



Statement of Issues

12 December 2019

Cengage proposed merger with McGraw-Hill

Purpose

1. Educational publishing businesses Cengage Learning Holdings II, Inc (**Cengage**) and McGraw Hill Education, Inc (**McGraw-Hill**) propose to merge their global businesses (the **proposed merger**). Cengage and McGraw-Hill both operate educational publishing businesses in Australia through various subsidiaries.
2. This Statement of Issues:
 - gives the preliminary views of the Australian Competition and Consumer Commission (**ACCC**) on competition issues arising from the proposed merger;
 - identifies areas of further inquiry; and
 - invites interested parties to submit comments and information to assist our assessment of the issues.
3. Statements of Issues do not refer to confidential information provided by the parties or other market participants and therefore may not necessarily represent a full articulation of the ACCC's preliminary position.

Overview of ACCC's preliminary views

4. The legal test which the ACCC applies in considering the proposed acquisition is set out in section 50 of the *Competition and Consumer Act 2010*. In general terms, section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
5. The ACCC divides its preliminary views into three categories, 'issues of concern', 'issues that may raise concerns' and 'issues unlikely to raise concerns'. In this Statement of Issues there is one "issue of concern", one "issue that may raise concerns" and two "issues that are unlikely to raise concerns".

Issue of concern – reduction in the number of major publishers in higher education publishing in Australia

6. The ACCC is concerned that the proposed merger would substantially lessen competition in the supply of higher education publishing in Australia.
7. Higher education publishing in Australia is highly concentrated, and there are very few firms that operate on a scale comparable to Cengage and McGraw-Hill. Most other competitors are much smaller and are only active in a narrow range of disciplines. Further, the barriers associated with new entry or expansion appear to be high.

Issue that may raise concern – loss of competition for the acquisition of authors' rights for higher education content

8. The ACCC is concerned that the proposed merger may substantially lessen competition in the acquisition of authors' rights for higher education content in Australia.
9. The ACCC's preliminary view is that the proposed merger will further reduce the already limited number of major publishers with whom higher education authors can publish their works. This will likely enhance the merged entity's bargaining power with authors and increase the merged entity's ability and incentives to impose onerous terms in contracts with authors.

Issues unlikely to raise concerns – supply of primary education publishing and secondary education publishing

10. The ACCC's preliminary view is that it is not likely that the proposed merger will raise significant competition issues in respect of the supply of primary education publishing.
11. The ACCC's preliminary view is that it is not likely that the proposed merger will raise significant competition issues in respect of the supply of secondary education publishing.

Making a submission

12. The ACCC is seeking submissions from interested parties, particularly on the following key issues:
 - whether there is a market for publishing in higher education (incorporating university and Vocational Education and Training (VET)) or whether there are separate markets for publishing in university and vocational education, or separate markets for publishing in individual higher education disciplines (for example, psychology or accounting) or courses (for example, introductory psychology, management accounting or financial accounting),
 - whether there is a market for the acquisition of authors' rights in higher education (incorporating university and VET) or whether there are separate markets for the acquisition of authors' rights in university and vocational education or separate markets for the acquisition of authors' rights for individual higher education disciplines or courses,

- the extent to which a merged Cengage-McGraw-Hill would be constrained from reducing the quality of its products, eliminating titles or increasing its actual or effective prices by remaining publishers of higher education materials,
 - the height of barriers to entry in higher education publishing,
 - the height of barriers to expansion into higher education publishing in particular disciplines,
 - the ease with which authors can switch publishers, or may be able to do so post-merger, and
 - the extent to which a merged Cengage-McGraw-Hill would be constrained from lowering royalties or otherwise adversely changing terms of its contracts with authors.
13. Detailed discussion of these and other issues, along with specific questions, is contained in this Statement of Issues.
14. Interested parties should provide submissions by no later than 5pm on 20 January 2020. Responses may be emailed to mergers@acc.gov.au with the title: Submission re: Cengage/McGraw-Hill - attention Nicholas Wellfare/Tash Venaik. If you would like to discuss the matter with ACCC officers over the telephone or in person, or have any questions about this Statement of Issues, please contact Nicholas Wellfare on 02 9230 3813 or Tash Venaik on 02 9102 4084.
15. The ACCC anticipates making a final decision on 12 March 2020, however, this timeline can change. To keep abreast of possible changes in relation to timing and to find relevant documents, interested parties should visit the Mergers Register on the ACCC's website at www.accc.gov.au/publicregisters/mergers-registers/public-informal-merger-reviews.

