TREASURY COMPETITION TASKFORCE

CONSULTATION PAPER: MERGER REFORM

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1. The Treasury's Competition Taskforce has released its Consultation Paper, Merger Reform (November 2023). The Taskforce is seeking views on the suitability of the current approach for assessing whether proposed mergers and acquisitions are likely to 'substantially lessen competition' (SLC) contrary to s 50 of the *Competition and Consumer Act 2010* (Cth) (CCA). Th Consultation Paper sets out various options for reform and poses several consultation questions for comment by interested parties.

A. CHANGES TO THE MERGER CONTROL PROCESS

Should Australia introduce a mandatory notification regime?

2. Under the existing informal clearance scheme parties to a merger are not required to notify the ACCC and are not required to wait for ACCC clearance before completing the merger. This has resulted in some parties not notifying, or notifying late, or not providing sufficient information to allow the ACCC to make a proper assessment of the likely anti-competitive effects of the proposed merger. In that case, the ACCC's only recourse is to apply to the Federal Court for an injunction to prevent the parties completing the merger.

3. The current Chair of the ACCC has noted that there was 'compelling evidence' that companies have failed to notify significant mergers. She cites Primary Health Care's acquisition of Healthscope's pathology arm in Queensland in 2015 as an example. She also cites the creation of PETstock from a series of smaller acquisitions. The ACCC did not become aware of PETstock's serial acquisitions until Woolworths sought approval to acquire PETstock.[1]

4. Failure to notify was also an issue in *ACCC v IVF Finance Pty Limited (No 2)*, [2] where O'Bryan J granted an interlocutory injunction to prevent a proposed merger between the acquirer, Virtus Health, through its subsidiary IVF Finance, and the target, Adora Fertility, which operated four fertility clinics Australia-wide. Virtus was aware of the possible application of s 50 but the ACCC was not notified prior to the execution of the sale agreement.

5. Following the public announcement of the sale agreement, the ACCC requested the parties not to complete the transaction until it could conduct a formal public review. The parties refused. In granting the interlocutory injunction O'Bryan J observed:

> While there is a public interest in the free operation of markets for the sale and acquisition of shares and assets, that public interest is subject to a higher public

[1] Gina Cass-Gottlieb, *Australian Financial Review* Friday, 24 November 2023, 7.
[2] [2021] FCA 1295.

interest in preventing sales and acquisitions that substantially lessen competition.[3]

6. The ACCC has no way of keeping abreast of sales and acquisitions that are constantly occurring across the economy other than through following announcements in the financial press or being tipped off by informants. The most efficient way to bring these matters to the attention of the ACCC is to introduce a mandatory notification scheme.

Should mergers be suspended for a period of time while they are reviewed?

7. In addition to the need for mandatory notification there is a need for notification to have a suspensory effect to prevent the parties completing the merger until clearance is granted. The Google-Fitbit merger illustrates why this is necessary. In February 2020, Google LLC proposed to acquire Fitbit, Inc. The two US-based companies sought informal clearance from the ACCC. In June 2020, the ACCC released its Statement of Issues. In November 2020, Google offered s87B behavioural undertakings to obtain an informal clearance. The ACCC rejected the proposed undertakings. In January 2021, the parties proceeded to complete the acquisition without an ACCC clearance.

8. In such circumstances, the ACCC's only recourse is to commence an enforcement action in the Federal Court for a breach of s 50, seeking pecuniary penalties and an order for divestiture. Judicial enforcement proceedings involve significant costs and are resource intensive for the ACCC.

9. The current voluntary notification scheme should be replaced by a formal mandatory and suspensory clearance regime to avoid the costs, delays and uncertainties associated with judicial enforcement. The reform will mean that the parties can't complete a notified merger without a clearance, thereby giving the ACCC adequate time to make its assessment. Mandatory and suspensory notification schemes for mergers that meet certain minimum value and size criteria are widely regarded as international 'best practice'.

10. Careful consideration will need to be given to the value and size criteria adopted to ensure that all acquisitions that may SLC are notified for assessment, while at the same time avoiding the possibility that the ACCC will be swamped with notifications that have no risk of an SLC effect. These value and size criteria should be capable of being amended without legislative change to provide some flexibility in administering the scheme.

11. There should also be flexibility in the time limits set for the ACCC's review of applications for clearance. The European Union (EU) has adopted a merger control regime that is mandatory and suspensory under which the European Commission has 25 days to conduct an initial, Phase I investigation. If the merger is not cleared it has a further 90 days to conduct a more, in-depth Phase II investigation. This time period can be extended if the parties fail to respond to a request for information.

[3] [2021] FCA 1266, [147].

