Treasury– Competition Taskforce

Merger Reform – Consultation Paper

ACCC Submission

January 2024

The ACCC provides this submission[1] in response to the Competition Taskforce's Merger Reform Consultation Paper dated November 2023. The Consultation Paper notes the importance of Australia's merger[2] control regime and the need to ensure it has the right balance, particularly in the context of the current environment where there are concerns that competition intensity has weakened across many parts of the economy, and there is increasing market concentration and growing cost of living pressures.

1. Key points

1.1. The ACCC makes the following key points:

- A strong and effective merger regime is in the public interest. It is an essential ingredient in the creation and maintenance of competitive, dynamic, and resilient markets which are important for consumer confidence, and drive innovation and economic prosperity. It protects Australian consumers, farmers, and small businesses from anti-competitive acquisitions, which result in higher prices, lower quality, less innovation, less choice and lower productivity across the economy. Strong merger laws are particularly important as many of Australia's markets are already concentrated, and the Competition Taskforce's merger data analysis indicates that acquisitions in Australia are disproportionately made by very large firms – the largest 1 per cent of firms account for around half of all acquisitions – and the merger activity by large firms has increased over time.[3]

- Taken together, the ACCC's reforms would establish an administrative approval regime that is balanced and targeted which would ensure that non-contentious acquisitions (which account for the vast majority of mergers) can be dealt with expeditiously with minimal regulatory burden, and the small number of complex and contentious acquisitions which raise potential competition concerns can be carefully scrutinised via a structured, transparent, and timely process. These

---

1 On 20 December 2023 the ACCC provided a submission to the Taskforce outlining the ACCC's preliminary comments regarding the three options for reform outlined in the Consultation Paper (see link). This submission focused on Options 1 and 2 which the ACCC considers do not address the misaligned incentives that exist in the current merger regime and do not achieve the policy considerations relevant to good merger control. Option 3 in the Consultation Paper reflected the ACCC's proposed reform model which addresses the ACCC's current concerns about the effectiveness of Australia's merger control regime and achieves the policy considerations that Treasury has identified are relevant to merger control.

2 In this submission we use the terms "merger" and "acquisition" interchangeably regardless of the legal structure of the transaction.

3 Competition Review Taskforce, 'Tracking mergers in Australia using worker flows'; see also Andrew Leigh, 'Game Changer Harnessing Microdata for a Fairer Competition Landscape – Speech', 30 January 2024.

changes will provide greater certainty to businesses and their advisors and bring Australia's merger control regime into line with those of other major jurisdictions.

- The current informal voluntary enforcement-based regime is no longer fit for purpose. The Competition Taskforce's data analysis confirms that the ACCC only has partial visibility of merger activity in Australia – with many more mergers occurring each year over the past decade than the number notified to the ACCC under the informal merger regime.[4] This includes those that are part of a series of smaller acquisitions over time that have the potential to enable firms to achieve a position of substantial market power and erode competition. In combination, the informal, voluntary enforcement-based regime skews decision-making towards a default of allowing mergers to proceed, including for mergers likely to adversely affect competition but where there may not be sufficient evidence to establish this in court on the balance of probabilities. When this happens it is consumers that bear the risk of harm from anti-competitive mergers that are not able to be prevented due to evidentiary challenges.

- While the vast majority of merger transactions do not harm competition, some mergers can cause a long-term change in the structure of a market that results in an enduring lessening of competition, to the detriment of consumers, businesses relying on acquiring from or supplying to the merged entity, and the economy more broadly. Under the ACCC's proposed reforms, the vast majority of notifiable transactions would continue to be assessed expeditiously, under a fast-track process. It is for the small number of more contentious and concerning mergers that the proposed changes are particularly important.

- The ACCC's proposals to reform Australia's merger regime are measured and proportionate. We have proposed a test that more appropriately places the risk of uncertainty about the future with the merger parties rather than consumers and suppliers, including farmers, small business and manufacturers. Both big and small business benefit from competitive markets for sourcing inputs and/or supplying their products and services to other businesses.

- Serial acquisitions are an increasing area for concern given the existing concentration levels in many markets, including in consumer-facing markets. An important focus of the ACCC's reforms is to ensure that the combination of an administrative regime, mandatory notification, appropriate call-in powers and a fit-for-purpose approval test provide the necessary tools to deal with serial acquisitions.

1.2. The ACCC's proposed merger reform package contains the following key elements:

- An administrative regime with the ACCC as the first instance decision maker, with review by the Tribunal available to merger parties and third parties.

- A requirement for merger parties: (i) to notify the ACCC of mergers that meet clear, certain and objective thresholds for notification; and (ii) not to complete the transaction without ACCC or Tribunal approval, or unless the ACCC grants a 'fast-track waiver' from the full notification and approval requirements.

- A fast-track waiver process which enables non-contentious mergers – expected to be about 90% of all notifiable mergers – to be dealt with expeditiously (within 20 business days, often sooner), avoiding the longer formal notification process with

[4] Ibid.

its more substantial upfront information requirements, higher fees and longer review periods. To help businesses understand whether a waiver may be available, the ACCC would release clear guidelines on when waivers are likely to be granted. To provide transparency, the ACCC would publish each waiver request for a short period before making a decision.

- Clear and defined public review and decision-making timelines to provide certainty, predictability and transparency to businesses and third parties, with limited timeline extensions available, for example, when a remedy is proposed.
- Call-in powers to reduce incentives for large firms to strategically structure or divide transactions to avoid triggering the notification thresholds, and to ensure that potentially problematic mergers that fall below the thresholds do not escape scrutiny.
- An approval test where the ACCC (and Tribunal on review) *must* grant approval if "satisfied there is no likely substantial lessening of competition".
- Greater transparency through clear and upfront information requirements, publication of matters dealt with via the fast-track waiver process, publication of issues of concern, and publication of full reasons for decisions.
- A separate process to have a merger considered on net public benefits.

1.3. In this submission, Section 2 outlines the need for merger reform in Australia, Section 3 explains how the ACCC's proposed reforms address concerns and challenges arising from the current regime in a balanced, measured and transparent way, and Section 4 discusses the economics of merger control and the issue of who should bear the risk in merger control design.

2. Why merger reform is important

2.1. While there is always a need for strong and effective merger law, its importance is particularly highlighted in the current environment where Australian consumers and the economy are faced with uncertainty and vulnerability due to cost-of-living pressures, the green transition, and the continued evolution of the digital economy. A key part of responding to these challenges is to encourage competitive, innovative and dynamic markets. An effective merger regime is widely recognised as the first and most effective tool to protect competition in markets.

2.2. Merger control helps to ensure that relevant mergers are seen and assessed and those that are anti-competitive can be prevented so that the products and services that consumers and businesses require are available at lower prices, with higher quality and greater choice.

2.3. It is for this reason that merger control holds an important and unique position in competition law. As noted by Dr Jill Walker, "it addresses market structure and is generally concerned with preventing future conduct, rather than addressing past or current conduct. … [Moreover] merger control is particularly important as the 'preventative medicine' of competition law. By altering market structure, the underlying conditions for competition, mergers may adversely affect efficiency and consumer welfare for many years, and such changes are not easily reversed".[5]

---

[5] Dr Jill Walker, 'An Economic Perspective on Part IV', Chapter 3, Current Issues in Competition Law Vol 1, p 87.

2.4. However, merger control presents inherent challenges and risks, as it involves a prediction of the future state of the market based on a transaction that has not yet completed or has only recently completed. Managing these challenges and risks is fundamental to an effective merger regime.

2.5. For some time now, the ACCC has raised concerns that Australia's current merger regime – which is based on voluntary notification, an informal review process, and an enforcement-based model – is no longer fit for purpose. Attachment B outlines some examples of past domestic and global mergers which demonstrate the ACCC's concerns and the challenges with the current regime. Concerns with the current regime that the ACCC's proposals seek to address can be summarised as follows:

A. Non-notification of mergers

B. Inadequate or insufficient information being provided

C. Increased gaming of the system

D. The forward-looking test defaulting to approval

E. Challenges with serial acquisitions

F. Insufficient transparency of the ACCC's rationale and reasoning behind clearing or opposing mergers

G. Lack of cost recovery

H. Australia's merger regime being an international outlier.

2.6. Australia's current voluntary, enforcement-based regime relies on the willing compliance of the merger parties and their advisors, which the ACCC considers has diminished significantly in recent years. Increasingly, the ACCC is not notified of all the mergers that require scrutiny or is notified late and/or is provided with insufficient information by merger parties, causing delays to the review. The ACCC's experience with the non-notification of mergers is confirmed by the Competition Taskforce's merger data analysis which indicates that between 1,000 – 1,500 mergers took place each year for the past decade with the ACCC notified of around 330 each year on average over the past decade.[6] Attachment C contains some examples of mergers that were not notified to the ACCC.

2.7. In other instances, merger parties proceed to complete, or threaten to complete, the transaction before the ACCC has finalised its review (see Attachment D for some examples). Contrary to suggestions by some, these issues cannot simply be addressed by updating ACCC guidelines and processes as the same incentives of the voluntary, enforcement-based regime will remain, and the merger parties and their advisors are unlikely to have any incentive to respond differently to revised guidelines.

2.8. The issues with the current regime are often exacerbated in global transactions. Australia is one of only three OECD countries that does not have a mandatory suspensory notification regime and the ACCC's experience is that in global deals the merger parties give priority to complying with mandatory and suspensory regimes.

2.9. The ACCC considers that the enforcement-based model skews decision-making towards a default of allowing mergers to proceed. This is because the ACCC must form the view that there is sufficient evidence to persuade the Federal Court that, on the balance of probabilities, the merger would have the effect, or be likely to have the

[6] Competition Review Taskforce, 'Tracking mergers in Australia using worker flows'; Andrew Leigh, 'Game Changer Harnessing Microdata for a Fairer Competition Landscape – Speech', 30 January 2024.

effect, of substantially lessening competition in the future.[7] There are significant inherent challenges for the ACCC to obtain sufficient admissible evidence about the future harm to competition that is likely to arise from a transaction that is yet to occur.

2.10. As a result, the ACCC is not always able to oppose mergers that it considers are likely to adversely affect competition. When reviewing mergers under section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the ACCC considers its ability to prove a substantial lessening of competition before the Federal Court. This means that there are mergers that we have had to reluctantly not oppose due to a lack of admissible evidence, but have later identified as having had an adverse impact on competition. Under the current regime, it is consumers that bear the risk of harm from anti-competitive mergers that are not prevented due to evidentiary challenges.

2.11. There are also significant costs with an enforcement-based regime. While some might argue that the current regime is working as the ACCC has successfully prevented anti-competitive acquisitions, such an argument ignores the clearance decisions made because the ACCC considers it does not have sufficient admissible evidence and the cost and inefficiency of an enforcement regime for mergers. Preparing for and engaging in Federal Court litigation, even if proceedings are not ultimately commenced, is an uncertain and expensive process for both the ACCC and merger parties.

2.12. The fact that the vast majority of mergers raise few, or no, competition concerns and may facilitate innovation, productivity growth and greater levels of competition is not an argument for there to be no reform. The ACCC agrees that an effective merger regime must enable non-contentious mergers to be assessed expeditiously without imposing a significant burden on the merger parties. This is currently the case under the existing voluntary merger regime and this is also a feature of the ACCC's proposed reforms. The ACCC currently reviews around 350 mergers each year and in FY2022-23, approximately 90% of mergers assessed were pre-assessed after a quick review, based on limited information. These pre-assessments were across a wide range of sectors including digital platforms, financial services, retail, energy, pharmaceuticals, financial services, mining, manufacturing, and agribusiness. The ACCC's willingness to pre-assess mergers across many sectors, including those involving acquisitions of start-up firms, demonstrates the ACCC's risk-based approach to dealing expeditiously with non-contentious mergers.

2.13. Of the remaining approximately 10% of mergers that require a public review, only a subset of these may ultimately raise significant competition concerns. However, due to limited time and information available to the ACCC, as noted above, it can be difficult for the ACCC to obtain sufficient admissible evidence to enable the ACCC to properly commence proceedings to establish a contravention of section 50 in court, on the balance of probabilities. This skews decision-making towards a default of allowing mergers to proceed, including for those that may raise significant competition concerns. It is in relation to these mergers that the ACCC considers its proposed reforms will make a difference, appropriately shifting the risk to the merger parties rather than consumers and the economy.

2.14. As noted, the need for reform is now particularly important. The ACCC has observed, supported by empirical research[8], an ongoing and significant increase in market

---

[7] Merger parties may also seek a declaration from the Federal Court that the acquisition will not contravene section 50 of the *Competition and Consumer Act 2010* (Cth). Such relief is at the discretion of the Federal Court of Australia and the evidentiary burden of proving that the merger would (or would not) have the effect or likely effect of substantially lessening competition is on the party seeking the orders.

[8] Hambur, J, Product Market Power and its Implication for the Australian Economy, Treasury Working Paper 2021-03, June 2021.

concentration in Australia's economy over the last decade. This rise in market concentration has brought with it higher prices, less innovation and lower productivity, as well as a noticeable weakening of the intensity of competition across a number of sectors. Many of these sectors are important to the productivity of the Australian economy and prices for end consumers. They include markets in mobile telecommunications, fixed broadband, home mortgages, petrol, supermarkets, funerals, electricity, gas, domestic air travel, health insurance and beer. Households in Australia already spend around $200 billion on these products each year.

2.15. Even small increases in prices resulting from anti-competitive mergers can be harmful for consumers. For example, economic analysis by the ACCC's former chief economist Dr Graeme Woodbridge (see Attachment A) of the ACCC's ex-post review of Caltex's acquisition of Milemaker found that petrol prices in local areas near the Milemaker sites had increased by around 0.8 cents per litre (or around 0.5 per cent) costing motorists around $6 million per annum. Depending on the circumstances, a merger between national petrol retailers could have a similar effect on a far broader geographic scale. For example, in a past merger between petrol retailers operating on a national scale, the ACCC found that petrol prices increased by, on average, 0.5 per cent and would have cost households up to $90 million per annum in FY16, and likely much more today.

2.16. It is not just households that are impacted when competition is reduced. Businesses across the entire supply chain are impacted. Suppliers across sectors of the economy, including farmers, small business, and manufacturers, benefit from competitive markets for sourcing inputs and/or supplying their products and services to other businesses. The Australian economy is more attractive to innovative start-ups, investors, and potential new entrants when markets are competitive and therefore dynamic.

2.17. The harms to consumers and the economy from anti-competitive mergers are clear. Less clear are the claimed efficiency benefits from such mergers. As outlined in section 3 and by Dr Woodbridge in Attachment A, even if efficiencies arise from a merger, this does not guarantee that those beneficial effects will outweigh the adverse effects of any consequent increase in market power. That is, the merger may still be characterised by a substantial lessening of competition. Available evidence indicates that mergers not only do not reliably result in efficiencies but, to the extent that they do, they are often outweighed by adverse competition effects, including from higher prices. There are also often other means of achieving claimed efficiencies; ones that do not rely on adverse effects on consumers and the economy. In the main, this includes by way of competition.

3. ACCC's balanced and targeted reform proposals

3.1. Consideration about whether, and how, to modernise Australia's merger control regime raises fundamental questions about the risk tolerance for allowing anti-competitive mergers to proceed against blocking mergers that do little or no competitive harm, and about where the harms from these risks should lie. The ACCC considers it is appropriate to place the risk and costs of uncertainty about the future with the merger parties rather than consumers and the economy, and for this to happen, there needs to be a policy and law shift.

3.2. The ACCC's proposals to reform Australia's merger regime are measured and proportionate. In our view, the proposals more appropriately place the risk on the merger parties rather than the public. Once an anti-competitive merger has occurred

and competition has been lessened, the market structure will have changed, and the effects can be long-lasting.

3.3. The elements of the ACCC's proposed merger reform package are summarised in paragraph 1.2 above. The ACCC has developed its proposed reforms as a package, to be considered and implemented in its entirety. The effectiveness of individual elements of the proposed reforms depend on the entire package being implemented.

3.4. Together, the ACCC's reforms would establish an administrative approval regime that strikes the right balance by ensuring mergers that are unlikely to have anti-competitive effects can be dealt with expeditiously with minimal regulatory burden, and creating a structured, transparent, and timely process to carefully consider those mergers where there are potential anti-competitive effects. The vast majority of mergers are non-contentious and such mergers will continue to be dealt with expeditiously and with minimal burden via the fast-track waiver process (which will deal with such mergers within 20 business days) or may not fall within the regime at all.

3.5. The most significant change for businesses will be the requirement to notify the ACCC of mergers that meet the thresholds and to suspend completion of the transaction until ACCC or Tribunal approval, or a fast-track waiver, is granted.

3.6. While concerns have been raised that the ACCC's proposals are overly burdensome, impose costs, and will stifle investment, this is not supported by the experience in other countries with similar regimes. Mandatory and/or administrative merger regimes already operate in most OECD countries and the ACCC has looked to these regimes for guidance in developing our proposals. While it is acknowledged that there will be some short-term implementation costs for merger parties under the new regime, not undertaking these reforms is likely to result in far greater long-term costs for consumers and the economy.

3.7. It is the small minority of mergers that require closer scrutiny and are most likely to cause competitive harm where the reforms are focused and will be most important. As noted by Dr Woodbridge in Attachment A, changes to merger control that make it more or less permissive will mostly affect the small number of mergers that require finely balanced judgements or are on the enforcement margin. Dr Woodbridge has observed that these mergers are in markets that are prone to the accumulation and entrenchment of market power, where the large firm faces few rivals and new entry is difficult.

3.8. The ACCC considers that the competitiveness of Australian markets is best preserved by a regime where merger parties must establish the case for approval. While a more permissive merger model decreases the risk of pro-competitive or benign mergers being erroneously prevented (in favour of merger parties), it increases the risk of anti-competitive mergers being erroneously allowed leading to adverse outcomes for consumers in the form of higher prices and less choice.

3.9. A key part of recalibrating the balance between preventing or allowing mergers where there is a risk of competitive harm is the ACCC's proposed approval test, where the merger can only proceed if the decision maker (the ACCC or Tribunal on review) is satisfied that it is not likely to substantially lessen competition. This test ensures that where the material before the decision maker does not positively satisfy it that there is no likely substantial lessening of competition, a merger will not be approved. This is not a reversal of the 'onus of proof' as this is an administrative decision being considered outside of the court context.

3.10. The ACCC does not agree with some stakeholders that a 'satisfaction' test gives the ACCC a high degree of discretion and creates uncertainty as to the standard the ACCC must apply. This is plainly wrong. There are numerous well-established legal precedents that limit the decision maker's discretion in applying the satisfaction test. These show that an administrative decision maker required to assess whether it is satisfied of a matter has a number of legal obligations, including to: (a) properly understand the law to be applied, (b) reach a conclusion that is reasonable, based on the evidence before it, (c) have an evident justification for its conclusion, (d) not act irrationally or illogically, (e) make findings of fact based on evidence, (f) take into account all relevant considerations, and ignore all irrelevant considerations, and (g) not fetter its conclusion, e.g. through pre-judgement.

3.11. In response to the concerns raised by stakeholders, the ACCC considers that concerns about discretion could be addressed by expressly stating that the decision maker *must* grant approval if satisfied that the merger would not be likely to substantially lessen competition. Such a change would clearly remove any discretion to deny approval where the decision maker is satisfied there is no likely substantial lessening of competition.

3.12. Under the ACCC's proposals, the Australian Competition Tribunal will play an important role in reviewing the ACCC's decisions. The Tribunal is an existing expert competition body, made up of a Federal Court judge, and two lay members with experience in economics, business or academia. Tribunal review is a merits review in which the Tribunal is the decision maker, forming its own decision on the evidence that was before the ACCC, not limited to finding errors in the ACCC decision. The Tribunal process will be required to be completed within a limited timeframe. The Tribunal will apply the same test as applied by the ACCC and consider the same material and any remedies before the ACCC, with discretion to consider only new evidence which relates to events that occur after the ACCC's decision or is for the purpose of clarifying existing information. We expect that the Tribunal will continue to create important guidance for the application of the merger test in future transactions.

3.13. One important focus of the ACCC reform proposals is to ensure that the ACCC is better able to respond to serial acquisitions – where a business undertakes a series of acquisitions over time and these serial acquisitions cumulatively have the potential to enable the acquiring firm to achieve a position of substantial market power, and potentially erode competition in that market. Serial acquisitions can also be used by firms that already benefit from a position of substantial market power to further extend or entrench it. The Competition Taskforce also identified this as an area of concern in its merger reform consultation paper.[9]

3.14. Dealing with serial acquisitions has been a long-standing concern and challenge, particularly as each individual acquisition may not trigger a merger notification and/or amount to a substantial lessening of competition, but a substantial lessening of competition may occur cumulatively as a result of the acquisitions over time.

