transaction and assess it in the formal system*.'[21]

The introduction of a call in power is of particular concern to the Committee, as it removes the certainty that merger parties would otherwise obtain from the existence of notification thresholds pursuant to a mandatory regime. Acceptance by businesses of the mandatory requirement to submit transactions for formal clearance and not complete until it has been granted should they meet the notification thresholds is typically linked to the certainty that is provided by clear parameters on when they need to notify *and when they do not.* Failure to provide this certainty undermines one of the key benefits and trade-offs of a mandatory and suspensory process.

Importantly, most overseas jurisdictions do not support both a mandatory merger notification regime and call in power for mergers that are under the notification threshold.

In the EU, for example, if a concentration does not have the requisite EU dimension, the European Commission does not have jurisdiction and there is no obligation on the parties to notify. However, in some limited circumstances, the European Commission may invite a Member State to make a referral request under Article 22(5).[22] In general, however, the European Commission's inability to call in transactions which fall below the thresholds reflects the balance to be struck between the protection of competition, commercial certainty as to the application of the law and limiting the bureaucratic burden of notification.

Where jurisdictions do have call in powers, they are typically enforcement jurisdictions where regulators are required to take a merger to court. The regulators do not themselves have the power to block a transaction with limited merits review. In the US, for example, while both the FTC and the DOJ have (and regularly do) investigate transactions that fall below the notification thresholds or are otherwise exempt from notification, neither agency can block a merger of its own accord — rather, that must be done by a court.

Accordingly, a key question for Government should it support a call in power is how it could operate so as to provide a sufficient level of certainty to business, and not completely erode

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20 https://www.accc.gov.au/about-us/media/speeches/protecting-and-promoting-competition-in-australia-keynote-speech.

21 See https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023.

22 Article 22 of the Merger Regulation allows Member States to ask the European Commission to examine any concentration that does not have an EU dimension, but which affects cross-border trade and threatens to significantly affect competition within the territory of the Member State(s) making the request, irrespective of whether such transaction is notifiable under the national merger control rules of the referring Member State. Originally, the clause, which was known as the 'Dutch Clause' existed to allow Member States without merger control regimes (which was the case for the Netherlands at the time) to refer a transaction to the European Commission for examination provided there was an impact on EU trade.

the benefits of notification thresholds. The Committee considers at least the following to be necessary:

- **Time limits** for the exercise of the power. In the EU, for example, under the Article 22 procedures:
    - requests must be made within 15 working days of a Member State being notified of or finding out about the transaction;
    - the European Commission must inform relevant parties of the request without delay; and
    - the Commission must determine whether it will examine the concentration within a further 10 working days and notify the Member States and parties.
- **Clear guidance** as to when the ACCC will exercise the power. For example, the European Commission issues guidance on Article 22 which encourages national authorities to refer mergers where the turnover of at least one of the companies concerned '*does not reflect its actual or future competitive potential. This could be the case of a start-up or recent entrant with significant competitive potential or an important innovator.'* The Guidance also indicates that the Commission is particularly willing to accept referrals in the pharmaceutical and digital sectors.[23]
- **Limited ACCC right to sue post-completion** for breach of section 50 in circumstances where the ACCC has elected not to exercise its call in power or has failed to do so within the time limit.

The Government will also need to consider whether an ACCC decision to exercise its call in power is intended to be (or should be) reviewable on ADJR grounds.

Finally, it may be that the ACCC envisages that parties whose transactions fall under the relevant thresholds could seek 'comfort' from the ACCC that their transaction will not be called in through some form of informal call in consultation process, similar to its pre-assessment clearance process today. This would effectively mean that the ACCC would continue to run a parallel 'informal clearance' process alongside the mandatory process, adding further complexity, resourcing requirements and inefficiencies to the overall regime.