Should the ACCC or the courts be the primary decision-maker for notifiable transactions?

12. Three options are canvassed in the Consultation Paper regarding this question. Under Option 1, a voluntary and suspensory notification regime is adopted. The administrative agencies only have a role to play if the parties seek a voluntary clearance. To obtain a clearance (an administrative ruling) the onus is on the parties to the merger to satisfy the ACCC that the merger will *not* be likely to SLC. The parties can appeal to the Australian Competition Tribunal to review a negative ACCC clearance decision. If the parties fail to notify the ACCC or proceed with the merger despite a negative clearance from the ACCC, the ACCC would need to seek an injunction in the Federal Court. In those proceedings, the onus would be on the ACCC to prove that the merger *is* likely to SLC. Option 1 is partly administrative but is primarily a judicial enforcement regime.

13. Under Option 2, a suspensory notification regime is adopted with compulsory notification. If the ACCC concludes that the transaction is likely to SLC, ACCC must apply to the Federal Court to seek an injunction to prohibit the merger. The onus is on the ACCC to prove to the Federal Court that the merger *is* likely to SLC. Option 2 is a judicial enforcement regime.

14. Under Option 3, a mandatory notification regime is adopted, and the transaction is suspended while the ACCC reviews it. To obtain a clearance the onus is on the parties to the merger to satisfy the ACCC that the merger is *not* likely to SLC. The parties can appeal to the Australian Competition Tribunal to review a negative ACCC clearance decision. Under this option, the ACCC can prevent mergers without needing to take proceedings in the Federal Court. The parties can appeal to the Federal Court for a limited judicial review of the ACCC's decision. Alternatively, the parties can apply to the Federal Court for a declaration that the proposed merger is not likely to SLC. Option 3 is primarily an administrative enforcement regime.

15. Before considering which option is preferable it is worth noting how the role played by the courts in enforcing s 50 of the CCA has evolved. When the original act was passed in 1974, the substantive prohibitions were relatively short, and the approach adopted for enforcement was 'court-centred'. The courts were left to work out what the prohibitions meant and how they were to be applied, but over time the provisions of the CCA have become more detailed, and much of the power to implement them has been transferred from the judiciary to the administrative agencies.

16. There have been very few fully argued merger cases considered by the courts since 1974. Mergers are generally time-sensitive and subject to fluctuations in share market prices. A period of long delay while a proposed merger is subject to a long litigation delay in the Federl Court may undermine the commercial rationale for the merger. Very few merger parties are prepared to wait until a proposed merger is given judicial clearance.

17. Thus, while the Federal Court has been assigned the task of adjudicating whether a merger contravenes s 50, the courts have rarely been used. Rather, the ACCC has assumed the role of assessing whether a merger is likely to contravene s 50. The costs, delays and uncertainties associated with litigating mergers in the Federal Court has led to the development of ACCC informal clearance procedures. These do not have any

specific statutory basis under the CCA, other than the ACCC's general power to enforce s 50 through proceedings in the Federal Court.

18. Under these informal procedures, the ACCC indicates *ex ante* whether it has any concerns about the anti-competitive effects of the proposed merger. If the ACCC indicates that it does have concerns then unless the parties are prepared to give s 87B undertakings that will satisfy those concerns, the parties will generally abandon the proposed merger rather than embark upon protracted litigation in the Federal Court.

19. There have only been a small number of cases in which the merger parties have sought a declaration from the Federal Court that a proposed merger is not likely to SLC.[4] In most cases the merger parties have a demonstrated a preference for the ACCC's administrative processes over judicial processes.

Options 1 and 2

20. Options 1 and 2 have judicial enforcement as a key element under which the ACCC bears the onus of proving that the merger *is* likely to SLC on the balance of probabilities. The ACCC faces numerous challenges in seeking to prevent a merger in the Federal Court. Some of these challenges arise from the nature of Competition Law itself, and the intersections it requires between the disciplines of law and economics. The CCA incorporates economic concepts including, 'market,' 'competition' and 'market power' and the courts consider the evidence of expert economists in defining and applying these concepts. Economics is a social science but not an exact science. It lends itself to a wide range of differing views. Under a judicial enforcement regime, the ACCC faces significant problems of proof in relation to these economic concepts because the information and evidence it can lead will be constrained by the rules of admissibility of evidence in relation to judicial proceedings.