3.15. Serial acquisitions by already large firms in already concentrated markets can lead to particularly problematic competition law issues, not least increased prices and reduced service and quality. Serial acquisitions have been prevalent across a broad range of industries in Australia, including many consumer-facing sectors such as grocery retailing, funeral homes, childcare, pathology, fuel retailing, hardware, liquor retailing, large digital platform service providers, pet supplies and services, and cancer

[9] Treasury, Merger Reform – consultation paper, November 2023.

treatment. In some of these markets, despite the appearance of competition because of multiple brands, consumers are not aware that they are in fact choosing between multiple brands owned by the same firm or a small number of firms.

3.16. For example, between 2017 and 2022, Petstock completed a large number of acquisitions without notifying the ACCC, and it is now the second largest specialty pet supplies retail chain in Australia. Upon subsequent investigation of the historic acquisitions, the ACCC identified significant concerns that 4 transactions (involving over 50 retail stores) have had an impact on national and state-wide chain-on-chain competition, as well as competition in multiple local areas.

3.17. Issues with serial acquisitions can be two-fold. Firstly, the ACCC might not become aware of them until a considerable time after they have completed, and market power has already been accumulated. Secondly, even where the ACCC is aware of these transactions, the current test in section 50 of the CCA may not sufficiently address acquisitions by a dominant firm of smaller or nascent competitors (either one-off or as part of a series of acquisitions) because the focus is on whether the incremental change from a single acquisition results in a substantial lessening of competition, rather than on whether the acquisition (or a number of acquisitions – i.e. serial acquisitions) increases or enhances a position of market power.

3.18. The ACCC's proposed merger reforms are intended to ensure that serial acquisitions that raise competition concerns or are in sectors prone to serial acquisitions are able to be called-in and assessed by the ACCC and that the test for approval is capable of taking into account the particular competition effects raised by serial acquisitions.

3.19. The ACCC considers that the mandatory notification regime itself may create incentives for large firms to strategically avoid triggering the notification thresholds by completing smaller serial acquisitions to avoid scrutiny. Therefore, it is important that the regime reduces these incentives and ensures that there is scope for the ACCC to have the ability to review these types of transactions via an effective call-in power.

3.20. While it is recognised that a call-in power may create some uncertainty for businesses, the ACCC proposes to produce guidance which would assist business to manage this uncertainty. Call-in powers are regularly used by competition agencies in many overseas jurisdictions with mandatory/suspensory regimes.

3.21. The ACCC's proposed approval test is intended to provide a greater focus on the structural conditions for competition. It is achieved by expressly stating that a substantial lessening of competition includes entrenching, materially increasing or materially extending a position of substantial market power. This is especially important in a context where the Taskforce's dataset reveals that acquisitions are disproportionately made by very large firms. In the case of serial acquisitions, this would focus the merger assessment on the enhancement of a position of market power by the acquirer in a market, not just on the magnitude of the incremental change arising from an individual acquisition. This would provide important interpretative guidance to businesses and for decision makers when assessing the effect of serial acquisitions on competition.

3.22. This aspect of the test is also relevant to digital platforms. Markets involving digital platforms are prone to tipping, where network effects result in one or two firms having substantial market power. Threats to these established platforms are most likely to come from nascent rivals. However, established platforms in these markets can, and it would appear often do, reduce the potential for future competitive constraint by acquiring nascent competitors before they can become a substantial threat. Large

digital platforms can also extend their market power into related markets, in particular by leveraging their data advantages.

3.23. The ACCC's Digital Platforms Services Inquiry report on regulatory reform, provided to Government in September 2022,[10] emphasised the competitive harms arising from the serial strategic acquisitions by major digital platforms which remove potential competitive threats or extend positions of market power. The report did not identify specific recommendations to address this concern, but rather suggested it be addressed as part of the broader merger reform discussions.

4. The economics of merger control and who should bear the risk

4.1. There has been considerable commentary in response to the ACCC's proposed merger reforms arguing that the current system works well and that there is no need for change. These arguments largely assume that the vast majority of mergers are pro-competitive and will benefit the economy and consumers and, in the case of mergers that do adversely affect competition, efficiencies are expected to outweigh any harm.

4.2. However, the reality is more complex and the ACCC considers that while the vast majority of mergers are not anti-competitive, assuming most mergers are pro-competitive and the efficiencies of otherwise anti-competitive mergers would outweigh any harm should not be the basis for determining the appropriate merger regime for Australia. Cost of living pressures, reduced competition in some key markets and declining productivity all indicate there should be a change in approach to merger control in Australia.

4.3. As outlined in the following section, and in the report in Attachment A by Dr Graeme Woodbridge[11], merger control balances the risk of erroneously allowing anti-competitive mergers and the risk of erroneously preventing pro-competitive or benign mergers and the resulting harm associated with each. The risk arises because of the forward-looking nature of merger review and the need to predict what is likely to happen in the future. In an overly permissive regime, the risk is more often borne by consumers.

4.4. At issue is merger control that best balances the risks of erroneously allowing anti-competitive mergers and one that erroneously prevents pro-competitive or benign ones. Critical to informing that balance is not only the risk of either of those sets of errors occurring under a particular regime, but, perhaps more importantly, the harm associated with each type of error.

4.5. Based on the ACCC's experience, and the information contained in Dr Woodbridge's report, "Economic issues in assessing merger control in Australia", an assessment of this relative harm, along with the best allocation of risk, suggests that mergers provisions should favour consumers.

4.6. Critical to this view is the fact that the potential benefits and costs of a merger are not mutually exclusive. As such, even if efficiencies do arise from a merger, this does not guarantee that those beneficial effects will outweigh the adverse effects of any consequent increase in market power, such as higher prices or lower quality goods

[10] ACCC, Digital Platform Services Inquiry Fifth Interim Report - Regulatory reform, 11 November 2022.

[11] Chief Economist of the ACCC, 2015 to 2022.

and services. That is, the merger may still be characterised by a substantial lessening of competition.

4.7. Available evidence indicates that mergers do not reliably result in efficiencies, and to the extent that they do, these are often outweighed by adverse competition effects. In particular, retrospective merger reviews indicate that the majority of mergers analysed were associated with subsequent higher prices. This is consistent with market power dominating any efficiency gains that may have arisen.

4.8. There are also often other means of achieving efficiencies; ones that do not rely on adverse effects on consumers. In the main, this includes by way of competition. As noted by Dr Woodbridge, firms can, for example, improve scale efficiencies by making better offers to their customers, so gaining additional sales. Efficiencies might also be available by way of a merger with a party that does not raise competition concerns, or by adopting different practices and management methods. As such, even in cases where efficiencies appear likely, and they do have the potential to outweigh the accompanying adverse effects, the question whether the efficiencies are only available, or more quickly and effectively available, by way of a contentious merger would remain.

4.9. With respect to the potential costs of mergers, the empirical literature (which focuses on price effects with limited information on non-price effects) not only suggests that mergers result in price increases in most cases, but that such price increases occur even in markets with a significant number of remaining competitors, and that price effects tend to be long-lasting. The last of these is supported by studies that examine the duration of cartels. This is also consistent with market power persisting in those markets characterised by high barriers to entry and expansion. Such high barriers are typical of mergers that raise serious competition concerns.

4.10. The ACCC, along with Dr Woodbridge, recognises the limitations of the empirical work on both post-merger price effects and efficiencies. The ACCC does not, however, think that negates its value. While the number of merger retrospectives are limited (although there are well over a hundred) and specific to their market circumstances, they tend to have similar results with most observing price increases following studied mergers. And while none of the studies are specific to Australia (although, Dr Woodbridge's report does note the results of an ex-post review of the 2017 acquisition of Milemaker's retail petroleum business by Caltex, which also found a price increase), a significant proportion of the international studies, as Dr Woodbridge notes, analyse mergers which involve local, rather than, national markets. There is no reason to consider that outcomes would differ in similar local markets in Australia.

4.11. Dr Woodbridge notes that parties at risk of being adversely affected by a merger (such as consumers or suppliers) are often diffuse, difficult to organise, and individually have limited "skin-in-the game". Merger parties are best-placed and best-incentivised to establish that their merger is not anti-competitive.

4.12. None of this is to deny that most mergers do not raise competition concerns – the vast majority of mergers do not. An effective means of allowing such mergers should be available, and the ACCC's proposed merger reforms support this. But in the case of mergers that do raise serious competition issues, it is in the best interests of all Australians – consumers and businesses alike – to ensure that there is a robust and effective merger regime that allows for thorough investigation and consideration.

4.13. The costs of doing otherwise are real and potentially substantial. As noted by Dr Woodbridge, even small increases in prices resulting from anti-competitive mergers

can be harmful. The potential adverse effects are not only borne by households. The goods and services at issue, as in the above example, are also often important inputs to Australian businesses of all sizes.

4.14. Reduced competition risks increasing the cost of living, rendering firms that rely on the merger parties' products as inputs less competitively effective, and reducing economic dynamism and productivity, among other risks. An effective merger regime is often the first and most effective tool against such effects. Once a merger has taken place and competition has been lessened, there is often little more that can be done – short of costly regulatory intervention – than wait and hope for the best in the long term.

5. Conclusion

5.1. For many years the informal merger review process has been the primary mechanism to protect the competitiveness of Australian markets from anti-competitive mergers. However, voluntary compliance with the current regime by merger parties and their advisors has diminished significantly. The ACCC is seeing increasingly complex transactions, notified late or not at all, and does not consider the enforcement-based informal merger review regime remains fit for purpose to prevent anti-competitive mergers and protect consumers. The enforcement nature of the regime means it is prone to inefficient and costly legal brinkmanship and is ultimately not preventing anti-competitive mergers effectively. The informal merger review regime is no longer striking the right balance between allowing benign and efficiency-enhancing mergers to proceed quickly and protecting Australian consumers and businesses from the harm of anti-competitive mergers.

5.2. Mergers can have an enduring effect on markets and competition. The costs of anti-competitive mergers are borne by consumers and business customers, through higher prices, lower product and service quality, less innovation, lower productivity and less choice. The public currently bears too much risk of anti-competitive mergers being allowed– the dial needs to be shifted to err in favour of competition and consumers.

5.3. The ACCC's strong view is that the competitiveness of Australian markets is best preserved by moving to a regime where, if a proposed transaction is caught by the regime, the merger parties must establish the case that clearance should be granted.

5.4. The Treasury Competition Review provides a unique opportunity to overhaul our outdated merger regime and move away from the enforcement-based model – which is an international outlier. The ACCC has proposed a package of balanced and measured reforms which together deliver benefits to the economy and consumers, while providing certainty to business.

5.5. In the midst of a cost-of-living crisis, the ACCC considers that merger reform is critical. The competitiveness of Australian markets must be preserved, and Australian consumers must be effectively protected from opportunistic anti-competitive acquisitions resulting in even higher prices, lower quality, less innovation, less choice and lower productivity.

Attachment A: Report by Dr Graeme Woodbridge

Economic issues in assessing merger control in Australia

Dr. Graeme Woodbridge*

22 January 2024

Executive Summary

Merger control is about identifying and preventing mergers that are likely to substantially lessen competition. For a small number of mergers this is a difficult and challenging task. As merger control is about predicting the future, errors can be made, even by well-informed and highly competent decision-makers.

The debate concerning merger rules and processes in Australia involves grappling with a difficult question: Does Australia's merger control regime strike an appropriate balance of the risk of erroneously allowing anti-competitive mergers and the risk of erroneously preventing pro-competitive or benign mergers? Or put another way, is Australia's merger control regime too permissive or not permissive enough?

There is a lot at stake in getting this balance right.

On the one hand, the accumulation and entrenchment of market power through anti-competitive mergers can inhibit innovation and productivity growth which underpin increases in real wages and improvements in living standards more broadly. On the other hand, pro-competitive or benign mergers can themselves facilitate innovation and productivity growth. There are also distributional issues. A merger control regime that is too permissive asks consumers to bear the risk of higher (quality-adjusted) prices or less product variety in return for the prospect of efficiencies, the benefits of which may largely accrue to the merger parties.

A number of issues are relevant in weighing up the risks in merger control in Australia. Specifically:

1) What are the characteristics of the markets affected by mergers that are "close calls" (or on the enforcement margin[1])?

---

* Chief Economist of the Australian Competition Consumer Commission (ACCC) from 2015 to 2022. I would like to acknowledge helpful comments on earlier versions of this paper from ACCC commissioners and staff. I would also particularly like to thank ACCC staff for preparing the table in the Appendix of the paper. The views expressed in this paper are my own.

[1] For the purpose of this paper, mergers on the enforcement margin are mergers that are opposed by the ACCC; or are not opposed by the ACCC subject to undertakings, such as divestiture undertakings, to modify

2) What are the likely economic costs of erroneously allowing anti-competitive mergers or erroneously preventing pro-competitive or benign mergers?

3) What is the empirical evidence of the effects of mergers on the enforcement margin?

4) How quickly do markets self-correct to reduce or eliminate the effects of anti-competitive mergers?

5) How are changes in economic activity, including the growth of the digital economy, affecting these risks?

6) Who bears these risks, and who is best placed to do so?

Mergers on the enforcement margin in Australia

Changes to merger control that make it more or less permissive will mostly affect mergers that are "close calls" or are on the enforcement margin. This is around 7 mergers a year in Australia.

These mergers are in markets that are prone to the accumulation and entrenchment of market power. As shown in the table below, they typically involve firms with large market shares that face few rivals. In most cases new entry is difficult. Economic theory and evidence indicate that the competition risks from mergers in markets with these characteristics are significant.

Market characteristics of horizontal mergers on the enforcement margin in Australia, 2020 to 2023

	Effect of the merger on the number of significant competitors							
Total	**2 to 1**	**3 to 2**	**4 to 3**	**5 to 4**	**6 to 5**	**7 to 6**	**Other**	**Not known or not applicable**
26	5	6	9	2	2	0	0	2
	Market shares of merged firm (estimated)							
Total	**100%**	**90 to 99%**	**80 to 89%**	**70 to 79%**	**60 to 69%**	**50 to 59%**	**Less than 50%**	**Not known or not applicable**
26	2	2	2	5	2	6	4	3

the transaction; or are withdrawn by the merger parties after the ACCC publishes a Statement of Issues where it expresses concern that the proposed merger is likely to substantially lessen competition (a red-light SOI); or are not opposed by the ACCC after it publishes a red-light SOI; or are completed before the ACCC finishes its merger review and become enforcement investigations.

Economic costs from errors in merger control

Erroneously preventing pro-competitive or benign mergers comes at an economic cost. Mergers can generate efficiencies (such as economies of scale) which can drive productivity and innovation and increase rivalry. Erroneously preventing pro-competitive or benign mergers foregoes these gains.

It is relevant to note that some efficiencies from mergers may be achieved through other means, including through letting competition "play out". While this is the case, mergers can enable efficiencies to happen more rapidly, more completely and involve less cost.

Erroneously allowing anti-competitive mergers also comes at an economic cost. Under most circumstances, competition enhances welfare through driving productivity growth and economic efficiency more broadly. Competition ensures the pursuit of profits works in favour of the many, including consumers and workers, rather than the few. Allowing anti-competitive mergers foregoes these gains.

Mergers on the enforcement margin may generate efficiencies and reduce competition. In such a case, the effect of the merger on welfare will depend on their relative effects.

Empirical evidence of the effects of mergers on the enforcement margin

The most valuable, and arguably the most reliable evidence of the effects of mergers on the enforcement margin comes from published studies that examine the effects of completed mergers. Most of these studies examine mergers in the U.S., and to a lesser extent, in Europe. Many of these studies or merger retrospectives examine mergers that were "close calls", but were allowed to proceed by the relevant competition authorities or the relevant appeal bodies.

These studies fall into two groups. The first group examines the impact of mergers on the efficiency or productivity of the merged firm. This literature is not extensive. The second group examines the effects of mergers on prices in affected markets. This literature is more developed and substantial. The studies cover different products and markets with different characteristics. While one must be careful in drawing broad conclusions from these studies, they suggest that:

a) Mergers can and do increase the efficiency or productivity of the merged firm, although this is not guaranteed and cannot be presumed.

b) Mergers can have significant effects on prices in both directions.

c) The majority of mergers analysed resulted in higher prices suggesting that:

    i. efficiencies from the mergers were not particularly common; and/or

    ii. efficiencies were not commonly passed through to customers in the form of lower prices; and/or

    iii. the effect of efficiencies on prices was not sufficient to outweigh the effects on prices from any lessening of competition from the mergers.

d) Price increases from mergers can occur in markets with a significant number of remaining competitors, but are more likely in more concentrated markets.

There are limitations of this empirical work. There are also questions concerning its value in informing the potential effects of mergers on the enforcement margin in Australia, especially given the smaller size of the Australian economy compared to the U.S. However, the majority of studies analyse the price effects of mergers in local, not national markets, which in some cases are larger and other cases smaller than similar markets in Australia.

Moreover, higher prices resulting from mergers do occur in Australia. For example, a detailed quantitative study by the Australian Competition and Consumer Commission of the effects of a merger between petrol retailers in Melbourne found prices increased in a number of local areas by, on average, 0.8 cents per litre, costing motorists around $6 million per annum.

Degree to which markets self-correct in response to anti-competitive mergers

A key question is the speed with which markets self-correct to reduce or eliminate the effects of anti-competitive mergers. Central to this question is the ease with which new firms can enter the affected markets and the ease with which existing firms in the market can expand or re-position their product offerings to "take on" firms with market power. As noted above, mergers on the enforcement margin in Australia are most often in markets where new entry is difficult.

While there is little direct empirical evidence of the speed with which markets self-correct from anti-competitive mergers, some insight can be gathered from studies that examine the duration of cartels. From an economic perspective, a cartel, by eliminating rivalry between firms, is similar to a horizontal merger. Despite price increases often in excess of 20%, around 50% of cartels last for five years, and many last a lot longer. This suggests that it can take considerable time for markets to self-correct in response to the exercise of market power.

Implications of the growth in the digital economy for merger control

The rapid expansion of the online economy has seen a significant shift of commerce to digital platforms such as Google and Amazon. These platforms make a large number of acquisitions each year, many of which are of firms in their infancy. The nature of these platforms means that the main competitive constraints can often come from entry that threatens to displace the incumbent (i.e. competition for the market).

The likelihood that any individual nascent competitor will become a disruptive force and compete for the market is most often low and uncertain. However, an anti-competitive strategy by large digital platforms of acquiring nascent competitors risks substantially reducing or eliminating potential competition and entrenching positions of substantial market power. The costs of a merger control regime that is too permissive and permits such a strategy are likely to be very substantial.

Bearing the risk of errors in merger decision-making

A key issue in balancing the risks in merger control is who should bear more or less of the risk of errors. Merger control that is more permissive shifts some of the risk from the merger parties to consumers, farmers, workers and other parties who do business with the merged firm.

A key question in this regard is which party is best placed to minimise or manage the consequences of errors in merger control.

In many cases, firms have alternatives available to them to pursue some of the productivity gains or efficiencies that otherwise may be achieved through mergers. These alternatives can provide the merger parties with the opportunity to reduce the consequences of erroneously preventing pro-competitive or benign mergers.

On the other hand, erroneously allowing anti-competitive mergers can have financial consequences for consumers that they can do little about. This is especially the case for mergers in consumer-facing markets. Many consumer-facing markets in Australia are highly concentrated and have high barriers to entry including markets in mobile communications services, fixed broadband services, residential mortgage services, petrol, supermarkets, electricity, gas, domestic air travel, health insurance and beer. Households in Australia spend around $200 billion or more on these products each year. The risk of erroneously allowing anti-competitive mergers in consumer-facing markets is particularly acute for low-income households who devote over a quarter of their expenditure to these products. Even modest increases in the prices of these products resulting from anti-competitive mergers are likely to cause financial stress for many of these households, especially those on fixed incomes (such as pensions).

Introduction

Mergers in markets where firms have market power or are prone to the accumulation of market power create risks. These risks are most often borne by consumers[2] who face higher prices and less choice from anti-competitive mergers. Anti-competitive mergers can also adversely affect other parties including farmers and workers who face fewer buyers of their produce or labour, and businesses who may pay more for their inputs. There are broader risks. The accumulation and entrenchment of market power through anti-competitive mergers can inhibit innovation and productivity growth which underpin increases in real wages and improvements in living standards more broadly.

The vast majority of mergers do not, however, pose risks to competition and are important to the efficient functioning of a market economy. They can facilitate innovation and productivity growth. They can also increase competition resulting in lower prices and better products.