Confidentiality of submissions

16. The ACCC will not publish submissions regarding the proposed merger. We will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the *Competition and Consumer Act 2010*. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our [Informal Merger Review Process Guidelines](#) contain more information on confidentiality.

About ACCC 'Statements of Issues'

17. A Statement of Issues published by the ACCC is not a final decision about a proposed merger, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
18. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide

the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

Timeline

Date	Event
2 September 2019	ACCC commenced review of the proposed merger
12 December 2019	ACCC publication of Statement of Issues
20 January 2020	Deadline for submissions from interested parties in response to this Statement of Issues
12 March 2020	Anticipated date for ACCC final decision

The parties

Cengage

19. Cengage is an education and technology company based in the United States of America (**USA**). It publishes educational materials including textbooks, digital solutions and supplementary educational materials and adapts its products for use in approximately 170 countries.
20. In Australia, Cengage publishes educational resources for primary education (through its Nelson Primary brand), secondary education (Nelson Secondary), and higher education, as well as research resources for libraries (GALE).
21. In the USA, Cengage offers a subscription service called 'Cengage Unlimited'. This platform provides students with access to all of Cengage's textbooks online and other online resources, for one price. The subscription offers complete access to over 22,000 products including e-books, online homework access codes and study guides. Cengage Unlimited is not currently available in Australia.

McGraw-Hill

22. McGraw-Hill is a publisher of educational services, including digital learning tools, digital platforms, custom publishing solutions and traditional printed textbooks. It is based in the USA with operations in more than 100 countries.
23. In Australia, McGraw-Hill publishes educational resources for primary education, higher education (including VET) and for professional use (in business, clinical medicine, allied health and psychology).

Industry background

24. Publishing in Australia has traditionally been considered as either:
 - “trade” publishing (also known as consumer publishing) which includes fiction and non-fiction books and children’s books; or
 - “educational” publishing.
25. Cengage and McGraw-Hill are not involved in trade publishing, and the ACCC has only considered educational publishing in its review of this matter.
26. Educational publishers develop and publish materials for teachers and students for use within the primary, secondary and higher education (university and vocational) segments. While the exact products offered differ depending on the publisher, materials generally include textbooks (both printed and digital), teacher resources and interactive or adaptive digital resources (to support student learning or allow teachers to produce customised resources).
27. Unless otherwise indicated, the remainder of the industry background described below relates to higher education publishing.

Other industry participants

Major multi-discipline publishers

28. In addition to Cengage and McGraw-Hill, Pearson and Wiley are the two other major publishers that publish materials for use across a broad number of disciplines in higher education.
29. Pearson is an education company based in the United Kingdom (**UK**) with over 30,000 employees in more than 70 countries. In Australia, Pearson publishes primary, secondary and higher education resources, as well as talent and clinical assessments, soft skills training and English language teaching and assessment. In higher education, Pearson publishes in a number of disciplines including business, economics, finance, accounting, nursing, science, language studies, medical texts and engineering.
30. John Wiley & Sons Inc (known as Wiley) is a global publishing company that also produces online scientific, technical, medical and scholarly journals, books and other digital content. In Australia, Wiley publishes secondary and higher education resources. In higher education, Wiley publishes in a number of disciplines including business, accounting, finance, psychology, health, education, science, engineering and maths.

Smaller multi-discipline publishers

31. Other multi-discipline publishers that are smaller in size include Cambridge University Press, Oxford University Press, Macmillan and Taylor & Francis.
32. Cambridge University Press is made up of three market facing publishing groups: Academic, Cambridge English and Education. In Australia, Cambridge University Press publishes in secondary and higher education. In higher education, Cambridge University Press publishes in a number of disciplines including economics, psychology, education, engineering, language and maths.

