



MERGERS

Why is the Commission concerned with mergers?

Mergers are integral to all properly functioning market economies. As the mechanism through which the market for corporate control operates, mergers help optimise management performance with under-performing managers and firms being supplanted by more vigorous ones. The threat of takeover is an important discipline on business leaders here and abroad.

Mergers may have other positive consequences for firms and for the economy as a whole, such as achieving scale efficiencies, cheaper access to capital and operating synergies. Not all mergers, however, are beneficial in net terms.

Some mergers, on balance, can harm other businesses and the wider community, for example, when the merged firm sets prices above competitive levels or otherwise distorts competitive market outcomes. It is these mergers with which s. 50 of the Trade Practices Act is concerned.

Mergers law is designed to preserve competitive industry structures for the benefit of consumers and the economy. Section 50 of the Act prohibits mergers and acquisitions which would have the effect, or likely effect, of substantially lessening competition in a substantial market for goods or services. Joint ventures are analysed within the same framework as, in most cases, the effect

they have on the market is similar to that arising from a merger.

This aspect of the Act has no impact on mergers which do not substantially lessen competition. Most mergers raise no competition issues at all. However, those that would have anti-competitive effects by changing market structures in a way likely to reduce substantially the incentive for firms to compete, or raise those to collude, are prohibited by s. 50.

Mergers analysis is an important part of the Commission's work. The test applied rests on recognition of the link between market structure and resulting market power, and the need to be able to respond to potential threats from the exercise of market power. Section 50 prevents accumulation of market power, which could lead to anti-competitive unilateral or coordinated firm conduct.



Year in review

Key statistics

In 2001–02 the Commission finalised 237 mergers, asset sales and joint ventures. Of these it objected to nine because they were likely to substantially lessen competition, and four of these proceeded following enforceable undertakings being provided under s. 87B of the Act. One matter, API/Sigma, has been resubmitted as an authorisation under s. 88. One other matter was withdrawn before decision after the Commission expressed concerns.

Figure 4.1 highlights the small percentage of merger matters objected to by the Commission.

It shows that the number of matters where a substantial lessening of competition would, or was likely to, occur in the Commission's view, has been stable at around 4 to 5 per cent for several years. Figure 4.1 also shows an easing in the number of merger matters considered in 2001–02, consistent with trends in the wider marketplace.

Figure 4.2 shows merger matters considered in 2001–02 by industry. Transport and health industry transactions formed a larger proportion of mergers considered than in the previous year while the proportion of communications, mining/forestry and finance/banking matters remained broadly stable.

Figure 4.1 Mergers not opposed, opposed and resolved with the ACCC

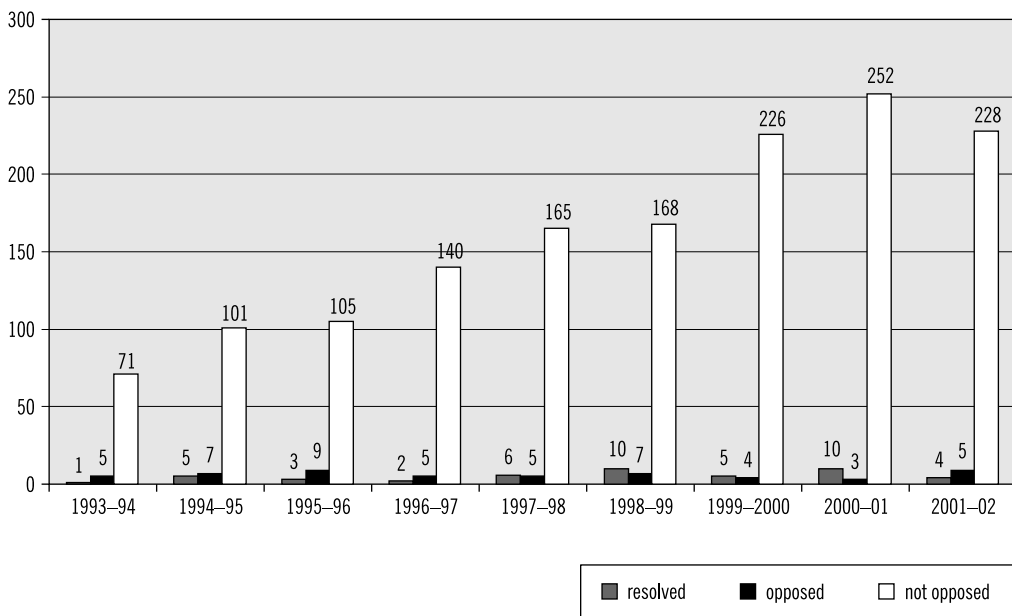
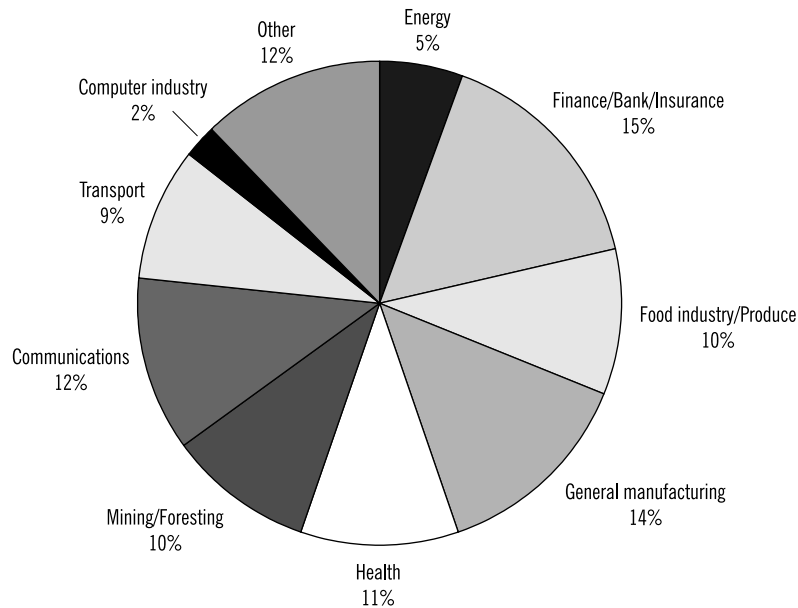