Merger control is about identifying and preventing mergers that are likely to substantially lessen competition. For most mergers this assessment is straightforward. For others it is a difficult and challenging task. Errors can be made, even by well-informed and highly competent decision-makers. Some anti-competitive mergers are erroneously allowed, and some pro-competitive or benign mergers are erroneously prevented.

One challenge for policymakers is to ensure that the law and the review processes that govern merger control limit the likelihood of both types of error without unduly burdening businesses or unnecessarily delaying unproblematic mergers. A greater challenge is to strike an appropriate balance of the risk of allowing anti-competitive mergers and the risk of preventing pro-competitive or benign mergers. It is prudent to periodically assess whether an appropriate balance of these risks is being struck as evidence of the economic effects of mergers grows and the nature of economic activity changes.

There is growing international evidence that mergers in even moderately concentrated markets can be harmful to competition. This is relevant given the highly concentrated nature of the markets in which the more contentious mergers occur in Australia. Moreover, evidence that mergers reduce costs or result in other efficiencies is mixed indicating that efficiencies from mergers cannot be presumed.

Economic activity in Australia is changing. The rapid expansion of the online economy has seen a significant shift of commerce to digital platforms such as Google and Amazon. These platforms make a large number of acquisitions each year, many of which are of firms in their infancy. The nature of these platforms means that, for many users, bigger is often better. It also means that the main competitive constraints can come from entry that threatens to displace the incumbent (i.e. competition for the market). The threat posed by any individual

---

[2] For the purpose of this paper, the term consumers refer to persons who acquire goods and services for personal use or final consumption. Businesses which acquire goods and services for their use or as inputs into production are separately identified.

potential entrant is most often highly uncertain and difficult to establish. This can result in acquisitions of these firms by large digital platforms being allowed by default. A merger control regime that does so risks insulating large digital platforms from a potentially important, and possibly the only, competitive constraint they face.

At the heart of the challenge of balancing the risks in merger control is an economic question. What are the likely effects on economic welfare of a more or less permissive merger control regime? There are also distributional issues. A merger control regime that is too permissive asks consumers to bear the risk of higher (quality-adjusted) prices[3] or less product variety in return for the prospect of efficiencies, the benefits of which may largely accrue to the merger parties.[4]

The focus of this note is on the assessment of mergers under the substantial lessening of competition test (SLC test). Acquisitions of shares or assets that would have the effect, or be likely to have the effect of substantially lessening competition in a market are prohibited under s50 of the Competition and Consumer Act (CCA). Under its informal merger review process, the Australian Competition and Consumer Commission (ACCC) examines around 350 mergers a year, forming a view on whether the merger is likely to substantially lessen competition.[5] The ACCC is not the arbiter of whether or not an acquisition breaches s50 of the CCA. That is a matter for the Federal Court.

Risks associated with merger assessments

The SLC test for mergers is a forward-looking test. It involves a comparison of the future state of competition in a relevant market with the merger with the future state of competition without the merger (future with and without test).[6] Predicting the future is subject to error. For example, the likelihood, sufficiency and timeliness of new entry post-merger are crucial considerations in many merger assessments. Prior to the merger they are inherently uncertain. As result, in merger assessments, whether by the ACCC or the Court, judgements must be made. These judgements are often based on incomplete and imperfect

---

[3] There is harm to consumers if the merger increases quality-adjusted prices. If prices and the quality of a product increase as a result of a merger, consumers may be better-off.

[4] Individuals can be shareholders of firms, as well as consumers. However, it seems unlikely for most individuals, especially those in less wealthy households, that the gain from their share of any increase in corporate profits from anti-competitive mergers will offset the loss from any increase in prices or reduction in product quality or range.

[5] The ACCC also assesses mergers under the formal merger authorisation process. If the ACCC authorises a merger, the merger parties are provided with statutory protection from legal action that the acquisition contravenes s50 of the CCA. The authorisation test is broader than the SLC test. The ACCC can authorise an acquisition if it is satisfied it will not substantiality lessen competition; or will result in a net public benefit. The ACCC has received 7 applications for merger authorisation since November 2017 (when it was granted the power under the CCA to authorise mergers).

[6] Australian Competition and Consumer Commission, 'Merger Guidelines' (November 2008 (amended in November 2017)) 11.

information. Moreover, one cannot expect decision-makers to reach the same conclusion even with the same information.[7]

Put simply not all merger decisions will, with the benefit to hindsight, be accurate. In some matters decision-makers will erroneously oppose a merger by concluding it is likely to substantially lessen competition when it will not or is unlikely to do so. In other matters decision-makers will erroneously clear a merger by concluding that it is not likely to substantially lessen competition when it will or is likely to do so.[8] If one adopts a more permissive approach to merger control (allowing more mergers at the margin), the risk of erroneously clearing a merger increases and the risk of erroneously preventing a merger decreases. The opposite is the case if one adopts a less permissive approach to merger control.

There are two challenges for lawmakers in this regard.

The first is to design relevant merger law and review processes that minimise the likelihood of one type of error for a given likelihood of the other type of error. This may be achieved, for example, through good law design that limits any unnecessary ambiguity. It also involves preventing potentially problematic mergers from escaping scrutiny and ensuring the ACCC and the relevant review body or bodies have the necessary expertise, information and time to assess the likely effects of mergers. There is a balance here. Measures to improve decision-making through the gathering and assessing of more information is usually more costly for affected parties and the decision-maker. It is also likely to delay the completion of some mergers.

The second is to strike an appropriate balance of the risks of the two types of errors. This is a more difficult challenge. It involves an assessment of the likelihood and potential costs of each type of error. Two issues are important in this regard.

First, there are static and dynamic elements. More permissive merger control not only increases the likelihood of erroneously allowing anti-competitive mergers, but is also likely to encourage firms to pursue some anti-competitive mergers in the first instance. Not only can this increase the risk of more anti-competitive mergers occurring, but it can also divert resources and the attention of firms away from activities that their improve productivity. Less permissive merger control not only increases the likelihood of erroneously preventing pro-competitive mergers, but is also likely to discourage firms from pursuing some pro-competitive mergers in the first instance. A regime that unnecessarily discourages beneficial mergers can cause significant harm.

---

[7] Decision-makers are likely to place different weight on particular information and approach decision-making under uncertainty in different ways. Moreover, elements of the SLC test are by their nature subjective, for instance, the interpretation of 'substantial' in the SLC test.

[8] Academics have termed these errors as false positives (erroneously concluding a merger is anti-competitive) and false negatives (erroneously concluding a merger is not anti-competitive). See Steven C Salop, 'The Evolution and Vitality of Merger Presumptions, A Decision Theoretic Approach' (2015) 80(2) *Antitrust Law Journal* 283.

Second, changes to merger control that makes it more or less permissive will only affect mergers that are "close calls" or are on the enforcement margin. It is decisions concerning these mergers that are most prone to error. Around 2% of the mergers assessed by the ACCC are likely to be on the enforcement margin (see below). This is about 7 mergers a year.

Mergers on the enforcement margin in Australia

The ACCC examines in excess of 350 mergers each year through its informal review process. These mergers fall into three groups:

- Horizontal mergers – mergers between firms that are competitors or potential competitors operating in the same market
- Vertical mergers – mergers between firms operating in separate markets in a vertical supply chain
- Conglomerate mergers – mergers between firms operating in separate markets that are not part of a vertical supply chain. This includes mergers between firms that supply products that are complementary in either demand or supply (for example firms producing engines for motorbikes and motorboats).

While it is difficult to precisely identify all mergers on the enforcement margin, most are likely to be mergers that are:

- opposed by the ACCC; or
- not opposed by the ACCC subject to undertakings, such as divestiture undertakings, to modify the transaction; or
- withdrawn by the merger parties after the ACCC publishes a red-light Statement of Issues (SOI)[9]; or
- not opposed by the ACCC after it publishes a red-light SOI; or
- completed before the ACCC finishes its merger review and become enforcement investigations.

Classifying a merger as being on the enforcement margin does not necessarily mean it is anti-competitive. Rather, it means that the competition issues raised by the merger are very significant and involve very close examination by the ACCC. While the vast majority of mergers not on the enforcement margin do not raise competition issues, it is possible that a small number of these mergers are anti-competitive.

Of the mergers assessed by the ACCC over the past four years, 28 fall into one of these categories. Of the 28 mergers:

- 5 were opposed by the ACCC;
- 12 were not opposed by the ACCC subject to undertakings, such as divestiture undertakings, to modify the transaction;
- 6 were withdrawn by the merger parties after the ACCC published a red-light SOI;

[9] A red-light SOI is an SOI in which the ACCC expresses concern that the proposed acquisition is likely to substantially lessen competition.

- 4 were not opposed by the ACCC after it published a red-light SOI; and
- 1 was completed before the ACCC finished its merger review and became an enforcement investigation.

26 of the 28 mergers were horizontal mergers[10]. One merger was a vertical merger[11], and one had horizontal, vertical and conglomerate elements.[12] Around half of the mergers were in consumer-facing markets.

Listed in Table A1 are some of the key market characteristics of the 26 horizontal mergers. This table was prepared by the ACCC based on public and non-public information. While the ACCC has taken care to ensure the information in the table is as accurate as possible, the following should be kept in mind. The information in the table is based on the ACCC's views of the relevant markets. Market definition is not a precise exercise and can often be a point of disagreement between the ACCC and merger parties. If one takes a broader view on the boundaries of the relevant markets, some of the information in the table including the number of significant competitors and the market shares of the merged firm will change. Moreover, different metrics can be used to estimate market shares (value of sales, quantity of sales, etc.). While the metrics used to estimate the market shares reported in the table are appropriate, market shares can vary, to a degree, if other metrics are used.

Not surprisingly, the ACCC considered barriers to entry or expansion in the relevant markets to be significant in most of the matters listed, and that, by and large, the merging parties were close competitors in those markets.

---

[10] A small number of these mergers involved vertical as well as horizontal aggregation (e.g. Qantas Alliance).

[11] This matter was Dye & Durham Corporation's acquisition of Link Administration Holdings. The merger, in its original form, would have resulted in the alignment of a near monopoly provider of electronic lodgement network services used for property settlements with a significant supplier of upstream information search and broking services and practice management software. The ACCC was concerned this would have created incentives for preferential dealing conduct, resulting in the foreclosure of competition in the supply of these products. The ACCC decided to not oppose the merger after it accepted an undertaking from the acquirer (Dye and Durham) to divest its Australian business (including its information search and broking services and practice management software business). See Australian Competition and Consumer Commission, 'Dye & Durham – proposed acquisition of Link', (Public Competition Assessment, 8 November 2022).

[12] This matter was Google LLC's acquisition of Fitbit Inc. This merger resulted in horizontal and vertical aggregation potentially affecting competition in the supply of wearables, horizontal aggregation potentially affecting competition in the supply of data-dependent health services and conglomerate aggregation potentially affecting competition in the supply of certain ad tech services. See Australian Competition and Consumer Commission, 'Google LLC – proposed acquisition of Fitbit Inc', (Statement of Issues, 18 June 2020). The transaction was completed before the ACCC finished its merger review and become an enforcement investigation of a completed merger.

Of key interest is the market shares of the merging firms and the number of significant competitors[13] in the market.[14] These are summarised in Table 1 below.[15] Most of the horizontal mergers on the enforcement margin were in, or would have resulted in, highly concentrated markets.[16] 20 of the mergers would have left 3 or fewer significant competitors. In 19 of the matters the merged firm's market share exceeded or would have exceeded 50%. As discussed further below, evidence from completed transactions indicates horizontal mergers resulting in these levels of market concentration often pose significant competition risks.

Table 1: Market characteristics of horizontal mergers on the enforcement margin in Australia, 2020 to 2023

	Effect of the merger on the number of significant competitors*							
Total	**2 to 1**	**3 to 2**	**4 to 3**	**5 to 4**	**6 to 5**	**7 to 6**	**Other**	**Not known or not applicable**
26	5	6	9	2	2	0	0	2
	Market shares of merged firm (estimated)							
Total	**100%**	**90 to 99%**	**80 to 89%**	**70 to 79%**	**60 to 69%**	**50 to 59%**	**Less than 50%**	**Not known or not applicable**
26	2	2	2	5	2	6	4	3

***** For the purpose of preparing this table, significant competitors are firms with at least 5-10% of the market or are firms that are smaller but expanding or otherwise could pose a significant constraint.

---

13 For the purpose of this paper the definition of significant competitor is that used by the U.S. Federal Trade Commission who note: " …"significant competitor" is a firm whose independence could affect the ability of the merged firms to achieve an anticompetitive outcome." United States Federal Trade Commission, 'Horizontal Merger Investigation Data, Fiscal Years 1996-2011' (January 2013) 3.

14 Market shares and the number of significant competitors are not the only relevant factors in assessing the likely competitive effects of mergers. In markets where firms supply differentiated products (i.e. similar products with different attributes such as quality), the degree to which the merging firms offer products that are close substitutes in the eyes of customers is important, and can be more important than the market shares of the merging firms.

15 For each merger, the characteristics of one market are captured in the table. Where the ACCC had concerns that the merger would substantially lessen competition in more than one market, the characteristics of the most concentrated market are captured. Where a range for the number of significant competitors or market shares for this market are provided in Table A1, the largest number of significant competitors and the smallest market shares are used.

16 The U.S. Department of Justice and the Federal Trade Commission classify markets as highly concentrated if the Herfindahl-Hirschman Index (HHI) of market concentration is above 1800. (See United States Department of Justice and Federal Trade Commission, 'Merger Guidelines', (18 December 2023) 5.) The HHI is the sum of the squares of the market shares of each supplier. In markets where the merged firm would have over 50% of the market, the post-merger HHI will exceed 2500. In markets where the merged firm would have over 70% of the market, the post-merger HHI will exceed 4900.

Mergers and economic welfare

Striking an appropriate balance in merger control involves considering the potential effects of mergers on the enforcement margin on economic welfare. Two measures of welfare are often considered in debates about merger control. The first is total welfare. The second is consumer welfare.

Total welfare is the effect of the merger on the well-being of all parties affected by a merger, either directly or indirectly. This includes the owners of the merged firm and customers (including consumers). It could also include firms that supply products or inputs to the merged firm (including workers), firms that compete with the merged firm and firms providing complementary products. Some of these parties may be made better-off by the merger and some may be made worse-off. Total welfare is synonymous with economic efficiency. Economic efficiency is about using the resources available in the economy to best promote total welfare.[17]

Consumer welfare is the welfare of the final consumers of production.[18] A merger can increase total welfare even if it reduces consumer welfare.[19]

Mergers and total welfare

Potential economic benefits of mergers

Many mergers or acquisitions are motivated by the pursuit of efficiencies that enable the merged firm to operate more profitably than the firms operating independently. These efficiencies can enhance the performance of the merged firm in a number of ways including by lowering its unit costs, by placing it in a better position to improve the quality of its products or develop new products, and by adopting more efficient pricing[20]. Some of the key sources of these efficiencies are outlined in Box 1.

---

[17] This has both static and dynamic elements. It is about using labour and capital today to most effectively produce goods and services given available production technologies. It is also about developing and adopting new technologies and finding ways to develop better goods and services through investment and innovation. See Productivity Commission, 'On Efficiency and Effectiveness: Some Definitions' (Staff Research Note, May 2013) 2.

[18] This differs to the "consumer welfare standard" which is often used to distinguish between conduct (including mergers) that is anti-competitive and pro-competitive. While there is no one universally accepted definition of the consumer welfare standard, it is often interpreted to include the welfare of trading parties directly affected by the conduct or merger. See Carl Shapiro, 'The Consumer Welfare Standard in Antitrust: Outdated or a Harbour in a Sea of Doubt?' (Hearing Before the Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights, 13 December 2017)

[19] This is demonstrated by Oliver Williamson who characterised the net welfare effect of mergers that generate efficiencies (through lowering average costs of production) and higher prices (through increases in market power). See Oliver Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs', (1968) 58(1) *American Economic Review* 18.

[20] More efficient pricing means setting per unit or marginal prices closer to the marginal cost of supply.

A number of issues are relevant in considering the economic benefits from the efficiencies generated by mergers.

First, some of the efficiencies have a once-off effect (such as a reduction in overheads), while others enable the merged firm to continually improve its performance (such as economies in research and development (R&D)).

Second, efficiencies vary from merger to merger. Some of the efficiencies are specific to, or are more likely to be achieved through, certain types of mergers (such as vertical mergers for instance). Moreover, it is not possible to assume that efficiencies will result from all mergers.

Third, some efficiencies may be achieved in ways other than a merger, such as through contracts between the firms, or through investment and growth by one or both of the firms. While this is the case, mergers may enable efficiencies to happen more rapidly and more completely, and involve less cost.

Fourth, the efficiencies are firm-specific. They are not shared with other firms in the market.

Fifth, efficiencies can enable the merged firm to become a more effective competitor (than the merging firms operating independently), in turn increasing rivalry in the market. This may encourage other firms to increase their efforts to attain these or other efficiencies through merging themselves or in other ways. Mergers can also increase competition by increasing the likelihood of new entry into markets. One factor that can affect the decision of a firm to enter a market is the financial consequences if it later decides to exit. The prospect of being acquired by another party in the future can reduce the risk and increase the returns from new entry.[21]

Potential economic costs of mergers

The pursuit of efficiencies is not the only motive for mergers or acquisitions. Some mergers aim to increase or protect the merged firm's profits by reducing or limiting competition. Some mergers are motivated by both the pursuit of efficiencies and to limit competition.[22]

Competition is a process of rivalry between firms to win sales (or acquire supplies). Mergers between competitors or between firms in related markets can, under some circumstances, have the effect of interfering with the process of competition (see Box 2) and in doing so have significant adverse effects on welfare.

---

[21] For example, start-up firms developing innovative new products can occur significant upfront cost and often have a low likelihood of success. The incentive to engage in these activities is driven by the prospect of a significant upside if the product is successful. This often depends on being acquired by a firm that can effectively monetise the innovation.

[22] There are a range of other motives for mergers or acquisitions, including the desire of firms to extend their businesses into unrelated areas of commerce.

Box 1: Sources of efficiencies from mergers

Economies of scale – Larger firms are often able to produce goods or services at lower unit cost than smaller firms by spreading the upfront or fixed costs of their operations over a larger volume of output for instance. In some markets, economies of scale are substantial and are only exhausted at very large levels of production. Mergers, by combining the operations of two firms, can enable (greater) economies of scale.

Reallocation of production/distribution activities – A merger may reduce costs through enabling the reallocation of activities across the production or distribution facilities of the merging parties. For example, by shifting some production to lower cost facilities or shifting production to facilities that are closer to customers.

Advantages of scope – In some circumstances, firms that produce or offer a range of products have advantages over firms that do not. These advantages can take a number of forms. Specifically, a firm producing multiple products may:

- have lower unit costs than firms that produce them separately by, for example, sharing facilities across production lines (economies of scope);
- be able to offer better products to customers by, for example:
    - sharing information and data collected in supplying one product in the supply of other products[23]
    - enabling customers to buy related products from one provider
    - ensuring better interoperability between related products.

Mergers, by increasing the portfolio of complementary products produced or offered by the merged firm, can generate advantages of scope.

Improved corporate control – This involves replacing poorly performing management and owners of underperforming firms. Mergers or acquisitions are important mechanisms through which this can occur. The benefits of replacing poorly performing management may include lower costs, better products and more innovation.

Internalising market transactions – Some mergers replace market transactions with internal organisation within the firm. For example, vertical mergers replace market transactions of an input with self-supply by the firm. Internalising market transactions may result in a number of benefits including:

- more efficient pricing through the elimination of double marginalisation (or double mark-ups)[24]
- more efficient investment through the protection of sunk assets from hold-up
- better coordination of production activities and scheduling
- reduced transaction costs.

Increased innovation – Mergers can increase the firm's incentive and ability to innovate. This can occur through a number of the mechanisms including by generating economies of scale and scope in R&D, by internalising the exploitation of intellectual property [25] or by increasing the scope to monetise innovations.

Competition is vital to the efficient operation of a market economy. Under most circumstances[26], effective competition[27] enhances welfare through driving productivity growth and economic efficiency more broadly. This has a number of elements.

Competition and allocative efficiency

Central to economic welfare is devoting society's resources to produce goods and services that consumers value most highly. At the extreme, this is achieved if all goods and services are produced up until the last unit provides a marginal benefit to society equal to the marginal cost of production. Economists term this allocative efficiency. Competition is important in ensuring the price mechanism works to promote allocative efficiency. This occurs at two levels.[28]

First is rivalry between firms within markets. To the extent feasible[29], competition pushes prices toward the marginal cost of production providing more accurate signals to firms and consumers as to the (opportunity) cost of the product.