Market definition: problems of proof

21. Market definition is seen as an essential first step in applying s 50. A competition law applicant (such as the ACCC) will typically seek to define the relevant market narrowly because in a narrowly defined market the respondent is more likely to possess substantial market power, or in the case of s50, the proposed merger is more likely to SLC. By contrast, the respondent in a competition law case will seek to define the market as broadly as possible so that the likely effect of the proposed merger on competition will be diluted.[5]

22. In merger cases the boundaries between markets may not be clearly defined. There may be some overlap or blurriness between them. The onus will be on the ACCC to establish the factual basis for the market it pleads, and the boundaries of the market will need to be supported by expert evidence.

23. Experts are required by the Rules of Court and Practice Notes to be frank and independent. Nevertheless, each party will choose an expert or experts that will support

[4] Recent examples include *Australian Gas Light Co v ACCC (No 3)* (2003) 137 FCR 317; and *Vodaphone Hutchinson Australia Pty Ltd v ACCC* [2020] FCA 117.
[5] Smith and Walker, 'Commercial Reality Versus Substitution in Market Definition' (1997) 5 *Competition & Consumer Law Journal 1*, 17-18.

their case. Experts can be required to exchange reports and make a report to the Court on matters agreed and the reasons for matter disputed. They may be required to give concurrent evidence where each may raise issues and question the opinion of the others. However, concessions are rare, and at the conclusion of the expert testimony, the Court is likely to be faced with conflicting expert opinions reflecting each expert's genuinely held views.

24. The expert economists are not permitted to find their own facts. The factual basis for the experts' opinions is provided by industry participants. These witnesses will provide testimony of their actual experiences as actual or potential competitors, suppliers or customers, or their intentions in relation to future conduct. If the ACCC is unable to persuade industry participants to give testimony, because of fear of reprisal or because they simply do not want to become embroiled in time-consuming litigation, it will struggle to prove its case.

25. It would be naïve to think that lawyers do not attempt to find credible evidence of a market that will best support the outcome they are seeking to achieve rather than defining the market in any objective sense. Of course, they will need to ensure that they don't depart too far from commercial realities, or they will risk having their definition of the market rejected by the court. Nevertheless, under the adversarial system the outcome will depend on what adversaries can prove, and if the ACCC fails to prove its case by credible evidence it will lose even if it should have won on the merits.

Future counterfactuals: problems of proof

26. The evaluative nature of applying economic principles under an adversarial system of justice in the courts has posed significant challenges for the ACCC. The SLC test is a 'forward-looking test' involving 'a prediction about the future'.[6] In *ACCC v Pacific National Pty Ltd (No 2)*, Beach J stated that the test to be applied in seeking to establish a contravention of s 50 involves one evaluative judgment with many constituent inquiries.[7]

27. The ACCC needs to prove that an SLC effect is 'likely' in the sense that there is a 'real chance' that an SLC effect will occur. The ACCC does not necessarily need to prove its counterfactual on the balance of probabilities, but if it does not meet this standard then this will affect any conclusion about whether there is a real chance the merger will have an SLC effect.

28. As the Beach J at first instance and the Full Federal Court confirmed on appeal in the *Pacific National* case, identifying the most likely counterfactual is just one component of the competitive assessment of the proposed acquisition. In many proposed mergers, the existing market, or *status quo*, will be the relevant counterfactual. In other words, without the merger, the target firm will continue to exist in its present form and continue providing competitive rivalry in relation to its price/quality/ service/ innovation package for the relevant goods or services. This will be the easiest counterfactual to support. The ACCC will gather information and evidence about the *actual* market

[6] *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49, [216].
[7] [2019] FCA 669, [1274]- [1279].

conditions prevailing at the time of the merger from competitors, suppliers, and customers.

29. However, the past will not necessarily be a reliable guide to the future in dynamic markets where conditions are changing. In such cases where some future counterfactual is pleaded other than the maintenance of the *status quo*, the ACCC is faced with almost insurmountable problems of proof. There is likely to be disagreement between the ACCC and the merger parties as to what the future market developments will look like and what is the most appropriate future counterfactual. The merger parties will argue for the future counterfactual that best supports their case, that is the counterfactual that is least likely to result in an SLC.

30. Three recent merger assessments illustrate the types of questions that arise in predicting a likely future counterfactual.

TPG/Vodaphone

Horizontal effects theory of harm

- Is the target an actual or potential competitor of the acquirer?
- If the target is not an actual competitor of the acquirer, will it nevertheless exercise a constraining influence as a potential new entrant to the acquirer's market?
- Would the target be likely to remain independent without the proposed merger?
- If so, how strong a competitive threat is the target likely to pose?
- Is the target likely to obtain the capital resources, skilled staff, and the other factor inputs necessary to remain viable into the future?