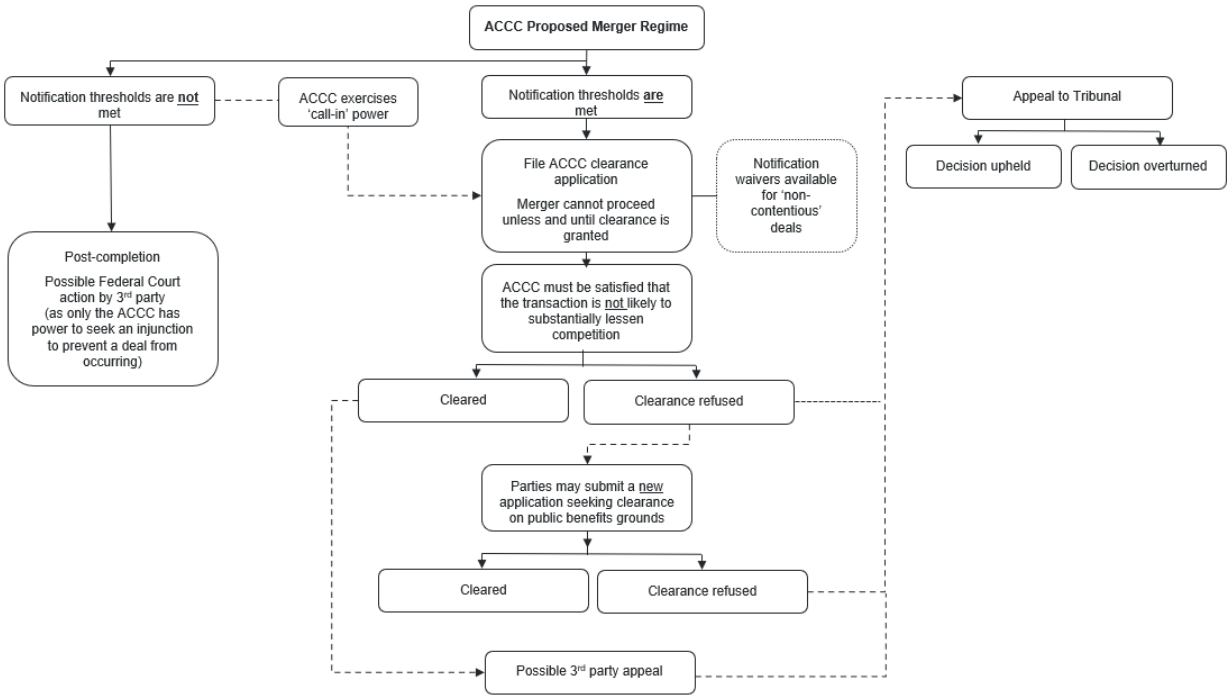
2. Review rights

> **'***…we consider that the Australian Competition Tribunal is the appropriate review body for ACCC decisions in the formal regime. The Federal Court would continue to consider applications for declaration and judicial review. The role of the Federal Court in considering merger enforcement matters would also continue for transactions that do not trigger the notification thresholds.'*
>
> (ACCC Chair, National Press Club speech, 12 April 2023)

[23] See European Commission '*Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases'* 26 March 2021 2-3 [8]-[11], available here: https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

The precise structure and process of how a merger decision by the ACCC would be appealed under the ACCC's proposed reforms, and the options open for merger parties whose transactions do or do not meet the notification thresholds, remains very unclear.

However, from the Chair's recent speech, the Committee understands the proposed structure of appeal rights and options would be as follows:



2.1 Concerns with proposed process

If the above is correct, two primary concerns arise:

- First, the proposal appears intended to remove the right for merger parties to seek declaration from the Federal Court in relation to transactions that meet the notification thresholds. This would significantly weaken the structure and robustness of the Australian merger regime, which has retained an important role for judicial oversight of ACCC decisions since its inception.

- Second, the only remaining form of review would be to the Tribunal, presumably based on the same 'limited merits review' process that has applied to review of merger authorisation decisions by the Tribunal since 2017, following amendments made to restrict the scope of Tribunal review following recommendations made by the Competition Policy Review in 2015 chaired by Professor Ian Harper (**Harper Review**).

Either or both of the above (loss of access to the Federal Court coupled with limited merits review) would undermine the ability of merger parties, and others, to seek substantive, merits-based review of a merger clearance by a body independent of the first instance administrative decision maker (the ACCC).