Second is rivalry between firms operating in different markets. Firms in different markets compete to attract resources, such as labour and capital. Competition for resources provides for more accurate price signals as to the value of resources in their alternative uses.

---

[23] For example, Google is able to provide higher quality ad targeting services by using data it obtains from its owned and operated sites such as Google Search, YouTube, Google Shopping, Gmail, and Google Maps, as well as data it obtains from third party sites through the use of Android devices and Google Chrome. See Australian Competition and Consumer Commission, *Digital Platform Services, Interim Report No. 5 – Regulatory Reform* (September 2022) 34.

[24] Double marginalisation occurs when two independent firms in a vertical supply chain exercise market power in setting their prices above marginal cost. As neither firm takes into account the effect of its prices on the profits of the other firm, prices are higher than if set by an integrated firm.

[25] For example, in some cases, a merger may be the only way in which one firm may be willing to share its IP with another firm.

[26] In the absence of market imperfections (or market failures).

[27] For the purpose of this note, the term competition refers to effective competition or workable competition. The definition of effective competition is not precise. It is probably best described by the report of the United States Attorney-General's National Committee to Study Antitrust Laws where it noted: "The basic characteristics of effective competition in the economic sense is that no one seller, and no one group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements." (United States Attorney-General's National Committee to Study Antitrust Laws, *Report of the Attorney-General's National Committee to Study Antitrust Laws* (Report 1955) 320.

[28] Jill Walker, 'An Economic Perspective of Part IV' in Michael Gvozdenovic and Stephen Puttick (eds) *Current Issues in Competition Law - Vol 1: Context and Interpretation* (Federation Press 2021) 61.

[29] In many markets prices at or close to marginal cost do not allow firms to recover their cost of production and achieve a commercial return. This is particularly the case in markets involving high fixed costs of production.

Competition and productivity

Productivity growth is about increasing the amount of goods and services produced in the economy for a given amount of production inputs, such as labour and capital.

Effective competition drives productivity growth in a number of ways.

First, is at the firm-level. Competition enhances the imperative for firms, in the pursuit of profits, to continually improve how they operate. This can involve firms finding ways to reduce or eliminate waste[30], seeking out and adopting better production technologies and systems, and seeking to improve the mix of productive inputs they use.

Box 2: Potential sources of competitive harm from mergers

The potential sources of competitive harm from mergers differ depending on the type of merger.

Horizontal mergers are mergers between firms that produce goods or services that are alternatives or substitutes from the perspective of customers. There are two broad theories of harm to competition from horizontal mergers. Specifically, horizontal mergers:

- by eliminating competition between the merging firms, may make it profitable for the merged firm to unilaterally[31] raise its prices (or lower its product quality or range) (unilateral effects theory of harm)
- by enabling firms in the market to (better) coordinate their commercial decisions, may make it profitable for firms (including the merged firm) to raise prices or reduce output[32] (coordinated effects theory for harm).

Vertical mergers are between firms supplying products that are complementary rather than substitutable. As a result, the merging firms are not competitors. There are two broad theories of harm to competition from vertical mergers:

- (anti-competitive) foreclosure where the merged firm uses control of an essential input or distribution channel to prevent or inhibit rivals from competing on their merits in an upstream or downstream market
- increasing the likelihood or stability of coordinated conduct, for example, by aligning the business structures of rival firms.

Conglomerate mergers include mergers of firms that supply products that are complementary in either demand or supply (but are not part of a vertical supply chain). As with vertical mergers, the merging firms are not competitors. The major theory of harm from conglomerate mergers concerns (anti-competitive) foreclosure where the merged firm is able to use market power in one market to limit competition from rivals in a related market through practices such as tying or bundling products. As with vertical mergers, it is

30 This is referred to by economists as x-inefficiency.

31 Holding constant the strategies of other firms in the market.

32 Coordinated conduct involves accommodating behaviours of firms in the market.

possible that some conglomerate mergers may also have the effect of increasing the likelihood or stability of coordinated conduct.

Second, effective competition drives productivity growth across the market. Competition is an effective mechanism for determining the firms that survive and thrive and those that do not. It engineers a process of creative destruction where more productive firms that are able to offer products that consumers find attractive replace less productive firms that don't. Part of this involves firms with lower (resource) costs of production replacing firms with higher costs of production (for the same or similar products). This process increases productivity across the market.

Competition and market structure

Effective competition drives change in the structure of markets (the number and size of firms). Demand and cost conditions affect the number and size of firms that are likely to profitably operate in a market, at least over the medium to longer term. For example, in some markets it may be the case that only a few firms are able to operate at the production levels necessary to fully exploit the available economies of scale. In these markets, the cost of production across the market is lower if production is concentrated in a few firms. Competition engineers a process that 'pushes' the market toward the 'optimal' structure. Importantly, the process of competition not only 'pushes' the market toward the 'optimal' number and size of firms, but it is also effective in ensuring that the more efficient firms survive.

Competition and innovation

The process of creative destruction engineered by effective competition is an important driver of innovation. As noted by Maureen Brunt:

> "Profits and losses move the system: it is the hope of supernormal profits and some respite from the "perennial gale" that motivates firms' endeavours to discover and supply the kinds of goods and services their customers want and to strive for cost-efficiency."[33]

The prospect of attaining supernormal profits[34] drives innovation and new entry into markets and the lawful pursuit of market power.[35] Market power can result from leading the development of new products or the adoption of new technologies. It can also result from establishing a reputable brand for high quality goods or services or through locational advantages. However, current success does not guarantee future success. Being "out done"

---

33 Maureen Brunt, '"Market Definition Issues" in Australia and New Zealand Trade Practices Litigation' (1990) 18 *Australian Business Law Review* 96.

34 Supernormal profits are profits in excess of the profits necessary to keep a firm in business.

35 Schumpeter is well known for stressing the importance of 'temporary monopolies' as a reward for innovation and that a great deal of innovation is by large firms in concentrated markets. See Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (George Allen and Unwin, 5th ed, 1976).

by new entrants, or the threat of being “out done” creates pressure for incumbents to respond.

Mergers and consumer welfare

Mergers that limit or prevent competition allow firms to extract ‘monopoly’ rents. While this often occurs through higher prices charged to customers, it can also occur through lower quality goods or services, more limited product range, or less choice. In consumer-facing markets, the customers are consumers. In intermediate goods markets the customers are businesses who buy inputs from the merged firm. The ultimate impact on consumers of anti-competitive mergers in these markets depends on the degree to which businesses pass on higher input costs to consumers in the form of higher prices for their products.

Not all mergers that limit or prevent competition make consumers worse-off. As noted above efficiencies resulting from mergers can drive a range of benefits for consumers, including lower prices. It is often the case however that in order for merger efficiencies to offset the effects of any significant increase in market power resulting from a merger they have to be substantial.[36]

Mergers that generate efficiencies and do not lessen competition most often provide consumers with access to better products or lower prices, or both. While this is the case, the extent of the benefits from mergers and how they are shared between the merged firm and consumers is not always clear and is likely to change over time. For example, consider a merger between two firms in a consumer-facing market. Say the merger enables the merged firm to improve the quality of its products or develop new products and bring them to market sooner. The availability of better products will no doubt benefit consumers. The extent of the consumer benefit will depend on how the new products are priced. If the improved product offered by the merged firm is unique in the market, one may expect the firm will endeavour to set the price of the product at a level to extract some or most of the additional value consumers place on the product. While this is the case, it could be short-lived. To the extent consumers value the improved product, one would expect other firms in the market to respond by improving their own offerings. How quickly and fully this is likely to occur will depend on the degree of rivalry in the market and the ease of entry.

Mergers between buyers and welfare

Merger can occur between buyers, as well as sellers. As with mergers between sellers, mergers between buyers can generate efficiencies. Mergers between buyers can also lessen

---

[36] For example, Farrell and Shapiro show at a theoretical level “… that firms with large market shares must achieve impressive synergies or scale economies if their merger is to reduce price.” See Joseph Farrell and Carl Shapiro, ‘Horizontal Mergers: An Equilibrium Analysis’ (1990) 80(1) *American Economic Review* 109. Nocke and Whinston find similar results using a broader range of theoretical models of competition. See Volker Nocke and Michael D Whinston, ‘Concentration Thresholds for Horizontal Mergers’ (2022) 112(6) *American Economic Review* 1915

competition. This can occur, for example, in produce markets where farmers face fewer buyers for their produce and in factor markets where workers face fewer buyers of their labour. In these cases, the harm is incurred by the sellers through lower prices for their produce or lower wages or worse employment conditions.

For example, in 2018, the ACCC reviewed a proposed merger between two of the three major milk processors in a large dairy farming region in south-west Victoria.[37] The ACCC was concerned that the proposed merger would substantially lessen competition in the acquisition of raw milk resulting in lower farm-gate prices for dairy farmers in the region. The impact of the lessening of competition was on farmers, not consumers. The ACCC cleared the merger after the acquirer offered to divest a major milk processing plant in the region to maintain the pre-merger market structure.

Assessing and weighing-up the risks in merger assessments

As noted above, striking an appropriate balance of the risks in merger assessments is a key challenge for merger control. There are two broad perspectives among economists and others in striking this balance.

The first is that merger control should be **more** permissive. This sentiment dates back to the Chicago School of Economics in the 1960s and is captured by Easterbrook who noted:

> "A fundamental difficulty facing the court is the incommensurability of the stakes. If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."[38]

The second is that merger control should be **less** permissive. This sentiment is captured by Hovenkamp and Scott Morton who have noted:

> **"**The economic literature has come down solidly against the key early assumption of the Chicago thinkers that markets will self-correct. To the contrary, the evidence demonstrates that eliminating antitrust enforcement likely results in monopoly prices and monopoly levels of innovation in many markets. The higher prices (or lower

[37] Australian Competition and Consumer, 'Saputo Dairy Australia – proposed acquisition of Murray Goulburn's operating assets' (Public Competition Assessment, 17 May 2018)

[38] Frank H Easterbrook, 'Limits of Antitrust' (1984) 63(1) *Texas Law Review* 2-3.

quality) caused by lack of enforcement are paid by all consumers, while the profits accrue to equity holders, disproportionately to a very small percentage at the top."[39]

The purpose of this section is to consider a number of issues relevant to assessing and weighing-up the risks in merger assessments in Australia. The following questions are relevant in this regard.

1. What is the likelihood and size of efficiency benefits from mergers?
2. Is it likely that these efficiencies would occur absent the merger, and how quickly is this likely to happen?
3. What is the likely cost from allowing anti-competitive mergers?
4. To what degree will markets 'self-correct' to eliminate or reduce any adverse effects from anti-competitive mergers, and how quickly is this likely to occur?

These are empirical questions. Where available, empirical evidence of the effects of past mergers is presented. Evidence of the effects of mergers on the enforcement margin in Australia is sparse. There is, however, a well-developed and growing empirical literature of the effects of mergers in the U.S. and to a lesser extent in Europe. This literature, in combination with the limited evidence of the effects of domestic mergers, provides some insights as to the likely effects of mergers on the enforcement margin in Australia.

1. What is the likelihood and size of efficiency benefits from mergers?

Invariably in applications for merger clearance the merging parties provide explanations of why they propose to merge. Typically, this focuses on the efficiencies they expect to achieve from the merger. While the parties often anticipate a merger will generate efficiencies, it does not mean they will always occur. Management forecasts of efficiencies can be optimistic.[40]

Ultimately, the degree to which efficiencies are achieved in practice and their size is an empirical question. Arguably, this can most reliably be assessed a period after a merger has been completed through ex-post merger reviews or retrospectives. Merger retrospectives compare firm performance (such as productivity) or outcomes (such as prices) observed before and after the merger.[41]

---

[39] Herbert Hovenkamp and Fiona Scott Morton, 'Framing the Chicago School of Antirust Analysis' (2020) 168(7) *University of Pennsylvania Law Review* 1852-1853.

[40] For example, a study of bank mergers in the U.S. found around half of the cost savings forecast by management when the merger was announced were realised. See Joel F Houston, Christopher M James and Michael D Ryngaert, 'Where Do Mergers Gains Come From? Bank Mergers from the Perspective of Insiders and Outsiders', (2001) 60 *Journal of Financial Economics* 285

[41] A key issue in these studies is controlling for factors other than the merger that may have affected firm performance or outcomes. There are two main approaches to doing so. The first involves identifying and measuring each of these factors and using regression analysis to control for their impact pre- and post-merger. The second is to use a differences-in-difference approach. This involves comparing the change in

There are two groups of merger retrospectives that can potentially shed light on the prevalence and economic significance of efficiencies from mergers. Most of these focus on horizontal mergers.

Studies in the first group directly estimate the impact of mergers on firm efficiency or productivity (such as output per worker for instance). This literature is not extensive. The major findings of a number of studies that examine the effects of mergers on firm efficiency or productivity[42] are presented in Box 3. Six of the studies estimate the efficiency effects of mergers in the U.S. Most of the studies examine the effects of a large number of mergers in major industry groups.

A number of issues are relevant in drawing implications from these studies for the efficiency effects of mergers on the enforcement margin in Australia. First, the studies are small in number and are specific to the mergers examined. Second, many of the mergers examined were not on the enforcement margin. While this is case, a number of studies focus on mergers involving horizontal overlap. Third, to the extent that smaller markets mean more firms in Australia operate below an efficient scale than in the U.S., it is possible that more mergers may achieve greater efficiencies in Australia. While this is the case, many of the mergers analysed in these studies involve small acquisitions, and in some cases involve local markets with characteristics that are likely to be similar to markets in Australia (such as local ready-mix concrete markets).

The studies found evidence of:

- increases in price-cost mark-ups but not productivity gains following mergers in the U.S. manufacturing sector
- increases in productivity following mergers in U.S. electricity generation, but not following mergers in U.S. electricity distribution
- increases in productivity at the acquired plants following mergers in the U.S. ready-mix concrete industry, but also higher prices in local areas of competitive overlap
- significant costs savings following mergers among U.S. hospitals, although these were smaller in local areas of competitive overlap
- price decreases resulting from shorter shipping distances following a joint venture between the second and third largest firms in the U.S. brewing industry, although these were offset by price increases from increases in market power.

---

the pre- and post-merger performance or outcomes in the market affected by the merger with the change in the pre- and post-merger performance or outcomes in a very similar market or markets that was not affected by the merger.

[42] This does not include revenue productivity studies which typically analyse the effect of a merger on the merged firm's revenue per worker (rather than output per worker) and merger simulation studies which use structural models to estimate the effects of the merger. It also excludes stock market event studies which examine the effects of the announcement of a merger on the stock market values of the merger parties and their rivals. Revenue productivity studies and stock market event studies do not separately identify the efficiency and market power effects of mergers.

Box 3: Empirical evidence of the effects of mergers on productivity and efficiency

Blonigen and Pierce[43] estimated the effects of mergers in the U.S. manufacturing sector that occurred between 1998 to 2006 on productivity and mark-ups (price divided by the marginal cost of production) at the plant and firm level. They noted:

> "….. we find evidence that M&As increase markups on average across U.S. manufacturing industries, but find little evidence for channels often mentioned as potential sources of productivity and efficiency gains."[44]

Demirer and Karaduman[45] examined around 5000 instances of ownership changes of plants in the U.S. electricity generation sector that occurred between 2000 and 2020. The authors found that acquired plants experienced, on average, a 4% increase in fuel efficiency in five to eight months after the acquisition. This was mainly achieved through high-productivity firms buying underperforming plants from low-productivity firms and increasing the productivity of those plants through changing operational processes.

Kwoka and Pollitt[46] examined the effects of a number of mergers in the U.S. electricity distribution sector that occurred between 1994 and 2003 on operating and capital costs. They concluded:

> "Buying firms have poor performance records prior to the merger, and appear to seek out and acquire better-performing target firms. Even more notably, target firms' post-merger efficiency actually declines. Acquiring firms record little or no gain to offset these efficiency losses by the acquired firms."[47]

Kulick[48] examined a significant number of mergers and acquisitions in the U.S. ready-mix concrete industry that occurred between 1977 and 1992. The author estimated the effects of mergers between local plants and concluded:

> " …. horizontal mergers involving plants in close geographic proximity are associated with significant price increases and decreases in output, but also significant increases in productivity at acquired plants."[49]

---

[43] Bruce A Blonigen and Justin R Pierce, 'Evidence for the Effects of Mergers on Market Power and Efficiency' (Finance and Economics Discussion Series 2016-082, Board of Governors of the Federal Reserve System, October 2016) https://doi.org/10.17016/FEDS.2016.082

[44] Ibid 5.

[45] Mert Demirer and Omer Karaduman, 'Do Mergers and Acquisitions Improve Efficiency: Evidence from Power Plants' (2023) https://gsb-faculty.stanford.edu/omer-karaduman/files/2022/12/Draft.pdf

[46] John Kwoka and Michael Pollitt, 'Do mergers improve efficiency? Evidence from restructuring the US electric power sector' (2010) 28 *International Journal of Industrial Organization* 645

[47] Ibid 654.

[48] Robert Kulick, 'Ready-to-Mix: Horizontal Mergers, Prices, and Productivity' (Discussion Paper CES 17-38, US Census Bureau, Center for Economic Studies, April 2017) https://www2.census.gov/ces/wp/2017/CES-WP-17-38.pdf

[49] Ibid 2.

Schmitt[50] examined around 330 mergers among general acute care hospitals in the U.S. that occurred over the period 2000 to 2010. The author found that:

> "…hospitals that were acquired ("target hospitals") realized cost savings of 4-7 per cent in the years following the merger (on average)"[51]

The author also concluded that:

> "…. while the main result of a 4-7 per cent cost savings suggests that recent hospital consolidation may truly be delivering on claims of systematic cost savings, it appears that those cost savings may not be as prevalent for mergers in which the acquiring system is nearby – which are exactly the transactions for which antitrust concerns are likely to be the strongest."[52]

Ashenfelter, Hosken and Weinberg[53] examined the effects on prices of a joint venture between the second and third largest firms in the U.S. brewing industry in 2008. The authors examined the correlation between changes in prices (by geographic area) and changes in market concentration and shipping distances (efficiencies) resulting from the JV. The authors found:

> "….. small but statistically significant effects of both predicted increases in concentration and reductions in our measure of shipping distances on retail beer pricing."[54]

and that

> "The effect of the increase in concentration on pricing was nearly exactly offset by efficiencies created by the merger in the average market."[55]

Braguinsky, Ohyama, Okazaki and Syverson[56] examined 73 acquisitions in the Japanese cotton spinning industry that occurred between 1896 and 1920. The authors found:

> "… that once purchased by more profitable firms, the acquired plants saw drops in inventories and unrealized output, gains in capacity utilization, and growth in both productivity and profitability. These patterns are consistent with acquiring

---

50 Matt Schmidt, 'Do hospital merger reduce costs?' (2017) 52 *Journal of Health Economics* 74.

51 Ibid 87.

52 Ibid.

53 Orley C Ashenfelter, Daniel Hosken and Matthew C Weinberg, 'Efficiencies brewed: pricing and consolidation in the US beer industry' (2015) 46(2) *The Rand Journal of Economics* 328 (*'Ashenfelter'*).

54 Ibid 329.

55 Ibid 330.

56 Serguey Braguinsky, Atsushi Ohyama, Tetsuji Okazaki and Chad Syverson, 'Acquisitions, productivity and profitability: Evidence from the Japanese cotton spinning industry' (2015) 105(7) *American Economic Review*, 2086.

owner/managers spreading their better demand management abilities across the acquired capital."[57]

Studies in the second group of retrospectives estimate the price effects resulting from mergers. These studies provide an indirect way of assessing merger efficiencies. In the absence of any lessening of competition, and to the extent that the benefits of efficiencies, at least to some degree, are passed on to customers, one would expect mergers to result in lower prices (all else the same).

There are very few studies that examine the price effects resulting from mergers in Australia. There is however an extensive literature that examines this issue in other countries, mainly in the U.S. Most of these studies examine the price impacts[58] of horizontal mergers. Reporting the findings of each of these studies is an extensive task. Fortunately, a number of reviews of this literature have been published. The main findings from these reviews are reported in Box 4.[59] The number of merger retrospectives captured in these reviews range from 18 to 60. There is a degree of overlap of the merger retrospectives covered in some of the reviews.

As with the merger retrospectives examining efficiency effects, a number of features of these retrospectives should be kept in mind when drawing implications from these studies for mergers in Australia. These are discussed later in the paper.