ANZ/Suncorp

Horizontal effects theory of harm

- Would the target remain independent without the proposed merger?
- If so, how strong a competitive threat is the target likely to pose?
- Is the target likely to be purchased by an alternative acquirer without the proposed merger?
- Are the potential alternative bidders able to pay the same price or offer the same terms as the acquirer?
- Are the potential alternative acquisitions less likely to have an SLC effect than the proposed merger?
- Without the merger, is the acquirer likely to purchase another firm?
- If so, is that alternative purchase likely to have a greater or lesser SLC effect than the proposed merger under scrutiny?

Pacific National

Vertical foreclosure effects theory of harm

- Is the acquisition of an essential facility to which access is necessary to compete in other markets likely to deter new entry into those other markets and entrench the acquirer's market power?
- How far into the future does one look to assess the impact of the proposed acquisition?

31. Where it is established that there is more than one realistic counterfactual, how is the ACCC to assign probabilities to each of those counterfactuals and convince the Court on the balance of probabilities that its assessment of those probabilities is valid and plausible?

32. Where the target already exercises a constraining influence on the acquirer there may be less of a problem. However, where the target is a new entrant with a new product or service that is yet to be tested in the market predictions about the future are required. In such circumstances, how is the ACCC to predict in advance the likely prospects of success for the new product or service if the target remains independent? If the parties to the merger are not existing competitors, are they likely to become future competitors? What evidence can the ACCC rely on to convince the Court on the balance of probabilities that its predictions are valid and plausible? The dynamic nature of businesses today means that expansion into new markets is much more common than it has been in the past.

33. The most likely sources of evidence in proving future counterfactuals are the parties' internal documents used for making business decisions about the future such as strategic analyses. If businesses are advised by their lawyers in advance of a proposed merger that reliance will be placed on their internal business documents, they will seek to control the content of those documents. This will make the task more difficult for the ACCC. It is highly unlikely that the ACCC will uncover a document stating that the object of the merger is to eliminate the competitive threat posed by the target.

34. Where the merger parties reject the ACCC's future counterfactual and advance a future counterfactual of their own, their executives are likely to provide evidence in support of that scenario which the ACCC will find it difficult, if not impossible, to refute. In *Vodaphone Hutchinson Australia Pty Ltd v ACCC,*[8] the ACCC's pleaded counterfactual was that TPG would roll out a retail mobile phone network and become a fourth mobile phone network operator. Mr Teoh was TPG's Executive Chairman and a witness in the case. His oral testimony was that TPG had put aside plans to become a fourth retail network operator. Middleton J stated: 'the assessment of Mr Teoh's views and the reasons he has given for those views as to the future plans of TPG is critical to the Court's assessment in these proceedings'.[9]

35. The courts struggle to deal with conjectures about what is likely to occur in the future, rather than factual evidence of past events. Requiring the ACCC to identify the likely changes in the level of competition caused by a proposed merger is an extremely difficult exercise which requires speculation about current and future competitive constraints in the market. It raises doubts as to whether the likelihood of a future lessening of competition can be proved on the balance of probabilities in judicial proceedings.

36. There are significant disadvantages associated with Options 1 and 2. First, there is a greater risk of allowing anti-competitive mergers (type II error) if the onus is on the regulator to prove that a proposed merger will be likely to SLC; and secondly,

[8] [2020] FCA 117.
[9] [2020] FCA 117, [16].

divestiture will rarely be an adequate remedy where anti-competitive mergers have been allowed to occur.

Risk of Type II Error (Under-enforcement)

37. The underlying policy objective of merger regulation is to prevent the creation or enhancement of market power. Any merger, especially one between two competitors, can increase market concentration and may create or enhance market power because it results in a permanent change to the structural market conditions. On the other hand, mergers can have beneficial economic effects by, for example, creating economies of scale or creating efficiencies through vertical integration. The task for the regulator is to identify those mergers that are only likely to have anti-competitive effects.

38. There is always a risk that a regulator will block a pro-competitive merger, (type I error), or allow an anti-competitive merger, (type II error). Type I error leads to over-enforcement; type II error leads to under-enforcement. As Merger Reform Consultation Paper correctly observes:

> Both allowing anti-competitive mergers and blocking pro-competitive mergers can lead to lower output, higher prices, lower quality and less innovation. However, allowing anti-competitive mergers means that merger parties benefit at the expense of consumers.[10]

The consequences of type I error are borne largely by the parties to the merger, and to a lesser extent the community if the pro-competitive effects of the merger are not realised. The consequences of type II are more serious for the community. The object of s 50 is the promotion of consumer welfare, rather than the welfare of individual competitors who may be parties to a merger. Every effort should be made to ensure that type II errors are avoided so that the process of competition and the beneficial impact that it has on consumers is preserved.