Figure 4.2 Percentage of mergers by industry



International liaison

Contact between competition agencies internationally has increased in recent years because of major mergers and acquisitions among transnational firms. Discussions continue about how to increase competition policy effectiveness in the era of globalisation. Linkages between Australian and US, European and Asian competition policy agencies are growing particularly quickly. Australia, through the Commission, is making constructive contributions to the growing international dialogue in this area.

One avenue through which this is occurring is the recently established International Competition Network (ICN), a global forum through which individual national competition agencies are liaising on common issues.

The ICN's Merger Review Working Group addresses the challenges of merger review in a multi-jurisdictional context. The group, in which the Commission is a leading contributor, is

developing best practice recommendations on:

- procedures, including timing, for reviewing multi-jurisdictional mergers
- analytical frameworks for merger review
- investigative techniques for conducting effective merger review.

The Commission has a long-term commitment to enhanced international competition policy effectiveness, and achieving this, including through the ICN, will remain a priority.

Mergers staff regularly communicate with colleagues from other agencies when asked to assess the implications of international mergers and acquisitions. These discussions often relate to technical aspects of the analysis, including such factors as the appropriate market definition, barriers to entry and emerging market dynamics.



Outlook and priority areas

Based on analysis from the business press, the Commission expects merger activity to stabilise around current levels this year. The high tide experienced in 2000–01 on the back of buoyant equities markets, ebbed in 2001–02 in line with cooling markets and a more subdued outlook, particularly in light of the September 11 attacks in the US. Business commentators have suggested that activity in 2002–03 is likely to continue at the current pace as mergers and asset sales proceed, spurred by the somewhat tighter conditions, particularly internationally.

Merger activity among US corporates adversely affected by the recent substantial equity market declines could well increase. This is likely to trigger more matters coming before the Commission concerning the merger implications of such firms' Australian arms.

Further domestic consolidation in several already concentrated industries is likely to continue, including the utilities sector. Pressures arising from cross-ownership and convergence issues will continue to influence the dynamics of several important industry sectors. Areas of priority for the Commission are likely to be financial services, telecommunications and broadcasting, transport, energy and the health sector.

Restructuring and consolidation of agribusiness is set to continue, and may intensify as the full consequences of drought conditions in Australia emerge and further pressure for rationalisation arises in the context of global market dynamics.

Section 87B undertakings

Concern over merger matters where the Commission believes a substantial lessening of competition will, or is likely to, occur may be resolved through enforceable undertakings under s. 87B of the Act. Section 87B undertakings provide scope for the merger parties to offer the Commission measures to address anti-competitive detriment. Structural undertakings, which address and solve underlying market impediments to effective competition, are the preferred route.

Major merger matters assessed

Compaq and Hewlett-Packard

The Commission did not oppose the merger between Compaq Computer Corporation and the Hewlett Packard Company, which was also cleared by the Federal Trade Commission in the US, the European Commission and the NZ Commerce Commission.