33. Oxford University Press is based in the UK and produces dictionaries, English language teaching materials, children's books, journals, scholarly monographs, higher education textbooks and schoolbooks. In Australia, it operates as Oxford University Press' Australian and New Zealand subsidiary. In higher education, Oxford University Press publishes in a number of disciplines including psychology, education, business, and medicine.
34. Macmillan operates in more than 80 countries. In Australia, it operates through Macmillan Publishers Australia and publishes secondary and higher education materials. In higher education, Macmillan publishes in a number of disciplines including psychology, science and finance.
35. Taylor & Francis is based in the UK. In higher education in Australia, Taylor & Francis publishes in a number of disciplines including business, economics, education, language, psychology, and finance.

Specialist publishers

36. There are also a number of other publishers that specialise in publishing for a single or narrow range of specific disciplines (for example, law or medicine), such as Elsevier, LexisNexis and Thomson Reuters.
37. Elsevier is a global information analytics business that helps science and healthcare institutions and professionals with web-based, digital solutions. Elsevier Australia Health Science Books are published in various disciplines including dentistry, health professions, medicine, nursing, midwifery, and veterinary.
38. LexisNexis publishes legal textbooks and provides customers computer-assisted legal research as well as business research, risk management services and analytics.
39. Thomson Reuters is a global publishing company specialising in legal, tax, and accounting. Thomson Reuters Legal Australia provides legal research and practice management solutions and products for students, higher education institutions and professionals.
40. There are also a large number of smaller niche or specialist publishers operating in Australia.

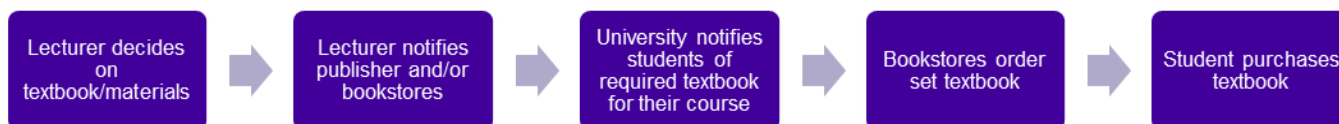
Content and engagement with authors

41. The process for developing content for higher education publishing differs between publishers:
 - most publishers identify and engage authors in Australia (often academics or lecturers) to write or contribute to their materials,
 - some publishers employ in-house writers (although the ACCC understands this is less common), and
 - some publishers use content produced overseas. This may involve selling a replica text in Australia, or adapting an overseas text for use in Australia (for example, by using Australian examples or adapting it to suit Australian standards).

42. An author is usually an academic or lecturer who is a subject matter expert. Authors are typically paid through royalties from the sale of the book. The ACCC understands the author is usually also contracted to write new editions and to update materials. It is also common practice for there to be exclusivity clauses in these contracts for the benefit of the publisher. However, authors may be able to write for other publishers in the same discipline as long as the texts are not in direct competition. For example, an author may be able to write a first year undergraduate financial accounting textbook with one publisher and write a second year management accounting textbook with another publisher.

Choice of text

43. The ultimate consumers of the products are predominantly higher education students of universities or vocational education institutions. However, the purchasing decisions of both resellers (as to what to stock), and students (as to what to buy) are directly influenced by the lecturers who are responsible for setting texts for the courses. From market inquiries, the ACCC understands that the process is generally as follows:



44. Some market participants have indicated that there is no real ability for either the reseller or the student to “shop around” for an alternative book about the same subject matter. The only product that will be useful to the student, or sell well for the reseller, is the book prescribed for the course by the lecturer.
45. Market feedback from lecturers has generally been that quality content and suitability for a course is the most important factor in choosing a book. The importance of the price to be paid by students to purchase the book varies amongst lecturers, and some feedback also indicated the author of the textbook may be an important factor to lecturers in setting the text.
46. Market feedback has indicated that some students acquire second hand books or unlicensed digital copies of education materials, and some students either borrow prescribed materials or rely solely on lectures or free materials provided by the educational institution.

Digital products

47. The provision of higher education materials has recently changed with the expansion of digital products. This has led to changes in both the form and delivery of products.
48. In addition to traditional printed textbooks, some publishers now also offer textbooks in electronic form (i.e. eBooks), as well as interactive digital products that may be standalone, or complementary to textbooks.