39. If the onus is on the regulator to satisfy the Court on the balance of probabilities that a proposed merger is likely to have anti-competitive effects, there is a greater risk of type II error. A former Chair of the ACCC has noted:

> Our lack of success in merger cases has resulted in some problematic acquisitions going ahead. For example, we have seen the number of competitors in rail container freight go from two to one. The threat from entry of a fourth mobile network operator has been extinguished as a result of the Vodaphone/TPG merger, and AGL's acquisition of Macquarie Generation saw higher power prices.
>
> The issue has broader implications, because it constrains the way the ACCC decides whether to oppose mergers. It has sometimes meant that we have not opposed acquisitions which we considered would be likely to adversely affect the structural conditions for competition, because of the challenges of proving the future effect to the requisite level required by the law as interpreted by the

[10] Merger Reform Consultation Paper, November 2023, 29.

courts. In some cases, there are signs of consumer or economic harm resulting from these acquisitions.[11]

Ex post remedies ineffective

40. The difficulties associated with divestiture are one of the principal reasons for adopting mandatory *ex ante* notification and administrative clearance of mergers. It may be impossible to restore competition to the position it was in prior to the merger. Key employees may have left the target; suppliers may have found other customers; customers may have found other suppliers; know-how and other valuable business secrets of the target may have been revealed to the acquirer, so that the target's competitive advantage is lost.

Option 3

41. Under Option 3 the parties to the merger would need to satisfy the ACCC that the proposed merger is *not* likely to SLC. It is the parties to the merger who are likely to have the information, evidence and documents necessary to make this assessment. Presumably, they will know the rationale for the merger, and what makes the target attractive to the acquirer. Is it a question of synergies arising from combining the target's product with one of the acquirer's products? Are the products complementary? Are there other efficiencies arising from economies of scale?

42. The adoption of a reversal of the onus of proof in relation to mergers is not new in Australia. A formal clearance process with a reversal of the onus of proof existed under the CCA from 2007 to 2017. At the time, it was not used because the parties preferred the informal, voluntary process which existed side by side with it, but the removal of the current informal clearance process will give the parties to the merger a strong incentive to provide as much information as possible at the time of filing to allow the ACCC to make its assessment within the time limits set.

43. A reversal of the onus of proof has also been adopted in s 90(7)(a) in relation to the granting of authorisations. It provides:

    The Commission must not make a determination granting an authorisation under s 88 in relation to conduct unless

    (a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition…

44. The ACCC's 2018 *Merger Guidelines* set out the approach it follows in assessing applications for merger authorisation under s 90(7). The onus is on the parties to identify the competitive constraints they face in the market and any likely change to those constraints should the authorisation be granted, and the proposed acquisition proceeds. In particular, the parties must provide information about the following structural factors:

[11] Rod Sims, Address to the Law Council of Australia Competition Law Workshop 2021, 'Protecting and Promoting Competition in Australia' (27 August 2021).

- existing or potential competitors including imports;
- the likelihood, sufficiency and timeliness of entry and expansion by existing and potential competitors; and
- the countervailing power of customers.

The adoption of satisfaction test under an administrative agency regime has the advantage that the information available to the agency is not constrained by the rules of admissibility of evidence in relation to judicial proceedings. The Tribunal presided over by a judge of the Federal Court of Australia, and lay members experienced in industry, commerce and economics has shown itself to be more attuned to economic concepts than the Courts.

45. Because of the separation of powers under the Commonwealth Constitution, the ACCC and the Tribunal cannot make findings that there has been a breach of s 50. They do not exercise the judicial power of the Commonwealth. Rather, they would make the finding that a proposed merger may contravene s 50, or that there is some risk of a contravention of s 50 and accordingly cannot grant a clearance. The granting of a clearance should confer immunity on the merger parties from proceedings by the ACCC or third parties for a contravention of s 50.

Will a reversal of the onus of proof deter innovation and investment?

46. There is disagreement about whether the reversal of the onus of proof will make it more difficult for start-up innovators to sell their businesses to established incumbents, especially in digital markets, because it will be seen as eliminating a nascent competitor and entrenching the position of existing platforms. If these start-up innovators cannot be rewarded for their ingenuity and risk by selling out rather than scaling up, so the argument goes, it will deter innovation. Innovators will move to other jurisdictions where the merger enforcement regimes are less 'draconian'.[12] Adopting Option 3 is seen by some as making it more difficult to sell an innovative product or service to an established incumbent and thereby creating a 'barrier to exit' for venture capital.