While some studies found that prices were lower following the merger (or mergers), this was in the minority. For example, in the studies of 46 U.S. mergers reviewed by Kwoka[60], prices were estimated to be lower following the merger in 8 or 17% of cases. Of 16 mergers in Europe examined in the studies reviewed by Mariuzzo et.al[61], this percentage was 37%. This suggests that from the mergers studied:

- efficiencies were not particularly common; and/or
- efficiencies were not commonly passed through to customers in the form of lower prices; and/or
- the effect of efficiencies on prices was not sufficient to outweigh the effects on prices from any lessening of competition from the mergers.

---

57 Ibid 2117.

58 A few also examine the impact on product quality.

59 A review of some of the literature is also contained in Malcolm B. Coate, 'A Retrospective on Merger Retrospectives in the United States' (2016) 12(2) *Journal of Competition Law and Economics* 209. Coate provides a review of a subset of the studies reviewed in other studies reported in Box 4.

60 John E Kwoka, 'Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes', (2013) 78(3) *Antitrust Law Journal*) 619 (*'Kwoka 2013'*).

61 Franco Mariuzzo, Peter Ormosi, Richard Havell, Amelia Fletcher and Bruce Lyons, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations? (Report prepared for the European Commission, Directorate-General for Competition, July 2015) https://op.europa.eu/en/publication-detail/-/publication/7c4f0300-f7cc-11e5-b1f9-01aa75ed71a1 (*'Mariuzzo'*)

Overall, the two sets of merger retrospectives suggest mergers can and do increase the efficiency or productivity of the merged firm, although this is not guaranteed and cannot be presumed.

2. Is it likely that these efficiencies would occur absent the merger, and how quickly is this likely to happen?

If the efficiencies achieved from a merger would occur in the same or similar timeframe absent the merger, and at the same or similar cost, the merger will provide little economic benefit. Whether this is likely to be the case will differ depending on the type of efficiency and the particular circumstance of the merger.

There does not appear to be any empirical studies examining this issue. The following high levels issues however seem relevant to the question.

First, in some cases, it may be better to let competition drive market consolidation in preference to mergers. For example, mergers are often motivated by the desire to reduce unit costs by increasing the merged firm's scale of production (economies of scale). Mergers are not the only way in which firms can increase their scale. They can also do so by winning sales from their rivals by making better offers to their customers. Letting the process of competition drive market consolidation can have a number of benefits. Rivalry in pursuit of scale benefits customers. It is also likely to be more effective in ensuring the most efficient firms survive.

Second, a relevant question is whether the efficiencies are only likely to be achieved through a merger that creates risks to competition. Or put another way, is it likely that the efficiencies would be achieved by a different merger, or by other means, that does not create competition concerns. Consider a merger that facilitates the replacement of poorly performing management. This is not the only way this can be achieved. The current owners of the firm are likely to have the incentive to do this. Or if they are not capable of doing so, there are likely be to a number of other potential buyers of the firm who are.

Third, most efficiencies are however likely to be, at least in part, merger-specific. That is, absent the merger, they would not be achieved to the same degree as with the merger, and/or would take considerably longer to achieve, and/or would be achieved at greater cost. Put another way, while the merger is not the only way to pursue the efficiencies, it can be most efficient or effective way of doing so. For example, consider a vertical merger that is motivated to eliminate the risk of a firm's sunk investments being appropriated through hold-up by a downstream customer. While this risk can be mitigated to a degree through long-term contracts, it may not be as complete or as effective as through the merger.

3. What is the likely cost from allowing anti-competitive mergers?

As with efficiencies, the cost of anti-competitive mergers is an empirical question. Again merger retrospectives are arguably the most reliable way of gaining an understanding of this issue. As noted above, there is an extensive and growing international literature that

examines the effect of mergers on prices (see Box 4). These studies do not directly estimate the economic cost of anti-competitive mergers. Rather, they provide some insight as to the frequency with which mergers on the enforcement margin increase or reduce prices, and the size of the price change if they do. In this way, the studies shed light on the effects of mergers on consumer welfare not total welfare.

It is important to note a few features of this literature. First, the vast majority of studies focus on the effects of horizontal mergers in consumer-facing markets. Second, the studies are limited to industries where prices are publicly available pre- and post-merger. As a result, a significant proportion of these studies examine the effects of mergers in a small number of industries including airlines, petrol, banking and hospitals.[62] Third, many of the mergers were reviewed by the relevant competition authority and were either cleared unconditionally, or cleared subject to remedies. Mergers that were blocked by the relevant authorities, or for some other reason did not proceed, are not part of the mergers studied. Fourth, many of the mergers were "close calls" involving significant competition issues (i.e. were on the enforcement margin).

As noted above, these studies mainly examine the price effects of mergers in the U.S. and to a lesser extent mergers in European countries. As a result, it is important to consider the extent to which the findings of these studies are relevant to assessing the likely price effects of mergers on the enforcement margin in Australia. A number of factors could potentially cause differing effects of mergers in similar product markets across countries including factors likely to affect barriers to entry (such as differences in regulations or licensing conditions across countries). A detailed comparison of the markets examined in these studies and markets in Australia is beyond the scope of this paper. However, a number of comments can be made about the possible effects differences in market size may have on the likely effects of mergers in the U.S. and Europe, and Australia. It is sometimes claimed that the smaller size of the Australian economy means merger control should be more permissive here than in other jurisdictions.

First, the effect of market size on the likely price effects of mergers is not clear cut. Consider a market involving economies of scale. On the one hand, a smaller market may mean more firms operate below an efficient scale in which case mergers may be efficiency-enhancing and, all else the same, result in lower prices. On the other hand, a smaller market may mean the market is more concentrated and that profitable entry is more difficult and less likely (as an entrant must gain a larger share of the market to reach an efficient scale) in which case mergers may, all else the same, result in higher prices.

---

62 Some studies estimated the price effects of individual mergers. A small number estimated the average price effect across a number of mergers.

Box 4: Summaries of international empirical studies of the price effects of mergers

Kwoka[63] examined 60 merger retrospectives estimating the price effects of 53 unique transactions in the U.S..[64] 46 of these were full mergers.[65] The table below[66] summarises the estimated price effects resulting from the full mergers.[67]

	Price change (%)	Number of cases
Overall	7.29	46
Increases	9.85	38
Decreases	-4.83	8

Ashenfelter, Hosken and Weinberg[68] surveyed 49 studies examining the price effects of horizontal mergers in North America and Europe.[69] Many of these studies examined more than one merger.[70] The authors noted:

> The empirical evidence that mergers can cause economically significant increases in price is overwhelming. Of the 49 studies surveyed, 36 find evidence of merger induced price increases.[71]

They further noted:

> While the literature shows that mergers on the enforcement margin increase prices more often than not, it is not the case that every marginal merger increases consumer prices. Of the 49 studies we surveyed, 13 find evidence of price reductions following a merger and 13 find evidence of no meaningful change in price following a merger.[72]

Asker and Nocke[73] reviewed 29 studies examining the effects of completed mergers that were published in top economics and industrial organisation journals. The vast majority of these mergers occurred in the U.S. or Europe. In terms of price effects the authors noted:

---

63 Kwoka 2013 (n 59).

64 Some mergers were the subject of more than one study. Two of the transactions occurred in the 1970s, 8 in the 1980s, 32 in the 1990s and 11 in the 2000s.

65 The other 7 transactions were joint ventures or airline code-sharing arrangements.

66 Ibid 632.

67 The estimated price effects varied significantly by industry.

68 Orley Ashenfelter, Daniel Hosken and Matthew Weinberg, 'Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers', (2014) 57 *Journal of Law and Economics* S67

69 Most of the mergers occurred in 1980 and 1990. Some occurred in the 2000s.

70 As a result, it is possible for a study to find evidence of both merger price increases and merger price decreases.

71 Ibid S78.

72 Ibid S79

73 John Asker and Volker Nocke, 'Collusion, mergers and related antirust issues' in Kate Ho, Ali Hortacsu and Alessandro Lizzeri (eds) *Handbook of Industrial Economics Vol 5* (Elseveir, 2021) 177.

"Studies find a wide range of price impacts. Some price[s] go up, at times by a lot. Others find no impact. Some find prices go down. The wide range of price outcomes reported following a merger is what we find most striking about these studies when examined collectively."[74]

Mariuzzo et.al[75] surveyed 18 studies examining 25 mergers in Europe that occurred between 1995 and 2012. The overwhelming proportion of the estimated price effects were between -5% and +5%. The table below reports the price effects for 16[76]of these mergers.[77] The figures in the table in parentheses remove 2 large estimated price changes (1 positive and 1 negative).

	Price change	Number of cases
Overall	2.34 (1.1)	16 (14)
Increases	8.27 (3.46)	8 (7)
Decreases	-4.80 (-1.76)	6 (5)
No effect	0 (0)	2 (2)

Price effects and market concentration

Kwoka[78] examined a significant number of merger retrospectives, separating the mergers into two groups. The first group are mergers where the retrospective study found prices increased following the merger. The second group are the mergers where the retrospective study found prices decreased following the merger. The table below classifies these mergers by the number of significant competitors remaining post-merger, including the merged firm.

Number of significant competitors remaining post-merger	Prices increased following the merger	Prices decreased following the merger
1	1	0
2	2	0
3		
4	4	0
5	7	0
6	4	1
7	2	2
8	1	2
Total	**21**	**5**

[74] Ibid 257.

[75] Mariuzzo (n 60).

[76] 4 of these mergers involved remedies.

[77] The estimated price effects reported in this table are limited to studies using the DiD estimation approach. There were 7 estimates of price changes from studies using merger simulation. The average estimated price effect for these studies was 6.9%.

[78] John Kwoka, Controlling Mergers and Market Power: A Program for Reviving Antitrust in America (Competition Policy International, 2020) 61 (*'Kwoka 2020'*)

Second, a significant proportion of the international studies analyse mergers affecting local, not national, markets. In some cases, these local markets are larger than similar markets in Australia, and in other cases they are smaller. For example, the studies examining the price effects of:

- hospital mergers examine the effects in local markets of varying sizes, including markets with around 250,000 residents[79]
- airline mergers examine the effects on routes of varying distances and passenger numbers, including small routes[80]
- retail petrol mergers examine the effects in local neighbourhoods[81]
- supermarkets mergers examine the effects in local store catchment areas.[82]

The studies captured in Box 4 examine around 100 mergers in total that occurred from the 1970s onwards. With the caveats noted above in mind, a number of observations can be made.

First, mergers can have significant effects on prices in both directions. A significant number of studies found that prices increased by more than 10% following mergers. A smaller number of studies found that prices decreased by more than 5% following mergers. Moreover, on average, price increases were larger in absolute terms than price decreases.

Second, it appears that consummated horizontal mergers on the enforcement margin are more likely to be associated with higher prices than lower prices. The majority of merger retrospectives estimated that prices increased following the merger. This is surprising given the vast majority of the mergers were investigated by the relevant competition authority and allowed to proceed.[83]

Third, horizontal mergers in markets involving even moderate levels of concentration can result in higher prices. As shown in Box 4, Kwoka[84] classified the estimated price effects from mergers by the number of significant competitors in the market (post-merger). He found price increases for some mergers that leave up to 8 significant competitors. Moreover, all of the mergers leaving 5 or fewer significant competitors resulted in higher prices. While it is not possible to draw broad conclusions from this analysis, it is consistent with the view that mergers in concentrated markets can often pose competition risks.

---

79 Vita and Sacher examine a hospital merger in Santa Cruz County in California, U.S.A.. See Michael G. Vita and Seth Sacher, 'The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study' (2001) 49(1) *Journal of Industrial Economics* 63.

80 See E. Han Kim and Vijay Segal, 'Mergers and Market Power: Evidence from the Airline Industry', (1993) 83(2) *American Economic Review* 549

81 See Vicente Lagos, 'Effectiveness of Merger Remedies: Evidence from the Retail Gasoline Industry' (2018) 66 *Journal of Industrial Economics* 942 (*'Lagos'*)

82 See Marie-Laure Allain, Claire Chambolle, Stéphane Turolla and Sofia Villas-Boas, 'The Impact of Retail Mergers on Food Prices: Evidence from France', (2017) 65(3) *Journal of Industrial Economics* 469.

83 Some of the mergers analysed proceeded prior to any investigation by the competition authority and some were allowed to proceed with remedies.

84 Kwoka 2020 (n 77)

As noted above, it may be that the effects of mergers in Australian markets differ to those in the U.S. and Europe. While this is the case, an ex-post review of a merger of petrol retailers in Melbourne suggests mergers on the enforcement margin in Australia can also result in higher prices. This merger retrospective is summarised in Box 5. The ACCC found that retail petrol prices in areas of Melbourne affected by the merger increased by, on average, 0.8 cents per litre (cpl) compared to retail prices in other areas of Melbourne that were not directly affected by the merger. These effects are similar to price or margin increases estimated in a number of international studies of the effects of mergers in petrol retailing.[85] Moreover, the price increases occurred despite the merging parties having moderate shares of petrol retailing in the affected areas. The ACCC estimated that the merger cost motorists around $6 million per year.

There is clear value in more studies examining the effects of completed mergers in Australia. As noted above, this requires access to relevant data (including pricing information) pre- and post-merger, which in many cases is not publicly available.

4. To what degree will markets 'self-correct' to eliminate or reduce any adverse effects from anti-competitive mergers, and how quickly is this likely to occur?

While some mergers may have the effect of lessening competition and enable firms to raise prices it may be short-lived. That is markets can 'self-correct'. If markets 'self-correct' quickly, the harm from anti-competitive mergers will be small.

Central to this question is the barriers to entry and expansion in the relevant markets. The ease with which new firms can enter a market and the ease with which firms in the market can expand or re-position their product offerings to "take on" firms with market power are determinative to how quickly markets can 'self-correct'. The issue here is not entry at the fringe. As noted by Marueen Brunt

> "….we cannot speak of easy entry if the only viable entry is that which occurs at the fringe of the market in competition with that fraction of the incumbents' business that has high marginal costs; or if the only viable entry is of fringe products that fail to attack the incumbents core business. There must be, in Richard Schmalansee's phrase, 'real pressure on established firms' profits'."[86]

---

[85] For example, Lagos examines the effects of a merger between the second and fourth largest petrol retailers in Chile. Lagos found in locations impacted by higher concentration there was an average margin increase of within the range [0% to 4%]. See Lagos (n 80) 945. The ACCC estimated that the Caltex-Milemaker merger increased retail margins in local areas near the Milemaker sites by 6%.

[86] Mauren Brunt, *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International , 2003) ch 6 264.

Box 5: Ex-post review of Caltex's acquisition of Milemaker

In May 2017, Caltex acquired the Milemaker retail petrol business. This involved Caltex taking over the operation of 46 retail petrol sites, 33 of which were in Melbourne. Prior to the acquisition, Milemaker acquired wholesale petrol from Caltex and sold petrol under the Caltex brand. Milemaker set retail petrol prices at its sites independently of Caltex. Caltex's had around 7% of the sites in Melbourne and Milemaker had around 4%.

The focus of the ACCC's investigation of the merger was on price competition in petrol retailing in areas of Melbourne. The ACCC found that Milemaker was a vigorous and effective price competitor in petrol retailing and that the acquisition would reduce this competition. The ACCC was concerned that this would, in turn, reduce the price competition faced by petrol retailers that compete with Milemaker resulting in higher petrol prices in the local areas in the vicinity of Milemaker sites, and possibly, more broadly, across the Melbourne metropolitan area.

The ACCC did not oppose the acquisition, concluding:

> "……. that there are a number of other vigorous and effective price competitors in fuel retailing in Melbourne who are larger than Milemaker and who compete more directly with Caltex on a local site basis. As a result, the ACCC formed the view that sufficient competitive pressure would remain in fuel retailing in Melbourne to prevent the proposed acquisition from having the effect or likely effect of substantially lessening competition in the relevant markets."[87]

In 2021, the ACCC undertook an ex-post review of the acquisition focussing on the effect on retail petrol prices. This involved comparing retail petrol prices observed prior to the acquisition with petrol prices observed after the acquisition.[88]

The ACCC's analysis indicated that Caltex changed the pricing approach at the Milemaker sites from aggressive price discounting to a less aggressive and more accommodating strategy. This reduced the competitive influence that the Milemaker sites had on other retail petrol sites in the vicinity. There was no discernible increase in the quality of the offering at the Milemaker sites. The ACCC estimated that the acquisition had the effect of increasing petrol prices in local areas near the Milemaker sites by around 0.8 cpl costing motorists around $6 million per annum.

---

[87] Australian Competition and Consumer Commission, 'Caltex Australia Petroleum Pty Ltd – proposed acquisition of certain assets of Milemaker Petroleum Pty Ltd' (Public Competition Assessment, 25 July 2018) 1.

[88] The ACCC compared retail petrol prices on a site basis observed over a period of 15 months prior to the acquisition with retail petrol prices on a site observed over a period of 17 months after the acquisition. The ACCC employed a differences-in-difference estimation approach to account for factors other than the acquisition that may have affected retail petrol prices over time. The control group for this exercise was retail petrol prices in areas of Melbourne where Milemaker did not operate.

Barriers to entry and expansion are many and varied[89] and their significance varies from market to market. As a result, the likelihood and speed with which entry is likely to undermine market power resulting from a merger can be difficult to predict. While this is the case, a number of issues are relevant in considering the likelihood that entry and expansion will limit any market power that may result from mergers on the enforcement margin.

First, most of the more controversial mergers occur in markets where firms already have some degree of market power. This suggests that barriers to entry and expansion in those markets are significant, especially in cases where the market power is persistent. The absence of entry or expansion to undermine the exercise of market power pre-merger suggests that entry or expansion is unlikely to constrain the exercise of market power post-merger.

Second, there are markets where entry on a scale necessary to discipline incumbents is highly improbable, at least over the medium term. This is particularly relevant in markets involving multi-sided platforms where strong network effects can result in markets tipping in favour of one or two providers. In such markets, entrants that offer the same or similar services as the incumbents will provide little or, more likely, no constraint. In order for entry to be effective it will likely require a very disruptive business model or vastly superior service.

Third, there can be a tendency to overestimate the likelihood and speed of new entry in merger matters. As the ACCC has recently noted after conducting ex-post reviews of a small number of mergers:

> "The ACCC relies on a range of information to assess barriers, but it is heavily informed by the submissions of merger parties and third parties. Across the ex-post reviews conducted to date, we identified numerous claims by industry participants across various industries about potential new entry. However, the ACCC identified that in almost none of these cases had any entry transpired in the time since the merger."[90]

In a few cases, the ACCC's ex-post review found little or no evidence of anti-competitive effects from the merger.[91] For these mergers the lack of entry may not be surprising. An exception to this a merger between two large suppliers of cold storage in Victoria. The ACCC found evidence that indicated prices for medium-sized customers increased by between 5%

---

89 Barriers to entry are largely factors that affect the expected profitability of entry, which in turn affects the likelihood of entry. These factors include, for example, long-term contracts or customer switching costs that make it difficult for entrants to build up scale or exploit network effects present in the market. They can also be behavioural or strategic in nature. For example, the risk of retaliatory action by incumbents against new entry, such as price wars, or actions by incumbent firms that 'lock-in' customers by increasing the costs they incur in changing their supplier.

90 Australian Competition and Consumer Commission, *Ex post review of ACCC merger decisions* (February 2022) 6.

91 This may not be surprising given a number of the mergers reviewed were not on the enforcement margin.

and 10% following the merger.[92] Two years after the merger, neither new entry nor expansion by existing suppliers had occurred to constrain these prices increases.[93]

Fourth, the loss of rivalry particularly from horizontal mergers is certain and often can be readily observed. The likelihood of new entry and its scale is much less certain. A judgement often needs to be made in weighing up the certain loss of rivalry between the merger parties and the uncertain prospect of future entry.

Finally, it is relevant to note that mergers themselves can raise barries to entry and expansion. For example a vertical merger can prevent entry by 'locking-up' access to an essential input.

Empirical evidence of the impact of mergers over time

The degree and speed with which markets 'self-correct' following mergers that lessen competition is an empirical issue.

One way to examine this issue is to investigate the effects of mergers on prices over time. To the extent markets self-correct, one would expect any initial price increases following a merger to be reversed within a short period of time. Most of the merger retrospectives estimating the price effects of mergers do not, however, estimate the effects over time. Moreover, most focus on a period of up to 2 years post-merger. This is in part because the more time that elapses post-merger, the greater the risk that factors other than the merger will affect prices.

While a small number of studies examine the price effects over time, most provide little guidance as to how quickly markets self-correct.[94] Probably the key finding from this literature is that price increases following mergers can occur soon after the merger is consummated, while the price decreases can take longer to occur.[95]

The literature on cartels provides some guidance of the speed with which markets correct in response to the exercise of market power. From an economic perspective, a cartel, by eliminating rivalry between firms, is similar to a horizontal merger. International evidence suggests that price increases resulting from cartels can be significant, often in excess of 20%.[96] While this is the case, cartels can be long-lived. Around 50% of cartels last for five

---

[92] This did not involve detailed empirical analysis of the potential causes of the price increase. While this is the case, the absence of price increases for large customer suggests that increases in (marginal) cost are unlikely to have been the cause.

