



## Statement of Issues

13 June 2024

### Sigma Healthcare Limited – proposed acquisition of CW Group Holdings Limited

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#### Purpose

1. Sigma Healthcare Limited (**Sigma**) has entered a merger implementation agreement with CW Group Holdings Limited (**Chemist Warehouse**).
2. This Statement of Issues:
  - gives the Australian Competition and Consumer Commission's (**ACCC**) preliminary views on competition issues arising from the proposed acquisition,
  - identifies areas of further inquiry, and
  - invites interested parties to submit comments and information to assist the ACCC's 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 fully articulate the ACCC's preliminary position.

#### Overview of ACCC's preliminary views

4. In considering the proposed acquisition, the ACCC applies the legal test set out in section 50 of the *Competition and Consumer Act 2010* (the **CCA**). 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 are five 'issues that may raise concerns'.

#### Issues that may raise concerns

6. **Structural market change may raise barriers to entry and expansion.** The ACCC is concerned that, in the medium to long term, the structural change (due to the vertical integration caused by this acquisition) may make entry and

expansion at a single level in the supply chain less viable. This has the potential to raise barriers to entry and significantly alter competitive dynamics in the industry. The ACCC is considering whether this may constitute a substantial lessening of competition. The vertical integration due to the acquisition would sit alongside the growth of pharmacy banner groups, which has increased centralised control or influence over individual pharmacies. Chemist Warehouse appears to exert significant control or influence over its banner stores, including through high levels of executive ownership of Chemist Warehouse stores. The ACCC recognises that regulation of pharmacy ownership lessens the ability of rivals to replicate Chemist Warehouse's approach and will closely consider potential changes in the ability of non-vertically integrated rivals to effectively compete in its assessment of the proposed acquisition. If this ability is weakened or barriers are raised, the proposed acquisition may result in a substantial lessening of competition.

7. **Reduction in competition in pharmacy retailing.** The ACCC's preliminary view is that the proposed acquisition may substantially lessen competition in pharmacy retailing because it could lessen the competitive constraint Chemist Warehouse and Sigma banner stores impose on each other, which may lead to increased prices for the goods and services provided in pharmacies and/or reduced service quality. It may also remove Sigma's differentiated (from Chemist Warehouse) product and service offering from the market and lessen pharmacy retailing competition in certain local markets.
8. **Foreclosure of retail pharmacies.** The ACCC's preliminary view is that the proposed acquisition may lead to a substantial lessening of competition in pharmacy retailing by way of partial or full foreclosure of pharmacies currently supplied by Sigma. Presently, Sigma is incentivised to maximise profit, which due to the importance of scale efficiencies means it seeks to maximise wholesale sales, including to pharmacies outside its own banners. The ACCC is considering the extent to which Sigma's incentives may change post-acquisition (i.e., when Chemist Warehouse becomes one of its banners). In particular, whether the merged entity may have the ability and incentive to worsen terms to non-Chemist Warehouse banner pharmacies in order to maximise profit through the Chemist Warehouse banner group, by for example offering less favourable price and supply terms and so raising their costs and rendering them less competitive, ultimately resulting in a substantial lessening of competition in retail pharmacy market/s.
9. **Access to and use of Sigma-supplied independent pharmacies' data, reducing retail pharmacy competition.** The ACCC's preliminary view is that the proposed merger may substantially lessen competition in pharmacy retailing as it may enable Chemist Warehouse to access and use commercially sensitive data of pharmacies supplied by Sigma in a way that damages competition. Sigma may use insights from the data to target rival pharmacies and/or pre-empt and undermine their competitive actions. Chemist Warehouse's access to commercially sensitive data may also reduce the options of rival pharmacies outside the Sigma wholesale network, as they may limit trading with the merged entity due to data concerns.
10. **Foreclosure of rival suppliers.** The ACCC's preliminary view is that the proposed acquisition may foreclose rival suppliers' of pharmacy products access to customers. The ACCC understands that for some suppliers, Sigma and Chemist Warehouse's wholesale acquisition volumes are considered a

significant and necessary supply channel. The ACCC is considering the competitive effects of the acquisition on the upstream supply of pharmacy products, including considering the implications for suppliers who compete (or would like to compete) with Sigma and Chemist Warehouse's owned-label and private label products, given the merged entity's significant supply channel post-acquisition. This concern may increase if Chemist Warehouse and Sigma expand their portfolios of owned-label and private label products.

## Making a submission

11. The ACCC invites submissions from interested parties, particularly on the following key issues:
  - the sector-wide impacts arising from the proposed acquisition
  - likelihood the proposed acquisition would increase prices and/or reduce service quality in retail pharmacies
  - the extent to which the proposed acquisition increases Sigma's ability and incentive to engage in discriminatory and/or self-preferencing conduct and whether it is likely such conduct would result in a substantial lessening of competition
  - the level of constraint on Sigma from alternative wholesalers, and their ability to service Sigma banner pharmacies and other pharmacies currently supplied by Sigma
  - barriers to entry and expansion for retail pharmacies, particularly for independent pharmacies
  - the extent to which the proposed acquisition may enable Chemist Warehouse to access and use commercially sensitive data of independent pharmacies supplied by Sigma to advantage the Chemist Warehouse pharmacies, weakening competition.
12. Interested parties should provide submissions by 5pm on 27 June 2024. Responses may be emailed to [SigmaCWG@acc.gov.au](mailto:SigmaCWG@acc.gov.au) with the title: Submission re: Sigma/Chemist Warehouse. If you would like to discuss the matter with ACCC staff or have any questions about this Statement of Issues, please email [SigmaCWG@acc.gov.au](mailto:SigmaCWG@acc.gov.au) to arrange a time.
13. The ACCC anticipates making a final decision on 5 September 2024, however, this timeline can change. To keep up with possible timing changes 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](http://www.accc.gov.au/publicregisters/mergers-registers/public-informal-merger-reviews).

## Confidentiality of submissions

14. The ACCC will not publish submissions regarding the proposed acquisition. The ACCC will not disclose submissions to third parties (except its advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the CCA. 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, please identify any confidential information that is provided to the ACCC. The ACCC's [Informal Merger Review Process Guidelines](#) contain more information on confidentiality.

## About ACCC 'Statements of Issues'

15. A Statement of Issues is not a final decision about a proposed acquisition. A Statement of Issues outlines the ACCC's preliminary views and identifies further lines of inquiry.
16. 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.

## The parties

### The acquirer: Sigma

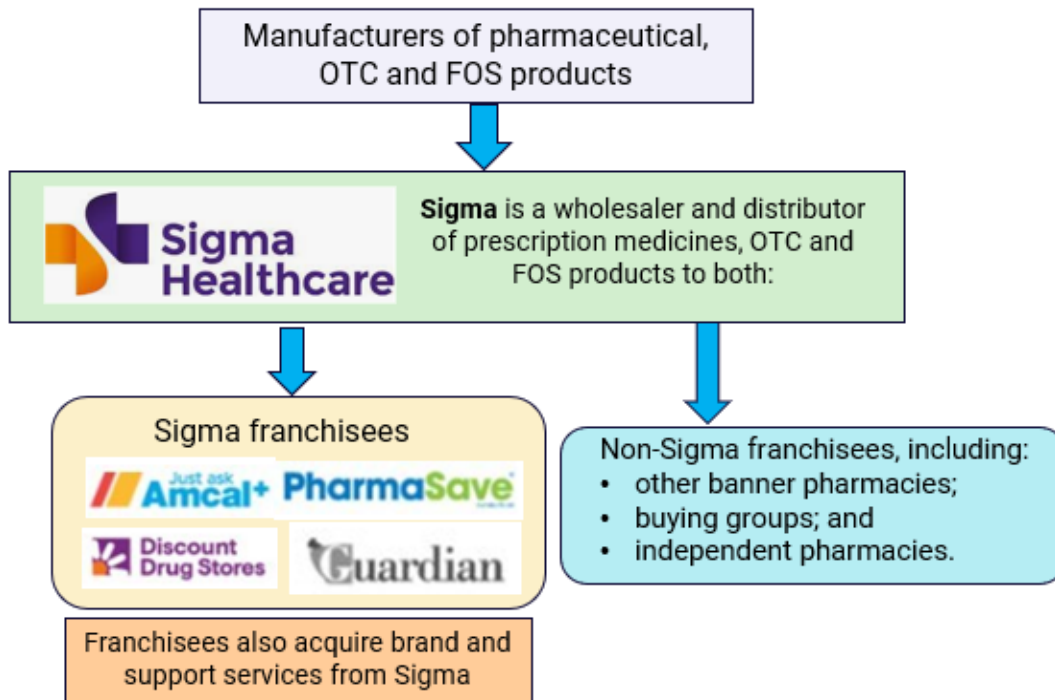
17. Sigma is an ASX-listed wholesaler and distributor of prescription medicines (including Pharmaceutical Benefits Scheme (**PBS**) prescriptions), over the counter (**OTC**)<sup>1</sup> and front of store (**FOS**) products to over 4,000 community pharmacies nationally.
18. Sigma's core business activities include:
  - full-line wholesale and distribution of prescription medicines, OTC products and FOS products to both its franchisees and independent pharmacies
  - providing brand and support services to 395 community pharmacies operating as franchisees under Sigma banners:  