47. The chief executive of the Technology Council predicts the effect this 'barrier to exit' will have:

> Investors anticipate the likelihood and ease of their future returns. If we start introducing rules that make it harder or less certain to undertake mergers and acquisitions in Australia … then you can send a signal to the market that it will be a harder path in Australia.[13]

48. It is difficult to assess how plausible this argument is. Some venture capitalists may be deterred from investing in start-up innovators in Australia if Option 3 is adopted, but that loss must be measured against the harm to consumer welfare that results from allowing firms to acquire market power through a series of acquisitions of start-ups and

[12] Ronald Mizen and Hannah Wootton, 'Merger crackdown risks VC funding' *Australian Financial Review* Monday, 4 December 2023, 6.
[13] Ronald Mizen and Hannah Wootton, 'Merger crackdown risks VC funding' *Australian Financial Review* Monday, 4 December 2023, 6.

the elimination of the competitive constraints they would otherwise have brought to the market.

49. Start-up acquisitions are a feature in the pharmaceutical sector, as well as high-tech and digital markets. For example, the US Federal Trade Commission has commenced proceedings against Facebook (now Meta, Inc), the world's largest social networking service alleging that it targeted potential competitive threats to its dominance, such as Instagram and WhatsApp, and acquired them rather than facing competition from them. It is alleged that in this way Facebook entrenched its market power making it more difficult for another social networking service competitor to gain scale.

Conclusion

50. The ACCC has not won a single case in the Federal Court under the SLC test since its adoption in 1993. One reason for its failure before the Court is the considerable uncertainty and difficulty associated with proving market definition and proving a future counterfactual on the balance of probabilities that will give rise to more intense competitive conduct without the merger. This is especially so in complex markets involving technology, undergoing evolution and change. Complex, dynamic markets involving technology are rapidly becoming the norm rather than the exception. The spread of Information and Communication Technology (ICT) across all business sectors of the economy including retail, transport and logistics, financial services, manufacturing and agriculture, education, healthcare, broadcasting and media,[14] has exacerbated these problems of proof for the ACCC. As generative Artificial Intelligence (AI) becomes widely adopted it is likely to add another layer of complexity.

51. The emergence of these complex markets using ICT and AI is forcing competition regulators to engage teams of specialist staff to understand the algorithms and technologies that support them.[15] Are these technologies substitutes for existing technologies or complementary to them, or a combination of the two? The answers will not always be clear-cut. In digital markets involving social media platforms, how is the market defined if consumers are allowed to use them for free? The traditional Hypothetical Monopolist Test to determine whether two products are substitutable so as to be in the same market can no longer be applied because it presupposes that consumers are being charged a price.[16]

52. Australia should retain its economics-based consumer welfare standard for competition assessment, but changes are necessary to make the merger control process more effective. I support a formal mandatory and suspensory notification process enforced by the administrative agencies (the ACCC and the Tribunal on appeal) where the onus of proof is on the merger parties to satisfy the administrative agencies that the proposed

[14] See the OECD report, 'The digital economy, new business models and key features'. Available at: oecd-ilibrary.org

[15] For example, the Digital Markets Unit within the Competition and Markets Authority (CMA) in the UK, a specialist unit to tackle anti-competitive practices by high-tech firms, has a staff of 70. On 17 February 2023 the Federal Trade Commission (FTC) announced that it was establishing an Office of Technology to strengthen its ability to keep pace with technological challenges in the digital marketplace, including developing investigative techniques as well as analysing data and documents received during investigations.

[16] For a consideration of the problem see Nick McHugh and Dietrich Marquandt, 'Digital disruption of competition law: Rethinking market definition'. Available at: nortonrosefulbright.com

acquisition is not likely to SLC. This will give the merger parties a strong incentive to provide the requisite information at the time of filing and lessen the risk of type II errors being made. Time limits should be imposed to ensure that the administrative agencies act expeditiously and do not undermine the commercial rationale for the merger. However, where delays cannot be avoided this will be a cost the economy will have to bear to prevent the harm to consumer welfare that would otherwise occur by allowing anti-competitive mergers. Option 3 reflects international best practice and should be adopted in Australia.

53. The adoption of Option 3 will have resource implications for the ACCC. A mandatory notification scheme is likely to result in more applications for clearance being lodged with the ACCC for assessment. The adoption of strict time limits for the ACCC to make its assessment is likely to require additional staff. If the onus of proof shifts to the merger parties, they are likely to supply substantial amounts of information at the time they lodge their applications. While this may reduce the burden on the ACCC to some extent, the ACCC will still need to verify the claims made by the parties.

If Australia was to move more towards an administrative decision-making regime as proposed by the ACCC, should ACCC decisions be subject to limited merits review by the Competition Tribunal, similar to existing merger authorisations?