[93] Ibid 16-17.

[94] This is the case for a number of reasons. For example, a number of these studies find no or limited price increases either in the short-run or long-run, or the price increases are the result of factors unrelated to the merger.

[95] See Ashenfelter (n52) and Dario Focarelli and Fabio Panetta (2003) 'Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits' (2003) 93(4) *American Economic Review* 1152.

[96] John M Connor and Robert H Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 Cardozo Law Review 427.

years[97], and many last a lot longer.[98] There are a number of ways in which cartels end including through detection by the relevant authorities or persistent 'cheating' by participants. One way is through disruptive new entry. The observation that many cartels last for over 5 years despite significant price increases suggests new entry is not universally rapid in undermining the exercise of market power.

Some factors to consider in balancing the risks in merger control in Australia

It is prudent to periodically assess whether an appropriate balance of the risks in merger control are being struck in Australia. A number of factors are relevant to this assessment.

Market characteristics of mergers on the enforcement margin in Australia

As noted above, the majority of mergers on the enforcement margin in Australia over the past 4 years were horizontal mergers. In the vast majority of cases the overlaps between the merging parties were in markets with significant barriers to entry and expansion. Moreover, most of the mergers were between firms offering similar products targeting common customer groups (i.e. they were close competitors) and resulted in, or would have resulted in, highly concentrated markets.

It is interesting to compare these characteristics with the characteristics of the markets analysed in the international merger retrospectives discussed earlier. As noted above, the merger retrospectives in the U.S suggest that is possible that mergers that leave up to 8 significant competitors could pose competition risks. Moreover, evidence suggests that this risk increases the fewer the number of significant competitors in the market. Nearly all horizontal mergers on the enforcement margin over the last 4 years in Australia would have left 5 of fewer significant competitors in a relevant market, and more than 75% would have left 3 or less. It is clear that many horizontal mergers on the enforcement margin in Australia are in markets that are prone to the accumulation of market power, and, as a result, pose significant competition risks.

Growth and characteristics of digital platforms

The growth of digital platforms, including Google and Meta, provide difficult challenges for merger control. Digital platforms provide services to more than one distinct user group. Amazon Marketplace, for example, provides a platform that facilitates trade between buyers and sellers of products.

---

[97] Similar experiences occur in Australia. For example, the cartel between Visy and Amcor in the corrugated fibre packaging market "…went on for almost five years. Had it not been accidentally exposed, it would probably still be flourishing". See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty* Limited (No 3) (2007) FCA 1617 [315].

[98] John M Connor, 'Cartel Detection and Duration Worldwide' (2011) 2 *Competition Policy International Antitrust Chronicle* 4.

A range of characteristics of digital platform markets make them prone to the accumulation of substantial market power. These include the presence of network effects[99], significant economies of scale and sunk costs, expansive ecosystems and advantages of scope, consumer inertia, switching costs and defaults, and access to and use of, vast amounts of high quality individual-level data.[100]

These characteristics have enabled a number of digital platforms to gain substantial competitive advantages, making them very difficult to challenge. Smaller platforms offering the same or similar service often have limited prospects of achieving the scale necessary to constrain large incumbent platforms in a meaningful way.[101] In such markets, more substantial competitive constraints can come from entrants who threaten to displace the incumbent by using new business models or offering different and substantially superior services. That is, in these markets, the most relevant competition can be “competition for the market” not “competition within the market”.

Digital platforms including Google, Amazon and Meta make a large number of acquisitions each year, many of which are of firms in their infancy. Many of these acquisitions are of firms supplying products that are complementary to the products offered by the platforms. This can enable the platforms to improve their product offering to users.

Some acquisitions by large digital platforms risk interfering with the process of competition by reducing or eliminating the constraint from potential competitors. Moreover, large digital platforms appear to have strong commercial incentives to make these acquisitions. While the prospect that a nascent competitor will become a disruptive force is most often low, the potential loss to a large digital platform from disruptive entry that may displace its incumbency is likely to be very substantial.

Acquisitions by large digital platforms can reduce potential competition in two ways. One is by acquiring firms that are in a position, or are developing a position, to become a meaningful competitor. These firms are likely to have a range of attributes including a significant customer base, customer data, and complementary products. The second way is by acquiring firms who have some of these attributes (e.g. customer data) but, by themselves, are not capable of developing a position to challenge the incumbent. By acquiring these firms, a large digital platform can keep them “out of the hands” of firms who may be able to use them to develop such a position.

---

99 There are two types of network effects. Positive same-side network effects occur when the value of the platform to a user increases with the number of the same type of users on the platform. Positive cross-side network effects occur when the value of the platform to a user increases with the number of the users on the other side of platform.

100 See Organisation of Economic Co-operation and Development, *The Evolving Concept of Market Power in the Digital Economy – Note by Australia* (2022). This note was prepared by the ACCC.

101 This is the case for a number of reasons including the need for users to move “on mass” to make shifting to another platform worthwhile and the absence of monetary payments by users on one side of the platform. The latter characteristic largely eliminates price discounting as a means available to entrants to attract those users to their platform.

Assessing the likely effects of acquisitions by large digital platforms on potential competition is challenging. The likelihood that any individual nascent competitor will, absent the merger, become a disruptive force and compete for the market is most often low and uncertain. However, an anti-competitive strategy by large digital platforms of acquiring nascent competitors risks entrenching positions of substantial market power. The costs of a merger control regime that is too permissive and permits such a strategy are likely to be very substantial.

Potential harm to households

The purpose of this section is to begin to explore the potential size of the harm to households from anti-competitive mergers. The harm to households from anti-competitive mergers can be direct and indirect. Anti-competitive mergers in consumer-facing markets can directly harm households though higher prices, lower product quality, or more limited range and choice. Anti-competitive mergers in intermediate product markets can indirectly harm households through businesses paying more for their inputs. The extent of this harm largely depends on the extent to which businesses pass on higher inputs costs from anti-competitive mergers to consumers.

Many consumer-facing markets in Australia are highly concentrated and entry on a significant scale is not easy. These include markets in petrol, mobile communications services, fixed broadband services, residential mortgage products, petrol, supermarkets, electricity, gas, domestic air travel, health insurance and beer. Mergers in these markets have been closely scrutinised by the ACCC in the past.

Table 5 details household expenditure on the products listed above. The expenditure for FY16 was sourced from the most recent Household Expenditure Survey (HES) conducted by the Australian Bureau of Statistics (ABS)[102]. In FY16, households[103] spent in aggregate around $155 billion on these products, constituting 23% of their expenditure. It is likely that households in aggregate spend over $200 billion per annum on these products today.[104]

---

[102] Australian Bureau of Statistics, *Household Expenditure Survey, Australia: Summary of Results, 2015–16*. (29 September 2017) Table 3.3A Household Expenditure, Detailed expenditure items, Equivalised disposable household income quintiles – Estimates

[103] Number of households sourced form Australian Bureau of Statistics, *Household Expenditure Survey, Australia: Summary of Results, 2015–16*. (29 September 2017) Table 3.2 Household Characteristics, Equivalised disposable household income quintiles

[104] Between FY16 and FY23, household final consumption expenditure in current prices increased by around 35%. See Australian Bureau of Statistics, *Australian System of National Accounts*, (Catalogue No. 5204.0, 27 October 2023) Table 42 Household Final Consumption Expenditure. Assuming that expenditure on the products listed increased in line with total household expenditure, households in aggregate spend over $200 billion per annum on these products today.

Table 5: Household expenditure by product, FY16

Product	Household Expenditure ($ billion)
Petrol	17.5
Mobile communication services	9.1
Internet services	3.0
Mortgage repayments - Interest component	37.5
Packaged groceries* (supermarkets)	44.2
Electricity	13.9
Gas	4.2
Domestic air travel (holiday travel)	4.1
Health insurance	15.6
Beer	5.4
Total	**154.6**
Percentage of total household expenditure	**23%**

* Does not include fresh products including fresh meat, fruit and vegetables.

It is difficult to predict the potential effects of anti-competitive mergers affecting the supply of these products on household expenditure. The likely size of the effects of anti-competitive mergers on prices is uncertain. Moreover, some mergers (such as acquisitions of individual supermarkets) may only affect a very small proportion of households. While this is the case, merger activity in a number sectors, including supermarkets, involves a large number of small acquisitions over time (serial acquisitions). It is the combined effect of these acquisitions that is relevant for assessing the potential impact of anti-competitive mergers in these sectors on households.

Furthermore, it should be noted that even small price increases from anti-competitive mergers can be costly to households in aggregate. For example, a merger between petrol retailers operating on national scale that increased petrol prices by, on average, 0.5 per cent could cost households up to $90 million per annum in FY16, and likely more today. Such an outcome is not unrealistic.[105]

Many of these products comprise a larger proportion of the expenditure of lower income households than they do for higher income households (see Table 6). As a result, in relative terms, lower income households have more to lose from anti-competitive mergers affecting the supply of these products. Moreover, given many of these products involve non-discretionary expenditure[106], households are likely to have limited options to 'avoid' the price increases if they were to occur.

---

[105] As noted above, the ACCC estimated that Caltex's acquisition of the Milemaker retail petrol business had the effect of increasing retail petrol prices in local areas near 33 Milemaker retail petrol sites in Melbourne by around 0.8 cpl (or around 0.5 per cent). Depending on the circumstance, a merger between national retailers could have a similar effect on a far broader geographic scale.

[106] Non-discretionary expenditure is expenditure on products that meet a basic need (food, shelter, healthcare), are required to maintain current living arrangements (car maintenance, school fees), or are a legal obligation (compulsory insurance, stamp duty). These include telecommunication services,

Table 6: Percentage of household expenditure, by income quintile and by product, FY16

	Income Quintile					
Product	**Lowest**	**Second**	**Third**	**Fourth**	**Highest**	**All**
Petrol	3.5%	3.1%	3.0%	2.7%	1.8%	2.6%
Mobile communication services	1.5%	1.6%	1.5%	1.5%	1.0%	1.4%
Internet services	0.5%	0.5%	0.5%	0.5%	0.4%	0.5%
Mortgage repayments - Interest Component	3.5%	4.8%	5.7%	6.4%	6.4%	5.6%
Packaged groceries*	8.8%	7.9%	7.5%	6.4%	4.9%	6.7%
Electricity	3.3%	2.5%	2.1%	2.0%	1.5%	2.1%
Gas	0.9%	0.8%	0.6%	0.6%	0.5%	0.6%
Domestic air travel	0.4%	0.6%	0.6%	0.6%	0.7%	0.6%
Health insurance	2.1%	2.2%	2.3%	2.5%	2.4%	2.3%
Beer	0.7%	0.9%	0.9%	0.9%	0.7%	0.8%
Total	**25.3%**	**24.9%**	**24.7%**	**24.0%**	**20.3%**	**23.2%**

* Does not include fresh products including fresh meat, fruit and vegetables.

The above figures are not designed to be an estimate of the potential harm to households from anti-competitive mergers. It does however demonstrate that households bear significant financial risks if the merger regime allows anti-competitive mergers to be consummated.

Who should bear the risk of errors in merger decision-making?

A key issue in balancing the risks in merger control is who should bear more or less of the risk of errors.

Merger control that is more permissive shifts some of the risk from the merger parties to consumers.

More permissive merger control decreases the risk of pro-competitive or benign mergers being erroneously prevented, and increases the risk of anti-competitive mergers being erroneously allowed. This as a 'win-win' for merger parties. It is not a 'win-win' for consumers. While consumers are better-off if the risk pro-competitive mergers being erroneously prevented decreases, they are worse-off, and arguably much worse-off, if the risk of anti-competitive mergers being allowed increases.

A number of factors are relevant in efficiently allocating the risk of errors in merger decision-making.

automotive fuel, many packaged groceries, housing, electricity, gas and insurance. Spending on these products may be less responsive than spending on other products to changes in household wealth or income, or changes in relative prices. See Australian Bureau of Statistics, 'Measuring Non-discretionary and Discretionary Inflation' (25 May 2021) https://www.abs.gov.au/articles/measuring-non-discretionary-and-discretionary-inflation#method

One factor is determining, and allocating more of the risk to, the party that is best placed to reduce the consequences of errors. In many cases, this is likely to be the merger parties. As noted above, it can be the case that firms have alternatives to pursue productivity gains or efficiencies that otherwise may be achieved through mergers that are on the enforcement margin. For example, firms can purse efficiencies associated with the scale or scope of their activities through other means including from pursing mergers that do not pose competition risks. How vigorously these alternatives are pursued is in the control of the merger parties. The same is much less likely to be the case for those harmed by anti-competitive mergers. This is especially the case for consumers. As noted above, many of the more contentious mergers occur in consumer-facing markets involving non-discretionary purchases. Consumers can do little to reduce the consequences of higher prices or lower product quality or range that can result from erroneously allowing anti-competitive mergers in these markets.

A second factor is determining, and allocating more of the risk to, the party that is best placed to reduce the risk of errors. In most cases, this is likely to be the merger parties. The merger parties usually have significant 'skin-in-the-game'. They also have access, and in some cases unique access, to information relevant to establishing that their merger is not anti-competitive. Put simply, merger parties are in unique position to reduce the risks that pro-competitive or benign mergers are erroneously prevented. On the other hand, parties likely to be adversely affected by decision-makers erroneously allowing anti-competitive mergers are often diffuse, difficult to organise and individually have limited 'skin-in-the-game'. This is especially the case in mergers in consumer-facing markets. While these parties may in aggregate have information relevant to establishing a merger is anti-competitive, they may not have a strong incentive and/or ability to cost-effectively collect and provide that information to the decision-maker.

A third factor is determining, and allocating less of the risk to, the party that is less able to bear the financial consequences of errors. The capacity to bear the risks of errors in merger-decision-making depends on the consequences of those errors for the parties affected. This can depend on the circumstances. Mergers most often financially benefit the firm being acquired. Erroneously preventing pro-competitive or benign mergers may have significant financial consequences for these firms. This in turn may have significant consequences for the business model of these firms and ultimately their survival. For example, the business model of start-ups involved in risky ventures that rely on being acquired to generate a commercial return on their investments may be undermined by erroneously preventing pro-competitive or benign mergers. On the other hand, erroneously allowing anti-competitive mergers can have financial consequences for households, especially low-income households, that they can do little about. As shown in Table 6, over 25% of the expenditure of low-income households is on products supplied in highly concentrated markets. Even modest increases in the prices of these products resulting from anti-competitive mergers are likely to be cause significant financial stress for many of these households, especially of those on fixed incomes (such as pensions).

The above factors suggest that, all else the same, it may be prudent to allocate more of the risk of error in merger control to the merger parties.

Table A1: Recent horizontal mergers on the enforcement margin assessed by the ACCC, Australia[1]

This table was prepared by the ACCC based on public and non-public information.

In interpreting this table it should be kept in mind that, in many matters, the ACCC did not find it necessary to come to a concluded view of the relevant market to undertake its analysis and focussed on competitive constraints. In matters where the ACCC did not form a concluded view on the markets, the number of significant competitors and market shares should be treated with caution and read in conjunctions with the ACCC's public analysis of the relevant constraints. These markets are indicated with an asterisk.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
Australian Clinical Labs/Healius[4]	2023	Opposed by ACCC	Community pathology services*; Public pathology services in Victoria*	Community pathology services: 4[5] Public pathology services in Victoria: 3[6]	Between 40 – 75% in each state and territory based on number of collection centres.[7] Public pathology services are tendered in bidding markets and historical market shares may not be indicative of closeness of competition or constraint.	Close competitors in the supply of community pathology services Close competitors in tenders to provide public pathology services in Victoria.	Significant barriers to entry/expansion on a scale sufficient to constrain the merged firm in the supply of community pathology services. High barriers to entry to compete in the supply of services in public hospitals
Viva Energy/ OTR Group[8]	2023	Not opposed by ACCC subject to divestiture undertaking	Local retailing of fuel and convenience products in South Australia/Adelaide*; Wholesale fuel distribution	4 retailers in some local areas of concern in South Australia	40%+ in some local areas of concern	Close competitors for the retail supply of fuel Target largest retailer in Adelaide	High Significant barriers to entry/expansion for petrol retailing
Endeavour Group/ Rye Hotel[9]	2023	Not opposed after ACCC published "red light" SOI	Local retailing of packaged liquor for off-site consumption*	3 (within 3km of target) 5 (within 5km of target)[10]	80% revenue basis within 3km of target 50% revenue basis within 5km of target[11]	Close competitors based on size, range and locality	The ACCC did not comment publicly on barriers to entry in this market

---

1 This table contains horizontal mergers for the period 2020 to 2023 that were opposed by the ACCC; or not opposed by the ACCC subject to undertakings, such as divestiture undertakings, to modify the transaction; or withdrawn by the merger parties after the ACCC published a "red-light" SOI; or not opposed by the ACCC after it published a "red-light" SOI; or completed before the ACCC finished its merger review and become enforcement investigations.

2 For the purpose of preparing this table, only those markets where the merger raised "issues of concern" for the ACCC are captured.

3 A significant competitor is a firm whose independence could affect the ability of the merged firm to achieve an anticompetitive outcome. For the purpose of preparing this table, significant competitors are firms with at least 5-10% of the market or are firms that are smaller but expanding or otherwise could pose a significant constraint. In determining the number of significant competitors, the ACCC has taken a conservative approach. As a result, in a number of cases, firms have been included as significant competitors where they provided a limited competitive constraint.

4 Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/australian-clinical-labs-limited-healius-limited

5 Statement of Issues at paragraph 110.

6 Statement of Issues at paragraph 158.

7 The ACCC does not necessarily consider that the number of collection centres in the state or territory is the best measure of market share, however market shares based on other metrics including revenues and the volumes of services provided are confidential.

8 Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/viva-energy-otr-group

9 Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/endeavour-group-rye-hotel

10 Statement of Issues at paragraph 24.

11 Statement of Issues at paragraph 37.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
Transurban/ Horizon Roads[12]	2023	Opposed by ACCC	Concessions to construct/ own/operate toll roads acquired through tender or unsolicited proposals in Victoria.	Bidding market – likely to vary by toll road concession.	Bidding market – historical market shares may not be indicative of closeness of competition or constraint	Future competition. Likely close competitors for future concessions	[13] High Significant incumbency advantages. Merger would have prevented potential competitors from gaining similar advantages[14]
Woolworths/ IGA - Karabar[15]	2023	Opposed by ACCC	Local retailing of groceries*	[16] 4 (within 5km of target)	[17] 50%+	Merger would have removed the competitive tension provided by IGA's differentiated offer	[18] High Low likelihood of timely entry/expansion to replace competitive tension lost by merger
Qantas/ Alliance[19]	2023	Opposed by ACCC	Fly In Fly Out air transport services to resource customers in WA and Qld*	3 large and 1 small supplier (Qld) 4 (WA) The ACCC considered competition in respect of particular FIFO routes. The number of providers overstates the number of significant competitors on some routes	[20] 50%+ based on number of aircraft and higher in terms of passengers	Close competitors Merger would have combined 2 of the 3 largest suppliers in WA and Qld	[21] High Entry or expansion on a scale required to constrain the merged firm on a timely basis unlikely.
Sika AG/ MBCC Group[22]	2023	Not opposed by ACCC subject to global divestiture undertaking	Chemical admixtures	[23] 4	[24] 80%	Closest competitors Merger would have combined the 2 largest suppliers.	[25] High Threat of new entry or expansion unlikely to have provided an effective constraint.

[12] Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/transurban-group-proposed-acquisition-of-horizon-roads-pty-ltd

[13] See Media Release: https://www.accc.gov.au/media-release/accc-opposes-transurbans-eastlink-acquisition-proposal#:~:text=The%20ACCC%20has%20decided%20to,Australia's%20largest%20toll%20road%20operator.

[14] Statement of Issues at paragraph 7.

[15] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/woolworths-supa-iga-karabar

[16] Statement of Issues at paragraphs 53-59.

[17] Statement of Issues at paragraph 53.

[18] While no public statement was made in respect of barriers in this matter, the ACCC ordinarily considers barriers to entry for local grocery retailing to be high (depending on the specific local market), see for example Coles Supabarn Statement of Issues at para 70 or the ACCC Grocery Inquiry Report at page 177.

[19] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/qantas%E2%80%99-proposed-acquisition-of-alliance-airlines

[20] Statement of Issues at paragraph 33.

[21] Statement of Issues paragraph 34.

[22] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/sika-ag-mbcc-group

[23] Public Competition Assessment at paragraph 23.