  - operating a buying group – the PriceSave program – for approximately 445 independent pharmacies
  - supplying private label products under the brands 'Pharmacy Care', Beauty Theory' and 'Amcal Plus'.
19. Sigma also owns and operates MPS Connect Pty Ltd which offers medication packing services and management solutions to pharmacies and aged care providers. Sigma holds 51% of the shares in NostraData Pty Ltd which supplies

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<sup>1</sup> Pharmacy and pharmacist only medicines listed in Schedules 2 and 3 of the Standard for the Uniform Scheduling of Medicines and Poisons.

technology and data analytics solutions to pharmacies, wholesalers and manufacturers.

**Figure 1: Overview of Sigma’s core operations**



**The target: Chemist Warehouse**

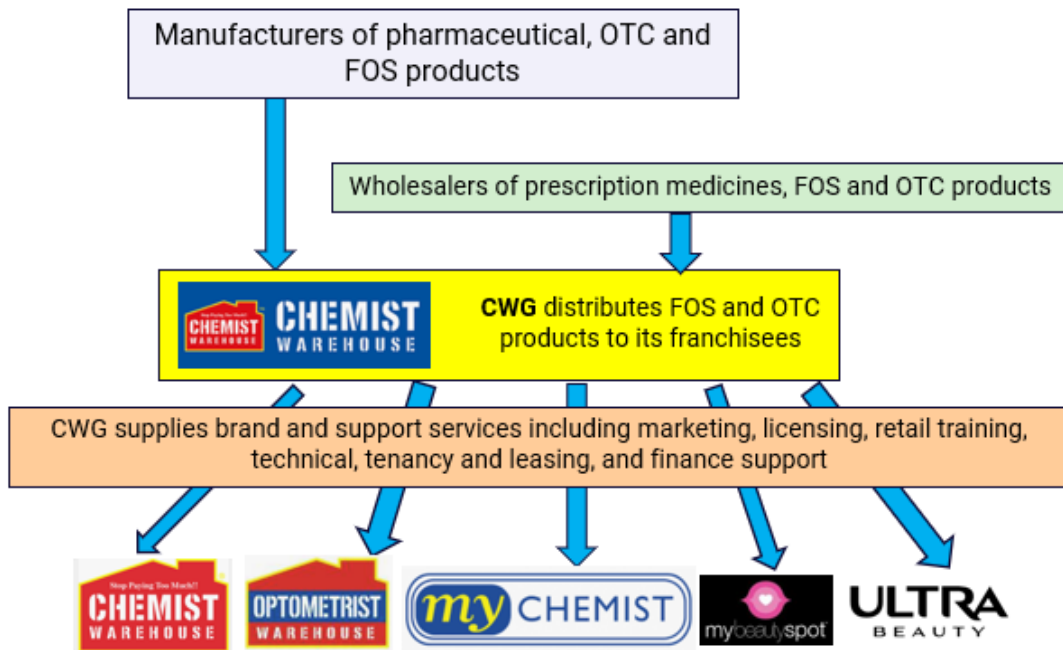
20. Chemist Warehouse is an unlisted Australian public company. It is a franchisor of pharmacies and retail stores under the following banners:



- 21. It has approximately 550 pharmacies under the Chemist Warehouse and MyChemist banners.
- 22. Chemist Warehouse executives also have direct ownership interests in a large number of Chemist Warehouse stores.
- 23. Chemist Warehouse provides brand and support services to its franchisee pharmacies, including but not limited to:
  - media, advertising, marketing, licensing and financial support services
  - supply of FOS and OTC products including Chemist Warehouse Group owned, private label and exclusive consumer brands
  - support services such as negotiating supply terms on behalf of franchisees with suppliers and manufacturers to distribute FOS and OTC products.

24. Chemist Warehouse also owns private label product brands which it sells online and supplies to its franchisees. These include Wagner, Bambi Mini, Barely, Bondi Protein Co, Inc, and Goat.
25. Chemist Warehouse operates six distribution centres to support the distribution of FOS and OTC products to its franchisees. Chemist Warehouse currently obtains wholesale supply of certain FOS products from Sigma and prescription medicines from EBOS.

**Figure 2: Overview of Chemist Warehouse’s core operations**



## Other industry participants

26. Other participants in the pharmaceutical industry in Australia include:
  - retail pharmacies including independent community pharmacies
  - wholesalers
  - pharmaceutical, OTC and FOS manufacturers
  - banner groups
  - buying groups
  - friendly society pharmacies (community pharmacies owned by not-for-profit Friendly Societies rather than pharmacists).

### Community (or retail) pharmacies

27. There are approximately 6,000 community pharmacies in Australia. Each of these are owned and operated by a registered pharmacist or, in some jurisdictions, the relative of a registered pharmacist.
28. Around 60% of Australia's 6,000 pharmacy stores are part of a banner group, with the remainder being independents. The ACCC estimates that around two-thirds of all pharmacies are associated with a banner or buying group operated by EBOS (Symbion), Wesfarmers (API), Sigma, Chemist Warehouse or Independent Pharmacies of Australia Group (IPA Group) (formerly Platform).

### Wholesalers

29. Wholesalers are typically either full-line or short-line wholesalers:
  - Full-line wholesalers distribute the majority of pharmaceutical, healthcare and other products that pharmacies, hospitals and other health-related facilities and businesses may require. There are four national full-line wholesalers in Australia (Sigma, API, EBOS and CH2) and two state-based full-line wholesalers (NPD and Barretts).
  - Short-line wholesalers provide a more limited range and service than full-line wholesalers. Generally, they deal in a narrower product range than full-line wholesalers, usually high-volume products and may target particular sectors. Pharmacies tend to use short-line wholesalers to take advantage of lower pricing on particular products.
30. Pharmacies tend to have a first-line wholesaler from whom they acquire a larger proportion of their PBS and other products to minimise transaction costs and maximise discounts and volume rebates. In addition to a first line supplier, they also tend to have a second-line wholesaler and sometimes a third.
31. In addition to Sigma, the two leading full-line wholesalers are:
  - **EBOS** (Symbion), which operates 11 warehouses around Australia servicing over 4,000 community pharmacy customers and 1,300 hospital customers. EBOS also operates a number of pharmacy banners including TerryWhite Chemmart, healthSAVE, Ventura Health (which itself includes six brands, namely, Cincotta Discount Chemist, Mega Save Chemist, Max Value Pharmacy, BetterBuy Pharmacy and MyMedical Pharmacy), and Good Price Pharmacy Warehouse.
  - **Wesfarmers** (API), which operates seven distribution centres across Australia. API operates the following pharmacy banners: Priceline Pharmacy, Soul Pattinson Chemist and Pharmacist Advice. API also owns the Priceline Health and Beauty (non-pharmacy) retail stores.

### Banner and buying groups

32. Banner groups are groups of stores owned by individual pharmacists that operate under the same brand (i.e., banner). Banner groups can be, but are not necessarily, franchise systems. Banner groups are formed to provide operational support to pharmacies and to undertake joint advertising and promotions.

Banner group owners provide services to their banner group stores which may include the wholesale supply of goods, management of external suppliers, pricing systems and methodology, and leasing-related services.