54. The review process for the ACCC's administrative decisions under a formal clearance regime for mergers should be consistent with the review process for merger authorisations, namely a limited merits review. As a result of amendments to the CCA made in 2017, where the Tribunal reviews a merger determination it does not undertake a re-hearing of the matter. Restrictions are placed on the information the Tribunal may consider in reaching its decision. Given the time-sensitive nature of merger transactions, the Tribunal is only permitted to consider the material that was before the ACCC at the time of its determination.

55. The rationale for these restrictions is spelt out in the Explanatory Memorandum accompanying the 2017 Bill. These restrictions '… are intended to ensure that applicants for merger authorisation provide the Commission with all the relevant material at the time of the application, and do not delay production of that material until later in the process or until Tribunal review.' [17]

56. To avoid unfairness, the Tribunal should be allowed to consider new information, documents, or evidence if the Tribunal is satisfied that such information, documents or evidence was not in existence at the time the ACCC made its determination.

[17] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), [9.80].

B. CHANGES TO THE MERGER CONTROL TEST

Should Australia's substantial lessening of competition test be amended to include acquisitions that 'entrench, materially increase or materially extend a position of substantial market power'?

57. The underlying policy objective of merger regulation is to prevent the creation or enhancement of market power. The existing legal test for mergers is whether the proposed transaction would or is likely to lessen competition *substantially.* There has been a long-standing problem with so-called 'creeping acquisitions' where an incumbent makes one or more small-scale acquisitions, no one of which could be said to result in a *substantial* lessening of competition contrary to s 50, but collectively over time may have that effect.

58. The ACCC attempts to deal with this problem under its informal merger clearance process. It interprets and applies the existing SLC test so that it catches small-scale acquisitions by firms with substantial market power (SMP). For example, in May 2023, the ACCC opposed Woolworths' proposed acquisition of the SUPA IGA in Karabar. The ACCC concluded it would be likely to SLC because Woolworths was an incumbent with SMP and the acquisition would result in it operating 3 of the 6 supermarkets in the Queanbeyan area. Local consumers would be left with only one Coles and 2 Aldi supermarkets. In September 2023, the ACCC opposed the proposed acquisition of a majority interest in Horizon Roads by Transurban. In Melbourne, Transurban operates the Citilink Toll road and will operate the West Gate Tunnel Toll Road when completed. Horizon operates the Eastlink Toll Road. The ACCC concluded that the acquisition would result in Transurban entrenching its SMP in Victoria and prevent new entry by a future rival.

59. Another aspect of the problem relates to acquisitions by the owners of dominant platforms which confer SMP. If Amazon, Google and Facebook control access to their platforms, and if the services they own are competing with other companies using those platforms, then they have the ability and the incentive to hinder the operations of their competitors. Unless the current SLC test captures such acquisitions the ACCC is forced to regulate their conduct under the misuse of market power prohibition in s 46 of the CCA.

60. The Google-Fitbit merger illustrates the ACCC's concerns. There was a real risk that if Google acquired Fitbit it would use data collected through Fitbit for advertising. This data collected over a long period would improve Google's ability to engage in more targeted advertising than its competitors. There was also a risk that Google would use its Android operating system to discriminate against wrist-worn wearable devices by withholding or delaying access to the functionalities of Android.

Conclusion

61. While it is arguable that acquisitions by firms with SMP that increase or entrench their market power already fall within the ambit of s 50, and/or s 46 (the misuse of market power provision of the CCA), there is no guarantee that a court would make such a finding. I support the ACCC's proposal for legislating special rules for merger parties with SMP so that s 50 will be contravened if the acquisition entrenches, or material

increases or materially extends the merger party's market power. At a minimum the factors in s50(3) could be amended to include a new factor that requires consideration of whether the proposed merger will entrench, increase or extend the pre-existing market power of one of the merger parties.

Should the merger factors in s 50(3) be amended to increase the focus on changes to market structure as a result of the merger? Or should the merger factors be removed entirely?

62. In an address to the Competition Law Workshop conducted by the Law Council of Australia in August 2021, the then Chair of the ACCC, observed:

> The approach adopted by the Courts of focusing on the evidence establishing the likely state of competition in the future with and without the merger is usually at the expense of looking at how the acquisition will change the structural conditions for competition…
>
> In Australia, there appears to be excess weight placed on the capacity of market forces to overcome problems caused by lack of competition in concentrated markets. There seems to be undue optimism that new entry will rapidly occur if firms attempt to exercise market power, or that a small number of large players will compete rather than simply accommodate each other so that all can make more profit.[18]

63. The emphasis on market structure as the key determinant of whether firms compete has been at the centre of Australia's competition law jurisprudence since it was first adopted by the Trade Practices Tribunal in its *QCMA* determination.[19] The market structure elements identified by the Tribunal in that case have been applied by the Courts in all major competition cases since then.[20] Section 50(3) provides a non-exhaustive list of mostly structural matters to be considered in determining whether a merger will be likely to SLC. These matters are drawn from the Tribunal's *QCMA* determination and the broader case law relating to competition analysis under pt IV of the CCA.