The Federal Court and Tribunal have been asked to test merger clearance decisions of the ACCC on seven occasions over the last two decades. As is apparent from the table below (capturing the mergers that have been the subject of Federal Court litigation or Tribunal

review since 2000), in *every* merger review or proceeding since 2000, the Court or Tribunal have reached a different view on the evidence to the ACCC. This should not be interpreted as a criticism of the ACCC or its process; it does however reflect the value of judicial or Tribunal processes that permit the full and transparent participation of invested commercial parties – who have the in-depth industry knowledge, experience, and incentives to robustly test and provide evidence. This must, and does, improve the quality of decision-making irrespective of the final decision.

Decision	Year	Review body	Result
Australian Gas Light Co v Australian Competition and Consumer Commission (No 3) (2003) 137 FCR 317 (**AGL / Loy Yang**)	2003	Federal Court (declaration)	ACCC loss
Australian Competition and Consumer Commission v Metcash Trading Ltd (2011) 198 FCR 297 (**Franklins / Metcash**)	2011	Federal Court (declaration)	ACCC loss
Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1 (**Macquarie Generation / AGL**)	2014	Tribunal (authorisation)	ACCC loss
Application by Sea Swift Pty Ltd [2016] ACompT 9 (**Toll / Sea Swift**)	2016	Tribunal (authorisation)	ACCC loss
Application by Tabcorp Holdings Limited [2017] ACompT 1 (**Tabcorp / Tatts**)	2017	Tribunal (authorisation)	ACCC loss
Australian Competition and Consumer Commission v Pacific National Pty Ltd (2020) 277 FCR 49 (**Pacific National / Aurizon** – acquisition of Acacia Ridge Intermodal Terminal)	2019	Federal Court (ACCC prosecution)	ACCC loss
Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission [2020] FCA 117 (**TPG / Vodafone**)	2020	Federal Court (declaration)	ACCC loss

2.2 Retaining the option for Federal Court declaration in complex merger cases is critical

The Federal Court is highly experienced in handling competition law cases and is the appropriate body to exercise ultimate oversight of the development and application of

competition law within the Australian economy. Preventing the consideration of complex mergers by the Federal Court, through removing a right for merger parties to seek declaration, would remove a central and significant element of Australian competition law from this important oversight.

This oversight is both necessary and is not 'replaced' by either the administrative process undertaken by the ACCC, or any merits review process by the Tribunal.

By their nature, the ACCC's administrative merger clearance processes are time-constrained and lack transparency. In the case of the current informal clearance process, merger parties do not have any direct understanding of the evidence or submissions made by other stakeholders (except in the limited form of a 'market feedback letter'). Even in cases of formal merger authorisation, where all submissions are required to be published by the ACCC, substantial quantities of material are withheld on the basis of confidentiality. The ACCC is also not required to make public the material obtained through use of its investigation powers.

The declaration process therefore provides merger parties with a robust mechanism to understand and test the evidence that is relied upon by the ACCC in assessing a notified merger. For example, amongst other safeguards:

- Parties in the Federal Court have rights of discovery that permit them substantially greater transparency of evidence, including access to documents or information obtained by the ACCC or transcripts of compulsory interviews undertaken by the ACCC during its merger review process.

- Rules of evidence apply to all lay evidence filed in any proceeding.

- The Federal Court rules provide important guard rails around the handling and filing of expert evidence, including expert economic evidence. Proceedings in the Federal Court also permit open testing of experts, including through joint expert reports, expert conclaves, etc.

- Parties have the ability to cross-examine witnesses and experts. This capacity for direct cross examination of witnesses has proven highly influential in a number of merger cases (eg, *Pacific National / Aurizon; TPG / Vodafone*).

- Third parties with sufficient interest have rights of intervention in the Federal Court, ensuring their role is public and formally acknowledged.

On the basis of the above, the Committee considers that it is important that merger parties to notifiable mergers retain the option of seeking a declaration from the Federal Court if the ACCC refuses to give formal clearance.

2.3 Limited merits review before the Tribunal in the absence of Federal Court oversight is not appropriate

If any restriction is being considered on merger parties' direct access to the Federal Court, it is critical that the review process to the Tribunal involves a full merits review of the ACCC decision. This was historically the case prior to the introduction of reforms following the Harper Review.

Those changes have been considered and applied for the first time by the Tribunal in an interlocutory determination issued in relation to the TPG / Telstra spectrum authorisation review process, which is presently before the Tribunal.[24]

Based on that determination, the Committee considers that the reforms made to the merits review process have resulted in restrictions being placed on the Tribunal (and merger parties) that go beyond those anticipated or recommended by the Harper Review. The consequence is that very few of the benefits identified above in relation to the Federal Court process apply to merger authorisation reviews conducted before the Tribunal.