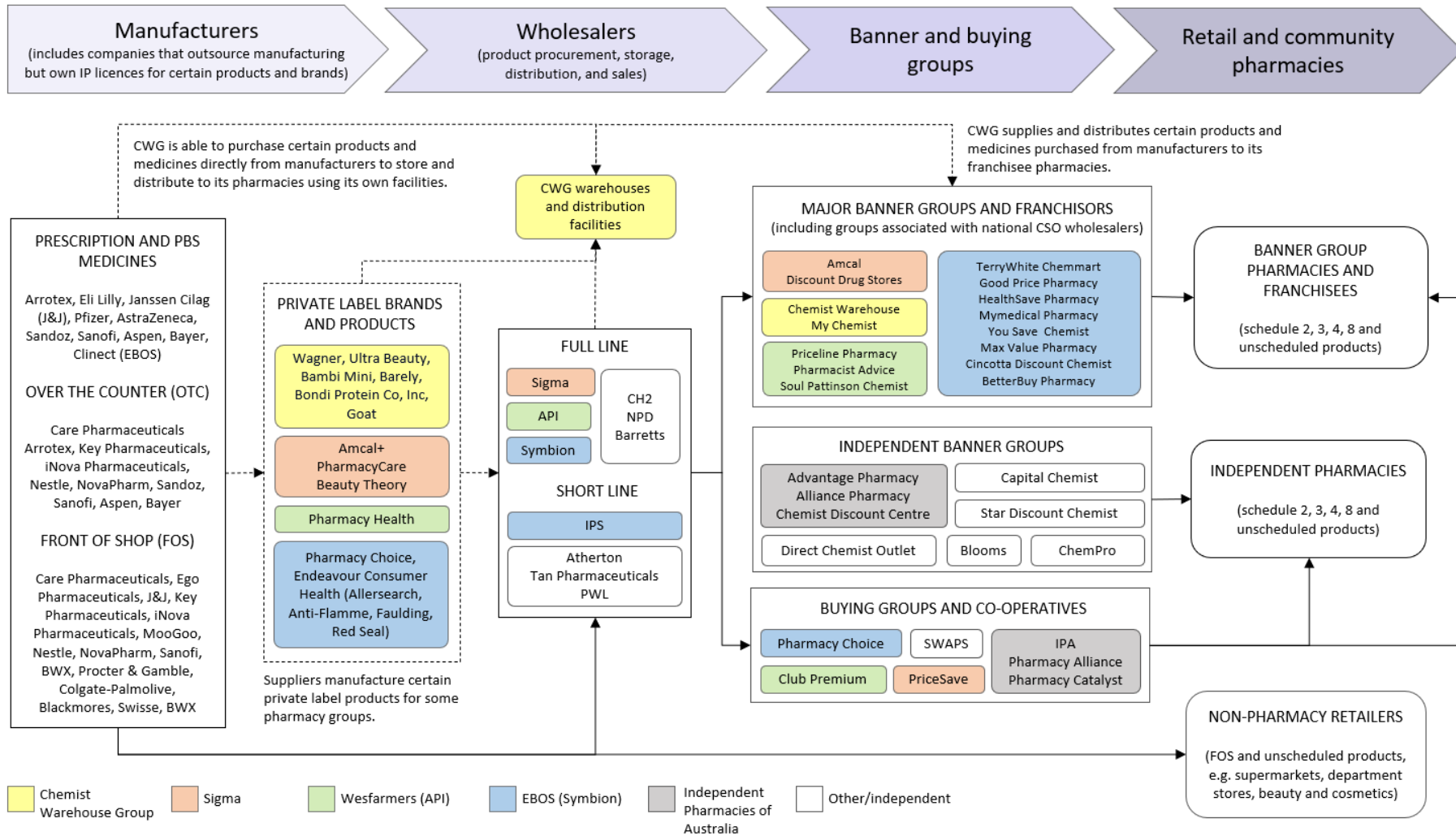
33. Buying groups are groups formed and owned generally by wholesalers for the purposes of negotiating the cost of medicines and products with other wholesalers or manufacturers. Membership in these groups is offered to pharmacies.
34. The key distinction between buying and banner groups is that pharmacies in a buying group are (generally) independent pharmacies rather than operating under the same banner as each other. Banner group owners therefore have a greater degree of influence/control over banner group pharmacies than buying group owners have over the independent pharmacies that are part of a buying group.
35. Different banner groups and buying groups can be owned by the same entity, and the same entity may operate multiple groups. For example, Amcal, Discount Drug Stores, Pharmasave and Guardian are all Sigma banner groups. Sigma also owns the PriceSave buying group, which is offered to independent pharmacies.

### **Suppliers and manufacturers**

36. Suppliers and manufacturers in the pharmaceutical industry include:
  - research-based pharmaceutical companies, which invest in research, development and manufacturing of new medicines
  - generic pharmaceutical companies, which manufacture and sell off-patent medicines ('generic medicines') once a medicine loses patent protection
  - consumer medicines companies, which may be a division of a pharmaceutical company or a standalone company, and generally produce non-prescription products that are available at pharmacies like cough medicine and pain killers. Consumer medicines are also referred to as self-medication or OTC medicines
  - complementary medicines companies (also known as 'traditional' or 'alternative' medicines) include vitamin, mineral, nutritional supplement, herbal, aromatherapy and homoeopathic products
  - other manufacturing companies that supply products typically sold in retail pharmacies, such as manufacturers of beauty and cosmetic products.



Figure 3: Overview of pharmacy supply chain



## Industry regulation

37. The retail pharmacy industry in Australia is comprised of community pharmacies that dispense scheduled prescription medicines and controlled drugs, scheduled non-prescription medicines, unscheduled products, and pharmacy professional services and advice.
38. The pharmacy industry is subject to a number of rules, regulations and legislative requirements.

### Therapeutic Goods Act 1989 (TGA Act) and the Pharmaceutical Benefits Scheme (PBS)

39. The supply of prescription medicines in Australia is highly regulated and subject to the *Therapeutic Goods Act 1989 (TGA Act)* and the Pharmaceutical Benefits Scheme<sup>2</sup>. The Therapeutic Goods Administration (**TGA**) classifies medicines into Schedules, which are recorded in the Standard for the Uniform Scheduling of Medicines and Poisons<sup>3</sup> (**SUSMP**), also known as the Poisons Standard. Through the PBS, broadly speaking, the Government effectively sets the prices for PBS medicines at several points of the supply chain and regulates how PBS medicines are distributed, dispensed, and sold.

	<b>Medicines and products</b>	<b>Definition</b>
<b>PBS</b>	Scheduled PBS prescription medicines and controlled drugs	Prescription only medicines listed in Schedules 4 and 8 of the SUSMP which can only be obtained with a prescription from an authorised medical practitioner.
<b>OTC</b>	Scheduled non-prescription medicines	Pharmacy and pharmacist only medicines listed in Schedules 2 and 3 of the SUSMP and include non-prescription medicines available on the shelf in pharmacies but not in other retail outlets (at least in certain dosages/pack sizes), and pharmacist only medicines behind the counter at pharmacies.
<b>FOS</b>	Unscheduled medicines and products	Includes beauty and cosmetics, health and wellness, toiletries, baby and infant care, and vitamins and supplements. Unscheduled medicines and products can be sold by non-pharmacy retailers.

### Community Service Obligations (CSO) Funding Pool

40. The CSO Funding Pool arrangements were established on 1 July 2006 and continue under the Eighth Community Pharmacy Agreement (**8CPA**).<sup>4</sup>
41. Some wholesalers of PBS medicines which have entered into agreements with the Commonwealth Government (CSO Deed) are eligible to receive funding from

<sup>2</sup> See *National Health Act 1953* Pt VII.

<sup>3</sup> See *Therapeutic Goods Act 1989* para 52D(2)(b).

<sup>4</sup> *National Health Act 1953* s 98BAA.

the CSO Funding Pool for distributing PBS medicines. These wholesalers are known as CSO Distributors and the CSO Funding Pool remuneration is in addition to the regulated wholesale mark-up that wholesalers are permitted to charge for distributing PBS medicines.

42. To receive funding, CSO Distributors must meet a set of obligations, including the CSO Service Standards and the CSO Compliance Requirements<sup>5</sup>. The CSO Service Standards are directed to ensuring that Australians have timely access to PBS medicines regardless of where they live and include that CSO Distributors must:
- ensure PBS listed medicine is supplied to any pharmacy nationally generally within 24 hours (including rural and remote communities), and
  - guarantee supply of low volume PBS listed medicines.

### Pharmacy location rules

43. PBS medicines can only be dispensed at registered pharmacies. The 'Pharmacy Location Rules'<sup>6</sup> prescribe specific and general requirements relating to the establishment of a new pharmacy, or the relocation of an existing pharmacy under section 90 of the National Health Act 1953 (Cth).
44. The application of the Pharmacy Location Rules depends on the distance to the nearest existing pharmacy and the number of supermarkets. It typically prohibits a new pharmacy from opening within a certain distance of an existing pharmacy, usually either 1.5 or 10 km depending on the location and medical practitioners located within a particular area. However, there are a few exceptions.