49. In terms of delivery, digital products are able to be purchased online directly from publishers. Overseas, publishers (including Cengage) have introduced delivery via subscription, providing subscribers (students or academics) with access to all of a publisher's digital textbooks for one subscription fee. As noted above, Cengage operates a digital subscription service through its Cengage Unlimited platform in the USA. Market feedback has also suggested that in Australia, universities are starting to partner with publishers to develop digital materials.

The proposed transaction

50. Educational publishing businesses Cengage and McGraw-Hill propose to merge their global publishing businesses.
51. In Australia, Cengage carries on business through Cengage Learning Australia Pty Limited, McGraw-Hill carries on business in Australia through McGraw-Hill Australia Pty Ltd.

Market definition

52. The ACCC's starting point for defining relevant markets to assess the competitive effects of the proposed acquisition involves identifying the products actually or potentially supplied by the merger parties. The ACCC then considers what other products constitute sufficiently close substitutes to provide a significant source of constraint on the merged entity.
53. The ACCC's preliminary view is that there are markets for:
- the supply of higher education publishing in Australia, and
 - the acquisition of authors' rights for higher education content in Australia.
54. Issues relating to demand and supply side substitution, and the geographic scope of the markets are explored under the competition issue headings below.
55. In considering the relevant markets, the ACCC considers that demand from those purchasing the products (students) is heavily influenced by lecturers or course coordinators who are responsible for setting the textbooks or other educational materials to be used by students.

Market for the supply of higher education publishing in Australia

Geographic scope

56. The ACCC considers the geographic scope of the relevant markets is likely to be national.
57. The parties both publish and supply educational materials nationally. Products are generally able to be purchased online from anywhere in Australia, and either physically delivered (in the case of a printed textbook), or downloaded or otherwise accessed electronically. Products are also available in bricks and mortar bookstores, primarily on campus at universities around Australia. While some materials contain state or territory specific information (for example to take account of local laws or standards), it is likely that lecturers will be able to find appropriate substitutes elsewhere in Australia.

Product scope

58. In Australia, the parties overlap in the supply of educational publishing, with a focus on higher education publishing. The ACCC's preliminary view is that competition effects should be considered in the context of higher education publishing (incorporating both university and VET). However the ACCC is continuing to consider whether there are separate product markets for educational publishing in either university or VET, or in individual academic disciplines.

Demand side substitutability

59. On the demand side, the ACCC considers that faced with a price increase or drop in quality of the materials they currently use, lecturers are likely to only look for alternative textbooks they consider suitable to their particular course (for example, an introductory accounting lecturer would only look for alternative introductory accounting textbooks).
60. In assessing the competitive implications of a merger, the ACCC considers both the range of available or potentially available substitutes in each relevant market and the relative intensity of rivalry between different products within those markets. The existence of comparable alternatives to the merged entity that are available in plentiful supply to the entire market can, in the absence of coordinated effects, indicate that a merger is unlikely to substantially lessen competition.¹
61. The ACCC is considering whether the following sources of educational resources are alternatives to textbooks in higher education:
- Open Education Resources (**OER**): are freely accessible digital tools and resources which are produced by individuals or professionals. Market feedback has been mixed on whether OER is an alternative for textbooks, with some market participants noting that there is only a limited range of resources available for the Australian context and that content tends to be written for specific courses at specific educational institutions without being generic enough to be used widely.
 - Second hand books: these are sold by retailers and in private transactions through platforms like StudentVIP. Second hand books tend to be sold at a lower price than new textbooks but purchasers are unable to access digital content associated with the print version. Second hand books will likely be demanded by students if a newer edition of the text is not set by the lecturer. Therefore, publishers might seek to undermine the attractiveness of second hand books by updating editions frequently.
 - Rentals: students can also rent textbooks through companies like Zookal, enabling them to be able to keep the textbook for the entire semester.
62. Market participants also noted that it is common for lecturers to avoid setting a textbook for the courses they teach but instead set a variety of reading or articles.

¹ ACCC, *Merger Guidelines 2008* (updated 2017), paragraph 7.38.