For example, the Tribunal found that:

- The Tribunal is limited in its power to compel a person to appear and to give evidence or produce documents in relation to matters or evidence that they provided to the ACCC.[25]

- Merger parties have extremely narrow rights to seek leave to bring additional material or evidence before the Tribunal and this is likely to be confined only to evidence related to market developments or events that occurred *after the ACCC determination*. Parties are not able to seek to bring on additional evidence or information to respond to material that was relied upon by the ACCC, but which the parties had not seen during the ACCC process.[26]

- Parties before the Tribunal do not have an opportunity to seek to cross-examine witnesses (including experts) or to test and challenge evidence that was provided to the ACCC, but which was not shared or disclosed to the parties during the ACCC process.[27] Nor is the ACCC under any requirement to do so.[28] The Tribunal found (at [88]):

  > *The implicit contention of the applicants that a review of the ACCC's determination by the Tribunal is intended to afford an applicant an opportunity to test and challenge evidence that was received by the ACCC is not supported by the language of ss 102(9) and (10) nor the extrinsic materials.*

- The review process does not permit further discovery or document production that would enable parties to seek to respond to any perceived gaps in the documents or evidence that was before the ACCC.[29]

- The review before the Tribunal is not a process to correct any procedural fairness concerns that arise from the ACCC process.[30]

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24 *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 (***Telstra and TPG Telecom***).

25 *Telstra and TPG Telecom* at [82].

26 *Telstra and TPG Telecom* at [82]-[83] and [88].

27 *Telstra and TPG Telecom* at [84]-[85] and [88].

28 *Telstra and TPG Telecom* at [87].

29 *Telstra and TPG Telecom* at [82] – [83].

30 *Telstra and TPG Telecom* at [86].

Under the limited merits review process, as is now in place, merger parties and others are 'captive' before the Tribunal to the administrative and investigative process undertaken by the ACCC, and the evidence obtained by the ACCC, notwithstanding that those parties had little transparency in relation to that process or that evidence – and the ACCC is not under any compulsion to itself undertake steps such as testing evidence through cross-examination.

In this context, the Committee is concerned that any removal of a right to access the Federal Court declaration process – and to limit merger parties and other stakeholders to such a restricted form of merits oversight – would substantially erode the quality, transparency, and robustness of the Australian merger regime.

In the event any restriction on direct access to the Federal Court by merger parties to notifiable transactions is being considered, the Committee submits that the current restrictions that apply to merger authorisation reviews before the Tribunal would also need to be revisited and removed.

2.4 Transactions that do not meet the mandatory thresholds

Finally, the Committee is very concerned that the regime proposed by the ACCC would result in an anomaly whereby the ultimate arbiter of mergers that meet the notification thresholds is different from the ultimate arbiter of mergers that do not.

It is not clear what is meant by the ACCC Chair's statement that '*[t]he role of the Federal Court in considering merger enforcement matters would also continue for transactions that do not trigger the notification thresholds'*.

The Committee is concerned that the ACCC's proposal is that:

- a declaration could be sought from the Federal Court in respect of transactions that *do not* meet the thresholds (for example, in proceedings brought by a third party); but that

- a declaration could not be sought from the Federal Court in respect of transactions that *do* meet the thresholds (for example, parties to the transaction could not seek a declaration to the effect that it does not have the likely effect of substantially lessening competition.

This would appear to create a two-class system where transactions are subject to different regimes, processes, and ultimate decision makers in relation to their transaction depending on whether they meet the thresholds (and for the rights for merger parties who transactions do meet the thresholds to be more limited than for merger parties whose transactions do not).

3. Changes to the substantive test for clearing and prohibiting mergers

3.1 Proposed test for granting clearance under the mandatory regime is inappropriate

> *'In the proposed new formal process, the ACCC, or Australian Competition Tribunal on review, would not clear a merger unless it is satisfied that the transaction is not likely to substantially lessen competition. This is important because it recalibrates the decision on whether a merger proceeds where there is a risk of competitive harm – it means the ACCC must be positively satisfied there is no likely substantial lessening of competition, which is consistent with the current merger authorisation test.'*

Currently, if the ACCC challenges a merger in the Federal Court, it must establish on the balance of probabilities that the merger *would* have the effect or likely effect of substantially lessening competition in a market in Australia.