### Pharmacy ownership

45. In addition to the national regulation of pharmacy location, the states and territories prescribe their own regulations in relation to pharmacy ownership. Pharmacy ownership rules typically operate to limit the ownership, control, and operation of community pharmacies to pharmacists or corporations controlled by pharmacists, with limited exceptions in particular states and territories<sup>7</sup>. Provisions also exist in all jurisdictions, except the Australian Capital Territory, to enable 'friendly societies' to own pharmacies<sup>8</sup>.
46. Pharmacy ownership rules generally restrict the number of pharmacy businesses a pharmacist or other eligible person or corporation is permitted to own, or have a relevant interest in, in each state and territory to the following:

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<sup>5</sup> Outlined in the Department of Health and Aged Care's Community Service Obligation Operational Guidelines.

<sup>6</sup> Legislated under the *National Health (Australian Community Pharmacy Authority Rules) Determination 2018 (PB 46 of 2018)*, made under section 99L of the National Health Act 1953.

<sup>7</sup> *Health Practitioner National Law 2010* (NSW) Sch 5F, s 5(1); *Pharmacy Act 2010* (WA) s 54(1); *Pharmacy Business Ownership Act 2001* (Qld), ss 139B; *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA), s 51(1a); *Pharmacy Regulation Act 2010* (Vic) s 5(1); *Pharmacy Control Act 2001* (Tas) ss 62(1)(a), 61C; *Health Practitioners Act 2004* (NT) Sch 7 s 2.

<sup>8</sup> *Health Practitioner National Law 2010* (NSW) Sch 5F, s 6; *Pharmacy Act 2010* (WA) s 54(1)(d); *Pharmacy Business Ownership Act 2001* (Qld), ss 139B(c),(d); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA), s 51(1a)(iii); *Pharmacy Regulation Act 2010* (Vic) s 51(1)(c); *Pharmacy Control Act 2001* (Tas) s61C(1)(d).

- Western Australia and Tasmania: four<sup>9</sup>
- Queensland, New South Wales and Victoria: five<sup>10</sup>
- South Australia: six<sup>11</sup>
- Australian Capital Territory and Northern Territory: no restrictions.<sup>12</sup>

## The proposed acquisition

47. On 11 December 2023, Sigma and Chemist Warehouse entered into a merger implementation agreement under which Sigma would acquire all the shares in Chemist Warehouse in exchange for Sigma shares and a \$700 million cash consideration.
48. Upon completion of the proposed acquisition, Chemist Warehouse shareholders will hold 85.75% of the ASX listed merged entity while Sigma shareholders will hold 14.25%.

## Future with and without the acquisition

49. In assessing a proposed acquisition under section 50 of the CCA, the ACCC considers the effects of the acquisition by comparing the likely future state of competition if the acquisition proceeds (the 'with' position) to the likely future state of competition if the acquisition does not proceed (the 'without' position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
50. The ACCC considers that the likely future competitive environment absent the proposed acquisition would be the status quo. That is, Chemist Warehouse would continue to operate as an independent and effective competitor to Sigma in relevant markets.
51. Chemist Warehouse has signed a contract with Sigma for the wholesale supply of prescription, OTC and FOS products for a 5-year period commencing 1 July 2024 (the **New Supply Contract**).<sup>13</sup> The ACCC is considering whether the counterfactual should include the new supply agreement and how the agreement affects assessment of the counterfactual.

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<sup>9</sup> *Pharmacy Act 2010* (WA) s 55; *Pharmacy Control Act 2001* (Tas) s 65.

<sup>10</sup> *Pharmacy Business Ownership Act 2001* (Qld) s 139H(1) ; *Health Practitioner Regulation National Law 2010* (NSW) Sch 5F s 9; and *Pharmacy Regulation Act 2010* (Vic) s 5(2).

<sup>11</sup> *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) s 42(2).

<sup>12</sup> *Health Professions Act 2004* (ACT); *Health Practitioners Act 2007* (NT).

<sup>13</sup> <https://sigmahealthcare.com.au/sigma-wins-chemist-warehouse-supply-contract/>

## Previous ACCC decisions

### **2022 Wesfarmers Limited's proposed acquisition of Australian Pharmaceutical Industries Limited (not opposed)**

52. On 11 February 2022, the ACCC announced it would not oppose Wesfarmers' proposed acquisition of API.
53. Whilst the ACCC considered that several Wesfarmers businesses retailed products in the same categories as API's Priceline business (in OTC pharmaceutical products and beauty and personal care products) the ACCC concluded that the proposed acquisition was unlikely to substantially lessen competition in the relevant markets. The ACCC considered that Wesfarmers and API were not particularly close competitors in these retail markets and that there were many large and well-established retailers operating in the same markets that would compete strongly with Wesfarmers post-acquisition.

### **2018 Arrow Pharmaceuticals Pty Ltd's proposed merger with Apotex Pharmaceuticals Pty Ltd (not opposed)**

54. On 20 September 2018, the ACCC announced it would not oppose Arrow Pharmaceutical's proposed merger with Apotex. The ACCC concluded that the proposed acquisition was not likely to substantially lessen competition in any relevant market.
55. The ACCC concluded that the proposed acquisition was not likely to substantially lessen competition in the supply of generic prescription pharmaceuticals to pharmacies because:
  - pharmacies regularly purchase outside of their first line supply agreements with respect to generic prescription products, and
  - the combined entity would continue to face competition from suppliers such as Mylan and Sandoz, and was not likely to be able to reduce discounts and incentives offered to pharmacies (including for buying and banner groups).
56. The ACCC also considered the level of barriers to expansion for existing suppliers were not significant.
57. The ACCC concluded that the proposed acquisition was not likely to substantially lessen competition in the supply of OTC pharmaceuticals to pharmacies because:
  - the combined entity would continue to face competition from a number of alternative generic and brand name OTC pharmaceuticals
  - the combined entity would not be likely to have an enhanced ability to bundle generic prescription and OTC pharmaceuticals.
58. The ACCC considered that any attempt by Arrow-Apotex to foreclose its rivals from supplying the Pharmacy Alliance group (which Arrow had interests in) was unlikely to impact those rivals' ability to access customers as the vast majority of pharmacy customers are not part of the Pharmacy Alliance group. Further,

pharmacies within a banner group are able to switch suppliers and negotiate prices with suppliers.

59. The ACCC also concluded that the combined entity would not have the ability to foreclose competitors' access to molecules manufactured by Generic Partners or Oraderm as there were a number of alternative manufacturers of these molecules that competitors would be able to source supply from.

### **Issue that may raise concerns: structural market change may raise barriers to entry and expansion**

60. The proposed acquisition represents a significant structural shift in the pharmacy sector. If the proposed acquisition proceeds, the current owners of Chemist Warehouse would control one of the three major full-line CSO wholesalers operating in Australia. The ACCC is considering the incentives and opportunities for the merged firm post-acquisition and the risk of anticompetitive outcomes given the centralised control of entities at different levels of the supply chain.
61. Chemist Warehouse already has the largest retail presence in pharmacy by revenue. Through ownership connections and its commercial arrangements, its commercial control of its banner stores is, in the ACCC's preliminary view, significantly stronger than other retail banner groups. In addition, it is already vertically integrated into pharmacy supply with several successful brands. The proposed acquisition would increase Chemist Warehouse's existing significant vertical integration.
62. Sigma is a significant industry participant with a different business model. It is one of the leading wholesalers supplying many independent pharmacies and independently owned Sigma-banner pharmacies through franchise arrangements. Changing control of Sigma, such that the most significant retail competitor in the sector would now control the wholesale supply to those independently owned pharmacies, as well as control the commercial relationships with those pharmacies, is a significant shift. It would give Chemist Warehouse control of a high proportion of the entire market's volume at the retail and wholesale level, combined with control of some pharmacy supply.
63. Increased vertical integration and resulting changes in business models can significantly alter competitive dynamics and constraints. The ACCC is concerned that the longer-term effects of this may limit the ability of non-vertically integrated business models to compete, making expansion and entry at a single level more difficult and lessening the competitive constraints provided in the medium to long-term. This in turn can have medium to longer term effects if, as a consequence, the only viable business model becomes a vertically integrated one, raising barriers to entry and expansion and potentially resulting in a substantial lessening of competition.
64. The pharmacy sector may be vulnerable to such a longer-term outcome given that the existing regulations generally drive a model of independent retail store ownership.
65. Some market participants have expressed concern to the ACCC about the past expansion of Chemist Warehouse in the pharmacy sector and the disruption that this has caused to traditional pharmacies.