[24] Public Competition Assessment at paragraph 33.

[25] Public Competition Assessment at paragraph 34.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
Endeavour Group/ Beachfront Hotel[26]	2023	Not opposed after ACCC published "red light" SOI	Local retailing of packaged liquor for off-site consumption*	[27] 2 (within 3km of target) and 4 (within 5km of target)	45 – 80% depending on geographic market adopted	Close competitors (by retail format)	High Low likelihood of new entry due to a moratorium on new takeaway liquor licenses.
Endeavour Group/ Beach Hotel and others[28]	2022	Not opposed by ACCC subject to divestiture undertaking	Local retailing of packaged liquor for off-site consumption*	[29] 4-5 (within 5km of target (the Beach Hotel))	50%+	[30] Close competitors. Merger would have combined the 2 largest retailers	Moderate
Forestry Corporation of NSW/ Hume Forests Ltd[31]	2022	Withdrawn after ACCC published "red light" SOI	Softwood logs in Bathurst/Oberon and Tumut/ Tumbarumba regions	[32] 2 in Bathurst/Oberon (target small but significant) 1 large and 4-5 small suppliers in Tumut/ Tumbarumba	[33] 75%+ in Bathurst/ Oberon 60%+ in Tumut/ Tumbarumba	Closest competitors. Merger would have combined the 2 largest suppliers in Bathurst/ Oberon	[34] Very high High cost of purchasing land for plantations and long lead times between planting and harvest. Entry unlikely even in the long term.
THL Group/ Apollo Tourism & Leisure[35]	2022	Not opposed by ACCC subject to divestiture undertaking	Motorised recreational vehicles for rent*	3-4 offering motorhomes *and* campervans for rent, dependant on geographic market adopted.	[36] 50-70% by bookings	Closest competitors. Merger would have combined the 2 largest suppliers	[37] High Entry or expansion on a scale necessary to constrain the merged firm unlikely
Zoetis/ Jurox[38]	2022	Not opposed by ACCC subject to divestiture	Intramammary antibiotics for lactating cows:	[39] Antibiotics for lactating cows - 3 Antibiotics for dry cows - 4	[40] 40 – 60%+	Merging firms large and close competitors in the	[41] High

[26] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/endeavour-group-limited-beachfront-hotel

[27] Statement of Issues at paragraph 36.

[28] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/endeavour-group-limited-each-of-the-beach-hotel-crown-inn-tower-hotel-and-whitehorse-inn-located-in-south-australia

[29] Undertaking at paragraph at 2.9.

[30] Media release: https://www.accc.gov.au/media-release/endeavour-revises-acquisition-of-four-hotels-in-south-australia

[31] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/forestry-corporation-of-nsw-hume-forests-ltd

[32] Statement of Issues at paragraph 54.

[33] Statement of Issues at paragraph 52.

[34] Statement of Issues at paragraph 51.

[35] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/thl-group-australia-pty-ltd-apollo-tourism-leisure-ltd

[36] Statement of Issues at paragraph 57.

[37] Statement of Issues at paragraph 70.

[38] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/zoetis-australia-research-and-manufacturing-pty-ltd-betrola-investments-pty-ltd-including-jurox-pty-ltd

[39] Public Competition Assessment at paragraph 30.

[40] Statement of Issues at paragraph 73.

[41] Public Competition Assessment at paragraph 32.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
		undertaking removing overlapping products	Intramammary antibiotics for dry cows; Teat sealants for cows*	Teat sealants - 3		supply of each of the products	
Aurizon/ One Rail[42]	2022	Not opposed by ACCC subject to divestiture undertaking	Coal rail haulage services in NSW and Qld	[43] NSW: 3 [44] QLD: 2 large and 1 small and 1 emerging supplier (the target)	[45] 50-65% in NSW 60-75% in Qld	Merger parties exerted a strong and effective competitive constraint on each other in both NSW and Qld. Target was a small recent entrant in Qld but expanding.	[46] High Entry on a sufficient scale to constrain the incumbents unlikely
Culligan/ Waterlogic[47]	2022	Not opposed by ACCC subject to divestiture undertaking for key brand	Manufacture, supply and servicing of multi-functional taps	[48] 2	85%+ on a revenue basis	Target was acquirer's most effective competitor. Merger would have combined the 2 largest suppliers.	[49] High
Cargotec/ Konecranes[50]	2022	Withdrawn after ACCC published "red light" SOI and after intervention by an international regulator	Container handling equipment used at ports and intermodal terminals: Straddle carriers and shuttle carriers; and Gantry cranes*	[51] Straddle carriers and shuttle carriers – 2 in Australia, plus 1 other smaller global supplier [52] Gantry cranes – 3 in Australia plus 2 other global suppliers	[53] Straddle carriers and shuttle carriers – 100% (Australia), 90% (globally) [54] Gantry cranes – 90% (Australia)	Merger parties were the only firms supplying of straddle and shuttle carriers to Australian customers; and the 2 largest suppliers of gantry cranes to Australian customers	[55] High

[42] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/aurizon-holdings-ltd-one-rail-australia-holdings-lp

[43] Public Competition Assessment at paragraph 32.

[44] Excluding a supplier who only self-supplies. Public Competition Assessment at paragraph 32 and Table 1.

[45] Public Competition Assessment at Table 1.

[46] Public Competition Assessment at paragraph 37.

[47] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/culligan-group-culligan-waterlogic-group-holdings-limited-waterlogic

[48] Public Competition Assessment at paragraph 24.

[49] Public Competition Assessment at paragraph 26.

[50] Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/cargotec-corporation-konecranes-plc

[51] Statement of Issues at paragraph 69.

[52] Statement of Issues at paragraphs 87-90.

[53] Statement of Issues at paragraph 67.

[54] Statement of Issues at paragraph 84.

[55] Statement of Issues at paragraph 91.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
Veolia/Suez[56]	2021	Not opposed by ACCC subject to divestiture undertaking	Commercial and industrial waste collection (national/ multi-regional); Medical waste collection (SA); Putrescible waste disposal (Sydney); Dry waste disposal (Adelaide); Design and construction services for water and wastewater treatment facilities; Operation and maintenance of water and wastewater treatment facilities*	[57] Commercial and industrial waste collection (national/ multi-regional) – 3 [58] Medical waste collection (SA) – 3 [59] Putrescible waste disposal (Sydney) – 3 [60] Dry waste disposal (Adelaide) – 3 [61] Design and construction services for water and wastewater treatment facilities – 2; [62] Operation and maintenance of water and wastewater treatment facilities – 2	In some markets, market share close to 100% where parties only meaningful competitors	Close or closest competitors in all listed markets	Barriers vary by market and high for design and construction services for water and wastewater treatment facilities
Virtus Health/Adora Fertility[63]	2021	[64] ACCC was successful in an application to the Federal Court for an interlocutory injunction to prevent	Assisted reproductive technology treatments, including IVF in Melbourne and Brisbane	[65] Brisbane: 6 (including 4 offering low-cost fertility services) Melbourne: 6 (including 2 offering low-cost fertility services)	[66] 50%+	[67] Close competitors in the supply of low-cost fertility services	[68] Significant

[56] Public Register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/veolia-environnement-sa-suez-sa

[57] Public Competition Assessment at paragraph 28.

[58] Public Competition Assessment at paragraph 34.

[59] Public Competition Assessment at paragraph 39.

[60] Public Competition Assessment at paragraph 45.

[61] Public Competition Assessment at paragraph 52.

[62] Public Competition Assessment at paragraph 57.

[63] Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/virtus-health-limited-adora-fertility-and-three-day-hospitals-from-healius-limited

[64] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295. The parties announced an intention to complete prior to ACCC completing review. Media release: https://www.accc.gov.au/media-release/accc-seeks-urgent-injunction-to-halt-virtus-acquiring-adora-fertility-clinics

[65] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295 at para 105, quoting a Virtus confidential briefing paper given to the ACCC:
"(a) In Brisbane, there are six fertility services providers operating 14 clinics: City Fertility Centre (5 clinics); Virtus (3 clinics); CARE Fertility (2 clinics); Life Fertility (2 clinics); Monash IVF (1 clinic); and Adora (1 clinic). Of those clinics, 6 can be characterised as offering low cost services: First Step Facility (3 clinics, owned by City Fertility); The Fertility Centre (1 clinic owned by Virtus); IVF 4 Family (1 clinic owned by CARE Fertility); and Adora (1 clinic).
(b) In Melbourne, there are six fertility services providers operating 15 clinics: Virtus (4 clinics); Monash IVF (4 clinics); City Fertility Centre (3 clinics); Genea (1 clinic); Newlife IVF (1 clinic); No 1 Fertility (1 clinic); and Adora (1 clinic). Of those clinics, 2 can be characterised as offering low-cost services: The Fertility Centre (1 clinic owned by Virtus); and Adora (1 clinic)."

[66] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295 at para 13, quoting ACCC Concise Statement para 17: "The market share of the combined entity will be approximately 53% of the Low Cost Market (49% of the Fertility Services Market) in Brisbane and approximately 53% of the Fertility Services Market (and likely higher in the Low Cost Market) in Melbourne."

[67] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295 at para 13, quoting ACCC Concise Statement para 14: "Virtus and Adora are close and substantial competitors in the Low-Cost Markets / Fertility Services Markets, in Brisbane and Melbourne."

[68] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295 at para 112: "The ACCC alleges that barriers to entry or expansion to the fertility services markets are significant." Justice O'Bryan noted at para 113: "The evidence adduced by the ACCC on this application in support of its contentions on barriers to entry cannot be described as strong."

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
		acquisition, subject to full hearing. Acquisition did not proceed					
Aon/ Willis Towers Watson[69]	2021	Withdrawn after ACCC published "red light" SOI and after intervention by an international regulator	Commercial insurance risk broking and advisory services for large customers; Reinsurance and broking and advisory services; Employee benefits broking and consultancy services*	[70] Commercial insurance risk broking and advisory services for large customers – 3 [71] Reinsurance and broking and advisory services – 3 [72] Employee benefits broking and consultancy services – 3	Not available	Commercial risk broking; merger parties were 2 of only 3 providers capable of meeting the needs of large customers. Reinsurance broking: merger parties were 2 of only 3 providers capable of servicing Australian insurers. Employee benefits broking: merger parties were 2 of 3 major providers.	[73] High Timely entry/expansion on a scale sufficient to constrain the merged firm unlikely.
Alsco/ Spotless Laundries[74]	2020	Withdrawn after ACCC published "red light" SOI	Commercial laundry services for garments, multi-state and separately by state/major city areas*	Number of significant competitors not provided given uncertainty about the geographic dimensions of the relevant markets. The number of significant competitors varied by markets or market segments based on requirements of customers, including demand for multi-state state, within state or city services	Market shares not provided given uncertainty about the geographic dimensions of the relevant markets. Shares varied by markets or market segments based on requirements of customers, including demand for multi-state state, within state or city service	Merger parties each other's closest competitor for supply on a multi-state basis and in number of geographic areas	Significant barriers to large scale or multi-state entry.
Mylan/ Pfizer Upjohn[75]	2020	Not opposed by ACCC subject to divestiture undertaking	Pharmaceutical products with the active ingredients: Amlodipine/ Atorvastatin; Latanoprost; Latanoprost/ Timolol	Products with the active ingredients: [76] Amlodipine/Atorvastatin - 2 [77] Latanoprost - 3 [78]	Market shares varied. 100% for Amlodipine/Atorvastatin	Close or only competitors in the supply of each product	[79] High Entry considered unlikely for both generic and branded products

69 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/aon-proposed-combination-with-willis-towers-watson

70 Statement of Issues at paragraph 40.

71 Statement of Issues at paragraph 75.

72 Statement of Issues at paragraph 93.

73 Statement of Issues sections starting at paragraphs 49, 80 and 96.

74 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/alsco-pty-ltd-spotless-garment-business

75 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/mylan-nv-and-upjohn-inc-proposed-merger

76 Public Competition Assessment at paragraph 47.

77 Public Competition Assessment at paragraphs 41 to 42.

78 Public Competition Assessment at paragraph 35.

79 Public Competition Assessment at paragraphs 37 and 43.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
				Latanoprost/Timolol - 3			
Elanco/Bayer[80]	2020	Not opposed by ACCC subject to divestiture undertaking for all products where there were competition concerns	Sheep lice treatments; Gastrointestinal worming treatments for companion animals	Sheep lice treatments - 3 Gastrointestinal worming - 4	[81] Sheep lice treatments – 70% [82] Gastrointestinal worming treatments for companion animals - 45%	Closest competitors in the supply of both products	High
Australian Finance Group/ Connective Group[83]	2020	Not opposed after ACCC published "red light" SOI	Mortgage aggregation services supplied to brokers; Mortgage distribution services supplied to lenders	[84] Mortgage aggregation services – 3 large and 3 small providers	[85] Mortgage aggregation services - 39%	Close competitors. Merger would have combined 2 of the 3 largest suppliers in mortgage aggregation services, and the only significant non-bank owned suppliers	[86] Some moderate and some significant barriers to entry
Cengage/ McGraw Hill[87]	2020	Withdrawn after ACCC published "red light" SOI and after intervention by an international regulator	Higher education publishing*	[88] 4 large multi-discipline publishers	Varied by discipline, estimated up to 50% across disciplines and higher in some disciplines.	Close competitors Merger parties were 2 of the 4 major publishers	[89] High
Asahi/ Carlton and United Breweries[90]	2020	Not opposed by ACCC subject to divestiture undertaking for several overlapping brands	Cider; Beer*	[91] Cider – 2 large and 2 small suppliers [92] Beer – 2 large and 2 small suppliers	[93] Cider - 65-70% [94] Beer - 50%	[95] Closest competitors and 2 largest suppliers of cider. Acquirer had a small share of beer sales but was in a unique position	Timely entry or expansion on a sufficient scale to constrain the merged firm unlikely

80 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/elanco-animal-health-incorporated-bayer-aktiengesellschaft%E2%80%99s-animal-health-business

81 Public Competition Assessment at paragraph 26.

82 Public Competition Assessment at paragraph 31.

83 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/australian-finance-group-ltd-connective-group-pty-ltd

84 Statement of Issues at Table 1.

85 Statement of Issues at Table 1.

86 Statement of Issues at paragraph 85 onwards.

87 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/proposed-merger-between-cengage-learning-and-mcgraw-hill-education

88 Statement of Issues at paragraph 80.

89 Statement of Issues at paragraph 87.

90 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/asahi-group-holdings-carlton-united-breweries-owned-by-anheuser-busch-inbev-sanv

91 Statement of Issues at paragraphs 76-77.

92 Statement of Issues at paragraphs 76-77.

93 Public Competition Assessment at paragraph 39.

94 Statement of Issues at paragraphs 76-77.

95 Public Competition Assessment at paragraphs 39-41.

Merger	Year	Outcome	Relevant product(s)[2]	Number of significant competitors[3] in the market pre-merger	Market share of merged firm (approx.)	Competition between merger parties	Barriers to entry/expansion
						to compete against the two incumbents	
Bauer Media/ Pacific Magazines[96]	2020	Not opposed after ACCC published "red light" SOI	Publication of print/ digital magazines and online content (in particular, women's interest and real-life product categories)	[97] 2	100% in women's interest and real-life product categories in print magazines	Only competitors in women's interest and real-life product categories in print magazines	New entry unlikely in print magazines
iNova Pharmaceuticals/ Juno PC Holdings[98]	2020	Withdrawn after ACCC published "red light" SOI	Weight-loss medications*	Number of significant competitors varied depending on product dimension. 3 product market dimensions were being considered before matter was withdrawn. 1 provider plus entry of the target in respect of TGA approved phentermine-based weight loss medication (narrow market); 3 providers plus likely entry of the target (broader market)	[99] 70%+ on broadest product market	Merger would have removed a likely direct and close future competitor.	[100] New entry possible, but not in direct competition with the acquirer or the target.

96 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/bauer-media-pty-limited-pacific-magazines-pty-ltd

97 Merger parties were the only two publishers of print magazines that offer a mix of entertainment, fashion, beauty, food, and health and fitness content (women's interest) (Statement of Issues at para 48) and the only two publishers of magazines in the "real life" category (Statement of Issues at paragraphs 65).

98 Public register: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/inova-pharmaceuticals-australia-pty-ltd-juno-pc-holdings-pty-ltd

99 Statement of Issues at paragraph 7. The acquirer (iNova) had approximately 70% of the market for weight loss medications. The target (Juno PC Holdings) was a likely entrant.

100 Statement of Issues at paragraph 63.

Attachment B: Examples of challenges with the current merger regime

We set out below an analysis of past decisions by the ACCC, the Federal Court and the Australian Competition Tribunal that illustrate the challenges of Australia's current merger regime. We illustrate these challenges in the context of the informal, enforcement-based regime, including non-notification of transactions, timing pressures and information deficiencies during the review stage, evidentiary challenges and the section 50 test.

It is important to note that there are challenges in retrospectively applying a different regime to the facts that existed at the time, and it is not possible to conclude that in each of the examples there necessarily would have been a different outcome under a regime that includes the merger reforms proposed by the ACCC. However, this may be the case for a significant proportion of the examples, and this is why we are seeking reforms. Further, even where it could be argued that the final outcome was appropriate, it may have been arrived at after incurring greater costs and with more inefficiencies than would be the case in a formal regime.

Many of the markets relevant to the examples are important to the productivity of the Australian economy and prices for consumers. In addition, businesses rely on competitive markets upstream and downstream to operate efficiently, so reduced competition harms business as well. The ACCC is strongly of the view that an administrative clearance model rather than an enforcement-based model lowers the prospect of consumers and other businesses bearing the risk of anti-competitive mergers proceeding due to uncertainty and evidentiary challenges faced by the ACCC leading to a default clearance or failure to prevent the transaction from proceeding.

Non-notification of mergers

A voluntary merger regime allows the merger parties to proceed with transactions without notifying the ACCC or seeking ACCC clearance.

Primary Health Care/Healthscope

In February 2015, Primary Health Care acquired Healthscope's pathology business in Queensland without notifying the ACCC. The ACCC received complaints about the acquisition immediately after the completed acquisition was made public.

The ACCC considered that the acquisition removed a significant third player in Queensland, leaving just two major full-service pathology providers in that state. The change in market structure would be likely to result in increased prices and reduced service levels for pathology services in Queensland.

The merger parties would have been aware that the ACCC was likely to have competition concerns, based on a prior public review conducted in 2012 involving Healthscope that the ACCC opposed and another involving one of the large firms in the market which the ACCC opposed.

The ACCC investigated the completed acquisition, including through compulsory examinations of senior executives of the merger parties, and the parties eventually offered to divest many of the acquired assets to a new entrant, Medlab. As a consequence of the commitments made by the merger parties, in June 2016 the ACCC announced its decision

not to commence proceedings against Primary Health Care and Healthscope for their involvement in a breach of section 50 of the CCA.

This decision was pragmatic, and motivated by the ACCC's view that it was important to restore a competitive market structure in Queensland as expeditiously as possible, and that the divestiture undertakings given by Primary Health Care and Healthscope would be more likely to achieve this than a contested court process where the ACCC would seek penalties and other remedies with no certainty of succeeding in establishing a breach of section 50.

In the course of merger investigations, the ACCC has seen many documents that clearly indicate that merger parties have considered the potential for competition issues to be raised by their transaction but adopted a strategy of not notifying in the hope the ACCC does not find out about it. Frequently, documents contain contractual steps the parties have put in place should the ACCC become aware of the transaction and raise questions, highlighting that ACCC interest is expected given the potential for competition concerns but that they hope to avoid their transaction being noticed.

In some cases, the ACCC may not become aware of completed transactions for many years after, if at all. It is disingenuous to say there is not a notification problem because the ACCC has not identified how many mergers were not notified when there is no requirement to notify the ACCC of proposed mergers. It is impossible to know what we do not know.

Further, while the practice of providing a 'courtesy notification' technically informs the ACCC of a proposed transaction, some merger parties and their advisors provide little or no substantive information with these notifications, which are often provided shortly before completion is to take place and where the merger parties do not intend to wait for the ACCC's consideration of the transaction.

Once an anti-competitive merger is completed and the businesses and assets of the acquirer and target are combined, it can be extremely difficult to unwind the competitive harm and restore the status quo after the fact, even if the Court subsequently finds the acquisition breached section 50.

Petstock – multiple acquisitions

Between 2017 and 2022, Petstock completed a large number of acquisitions without notifying the ACCC, and it is now the second largest specialty pet retail chain in Australia. Retailing of pets and pet supplies, measured by revenue, was $3.7bn in 2023.