Under the ACCC's proposal, the ACCC (or the Tribunal on review) would need to be positively satisfied that the merger would not be likely to have the effect of substantially lessening competition.

The Committee does not agree with this proposal and strongly believes it should not be adopted. In effect, it is an inappropriate reversal of the onus of proof that currently applies to contraventions of the CCA. In circumstances where parties are subject to a mandatory regime, the test that is applied by the ACCC in determining whether the transaction can proceed should mirror the legislative prohibition and the burden imposed by it – that is, a transaction should only be prohibited (and clearance should only be refused) if it is positively established that the merger would have the effect or likely effect of substantially lessening competition in a market in Australia. If the ACCC is not satisfied that the transaction would have this effect, it should grant clearance.

The proposed reformulation of the test is posited as a means of addressing an alleged tendency to permit mergers in the face of inherent uncertainties about the future state of a market:

> '*The future is inherently uncertain and is particularly so where markets are dynamic and there are complex commercial considerations. This uncertainty can be the driving factor behind the difficulties of positively proving a breach of section 50. A result of these challenges is that where there is uncertainty, the default position becomes to permit, or not to oppose, the merger. Overall, the [forward-looking] enforcement model means that the balance is shifted too much towards avoiding the risk of opposing a benign merger, at the expense of increasing the risk of enabling anti-competitive mergers.*'[31]

By requiring that the ACCC be positively satisfied that a merger will not substantially lessen competition, the new formulation is said to change the default position – so that, where there is uncertainty, the default will be to oppose (or not permit) a merger.

The Committee accepts that a perfect system of merger control would block every anti-competitive merger and allow all other transactions. In practice, however, merger control

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[31] See https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023.

systems operate imperfectly, allowing some false positives (blocking a merger that is not anti-competitive) and false negatives (allowing an anti-competitive merger).

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

(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.

Both forms of incorrect outcomes are likely to be associated with welfare losses, ie:

- 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 whether this reformulation of the test should be implemented.

As noted by Ms Cass-Gottlieb, the case for reform here is predicated on the position that there is an undesirably high level of anti-competitive mergers ('false-negatives') being allowed, and the ACCC is 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 this reform would be to evaluate the number and nature of the false positives and false negatives in the market, by assessing the outcomes of actual mergers (an *ex-post*-merger review). The ACCC last conducted an ex-post review in 2021, publishing its findings in February 2022.[32] The Committee does not consider that the findings of this review necessarily support the conclusion that there are an '*undesirably high level of anti-competitive mergers being allowed'* so as to necessitate the proposed change to the default position.

First, the ACCC only reviewed the outcomes of six mergers, all of which were unopposed. Of these mergers, only two appear to have had a negative impact on competition in their respective markets according to the ACCC. Moreover, this is not evidence of the failure of a voluntary regime supporting the need to introduce a mandatory filing regime. All the mergers were reviewed by the ACCC under the informal review process and not opposed by the ACCC.

Secondly, the impact of COVID-19 at the time of the *ex-post* review had created major disruptions in many markets, such that the effects of the mergers on competition may have been amplified or muted to what may have otherwise been expected. While the ACCC's analyses sought to control for the impact of COVID-19 where possible, it was not possible in every instance, and so may have warped the assessment.

The Committee notes that, under the current merger authorisation regime, the Commission must not make a determination granting an authorisation for a merger unless it is '*satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to*

[32] https://www.accc.gov.au/system/files/Ex%20post%20review%20of%20merger%20decisions.pdf.

have the effect, of substantially lessening competition' (or the merger will result in a public benefit which will outweigh the public detriment).[33]

However, the Committee considers this test to be inappropriate in circumstances where merger parties are subject to a mandatory regime – it is very important to remember that the current authorisation process is an *option* available to merger parties, and not a requirement.