66. The ACCC does not have a concluded view about the competitiveness of different business models. Many customers value the Chemist Warehouse business model and have benefitted from it but, as discussed above, it is important that the proposed acquisition does not weaken the ability of other business models to compete effectively. Barriers to expansion and entry may increase if the only competitively viable business model becomes a vertically integrated one.
67. Maintaining the ability for rivals to compete through competitive differentiation in their business models may be critical to the overall competitiveness of the industry and is therefore a focus for the ACCC's investigation.

The ACCC invites comments from market participants on its consideration of the likely impact of the proposed acquisition on the pharmacy supply chain and its concerns in relation to the broader impact of the proposed acquisition on the pharmacy supply chain and retail pharmacy sector. In particular market participants may wish to comment on:

- the impact of the proposed acquisition on competitive dynamics in the medium to long term on the wholesale and retail pharmacy sector,
- whether rival suppliers are incentivised (and able) to replicate Chemist Warehouse's vertically integrated model to effectively compete
- the extent to which non-vertically integrated pharmacies would be able effectively compete with vertically integrated ones through, for example, access to buying groups post acquisition.

### **Issue that may raise concerns: Reduction in competition in pharmacy retailing**

68. The ACCC's preliminary view is that the proposed acquisition may substantially lessen competition in pharmacy retailing because it could:
- lessen the competitive constraint Chemist Warehouse and Sigma banner stores impose on each other, which may allow them to increase prices, reduce service quality, or both, at a state/national level or in local areas, or both, and
  - weaken Sigma banner stores' differentiated product and service offering at a state/national level or in local areas, or both.
69. Some market participants have raised concerns that the proposed acquisition would create a merged entity of sufficient size and scale such that independent pharmacies' ability to compete and remain viable is undermined. The ACCC is considering these concerns but notes that the merged entity increasing in size and scale does not in itself raise competition concerns.

### **Relevant markets**

70. Both Chemist Warehouse, through Chemist Warehouse and MyChemist stores, and Sigma, through Amcal, Discount Drug Store, PharmaSave and Guardian

stores, operate networks of pharmacies that supply prescription, OTC and FOS products to consumers.

#### Product dimension

71. As all pharmacies offer a combination of PBS and non-PBS prescriptions, OTC and FOS products to consumers, the ACCC's preliminary view is that the appropriate product dimension through which to consider the impact of the proposed acquisition is pharmacy retailing, incorporating all of these product categories. While non-pharmacy retailers may also sell some of these products, the ACCC's preliminary view is that the retailing of the combination of these products in a pharmacy setting is valued and constitutes a single, separate market.
72. However, as also set out in the 'Industry regulation' section, different regulations apply to the supply of prescription, OTC and FOS products. The prices of prescription medicines listed on the PBS are regulated.<sup>14</sup> In addition, only pharmacies can dispense prescription medicines and most OTC medicines can only be dispensed in pharmacies or by pharmacists (at least for certain dosages or pack sizes).<sup>15</sup> These regulations do not apply to the supply of unscheduled FOS products and medicines to consumers, which may also be sold in supermarkets and other retail outlets. As such, the ACCC is also considering whether the competitive dynamics in the supply of PBS, non-PBS prescriptions, OTC and FOS products to consumers should also be viewed separately.

#### Geographic dimension

73. The ACCC is still considering the appropriate geographic dimension of the relevant markets. Consumers are unlikely to travel further than necessary to buy pharmacy products. The supply of retail pharmacy products therefore has local dimensions. However, while the relevant markets are likely local, as set out below, the ACCC recognises that the merger parties, at least to some extent, set their prices and other factors of competition (such as service levels) at a national or state level. Consequently, the ACCC considers the factors, including local competitive conditions, that inform those national/state-based prices. As such, while the relevant markets are likely local, many of the ACCC's considerations are at the national/state level.
74. Chemist Warehouse and Sigma own pharmacy franchise systems with a national presence. There are differences between regions and states in terms of the operation of smaller pharmacy banner groups (i.e. some smaller groups only operate in certain regions or states) and independent pharmacies, but all major group owners (including Chemist Warehouse, Sigma, API and EBOS) operate nationally.
75. In addition, the prices, product range, service offering and other competitive choices at Chemist Warehouse pharmacies appear to be made nationally. Sigma and other large pharmacy franchise system operators also appear to set franchise price and service level guidance and arrangements at a regional or

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<sup>14</sup> See *National Health Act 1953* Pt VII div 2.

<sup>15</sup> *National Health Act 1953* s 90.



national level and have some influence or control in assuring that this guidance is implemented.

76. As such, the ACCC is considering state-based and national competitive dynamics in its consideration of the proposed acquisition.
77. In addition to this state/national consideration, the ACCC is considering competition between Sigma and Chemist Warehouse stores in local markets in which both are present. Despite the apparent state or national control of key elements of the price and non-price offering by the major operators, individual pharmacy owners may have some ability to adjust their price and service quality in response to local market dynamics. Furthermore, other elements that affect quality, such as the level of staffing, the store amenity, and the level of individual care are likely to be impacted by local competition dynamics.
78. When assessing local retail markets, the ACCC identifies the competitive constraints on the merged firm's retail offers at an individual store level. The relevant local area will differ according to multiple factors. However, the process includes consideration of travelling time and distance between pharmacies, which also depends on the predominant means of transport in a local market. As a general rule, the area of close competition between pharmacies is likely to be larger in regional areas than in metropolitan areas. In local market matters, the ACCC develops radii for each area type for the purposes of an initial screening of potentially concerning areas of overlap. That merging parties may be present within a given radius does not mean the ACCC will necessarily identify competition concerns in that area but it does enable the ACCC to focus its analysis on the areas where some competitively relevant change in structure may arise post-acquisition. The ACCC's application of this methodology in relation to the proposed acquisition is set out under 'Impact on local markets' below.

#### Online retail markets

79. The ACCC is considering the competitive effects of the online supply of pharmacy products by Chemist Warehouse, Sigma banners including Amcal, and other pharmacy banners, on how the ACCC analyses the retail pharmacy market definition (and its competitive analysis more broadly).
80. It appears that pharmacies can supply OTC and FOS products to consumers nationally through online stores. For example, Chemist Warehouse has a significant online presence and supplies OTC and FOS products direct to consumers nationally. Sigma, likewise, supplies products through the Amcal website.
81. However, it appears to the ACCC that the relevant geographic area for online sales of prescription products (PBS and non-PBS) may be narrower than national or regional. The ACCC understands that some prescription products can be ordered online (from an online pharmacy that is connected to a retail pharmacy/pharmacist) and shipped to consumers nationally, while others (e.g. those that require special handling, refrigeration, etc.) must be collected from a local pharmacy. Where it is and is likely to remain the case that prescription orders must be fulfilled locally, the relevant area for online prescription products will be narrower.

**Market concentration**

82. Each Chemist Warehouse and Sigma banner store is owned and operated by an individual pharmacist (with some pharmacists owning multiple pharmacies) such that each separately owned store could be considered to be an individual competitor, and the proposed acquisition would result in no retail pharmacy aggregation. However, Chemist Warehouse appears to exert significant control or influence over price and non-price decisions at its banner stores, including through high levels of executive ownership of Chemist Warehouse stores. Sigma also appears to exert a degree of control or influence over price and non-price decisions at its banner stores.
83. As such, the ACCC considers that post acquisition the merged entity would have a degree of control or influence over Chemist Warehouse and Sigma banner stores. The extent of that influence likely varies between the banner groups and depends on the ownership structure of each individual pharmacy and other links between the franchisor and franchisee. Given the strong links (including close family links) between Chemist Warehouse and many of its pharmacy owners, the degree of influence over Chemist Warehouse stores is likely particularly strong. The ACCC is continuing to consider this issue, in particular the degree of control the merged entity would have over Sigma banner pharmacies.
84. There are over 6,000 pharmacies in Australia. The ACCC estimates that the largest 5 banner groups, set out in Table 1, account for around 40-45% of stores. Small to medium banners (such as Chempro Chemist, Blooms The Chemist, Direct Chemist Outlet, Pharmacy 777 and Ramsay Pharmacy) account for around 15-20% of stores, and the remaining 40% of pharmacies are independents.