63. The ACCC's preliminary view is that although the above resources might be conceivably considered as alternatives to students purchasing a new textbook, they are not close substitutes to new textbooks in most cases. Although OER could cover content that is similar in nature to that contained in a textbook, it is unlikely to be similar enough to serve the same functional purpose. Similarly, second hand books and rental books are not uniformly available in large numbers, and students are often inhibited from using second hand textbooks due to publishers making and lecturers prescribing revised editions. In addition, it is becoming common for lecturers to prescribe digital books, and it is not possible to obtain a second-hand digital textbook.

Supply side substitutability

64. On the supply side, publishers supplying materials for one course in a particular discipline are likely to be able to supply materials for another course in the same discipline relatively easily – at least with respect to mainstream undergraduate material. Market feedback to date supports this presumption, as does the fact that the narrowest area of publishing specialisation appears to be by discipline (rather than by specific courses).
65. The ACCC's preliminary view is that publishers active in a particular higher education discipline would likely find it easier to begin publishing in a new discipline than either publishers with no involvement in higher education or new entrants to publishing.
66. Higher education publishing is dominated by four large firms who are active across many disciplines (Cengage, Pearson, McGraw-Hill and John Wiley). This suggests that there may be complementarities or economies of scope on the supply-side of higher education publishing available when publishing materials for different disciplines. This may result from publishers' ability to share information and resources between disciplines required for:
- the acquisition of authors' rights – while authors will differ across disciplines, the expertise involved in identifying suitable topics and authors and in negotiating author contracts may share commonalities,
 - the production (for example, editing, typesetting, etc) and distribution of hardcopy and digital texts to outlets such as bookshops, higher education institutions and digital vendors, and
 - the promotion and marketing of materials to course coordinators and lecturers at higher education institutions, and subsequently to higher education students.
67. On the other hand, many single discipline specialist publishers exist, which suggests that the benefits of publishing across multiple disciplines are not so significant that barriers to expansion into new disciplines are insignificant.
68. Preliminary market feedback is that larger higher education publishers find it significantly easier to move into different disciplines than do smaller and more specialised publishers. Barriers to entry are discussed further at paragraph 85 to 88.

The ACCC invites comments from market participants on its preliminary views about the definition of the relevant market. In particular, market participants may wish to comment on the following:

- How difficult would it be for an existing publisher to expand into publishing either university or vocational education materials if they do not currently publish in either of these areas? Would such a publisher find it easier to succeed than a firm with no involvement in publishing?
- How difficult would it be for an existing higher education publisher to expand into publishing in higher education disciplines in which they do not currently publish? Does this depend on how large or diversified the publisher is already? What efficiencies or other benefits exist as a result of their existing publishing operations? Are some disciplines likely to be more difficult to expand into than others? If so, why?
- When lecturers choose education materials to set for a specific higher education course (this includes university or VET courses), what factors and alternatives are considered? For example, to what extent do lecturers consider the price and quality of the materials and, more broadly, whether students are likely to acquire the materials? How important is it to have Australian-authored or adapted content? Please provide examples if possible.
- To what extent do lecturers and students consider instructor-created materials, OER, rentals and second hand books, as well as other materials distributed via the “white space” (including piracy of print and digital materials) viable alternatives to new textbooks?
- If you are a higher education publisher, how do you assess your competitive position in higher education more broadly or in the disciplines in which you publish? What sources of data do you use to measure your competitive position relative to other publishers? Please comment on the reliability of any data sources discussed.

Market for the acquisition of authors’ rights for higher education discipline content in Australia

Geographic scope

69. The ACCC’s preliminary view is that the market for the acquisition of authors’ rights is also national. Market feedback has shown that publishers seek authors for their books from all around Australia, and that authors seeking to publish similarly look to publishers Australia-wide.

Product scope

70. The ACCC’s preliminary view is that competition in the acquisition of authors’ rights is likely to take place at an overall higher education level (as is the case with the downstream supply of publishing material). It is likely that publishers already active in the acquisition of material for certain higher education disciplines would find it easier to engage in the acquisition of authors’ rights in other disciplines than publishers with no involvement in higher education or completely new entrants to publishing.