Importantly, the ACCC is uniquely and best placed to assess (and prove) whether a substantially lessening of competition is likely, as it has the ability to consult industry participants, customers and government stakeholders broadly and take into account confidential information from a range of parties. This is the key way that the ACCC is able to evidence and test potential competition concerns. Unless there is a similarly burdensome evidential process to that occurring for merger authorisation (and even then it will be difficult due to confidentiality considerations) it is very hard to see how merger parties will be in the same position as the ACCC to assess the evidence and **positively** satisfy the ACCC than a substantially lessening of competition is unlikely – meaning that the risk of false positives is materially exacerbated by this proposal

Further, as noted in 0 above, the Committee believes that if the ACCC is unable to reach a decision within the statutory suspension period the deal should *not* be blocked by default. This would avoid the risk of a chilling effect for mergers and acquisitions in Australia, in circumstances where the ACCC's investigation has not conclusively determined that the deal would have the effect or likely effect of substantially lessening competition.

3.2 Proposed two-stage test (public benefit to be considered only if SLC established) may lead to inefficiency and unnecessary delays

> *'We therefore consider that merger parties should have the option of subsequently being able to apply for clearance on public benefits grounds if the applicants are not able to first satisfy the ACCC or Tribunal that a transaction can be cleared on competition grounds. Adopting a second stage public benefit clearance option reflects the fact that the majority of mergers are decided on competition grounds without reference to public benefits'* (ACCC Chair, National Press Club speech, 12 April 2023)

The ACCC's proposal appears to be to introduce a two-stage test for mandatory clearance that would mean the ACCC (or the Tribunal) will only consider the potential public benefits of a transaction once it has determined that the transaction gives rise to competition concerns (ie, public benefit arguments will not be considered concurrently with competition arguments).

The Committee urges the Government to carefully consider the practicalities of a two-stage test and considers it more appropriate for the ACCC to be able to grant clearance on either competition-benign or public benefits grounds, as part of a single process.

While the Committee agrees with the ACCC's proposition that most mergers have been authorised on competition grounds, this is not universally true. In *Tabcorp*[34] in 2017, the Tribunal granted authorisation on the basis of a mix of both competition considerations as well as public benefits in the form of efficiencies and better funding of the racing industry. Further, the submissions in the current Armaguard/Prosegur merger authorisation

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33 Section 90(7) CCA.

34 *Re Tabcorp* [2017] ACTR.

application before the ACCC include lengthy submissions as to why there will be public benefits flowing from the proposed merger.[35]

The Committee supports the ACCC's proposal to retain the public benefit aspect of the test, including because of the ACCC's stated position that the efficiencies that may be taken into account in a substantial lessening of competition test tend to be more limited than efficiencies that may be concerned in a public benefits test.[36] Further, given mergers can have different effects in different markets, it is not unusual that a merger could give rise to significant efficiencies in one market but a loss of competition in another market. It may not always be possible to solve this problem by requiring divestment, as the combination of the same assets that generate efficiencies in a consumer market may be also the same combination that reduce competition in another product market. Under a sole substantial lessening of competition test, a merger could be blocked due to a substantial lessening of competition in one market, in circumstances where the impact in that market cannot be balanced against benefits in a different market.

A public benefits test can assist to reconcile these differences and allows the ACCC and the Tribunal to take a richer view of a transaction and take wider economic impacts into account.

This said, the practical process and impact of a two-stage test is at present unclear. In particular, it is not clear how a two-stage test would impact decision timelines and how delays in decision-making could be avoided in order to provide merger parties with commercial certainty.

A two-stage test may also increase the burden on parties in preparing its submissions to the ACCC. For example, parties may pre-emptively prepare evidence to be used in a public benefits assessment which may prove unnecessary – in the absence of any indication from the ACCC whether or not a public benefits assessment will be undertaken. On the other hand, parties may suffer unreasonable and undue delay if they do not prepare a case for a public benefits assessment which is ultimately required – as a result of a lack of indication from the ACCC as to its likely position of the impact on competition of the transaction.

3.3 Proposal to expand the 'substantial lessening of competition' test requires more detail

> '*We now propose a model, which would include words in the legislation to make it clear that the substantial lessening of competition test includes "entrenching, materially increasing or materially extending a position of substantial market power".'*
> (ACCC Chair, National Press Club speech, 12 April 2023)

The ACCC appears to have abandoned its earlier proposal for the introduction of a 'deeming provision' whereby acquisitions would have been deemed to have the effect of substantially lessening competition where one party has substantial market power and, as a result of the acquisition, its position of substantial market power *'would be likely to be entrenched, materially increased or materially extended.'*

The Committee supports this decision, given the significant uncertainty that such a deeming provision may have caused for merger parties.