Although the Commission's concentration threshold for the exercise of unilateral market power was crossed in relation to servers and printers, the acquisition was unlikely to result in a substantial lessening of competition. The markets in which the two firms operate are characterised by high imports, strong global competition, technological innovation/convergence and customers exercising countervailing power.

Table 4.1. Section 87B undertakings relating to mergers and acquisitions accepted by the ACCC in 2001–02

Acquirer	Target	Date accepted
SPC Limited	Ardmona Foods Limited	28 November 2001
AES Environmental Pty Ltd	Clyde Apac Division of the Downer Group Limited	7 February 2002
Manildra Starches Pty Limited and Shoalhaven Starches Pty Limited	Certain assets of Weston Bioproducts and the Narrandera Flour Mill from George Weston Foods Ltd	21 February 2002
Monsanto Australia Limited	Appointment of Nufarm Australia Limited as Monsanto's exclusive distributor for Monsanto's <i>Roundup</i> range of glyphosate-based herbicides for agricultural uses	2 May 2002



Clyde Apac and AES Environmental

AES Environmental Pty Ltd's proposed acquisition of Clyde Apac, a division of Downer Group Ltd, was found likely to result in a substantial lessening of competition in the market for laminar flow products. There was a high level of concern in the market that the merged entity would be able to significantly and sustainably increase prices post-acquisition.

Undertakings by the parties were offered and accepted by the Commission in February 2002.

SPC and Ardmona Foods

The proposed merger of SPC Ltd and Ardmona Foods Ltd, manufacturers of processed fruits, was found by the Commission to be unlikely to result in a substantial lessening of competition in several markets because of the level of imports and the countervailing power of supermarkets. It was also found unlikely that the merged firm could significantly and sustainably raise prices.

A substantial lessening of competition was considered likely, however, in the national market for the supply of deciduous canning fruit. This was resolved through undertakings made by SPC and Ardmona to the Commission in November 2001.

API and Sigma

The proposed merger between Australian Pharmaceutical Industries Ltd (API) and Sigma Company Ltd was considered likely to substantially lessen competition in the pharmaceutical wholesaling market. The proposal would have resulted in a reduction of full-line pharmaceutical wholesalers from three to two. The Commission determined that together the parties would account for approximately 60–70 per cent of products wholesaled to retail pharmacies.

The Commission was concerned that the reduction may result in a reduction in service levels to pharmacies and, consequently, to consumers. It was also concerned that the level of rebates that retail pharmacies receive, currently a competitive factor in the industry dynamic, would be reduced.

The Commission determined that there were high barriers to entry and when linked with the fact that retail pharmacies requiring a full range of products need to use the full-line wholesaler's services and the loss of an effective competitor, the proposal would likely lead to a substantial lessening of competition.

The parties subsequently chose to seek authorisation for the merger on public benefit grounds. The authorisation process is continuing.

Manildra and Weston Bioproducts, Narrandera Flour Mill

The Commission considered Manildra Groups proposed acquisition of Weston Bioproducts and the Narrandera Flour Mill from George Weston Foods, in the context of very high market concentration that would result in the supply of gluten, starch and starch sugars to Australian customers. High barriers to entry in these markets and limited import competition were also evident.

The Commission decided a substantial lessening of competition was likely. Undertakings were offered by the parties and accepted by the Commission in February 2002.

IPMG and PMP

Inquiries into IPMG Pty Ltd's proposed acquisition of a controlling interest in PMP Ltd focused on the heat-set web printing market. High barriers to entry in heat-set web printing, other than potentially in relation to niche markets, were central in the Commission's decision to oppose the acquisition. Other competitive constraints such as customers with countervailing power, were not evident; nor did it seem commercially feasible for larger customers, such as publishers and retailers, to underwrite substantial new entry into the heat-set market.

Transfield Galvanising and Industrial Galvanisers

Industrial Galvanizers Corporation Pty Ltd's proposed takeover of Transfield Galvanising, a division of Transfield Pty Ltd, was found likely to result in a substantial lessening of competition in



the south-east Queensland galvanising services market. IGC and Transfield are the two largest providers of galvanising services in Australia, and market inquiries indicated it was likely that the merged firm would be able to significantly and sustainably raise prices if the acquisition proceeded.

Significant regulatory barriers to new entry, notably the environmental approvals required and the fact that only IGC and Transfield have large enough facilities to service several key customers, were relevant.