**Table 1: Store counts for major banner groups**

Owner	Banners	Metropolitan		Regional & Remote		Total	
		Approximate number of banner stores	Approximate % of total pharmacy stores	Approximate number of banner stores	Approximate % of total pharmacy stores	Approximate number of banner stores	Approximate % of total pharmacy stores
<b>Merged entity</b>	Chemist Warehouse, MyChemist, Amcal, Discount Drug Store, PharmaSave, Guardian	700	17%	250	13%	950	16%
<b>EBOS</b>	TerryWhite Chemmart, healthSAVE, Cincotta Discount Chemist, Good Price Pharmacy Warehouse (and others)	450	11%	250	13%	700	12%
<b>Chemist Warehouse</b>	Chemist Warehouse, MyChemist	450	11%	100	5%	550	9%
<b>API</b>	Priceline, Soul Pattinson, Pharmacist Advice	350	8%	150	8%	500	8%
<b>IPA Group</b>	Advantage, Alliance, Chemist Discount Centre	300	7%	200	10%	500	8%
<b>Sigma</b>	Amcal, Discount Drug Store, PharmaSave, Guardian	250	6%	150	8%	400	7%

85. With approximately 550 pharmacies, Chemist Warehouse accounts for 9% of retail pharmacy stores and has the second largest number of bannered pharmacies in Australia (behind only EBOS). The ACCC considers that assessing market share by revenue may be a more informative assessment than

store count, and notes that Chemist Warehouse's revenue-based market share is higher than its store count suggests, especially if online sales are included.

86. Sigma is the fifth largest banner operator in Australia, with approximately 400 bannered pharmacies between its Amcal, Discount Drug Store, PharmaSave and Guardian retail pharmacy banners. Compared to Chemist Warehouse stores, Sigma pharmacies have a greater focus on selling pharmaceutical products (OTC and prescriptions products), and on service quality.
87. As such, the proposed acquisition would result in a material concentration of retail pharmacy stores by combining two of the five major pharmacy banner operators. The proposed acquisition would create the largest banner operator with approximately 950 pharmacies and the merged firm will have an approximate 16% share of retail pharmacy stores in Australia.

### **Lessening of price and non-price elements of competition**

88. The ACCC is considering how Sigma banner stores and Chemist Warehouse banner stores competitively constrain each other and how the removal of this competitive constraint would affect the merged entity's prices and its non-price offering. Non-price factors include quality of service and variety of product offering.
89. Price increases could take the form of increases in the retail prices either set or influenced by the merged entity at a national or regional level, and the ACCC is considering whether the merged entity would have sufficient market share or power that it could raise prices without materially losing sales or market share.
90. In regard to non-price elements of competition, the proposed acquisition could result in a reduction in the differentiated product and service offerings. A decrease in the range of product offerings could take the form of an increase in owned-label and private label products in place of branded products.
91. Further, it is possible that the proposed acquisition could lead to a consolidation of Sigma banner pharmacies if the merged entity decided to:
  - convert Sigma's banner pharmacies to Chemist Warehouse stores, either when a Sigma banner franchise agreement expires and must be renewed, or by influencing Sigma banner pharmacists to convert sooner
  - not renew franchise agreements with Sigma pharmacists. This would result in former Sigma pharmacists having to switch to new banners or operate as independent pharmacists. This could result in these stores being less competitive or even exiting the market if the cost of switching to a new banner or operating independently is too expensive.
92. Against these concerns, the pharmacy retail market is fragmented and the merged entity would face competition from the three remaining major banner group pharmacies, from numerous small-medium banner groups' pharmacies and from a significant number of independent pharmacies. In addition, in the FOS segment, there are potentially other competitors that are relevant to the consideration of competitive effects, particularly the major supermarket chains.
93. In addition, the ACCC is considering the extent to which Sigma offers a different value proposition to Chemist Warehouse and how competitively significant that

differentiated offering is. Sigma appears to focus more on OTC and prescription products than FOS products and discount prices like Chemist Warehouse. However, other banner groups and independent pharmacies appear to have a similar service-offering to Sigma pharmacies, as do many of the independent pharmacies. So even if there is a shift towards the larger-format discount FOS focussed model by the combined entity, there are a large number of players with a differing more service-focussed model that will still exist.

### **Impact of increase in scale of the merged entity**

94. Market feedback received by the ACCC indicates that it is difficult for independent pharmacies to compete with Chemist Warehouse because it has high brand recognition, low prices (often with RRP's below competitor wholesale prices) and often has stores in prime locations. Market participants have submitted that the proposed acquisition may enhance these competitive advantages and make it even more difficult for other pharmacies to compete, particularly in relation to pricing and product offering for FOS products. Market participants suggest that this may result in the exit of independent pharmacies who are unable to compete with the merged entity, and ultimately reduce retail pharmacy competition.
95. The ACCC is continuing to consider this issue, but notes that the merged entity increasing in size and scale is and of itself is not necessarily a competition concern for section 50 purposes.

### **Impact on local markets**

96. Competition in the retail pharmacy market may be influenced by both state/national competition and local market dynamics. As such, the ACCC is also concerned about the issues discussed above in local areas where both Chemist Warehouse and Sigma banner stores operate.
97. The ACCC is analysing areas of local overlap between Chemist Warehouse and Sigma stores and notes that the competition analysis differs for each local area.
98. To assist with identifying areas of local overlap between Chemist Warehouse and Sigma stores that the ACCC proposes to consider in greater detail, the ACCC has applied some preliminary screening criteria to local areas.
99. Firstly, the ACCC has used the following radii around every Chemist Warehouse store, based on the area type the store is located in:
  - densely populated areas (e.g. CBDs): 1.5km
  - other metropolitan areas: 3km
  - Inner and Outer Regional areas:<sup>16</sup> 5km
  - Remote areas:<sup>17</sup> 10km.

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<sup>16</sup> As classified according to ABS Remoteness Areas.

100. Secondly, because local areas that are more concentrated are more likely to raise competition concerns, the ACCC has used the following preliminary thresholds (within the relevant radii) to identify areas that may be more concentrated:
- where the combined number of Sigma and Chemist Warehouse stores account for 25% or more of sites in the area, and
  - where there are 10 third-party competitors or fewer in the local area.
101. The ACCC's preliminary screening has identified a significant number of local areas of overlap between Sigma and Chemist Warehouse stores that it proposes to consider in greater detail. The ACCC proposes to conduct further consultation with market participants about potential local market concerns following publication of this SOI.
102. The ACCC has taken the approach above for the purposes of this preliminary market screening only and this does not reflect detailed analysis of critical issues that are relevant to local market competition. Not all areas that meet the above criteria will ultimately be of concern, and areas that fall outside of these criteria may nevertheless raise preliminary competition concerns and require further analysis.

The ACCC invites comments from market participants on its concerns in relation to competition in pharmacy retailing. In particular, market participants may wish to comment on the following:

- the level of control or influence Chemist Warehouse and Sigma each exert over pharmacies in their banner and buying groups
- the level of constraint that Chemist Warehouse pharmacies and Sigma pharmacies currently impose on each other
- the level of constraint that third-party pharmacies are likely to impose on the merged entity post-acquisition
- the level of constraint non-pharmacy retailers (e.g. Coles, Woolworths, Target, etc) impose on pharmacies (particularly Chemist Warehouse) in relation to FOS products
- if and how Chemist Warehouse and Sigma pharmacies may change their offerings post-acquisition
- the suitability of the ACCC's radius and market concentration measures for identifying local markets of potential concern.

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<sup>17</sup> As classified according to ABS Remoteness Areas.

## **Issue that may raise concerns: Foreclosure of retail pharmacies**

103. The proposed acquisition combines Sigma’s significant wholesale business with Chemist Warehouse’s significant downstream retail business. The ACCC’s preliminary view is that the proposed acquisition may substantially lessen competition in pharmacy retailing, by way of the foreclosure of Sigma banner pharmacies and other pharmacies currently supplied by Sigma.

### **Foreclosure of rival pharmacies**

104. Based on the ACCC’s initial review, including market feedback received, the ACCC is concerned that post-acquisition the merged entity could degrade its price and supply terms to Sigma banner pharmacies and other pharmacies currently supplied by Sigma, including by stockpiling limited supply medications and preferentially supplying them to Chemist Warehouse banner pharmacies.
105. The ACCC is investigating whether the proposed acquisition increases Sigma’s ability and incentive to foreclose rival pharmacies by engaging in the conduct outlined above, and whether such foreclosure would have the effect of substantially lessening competition in retail pharmacy markets.