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35 See https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/linfox-armaguard-pty-ltd-and-prosegur-australia-holdings-pty-ltd-proposed-merger.

36 See paragraph 7.65 of the ACCC's Merger Guidelines.

However, it is not clear how it is proposed that the CCA be amended to '*make it clear*' that that the substantial lessening of competition test includes "*entrenching, materially increasing or materially extending a position of substantial market power*".'

The Committee would like to understand more about what is specifically proposed by the ACCC with respect to this change, so as to understand the impacts of it. For example, the Committee would not support any proposal to introduce the ACCC's proposed wording into the merger test in section 50 itself (for example, amending section 50(2) of the ACCC to specifically refer to an acquisition having the effect, or being likely to have the effect, of substantially lessening competition in any market by, for example, entrenching, materially increasing or materially extending a position of substantial market power).

While the term 'lessening of competition' is defined in section 4G of the CCA to include references to '*preventing or hindering competition*', the Committee also does not believe this definition should be expanded to include reference to '*entrenching, materially increasing or materially extending a position of substantial market power*' as there could be unintended consequences of such a change given the multitude of provisions of the CCA that include a substantial lessening of competition test.

Ms Cass-Gottlieb stated that this change would assist with '*addressing concerns about creeping acquisitions – the accretion of market power through a strategy of small serial acquisitions that may not amount to a substantial lessening of competition on their own'.* However, it is unclear how this wording on its own could address these concerns.

It is also not clear whether such a change to the wording of the law would have any material impact on the outcome of merger cases, particularly given the ability of the ACCC to take into account a broad range of factors, including whether the level of concentration in the market and the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins.

3.4 Expanding the express factors that the ACCC will take into account is not a material change

> *'We believe [merger factors] should be updated to focus on the changes that occur overall as a result of a merger.*
> (ACCC Chair, National Press Club speech, 12 April 2023)

The ACCC Chair expanded upon this proposal, stating:

> *'For example, this would involve a merger factor referring to the impacts on the height of barriers to entry. We also propose new factors that refer to:*
>
> - *the loss of actual or potential competitive rivalry;*
> - *increased access to, or control of data, technology, or other significant assets;*
> - *whether the acquisition is part of a series of relevant acquisitions, and*
> - *whether the acquisition entrenches or extends a position of substantial market power.*'

Section 50(3) of the CCA already provides a list of 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 in a market. This list is non-exhaustive, meaning that while the ACCC must take into account the factors listed, it is not limited to those factors and may take into account any other factor it considers relevant.

Building upon its recommendation in the Digital Platforms Inquiry Final Report handed down in June 2019,[37] and reform proposals presented by former ACCC Chair Rod Sims in 2021, the ACCC is proposing to amend section 50(3) of the CCA to capture broader changes that result from a merger, including the impact on barriers to entry, the loss of potential competitive rivalry, and access to or control of data.

As section 50(3) of the CCA already allows the ACCC to consider any factors that are relevant to the matter, the Committee does not consider the ACCC's proposals in this regard to be a material change.

3.5 Industry specific test for digital platforms?

In his speech in August 2021, the former ACCC Chair indicated that the ACCC considered that there was a need for a specific merger test (potentially with lower thresholds) for acquisitions made by large digital platforms. Based on the current Chair's statements, it appears that the ACCC is no longer pursuing any industry-specific merger laws. Instead, the ACCC appears to be proposing to address its concerns in this space using service-specific mandatory codes of conduct for designated influential digital platforms.[38]

The Committee supports an industry-agnostic approach to merger laws and consider that any differentiation should only be established if there is a clear evidentiary basis and comprehensive framework to ensure innovation and/or consumer welfare are not harmed as a result.

[37] See ACCC Digital Platform Services Inquiry: Interim Report No. 5 – Regulatory Reform, 16, 111-120.

[38] See ACCC Digital Platform Services Inquiry: Interim Report No. 5 – Regulatory Reform, 16, 111-120.