71. As with the supply of publishing material, the prominence of the four large publishers suggests there are complementarities available in acquiring materials for different disciplines. For example, as noted above, while authors will differ across disciplines, the expertise involved in identifying suitable topics and authors and in negotiating author contracts may share commonalities.
72. However, the ACCC is also considering whether a narrower view of markets, based around specific disciplines, is appropriate. Narrower markets would recognise that publishers who focus on acquiring authors' rights to content in certain disciplines would face barriers to acquiring rights to content from authors who write in other disciplines. For example, publishers new to a discipline would have to incur sunk costs to develop or hire expertise regarding the identity and track record of potential authors, the subject-matter that would need to be covered in author outputs and the potential level of downstream demand. Similarly, authors might not be open to publishing with specialist publishers that do not have expertise in publishing in their particular discipline.

The ACCC invites comments from market participants on its preliminary views about the definition of the relevant market for the acquisition of authors' rights for higher education content. In particular, market participants may wish to comment on the following:

- How difficult it would be for a higher education publisher to identify suitable authors and acquire authors' rights in a particular discipline, course or year level that the publisher does not currently acquire content for or publish in, so as to enable them to publish successfully in that new discipline, course or year level?
- When authors are approached by publishers to write a textbook, what factors do they consider? Are authors specialising in particular courses or disciplines open to contracting with publishers which do not presently have a specific focus in that course or discipline? Does the size or discipline-breadth of the publisher matter?

Issue of concern: reduction in the number of major publishers in higher education publishing in Australia

73. The ACCC's preliminary view is that the proposed merger is likely to substantially lessen competition in higher education publishing in Australia.
74. Publishers in higher education compete in a number of ways. The primary way is by offering educational materials that lecturers are likely to recommend to their students as the primary reference for their courses. This drives substantial demand for that material. In selecting and recommending educational materials to their students, lecturers primarily consider the quality of the content and its suitability to the material for their course.
75. The ACCC is concerned that the elimination of the competition between two of the major publishers of educational materials for higher education in an already highly concentrated market, will reduce the commercial imperative for the merged firm to continually improve the quality and suitability of its educational materials. Given their size and position in this market, Cengage and McGraw-Hill are often each other's major rival. The proposed merger reduces the incentive for Cengage and McGraw-Hill to continually improve the quality and suitability of

their education material to either protect their position as the primary reference material for lecturers or to win that position.

76. To the extent that lecturers place weight on the prices of educational material in selecting educational material for their courses, the elimination of rivalry between Cengage and McGraw-Hill may also result in higher prices for these materials.
77. The result is likely to be a reduction in the quality and suitability of educational material for higher education, fewer titles and possibly higher prices.
78. The ACCC is also concerned that the small number of remaining competitors in higher education publishing may also lead to an increase in prices, or a reduction in the quality or range, of education materials due to co-ordinated conduct amongst the few remaining competitors. This is particularly the case given the ACCC's preliminary views that barriers to entry are likely to be high, and the likelihood of new entrants or expansion is likely to be low.

Level of concentration

79. As stated in the ACCC's *Merger Guidelines*, market concentration refers to the number and size of participants in the market. It provides a snapshot of market structure as well as an approximation of the size of the merger parties, which can assist when considering the other merger factors.²
80. In higher education publishing, Cengage and McGraw-Hill are both major publishers in Australia, and the merger would create a publisher of substantial size and competitive significance. Some market feedback has indicated that Pearson (and maybe John Wiley) will be the only remaining competitors able to constrain the merged entity in that it is a significant interdisciplinary higher education publisher. The proposed merger will result in a reduction from four to three major higher education publishers.
81. Market feedback has suggested that other publishers such as Oxford University Press, Cambridge University Press, Macmillan, Taylor & Francis and Elsevier may not constrain the merged entity in higher education more broadly as they do not operate at a scale comparable to Cengage and McGraw-Hill and do not have the same breadth of titles across multiple disciplines.
82. As noted above, lecturers are responsible for choosing the text for a course, and as such, are the decision-makers who publishers are ultimately marketing their texts to. Market feedback indicates that the major publishers have larger sales teams who are able to meet with faculties at higher education institutes to receive feedback about existing texts and market new texts to.
83. In addition to significantly increasing concentration in higher education publishing, the proposed merger will also increase concentration in a number of individual higher education disciplines where the parties are currently both significant publishers and post-merger there will only be a limited number of other competitors. In these disciplines Cengage and McGraw-Hill are likely to be particularly close competitors.