Foxtel and Optus

The Commission assessed proposed arrangements between Foxtel and Optus regarding pay television and found that in their present form they were likely to substantially lessen competition in several markets. The four principal areas of concern identified were:

- content acquisition
- likely dominance of the Foxtel distribution network
- supply of pay television services to households
- provision of channels to third parties wishing to supply pay television to customers.

Discussions between the Commission and the parties about possible undertakings are continuing.

Suncorp-Metway and general insurance business of GIO

The Commission assessed Suncorp-Metway Ltd's proposed purchase of the general insurance business of GIO Australia and concluded that the acquisition would allow Suncorp to compete more effectively in markets for general insurance than it could previously. While serious concerns were raised by a number of market participants, Suncorp was seen as a new entrant in a number of GIO's existing markets and the existence of sizeable national competitors such as NRMA and Allianz would be likely to constrain any possible anti-competitive activity.

The Commission was asked by a number of participants to consider the effect on the motor vehicle and CTP (compulsory third party) markets in Queensland, based on arguments as to the

significant barriers raised by state-based brand loyalty. The Commission determined that the regulatory arrangements in Queensland aligned with the price sensitive nature of the market would likely act as a constraint on price rises or service quality deterioration.

Warner Chappell Music and Music Sales

Warner Chappell Music Australia and Music Sales approached the Commission concerning a proposed joint venture for distribution of their respective print music publications in Australia. The Commission found a substantial lessening of competition was likely.

Parties would be likely to have market power through the joint venture by:

- raising prices to retailers and consumers
- leveraging market power in pop print music into the market for educational print music.

Because of Copyright Act restrictions on the parallel import of print music, the joint venture partners were also in a position to restrict the supply of pop print music into Australia.

Nufarm Australia Limited and Monsanto Australia Limited—herbicide distribution licence arrangements

On 2 May 2002 the Commission accepted court enforceable undertakings from Nufarm Australia Limited and Monsanto Australia Limited addressing the Commission's competition concerns regarding the proposed appointment of Nufarm as Monsanto's exclusive distributor for Monsanto's *Roundup* range of glyphosate-based herbicides.

While actual and potential imports had provided a competitive constraint on the supply of glyphosate, the Commission was concerned that uncertainty about a review or appeal of the Minister for Customs' decision not to impose a dumping duty on glyphosate imported from the People's Republic of China, and the ability of Monsanto and/or Nufarm to pursue new dumping actions against imported glyphosate, significantly undermined the credibility of that constraint.



Monsanto and Nufarm's undertakings prevent them from making an application for a review of the Minister for Customs' decision in February 2002 to not impose a dumping duty on glyphosate imported from China. Further, for the next three years Nufarm and Monsanto must obtain an opinion from an independent adviser, who is to be approved by the Commission, regarding the prospect of success of any proposed glyphosate anti-dumping application before lodging such an application.

Nufarm has also undertaken not to supply *Roundup* or other glyphosate products on condition that its customers not acquire glyphosate from Nufarm's competitors. Monsanto has undertaken not to 'bundle' its *Roundup* herbicide with the supply of its *Roundup Ready* crop seeds, nor supply its *Roundup Ready* crop seeds on condition that its customers not acquire glyphosate from Monsanto's competitors.

Coates Limited acquisition of Wreckair

The Commission did not oppose the acquisition of Wreckair by Coates. Both companies operated in the general equipment hire businesses as well as specialist hire businesses. The Commission found that a number of competitor firms in all states and territories would be able to act to constrain the merged entity. Market inquiries identified that a number of Coates' competitors were principal suppliers to the major infrastructure and earthworks segment while DIY customers generally have a range of choices, including locally based equipment hire firms.

The Commission also determined that the capacity to expand both geographically and across segments is likely to exercise an effective competitive constraint on Coates.

National Rail Corporation and Freightcorp

The Commission assessed the consortia bidding for the joint National Rail/Freightcorp assets. The Commission came to the view that none of the proposed bidders were likely to lead to a substantial lessening of competition should they win the tender.

The Commission's decision was based in part on an examination of the likely constraints the merged entity would face. In the north-south general freight corridor, for example, it was determined that road transportation acted as a constraint on the behaviour of rail companies and attempts to exploit rail bottlenecks in that corridor would likely see at least some rail customers switch to road transport. Given the need for any rail operator to maximise throughput on its system, any threat of switching would likely affect the overall revenue position of the operator.

Bulk freight is also increasingly contestable because of the state-based access regimes over the interstate track in New South Wales, Victoria, South Australia and Western Australia. The Commission also came to the view that the eventual acquirer of the operations would be faced with a further constraint by the typically large scale bulk customers, many of whom had their own terminal facilities.