### **Factors relevant to ability**

106. Whether Sigma can foreclose rival pharmacies it currently supplies depends on whether such pharmacies have alternative supply sources that would still allow them to be competitive (i.e., can these pharmacies cost-effectively switch to alternative wholesalers such as API or EBOS). The switching ability of Sigma-supplied pharmacies may vary, as some may be under contract for a set number of years or have other costs or reasons to stay with Sigma.

### **Market concentration**

107. Sigma is a significant wholesaler of pharmacy products and by its own estimate has approximately 20% wholesale market share.<sup>18</sup> This market share is prior to the commencement of the New Supply Contract between Sigma and Chemist Warehouse and is likely to understate Sigma’s market significance as of 1 July 2024. The two largest alternative wholesalers to Sigma are API and EBOS. Collectively the three wholesalers have approximately 90% market share. In addition to the three major wholesalers, retail pharmacies may use CH2 (a smaller national full-line wholesaler), short-line wholesalers, and, in some limited circumstances, direct supply from manufacturers.
108. The ACCC is continuing to investigate the competitive constraint from these alternative wholesalers, including the extent to which they would be viewed as a sufficient and equivalent alternative if Sigma were to worsen terms and conditions for the Sigma banner pharmacies and other pharmacies it currently supplies, and there was an effective reduction in the number of available wholesalers.

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<sup>18</sup> Sigma Healthcare FY22 Results Presentation.

### Regulatory environment

109. As outlined in the 'Industry regulation' section, the wholesale supply of pharmacy products (specifically PBS products) is regulated. As a CSO accredited wholesaler, Sigma has ongoing obligations it must meet. To continue to access the CSO Funding Pool, Sigma submits that it cannot self-preference and is required to supply to all pharmacies.
110. The ACCC understands from its inquiries that these obligations relate only to PBS medicines, and the regulatory framework does not cover most OTC or FOS products. The ACCC also understands that there are circumstances where the obligations may not apply such as in the event of stock shortages.
111. In addition, the ACCC considers that there are elements of wholesale supply that cannot be regulated, for example, how quickly a pharmacy receives a response to queries, how reliable the delivery is and the detail of the terms and conditions of the wholesale supply (for example payment terms).
112. The ACCC is considering the implications of the CSO obligations, CSO Funding Pool and the extent to which there is ability within this framework to preference certain pharmacies over others. The ACCC is also assessing how products that are not covered by regulations may be differently impacted. The ACCC's preliminary view is that regulations may limit but would not prevent Sigma from engaging in foreclosure strategies (if it were profitable to do so).

### Barriers to entry

113. Another factor relevant to Sigma's ability is the height of barriers to entry.
114. Market feedback indicates that barriers to entry in the wholesale supply of goods and services to retail pharmacies are high, and new entry is unlikely to occur in a timely manner because:
  - The wholesale supply of pharmacy products to retail pharmacies is characterised by significant economies of scale and scope. Existing market participants have obtained this scale, and the market structure has been stable at the wholesaling level for some time. This stable market structure and the importance of economies of scale and scope reduces the expected profitability of would-be entrants to enter the market.
  - Wholesaling often takes place through supply contracts, with variable terms but usually approximately 3 to 5 years in length. These contracts may reduce the available customers for a would-be entrant, making it harder for an entrant to reach efficient scale, and so reducing the expected profitability from entry.
  - The wholesale supply of pharmacy products is subject to a complex regulatory framework, that requires CSO wholesalers to operate nationally and meet certain service requirements. This regulatory framework raises the complexity for would-be entrants, raises compliance costs, and results in higher capital costs for entry (as entry must occur nationally).
115. The proposed acquisition would result in significant vertical integration between a wholesaler and a retail chain. The merged entity may obtain some efficiencies as a result of the proposed acquisition and lower its costs but increasing vertical

integration may also raise barriers to entry if would-be entrants are required to enter at all functional levels of the supply chain to better compete with the merged entity and obtain similar cost structures.

116. The ACCC's preliminary view is that barriers to entry for the wholesale supply of pharmacy products to retail pharmacies are high, and consequently new entry is unlikely to occur quickly enough to prevent Sigma worsening terms to other pharmacies post-acquisition.

#### Conclusion on ability

117. The ACCC's preliminary view is that Sigma banner pharmacies and other pharmacies currently supplied by Sigma may have limited competitive alternatives available to them, as suggested by high levels of concentration, significant regulatory complexity and high barriers to entry. As such, there may be some ability to engage in the conduct outlined in paragraph above.

#### **Factors relevant to incentive**

118. Chemist Warehouse is already a sizeable wholesale customer. From 1 July 2024 when the New Supply Contract between Sigma and Chemist Warehouse comes into effect, Sigma's sales to Chemist Warehouse will increase significantly. Post-acquisition, these sales become 'internal' sales, and as a result the importance of third-party sales as a proportion of total sales to the Sigma business would diminish.
119. Additionally, while third-party sales are presently important to the profitability of Sigma's business, the proposed acquisition would be transformative to that business, and third-party wholesale sales would be significantly less important to the profitability of the overall business of the merged entity. The profitability of the merged entity would likely depend on the more profitable Chemist Warehouse business, which in turn relies on wholesale sales to Chemist Warehouse banner stores.
120. In assessing whether the merged firm would have an incentive to foreclose rival pharmacies post acquisition, the ACCC is examining whether the benefit the merged entity might obtain from increased retail profits would likely be outweighed by a loss of profit from a reduction in third-party wholesale sales.
121. The merged entity may have an incentive to worsen terms to rival pharmacies, if, as a result, sufficient consumers switch away from these pharmacies in favour of its own banner pharmacies (of which there would be a significant number post-acquisition), and the margins that the merged entity earn on those additional buyers outweigh any reduction in profits due to reduced wholesale sales to these pharmacies.
122. As discussed in relation to ability, another factor the ACCC is considering is the extent of regulatory controls and the products they apply to. Incentives may differ depending on the category of product. While there are price regulations for PBS products (that may incentivise wholesalers to achieve high volumes of these products), OTC and FOS products are not generally subject to any pricing requirements, and the ACCC understands that FOS and private label products typically have a higher margin.



123. The ACCC's preliminary view is that the proposed acquisition may increase Sigma's incentive to engage in foreclosure strategies.

**Effect of foreclosure**

124. The foreclosure of rival retail pharmacies may have the effect of substantially lessening competition where it leads to an increase in the price and/or decrease in the quality of goods and services provided in retail pharmacies, raising barriers to entry and/or expansion in retail pharmacy markets.
125. Based on the ACCC's investigation to date, the ACCC's preliminary view is the proposed acquisition may increase Sigma's ability and incentive to foreclose rival pharmacies, and if this foreclosure occurs that it may substantially lessen competition.
126. The ACCC is continuing to investigate these issues. In its further assessment, the ACCC will consider the extent to which the proposed acquisition increases Sigma's ability and incentive to engage in discriminatory and/or self-preferencing conduct and whether it is likely such conduct would result in a substantial lessening of competition.

The ACCC invites comments from market participants on its concerns in relation to the foreclosure of retail pharmacies. In particular market participants may wish to comment on the following:

- the level of constraint from alternative wholesalers, and their ability to service Sigma banner pharmacies and other pharmacies currently supplied by Sigma
- the ability of pharmacies to switch wholesaler, including the related costs of switching
- whether Sigma has any different or special features to the other wholesalers that make it a preferred wholesaler
- the extent of regulatory price controls that apply to products sold in retail pharmacies, such as those that apply to PBS products
- the extent to which changes in price and other elements of competition are likely to drive customers toward a Sigma/Chemist Warehouse pharmacy or away from an independent pharmacy
- barriers to entry and expansion for wholesalers
- barriers to entry and expansion for retail pharmacies and, in particular for independent pharmacies
- the extent of any constraint on Sigma/Chemist Warehouse pharmacies were they to increase their prices after having worsened terms to rival pharmacies and so rendered them less competitive.

## **Issue that may raise concerns: Access to and use of Sigma-supplied independent pharmacies' data, reducing retail pharmacy competition**

127. The ACCC's preliminary view is that the proposed acquisition may enable Chemist Warehouse to access the commercially sensitive data of Sigma banner pharmacies and other pharmacies currently supplied by Sigma. This data could be used to disadvantage pharmacies both within the Sigma wholesale network, and those outside the Sigma network (i.e., supplied by alternative wholesalers and that would no longer consider Sigma an alternative wholesaler due to data concerns), and limit their ability to compete against Chemist Warehouse banner pharmacies.