² ACCC, *Merger Guidelines 2008* (updated 2017), paragraph 7.6.

84. On the basis of information that the ACCC currently has, the ACCC's preliminary view is that if the proposed merger proceeds, the following disciplines in Table 1 would be highly concentrated, with few remaining competitors available to constrain the merged entity.

Table 1: Disciplines where there will be a significant increase in concentration and reduction in remaining major competitors

Discipline	Remaining major competitors
Psychology	Pearson, John Wiley, Macmillan, Taylor & Francis
Finance	Pearson, John Wiley, Macmillan
Accounting	Pearson, John Wiley
Business	Pearson, John Wiley
Economics	Pearson, John Wiley, Macmillan, Oxford University Press
Management	Pearson, John Wiley, Oxford University Press
Science & maths (especially chemistry and biology)	Pearson, John Wiley, Macmillan, Oxford University Press
Early Learning & Childcare	The merged entity may only be constrained by smaller publishers
Trade disciplines (for example, plumbing, automotive, construction, carpentry, electrical)	The merged entity may only be constrained by smaller publishers

Barriers to entry and expansion

85. The ACCC is considering the extent of potential constraints from new entry.
86. The ACCC's *Merger Guidelines* note that the entry of new firms into a market can provide an important source of competitive constraint on incumbents. A credible threat of new entry alone may prevent any attempt to exercise market power in the first place. On the other hand, where a market has barriers to entry that either prevent firms from entering the market altogether or delay or impede entry, that may result in the merged entity being sheltered from competitive constraint for a significant period.³
87. Based on market feedback, the ACCC's preliminary view is that barriers to entry in higher education publishing are likely to be high. These barriers to entry include:
- the need to incur a variety of sunk capital and operating costs to either set up a publishing business or to expand into publishing in an unfamiliar discipline, with such costs not being recoverable in the event of exit or withdrawal. These include costs incurred in estimating demand, promoting

³ ACCC, *Merger Guidelines 2008* (updated 2017), paragraph 7.17.

and marketing material to universities, developing digital or online platforms and acquiring authors' rights for content,

- inertia on the demand side arising from the costs to lecturers of switching to alternative publishers (including the need to re-align course materials such as slides and assessments to the new textbook),
- expertise required to build and maintain relationships with institutions to facilitate marketing and promotion, building and maintaining teams to service customers and establish and maintaining a digital platform, and
- a publisher that is not part of a global operation will not have access to free or relatively cheap content written overseas and the ability to sell replica books in Australia or adapt overseas content for the Australian market.

88. Market feedback suggests that a number of the barriers noted above would also inhibit more specialist or discipline based publishers from expanding into another discipline.

ACCC's preliminary views

89. In summary, the ACCC is concerned that the proposed merger would be likely to substantially lessen competition in higher education publishing in Australia. The ACCC is also considering whether there are narrower, discipline based markets, where the impact of the proposed transaction is likely to be most acute. These disciplines include Psychology, Finance, Accounting, Business, Economics, Management, Science & Mathematics, Early Learning & Childcare and Trade disciplines (such as Plumbing, Automotive, Construction, Carpentry and Electrical).

The ACCC invites comments from market participants on its concerns in relation to the issues identified above. In particular market participants may wish to comment on the following:

- How difficult would it be to commence publishing in higher education? What financial, logistical or other factors would a potential new entrant need to consider and overcome?
- How closely do Cengage and McGraw-Hill compete in higher education publishing?
- How closely do Cengage and McGraw-Hill compete in the publication of educational materials in Psychology, Finance, Accounting, Business, Economics, Management, Science & Mathematics, Early Learning & Childcare and Trade disciplines (such as Plumbing, Automotive, Construction, Carpentry and Electrical)? Are there any other disciplines where there is close competition between Cengage and McGraw-Hill?
- How easy is it for publishers to increase prices or reduce quality or range of textbooks in a coordinated manner? How will the proposed merger affect this?
- We understand that Cengage offers a broad range of educational materials for VET disciplines. How does McGraw-Hill's, and other publishers' range of educational materials for VET disciplines compare and compete against Cengage?