The ACCC became aware of these historic acquisitions during a review into a proposed acquisition by Woolworths of a 55% interest in Petstock. The ACCC has subsequently investigated these historic acquisitions and has identified significant concerns that four transactions (involving over 50 retail stores) have had an impact on national and state-wide chain-on-chain competition, as well as competition in multiple local areas. The largest of these non-notified acquisitions had a reported purchase price of $180 million.

In December 2023, the ACCC accepted divestiture undertakings offered by Petstock to resolve the ACCC's concerns that each of these four past acquisitions may have contravened section 50.

Additional case studies where the ACCC has become aware of mergers that were not notified are outlined in Attachment C.

Timing pressures on the review (threats to complete)

The current informal system is not supported by any legislative process with timelines for review. While this can provide flexibility for both the ACCC and merger parties, it relies on voluntary compliance with guidelines and accepted practices.

Our recent experience is that voluntary compliance by merger parties and their advisors has diminished significantly. While merger parties may initially notify the ACCC of a proposed transaction, hoping to get a quick pre-assessment, when it does not happen they are able to opt out of the informal system and complete before the ACCC has finalised its review. In other instances, merger parties threaten to complete before the ACCC has had time to finalise its review. Merger parties may claim various commercial reasons for the timing pressure when in some cases it is a tactic to rush the ACCC's decision.

Examples of cases where parties have threatened to complete their merger before the ACCC's review has concluded are outlined in Attachment D.

Virtus/Adora

When Virtus proposed to acquire competing IVF provider Adora Fertility in 2021, it notified the ACCC and provided very limited information. Virtus and Adora Fertility both operate clinics in Brisbane, Sydney and Melbourne.

Despite the ACCC advising the parties that the acquisition raised competition concerns that would require a public review, Virtus indicated that it intended to complete the transaction within 2 weeks. The ACCC obtained a commitment that Virtus would give the ACCC five business days' if it proposed to complete the transaction.

The ACCC had concerns that the acquisition would increase Virtus' already significant market share in Brisbane and Melbourne. The change in market shares in Sydney may have also raised concerns. In addition, as Adora Fertility was a vigorous competitor, driving down prices for IVF services through a low-cost model, the ACCC was concerned that prices would increase following the acquisition.

Virtus then gave the ACCC five business days' notice that it intended to complete the transaction.

The ACCC was forced to commence proceedings in the Federal Court within days of receiving this notice, and successfully sought interim and interlocutory injunctions in the Federal Court to restrain Virtus from completing the acquisition until the proceedings were finalised. Virtus later announced that it would not proceed with the acquisition.

The ACCC's success in obtaining an injunction does not undermine our view that there is a need for a mandatory, suspensory clearance regime that requires merger parties to come to the ACCC, with accurate upfront information and obtain the ACCC's view before proceeding. In fact, the circumstances of the Virtus case highlight the need for change. The ACCC should not be put into a position of having to commence proceedings to obtain more time to investigate and consider a potentially anti-competitive transaction. Strategic notifications made in this way are designed to pressure the ACCC to allow a transaction to complete.

In addition, the Federal Court process is adversarial, costly and has timing and resource implications for both the ACCC and merger parties. At the peak of the ACCC's investigation of the Virtus/Adora acquisition approximately a third of the ACCC's staff in the mergers area was involved, and this does not account for internal and external legal advisors.

A significant factor in the ACCC's ability to obtain the urgent injunction was due to our existing knowledge of the market based on past merger reviews. It will not always be the case that the ACCC will have a sufficient level of information and understanding within such a short period to successfully obtain a court injunction to restrain completion.

Information deficiencies during the review stage

When the ACCC becomes aware of a proposed merger, it initially assesses whether a public review is required. This pre-assessment is based on information from the merger parties and other information before the ACCC. If the ACCC is satisfied there is a low risk of a substantial lessening of competition, it decides that a public review is not necessary (i.e., it 'pre-assesses' the proposed merger).

Since there are no mandatory upfront information requirements, there is scope for the merger parties to be selective about what and how much information they provide to the ACCC for pre-assessment purposes. Therefore, information gaps impact the ACCC's ability to form a view accurately and efficiently on whether or not to pre-assess a proposed merger. Often the ACCC needs to request further information, sometimes multiple times, to rectify or supplement incorrect or incomplete information, leading to delays in the pre-assessment process.

In the informal process there is no restriction on merger parties introducing new information or evidence later in the ACCC's review or if the matter proceeds to court. This means the merger parties have an incentive to initially only provide information on a voluntary basis that they consider will persuade the ACCC that there are no, or limited, competition issues. The ACCC may subsequently obtain other information or documents which are less helpful to the merger parties' arguments during its review through targeted voluntary information requests and/or compulsory information notices. However, in some cases, these issues may not come to light until after the ACCC has made its decision or Federal Court proceedings are commenced.

Emergent Cold/AB Oxford Cold Storage

The ACCC did not oppose Emergent Cold's acquisition of AB Oxford Cold Storage in 2019. The parties were suppliers of third-party cold storage services in Victoria. Cold storage is an integral part of the domestic and international supply chains for food products including dairy, seafood, raw and cooked meat, poultry, frozen vegetables and other frozen or chilled foods.

The ACCC had concerns that Emergent Cold and Oxford were likely to be each other's closest competitors for the supply of cold storage services in Victoria. The reduction in number of large third-party cold storage providers in Victoria from four to three, and the removal of Emergent Cold's closest competitor, was likely to result in higher prices or lower service levels for the supply of third-party cold storage services in Victoria.

These concerns were supported by confidential market feedback received by the ACCC during the review.

Ultimately, there was insufficient evidence to oppose the acquisition despite concerns about the high levels of market concentration. In addition, the ACCC had received some information relating to the remaining suppliers and potential for expansion by international suppliers.

However, the ACCC's ex-post review indicated that the merger parties did not provide all relevant information about new entry into the market. Certain information relevant to the ACCC's assessment was not provided during the initial review which became apparent during the ex-post review.

The ex-post review also found that the only entry to date had been through the acquisition of local firms by overseas companies, which has not created additional competitive tensions in the market. Relevantly, within the month following the ACCC's decision not to oppose the acquisition, Lineage Logistics announced its decision to acquire Emergent Cold. During the ACCC's initial inquiries, Lineage Logistics was identified as a potential *greenfield* new entrant. The ACCC found there had been no genuine new entry into the market since the acquisition, and global consolidation had reduced the number of available global entities which could enter Australia, to the extent that no market participants have been able to identify any potential overseas entrants.

A number of mid-sized customers provided detailed accounts of significant price rises directly as a result of the loss of competitive tension following the acquisition. This was due to limited, if any, viable alternatives to Emergent. The information obtained during the ex-post review suggested that the price increases were in the order of 5-10%.

Challenges with an enforcement-based model and forward-looking test

The enforcement-based model that applies in the current regime means that when the ACCC has competition concerns and the merger parties do not voluntarily abandon or amend their proposal, the ACCC must commence Federal Court proceedings and prove a breach of section 50 of the CCA to restrain the transaction from completing. This requires the ACCC to establish, on the balance of probabilities, that the proposed merger would have the effect, or be likely to have the effect, of substantially lessening competition in the future. Alternatively, some matters proceed to litigation where the merger parties seek a declaration from the Federal Court that the transaction does not contravene section 50, but similar evidentiary issues arise for the ACCC in these proceedings.

Being able to present probative evidence to the Federal Court of future harm to competition arising from a transaction that is yet to occur, has been very challenging for the ACCC. The evidentiary challenges arise because the required level of admissible evidence needed to prove that the transaction would breach section 50 if it proceeds may not exist due to the uncertainty about the future or is difficult to obtain because of the information asymmetry that exists between the merger parties and the ACCC and/or the reluctance of third-party witnesses (such as customers) to appear in court. Third parties may not wish to give evidence in support of the ACCC's case, despite their significant competition concerns, because they are worried about potential retribution from the merger parties that they may still need to deal with post-merger.

In addition, the application of section 50 by the courts has, over time, become more narrowly focused on the specific incremental change resulting from the transaction, rather than changes in the conditions for competition.

Pacific National/Aurizon

Pacific National was (and still is) the largest provider of intermodal rail freight services in Australia. In 2019, Aurizon entered into an agreement to sell its intermodal terminal, Acacia Ridge Terminal, to Pacific National as part of its exit out of the intermodal business in Queensland.

Intermodal rail freight is an essential service which involves the transportation of products such as food, beverages, finished steel products and household and personal effects. Price increases and reduced service for freight haulage would have a significant impact on the supply chain.

It was a highly concentrated market and Pacific National's own documents indicated that following Aurizon's closure, Pacific National's market shares increased from 63% to 78% on the East-West corridor, and from 66% to 80% on the North-South corridor.

The ACCC opposed the acquisition and instituted proceedings in the Federal Court. The ACCC's main competition concern was that Pacific National's ownership of the Acacia Ridge Terminal would allow it to effectively hinder or prevent access by potential rivals, raising already high barriers to entry and entrenching its position as the dominant rail freight carrier on the east coast. Given Pacific National's market position, the only significant constraint on its behaviour was the threat of new entry.

The Full Federal Court accepted that barriers to entry into interstate intermodal services were high, and that Pacific National's acquisition of the Acacia Ridge Terminal would further raise the barriers.

However, the Full Federal Court found that the ACCC had not demonstrated that, absent the acquisition, there was a real, commercial chance of new entry in the future. The ACCC was unable to demonstrate this at that point in time, to the required legal standard. It was not enough that the ACCC demonstrated the threat of foreclosure and that the competitive process would be disrupted by the entrenchment of Pacific National's position as a consequence of heightened barriers to entry.

This case highlights the challenges of the framing of the current section 50 test, and the difficulties of proving future competitive impacts or future events. In a highly concentrated market for an essential service, the Full Federal Court not only accepted that there existed high barriers to entry which would be increased post-acquisition, it also acknowledged the uncertainty of the future. However, the ACCC's case was unsuccessful primarily because ultimately the ACCC was not able to provide evidence of likely new entry in the future.

TPG/Vodafone

In May 2019, the ACCC announced that it opposed the proposed merger between TPG and Vodafone. The mobile services market was already concentrated, with the three network operators, Telstra, Optus and Vodafone, having over 87 per cent share. Similarly, the fixed broadband market is concentrated, with Telstra, TPG and Optus having approximately 85 per cent share.

The ACCC considered that that the proposed merger between TPG and Vodafone was likely to substantially lessen competition in the supply of mobile services because the proposed merger removed the threat of entry by TPG and would preclude TPG entering as the fourth mobile network operator in Australia. The ACCC noted in particular that TPG's potential entry would focus on a lower-cost innovative model that would significantly benefit consumers. The ACCC was of the view that TPG had a commercial imperative to roll out its own mobile network, despite shorter term limitations due to changes in Government security policy limiting use of certain equipment. Developing a mobile network would give it the flexibility to deliver both fixed and mobile services at competitive prices. TPG had previously stated this

and had invested accordingly. Contemporaneous documents from the major mobile companies indicated that they feared the price effect that TPG's entry would have.

Vodafone commenced Federal Court proceedings, seeking a declaration that the proposed merger would not substantially lessen competition in breach of section 50.

The ACCC lost the case, with the Federal Court placing little weight on the commercial incentives of TPG to invest in building a mobile network, and the impact that this competitive threat can have on incumbents. The Federal Court also made comments that even if TPG were to build a network, the merger would not substantially lessen competition and may actually be pro-competitive. The Court placed little weight on how a merger causing a critical industry to shrink from 4 players to 3 players would entrench an oligopoly structure in the market, leading to higher prices.

Since the merger of TPG and Vodafone in 2020, the ACCC has observed muted price competition in the mobile services market, particularly amongst the mobile network operators' flagship brands, with their retail offerings becoming less competitive over time. This involved consecutive increases in the prices of post-paid plans, reduction in the expiry period for pre-paid plans which resulted in effective price increases and migrating existing customers from older cheaper plans onto newer more expensive plans. From July 2022, the largest operator Telstra announced its intention to conduct an annual price review of its mobile services, with the possibility of increasing its prices in line with CPI each year. Between 2020-21 and 2022-23, the median advertised price for the mobile network operators' flagship brands has increased 16%. While some of these price increases were accompanied by increases in included data allowances, the additional data may not be of value to consumers as the ACCC's data shows that growth in mobile data usage has been well below the growth in included data allowances.

We consider that the current state of competition in the mobile services market reflects a tight oligopoly structure with limited or no threat of entry, which is not promoting market outcomes in the long-term interests of end-users.

While the future state of competition without the acquisition was uncertain, competition is lost when incumbents acquire potential innovative new competitors.

Merger parties will almost always have access to more evidence about the market and potential future developments than the ACCC, and third parties may be reluctant to give evidence if they perceive a risk of reprisals by the merger parties. This raises ongoing challenges for the ACCC with identifying sufficient documentary evidence and lack of witnesses.

Past decisions by the ACCC not to oppose mergers do not necessarily mean that we concluded that they were unlikely to substantially lessen competition. In a small number of public reviews each year, we identify significant concerns but in the time available and on the information provided there may be insufficient admissible evidence to establish a contravention in court. This means the ACCC is left with little alternative but to reluctantly allow mergers that are likely to adversely affect competition to nonetheless go ahead.

Attachment C: Some examples of mergers not notified to the ACCC

	Key dates/steps	Competition concerns	Outcome
Petstock (2017-2022)	• Petstock (the second largest speciality pet retail chain in Australia) completed a large number of acquisitions between 2017 – 2022 without notifying the ACCC. • ACCC became aware of the historic acquisitions during a review into a proposed acquisition by Woolworths of a 55% interest in Petstock. • Under the CCA, the ACCC can seek court-ordered divestiture of shares or assets acquired in breach of the merger law for a period of 3 years after completion of a transaction and can also seek penalty orders for a period of 6 years.	• During the review of Woolworths' proposed acquisition, market participants expressed concerns about the already significant consolidation that had occurred within specialty pet retail. • The ACCC's investigation has raised significant concerns that 4 transactions, in particular, have an impact on national and state-wide chain-on-chain competition, as well as competition in multiple local areas.	• Review of completed acquisitions commenced. • In December 2023, the ACCC accepted proposed divestiture undertakings that have been offered by Petstock to resolve the ACCC's concerns.
Qantas completed acquisition of 19.9% holding in Alliance Airlines (2019)	• Qantas did not seek informal merger review. • 1/2/19, Qantas publicly announced it had acquired a 19.9% holding in Alliance Airlines for about $60 million. • At that time, Qantas also announced that it expected to seek regulatory approval from the ACCC to build on its shareholding, with a longer-term view of taking a majority position in Alliance Airlines.	• 1/8/19 ACCC released Statement of Issues • Competition concerns arose because market was already highly concentrated and Alliance Airlines is a close, important and growing competitor to Qantas.	• As this was a completed acquisition the ACCC did not announce an outcome of its investigation of Qantas' acquisition of 19.9% interest in Alliance Airlines. • Separately, on 5/5/22 Qantas announced that it had reached an agreement to acquire the remaining shares in Alliance that it did not already own. Qantas sought clearance from the ACCC for the full acquisition of Alliance. On 20/4/23 the ACCC announced that it opposed this proposed acquisition and the transaction was subsequently abandoned.
Primary Health Care completed acquisition of certain pathology assets of	• 2/2/15 Primary Health Care acquired Healthscope's pathology business in Queensland without notifying the ACCC.	• The acquisition removed a significant third player in Queensland, leaving just two major full-service pathology	• Primary Health Care offered a divestiture undertaking that included a requirement to divest more than 70 collection centres.

Healthscope (2015)	• The parties were aware the ACCC would likely have concerns based on a prior public review conducted in 2012 involving the target that the ACCC opposed. • 3/2/15 ACCC received complaints about the completed acquisition. • The review included multiple statutory notices and the compulsory examination under oath of executives from both firms. • 16/6/16 ACCC announced it accepted an undertaking for the divestiture of the pathology assets and would not commence court proceedings for a breach of s 50.	providers in that state. • The change in market structure would be likely to result in increased prices and reduced service levels for pathology services in Queensland.	• Based on the commitments in the undertaking, the ACCC decided not to commence proceedings against both Primary Health Care and Healthscope seeking penalties and other remedies. The undertaking was designed to restore a competitive market structure in Queensland as expeditiously as possible.
Software provider	• Part of global transaction. ACCC not notified. • ACCC received a complaint which suggested acquirer had a 90% market share in Australia. • Responses to voluntary information requests by merger parties submitted a post-acquisition market share of less than 5%.	• Statement of Issues released identifying potential competition concerns. • ACCC found that the acquirer was dominant in Australia and globally and although the target is smaller in Australia it offered lower prices and more innovative products so was a competitive constraint.	• Not opposed following public review
Manufacturer	• Part of a global transaction. ACCC not notified. • ACCC received FIRB notification. • ACCC contacted the acquirer and obtained information which confirmed there were potentially significant competition issues. • ACCC commenced a public review.	• Statement of Issues released identifying potential competition concerns	• Transaction abandoned by merger parties after ACCC issued Statement of Issues raising competition concerns.
Agriculture sector	• ACCC not notified. • Over 12 months after the acquisition was completed the ACCC received a complaint. • Given the concerns raised we requested the acquirer not to alter or remove any infrastructure or facilities without giving the ACCC notice of at least 10 working days before doing so. • Transaction agreement contained clause requiring renegotiation of contract if ACCC learned of transaction and opposed it within 120 days of completion.	• The acquisition removed an independent competitor.	• Review of completed acquisition (we do not announce an outcome for completed acquisitions).

Attachment D: Some examples of threats to complete mergers without waiting for ACCC review

	Key dates/steps	Competition concerns	Outcome
Virtus proposed acquisition of Adora (2021)	• 30/8/21 Virtus provided the ACCC with a “courtesy notification” of its intention to acquire Adora Fertility. • 21/9/21 ACCC advised merger parties it was not possible to pre-assess the transaction and commenced a public review. • Merger parties notified the ACCC on 8 October 2021 that they proposed to complete the transaction on 15 October 2021, even although the ACCC’s review would not have been completed. • 13/10/21 ACCC commenced Federal Court proceedings. • 14/10/21 Federal Court granted an interim injunction to restrain completion of the acquisition pending determination of the application for an interlocutory injunction. • 25/10/21 Federal Court granted interlocutory injunction to restrain completion of the acquisition pending s 50 proceedings being finalised. • 17/12/21 Virtus announced it would not proceed with acquisition.	• Virtus and Adora are both providers of IVF services. Both companies operate fertility clinics in Brisbane, Sydney and Melbourne. • The ACCC had concerns the acquisition would increase Virtus’ already significant market share in Brisbane and Melbourne. Concerns may also arise in relation to the change in market shares in Sydney. • In addition, there are strong indications that Adora has been a vigorous competitor, driving down prices for IVF services through a low-cost model.	• ACCC obtained interlocutory injunction in Federal Court to restrain Virtus from completing the acquisition until s 50 proceedings were completed. • The acquisition was abandoned and did not proceed.
Qube’s acquisition of Newcastle Agri Terminal (2021)	• 8/9/21 Qube notified the ACCC of the proposed acquisition with a short courtesy letter. • 30/9/21 Qube completed the transaction, despite requests from the ACCC to delay completion after competition concerns	• Qube is Australia’s largest provider of import and export logistics services including ports, bulk material handling, logistics and property services. • The Newcastle Agri Terminal is one of two bulk grain terminals located at the Port of	• 18/3/22 ACCC announced it would not pursue enforcement action of the completed acquisition.

	were raised by market participants. • 7/10/21 ACCC launched a s 50 enforcement investigation of completed acquisition.	Newcastle. Qube also operates the Quattro Terminal, one of two bulk grain terminals located at the Port of Kembla. However, given concerns with potential impacts on the supply chain for bulk grain export through the Port of Newcastle, ACCC indicated it will continue to monitor developments in the industry.	
Large retailer	• The acquirer notified the ACCC of its proposed acquisition and requested the ACCC pre-assess the transaction. • The ACCC advised the acquirer that a public review was necessary. • The acquirer would not provide a commitment not to complete the transaction before a certain date. The acquirer's legal representative advised that the acquirer would consider proceeding with the transaction if the ACCC issued a Statement of Issues. • A written commitment not to complete was only provided following negotiations with the ACCC.	• Acquirer is large retailer, and the target was a specialist retailer so there was horizontal overlap. • Market participants raised competition concerns with the ACCC. • ACCC issued Statement of Issues outlining competition concerns resulting from target acquiring close competitor.	• After conducting the review, the ACCC concluded the proposed acquisition would not be likely to substantially lessen competition. • Given the potential for competition issues to be raised by the proposed acquisition the ACCC needed time to conduct the review. • It was necessary to allocate resources to respond to the acquirer's threat to complete.