### **Sigma's access to commercially sensitive data**

128. According to market participants, Sigma has access to commercially sensitive data and information regarding the pharmacies it supplies products to. Sigma has access to this data for multiple reasons, one main reason being so that Sigma can anticipate a pharmacy's demand for products so that it can fulfill its CSO supply obligations, in particular the 24-hour supply requirement (further discussed at paragraph 42). The data Sigma can access may include some or all of the following:

- product SKUs, price paid by pharmacy to wholesaler, volume and order history of pharmacies
- product negotiations and purchase prices including promotional pricing on wholesale purchases
- retail sales and loyalty data (for example, rewards club data).

129. Market participants indicate that this data is commercially sensitive and valuable as it provides information regarding their product range, purchases, buying patterns, and which products pharmacies rely on for profit, customer attraction and retention. Information available to Sigma through its historical relationships with pharmacies could also reveal additionally sensitive aspects regarding lease premises<sup>19</sup>, whether pharmacies are facing financial difficulty, and potential sites for new pharmacy locations.

### **Adverse impact on rival pharmacies**

130. Based on market feedback and its initial review, the ACCC is concerned that access to and use of Sigma-supplied pharmacies' data could limit the ability of rival pharmacies to compete against Chemist Warehouse banner pharmacies. The ACCC is considering whether competitive harm could occur in the following ways to pharmacies supplied by Sigma:

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<sup>19</sup> Lease of pharmacy premises is a key component of maintaining a pharmacy as the Pharmacy Location Rules require that the applicant for the pharmacy has evidence of a legal right to occupy the premises at all relevant times (Part 2, section 10, subsection 3(b)).

- By lowering the incentive for Sigma-supplied retail pharmacies to compete - if Chemist Warehouse uses insights from commercially sensitive data to pre-empt, appropriate or otherwise undermine Sigma-supplied pharmacies competitive actions (e.g. product promotions), this may discourage Sigma-supplied pharmacies from fully pursuing these opportunities. If the merged entity has knowledge of a rival pharmacy's promotion plan prior to implementation, there is an enhanced risk that Chemist Warehouse banner pharmacies will match the plans, meaning the Sigma-supplied pharmacies will not get the benefits of the promotion. This would lead to Sigma-supplied pharmacies being less able to compete against Chemist Warehouse banner pharmacies.
- Through targeted predation - if Chemist Warehouse uses insights from commercially sensitive data to target rival pharmacies (for example, by undercutting them on key product pricing) or by pre-empting, or otherwise undermining their competitive actions (e.g. product promotions). This may include being for the purpose of undermining their viability and forcing them to exit so that the licence can be acquired by a Chemist Warehouse store.

131. Market inquiries suggest Sigma-supplied pharmacies (and pharmacies which are not currently supplied by Sigma to a significant extent, but have Sigma as a potential option for wholesale supply or a franchise arrangement) are significantly concerned about Chemist Warehouse gaining access to their data, and using that data to constrain or limit their ability to compete. These are deeply held concerns about being supplied at a wholesale level, or having a franchise relationship, with their strongest competitor. Even if they can switch to API or EBOS, those market participants feel they are in a worse position, as they have a choice of two main alternatives for wholesale supply or a franchise arrangement, whereas currently there are three major options. This is of particular concern where products are in limited supply or out of stock from a pharmacies' first-line supplier, and they are no longer able to source supply from Sigma, affecting their product offering and competitiveness.

132. The foreclosure scenarios outlined above are of concern to the ACCC if the effect of the foreclosure is that rival pharmacies' ability to compete against Chemist Warehouse pharmacies is inhibited.

The ACCC invites comments from market participants on its concerns in relation potential for Chemist Warehouse to access commercially sensitive pharmacy data and use it to reduce rival pharmacies' competitiveness. In particular, market participants may wish to comment on the following:

- the types and extent of pharmacy data wholesalers can access
- the likely impact of such access on competition, including decisions with respect to pricing, promotions, and product offerings.

### **Issue that may raise concerns: Foreclosure of rival suppliers of pharmacy products**

133. The ACCC's preliminary view is that the proposed acquisition could foreclose suppliers who compete with Chemist Warehouse and Sigma's owned-label and

private label products access to customers. This concern is likely to be stronger for those products where suppliers have fewer paths to market, for example for PBS and OTC products (which can only be supplied in pharmacies, and not – for example – in supermarkets)<sup>20</sup>.

134. The ACCC understands that Chemist Warehouse and Sigma have stated intentions to expand their owned-label and private label products through the merger<sup>21</sup>, which could reduce reliance on third-party suppliers in the future. The ACCC's inquiries indicate that for some suppliers, Sigma and Chemist Warehouse's wholesale acquisition volumes are significant and may be considered an irreplaceable supply channel.
135. The ACCC is considering the effects of the proposed acquisition on the upstream supply of pharmacy products and potential implications for suppliers who compete (or would like to compete) with the merged entity's owned-label and private label products, given the merged entity's significant supply channel post-acquisition. For example, the ACCC is considering the likelihood, and competitive effects, of decision(s) by the merged entity to increase its owned or private label offering and/or ceasing to work with or offer products from rival suppliers that compete with its own. The merged entity may be incentivised to do this if it earns higher margins on the sales of its owned or private label products, than it does on the sale of rival suppliers' products, and if no longer offering rival suppliers' products does not result in a significant number of consumers switching their purchases to rival pharmacies.
136. This approach may have a competitive effect if, for example, the merged entity was able to effectively increase the price of its owned or private label products (unconstrained by the pricing of other products) and/or foreclose rival suppliers' access to market to such an extent that it reduces their ability and/or incentive to compete, leading to a reduction of consumer choice.
137. The ACCC is considering factors that may limit the competitive impact of any such strategy including the extent of alternative routes to market:
  - For some suppliers there are likely to remain numerous alternative routes to market (thus minimising the impact of any loss of supply channel). Most Chemist Warehouse sales are from FOS products<sup>22</sup> and for those products there is generally a wider range of distribution channels, including supermarkets and other retailers.
  - Several manufacturers of pharmaceutical and non-pharmaceutical products are part of large, global businesses, and may have sufficient countervailing power to bypass the merged entity's wholesale business and sell directly to retailers.

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<sup>20</sup> Market inquiries suggested that Chemist Warehouse is seeking to expand its use of its 'Wagner' brand into the production of Scheduled medicines, to be produced by Arrotex Pharmaceuticals Pty Ltd. The ACCC considers these inquiries likely to be corroborated by a number of recent registrations of new 'WGR' products by Arrotex on the Australian Register of Therapeutic Goods.

<sup>21</sup> See for example: Sigma Healthcare Limited FY24 results announcement, p. 16.

<sup>22</sup> Chemist Warehouse franchisees generated 67 per cent of their revenues from FOS sales from items such as beauty products, vitamins and perfume: <https://www.afr.com/companies/retail/chemist-warehouse-s-boss-targets-growth-of-infinity-and-beyond-20231211-p5eqk2>.

- Retail pharmacies do not have exclusive supply arrangements with wholesale suppliers of pharmacy products. The ACCC understands that it is commonplace for pharmacies to be supplied by several providers of wholesale goods and services.

138. The ACCC considers that the risk of the merged entity foreclosing suppliers and impacting competition will likely depend on the type of product being supplied. For example, while suppliers of FOS products may have a variety of alternative retail routes to market, options for suppliers of PBS and OTC products are more limited and Sigma and Chemist Warehouse's wholesale acquisition volumes are likely to be more significant to them. The ACCC is continuing to investigate these issues.

The ACCC invites comments from market participants on the potential foreclosure of rival manufacturers. In particular, market participants may wish to comment on the following:

- the significance for suppliers of being able to access Sigma's wholesale distribution network and its pharmacy customers
- the process for introducing new pharmaceutical products to market, and the extent to which it is necessary for the product/s to be distributed by some, most or all the full and short line wholesalers.

## ACCC's future steps

139. As noted above, the ACCC invites 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 should be emailed to [SigmaCWG@accc.gov.au](mailto:SigmaCWG@accc.gov.au) by no later than 27 June 2024.
140. The ACCC will finalise its view on this matter after it considers submissions invited by this Statement of Issues.
141. The ACCC intends to publicly announce its final view by 5 September 2024. However, the anticipated timeline may change in line with the *Informal Merger Review Process Guidelines*. A Public Competition Assessment explaining the ACCC's final view may be published following the ACCC's public announcement.