- How difficult is it for lecturers to switch to use different education materials? What are the costs (including in time and money) involved?

Issue that may raise concern: reduced competition in the acquisition of authors' rights for higher education content

90. The ACCC's preliminary view is that the proposed merger may substantially lessen competition in a market for the acquisition of authors' rights for higher education content in Australia.
91. The proposed merger will reduce the number of available publishers with whom an author can publish their works (in higher education generally, and in a number of specific disciplines), and the ACCC is concerned that this reduction may enhance the merged entity's bargaining power with authors. The ACCC is concerned that this may increase the ability and incentive of the merged entity to impose onerous terms in contracts with authors.
92. This may include lowering royalties or other payments to the authors or imposing exclusivity restrictions in contracts. Although the ACCC understands that exclusivity clauses are commonplace in contracts between authors and publishers, authors are generally able to write for other publishers in the same discipline so long as the texts are not in direct competition. The ACCC is concerned that the merged entity's stronger bargaining position may give it the ability and incentive to impose more onerous exclusivity terms – for example, prohibiting authors from publishing texts with other publishers, even where those subsequent texts are not in competition with the first text.
93. The ACCC is also concerned that the proposed merger may give the merged entity or other publishers the ability to demand more frequent new editions from authors. While more up-to-date content could offer some offsetting benefit to consumers, more frequent editions will also tend to reduce the value of second-hand texts and increase the effective price paid by those students who buy new books with a view to re-selling them at the completion of their enrolment in the relevant course.
94. A number of the factors discussed above in the context of higher education publishing (for example barriers to entry and level of concentration) apply equally to a market for the acquisition of authors' rights in higher education content given the participants and constraints in each of these markets are broadly the same.

The ACCC invites comments from market participants on its concerns in relation to the issues identified above. In particular market participants may wish to comment on the following:

- What is the process through which an author of a higher education textbook has their content published?
- How do authors of higher education textbooks negotiate royalties and other contractual terms with higher education publishers?
- Would the merged entity have a greater ability or incentive to reduce royalties or otherwise negatively impact contractual terms following the proposed merger?

- How easy is it for an author of a higher education textbook to switch to another publisher? What exclusivity obligations does an author of a textbook typically have to adhere to and how do these impact authors? Would the proposed merger affect the ability or incentive of the merged entity to impose such obligations on an author, and if yes how? Please provide examples.
- How will reduced choice of publishers impact higher education textbook authors?

Issues unlikely to raise concerns: competition in the supply of primary education publishing and secondary education publishing

95. The ACCC's preliminary view is that there is unlikely to be a substantial lessening of competition in the supply of:
- primary education publishing in Australia, and
 - secondary education publishing in Australia.
96. McGraw-Hill only has a small share of sales in primary education publishing and the proposed merger would therefore only marginally increase Cengage's existing share in primary education publishing. The ACCC's preliminary view is that this increase would not be significant enough to lead to a substantial lessening of competition.
97. The overlap between Cengage and McGraw-Hill in secondary education publishing is confined to a small range of VET related content that can also be offered to secondary schools and students. The ACCC's preliminary view is that the small overlap is unlikely to lead to a substantial lessening of completion.

The ACCC invites comments from market participants about its preliminary views about whether a merged Cengage/McGraw-Hill will be unlikely to substantially lessen competition in the supply of primary education publishing Australia, or secondary education publishing in Australia.

ACCC's future steps

98. As noted above, the ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter. Submissions are to be received by the ACCC no later than 20 January 2020 and should be emailed to mergers@acc.gov.au.
99. The ACCC will finalise its view on this matter after it considers submissions invited by this Statement of Issues.
100. The ACCC intends to publicly announce its final view by 12 March 2020. However the anticipated timeline may change in line with the *Informal Merger Review Process Guidelines*. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement to explain its final view.