64. Potential harm to consumers from a proposed merger can arise in four different ways: harm through higher prices; harm through poorer product quality; harm through less variety; and harm through less innovation. The merger factors in s 50(3) already capture the potential harm that can arise in each of these four ways.

Harm through higher prices

65. Section 50(3)(e) specifically requires that consideration be given to 'the likelihood that the acquisition would result in the acquirer being able to significantly and substantially increases prices or profit margins'. Section 50(3)(b) will also be relevant in any consideration of harm through higher prices. It provides that consideration be given to

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[18] Rod Sims, Address to the Law Council of Australia Competition Law Workshop 2021, 'Protecting and Promoting Competition in Australia' (27 August 2021).
[19] *Re Queensland Co-operative Milling Association and Defiance Holdings* (1976) 25 FLR 169 at 188-189.
[20] See, e.g., *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 21 [41- [42] and *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374 at 460 [265]- [266].

‘the height of barriers to entry to the market’. If barriers to entry are low any attempt to raise prices post-merger is likely to attract new entry and force the merged firm to lower its prices.

66. This reasoning was adopted in *AGL Company v ACCC (No 3)*,[21] where AGL, a major retailer of electricity in the National Electricity Market sought to acquire a power generator in Victoria. French J considered that the barriers to entry to the wholesale electricity market were not so high that they supported a price increase post-merger. Gas turbines could be commissioned in under two years. There was evidence of a significant increase in new generators following an increase in spot prices in 2001.[22]

67. Other structural factors that are relevant in considering harm through an increase in prices post-merger are s50(3)(c) and (d). Section 50(3)(c) requires that consideration be given to ‘the level of concentration in the market’. Market concentration is determined by the number and size of the participants in the market. A large increase in concentration may give the merged entity sufficient market power to increase prices unilaterally. A large increase in concentration may reduce the number of participants in the market and facilitate a coordinated increase in prices. Section 50(3)(d) requires that consideration be given to ‘the degree of countervailing power in the market’. Countervailing power exists where a supplier faces buyers with power and size sufficient to constrain the ability of the merged firm to increase prices.

Harm through poorer quality

68. As the Tribunal observed in its *QCMA* determination, if a merger gives rise to market power, it can result in the merged entity ‘giving less’ rather than ‘charging more’. Giving less can result in the merged entity increasing profit margins in a less obvious way than simply raising prices. The structural factors considered above in relation to *Harm through higher prices* apply equally to any theory of competitive harm based on poorer product quality. If barriers to entry are low, or powerful buyers have countervailing power, any attempt to sell an inferior product post-merger will be met by consumers switching to new entrants or powerful buyers finding new sources of supply.

Harm through less variety and less innovation

69. Section 50(3)(g) specifically requires that consideration be given to ‘the dynamic characteristics of the market, including growth, innovation and product differentiation’ which catches harm arising through less variety and less innovation.

70. Mergers in markets where innovation is an important aspect of competition can pose significant problems for consumer welfare. Competition in digital markets is sometimes characterised as ‘competition for the market’. This may take the form of a competitive struggle to capture the market and become a monopoly supplier. So long as there is competition ‘for the market’ and the right to supply is regularly re-contested through on-going innovation there may not be an SLC.

[21] (2003) 137 FCR 317.
[22] (2003) 137 FCR 317, [391].

71. However, the maintenance of the monopoly through acquisition of nascent competitors rather than constant innovation can harm consumer welfare. The Google-Fitbit merger considered above illustrates the concerns regarding the acquisition of nascent competitors in digital markets involving dominant platforms.

Conclusion

72. It is difficult to assess the extent to which the structural factors in s 50(3) have provided guidance to judges and the weight attached to them. Nevertheless, in my view they should be retained. With their mix of structural and dynamic features they cover the spectrum of harm to consumer welfare that can arise through a lessening of competition in markets. It is unclear whether s 50(3)(h) only relates to the removal of an actual competitor or whether it catches the removal of a *potential* competitor as well. It could be improved by amending it and specifically referring to the removal of a potential competitor as well as an actual competitor. The factors in s50(3) could be further improved by including a new factor that requires consideration of whether the proposed merger will entrench, increase or extend the pre-existing market power of one of the merger parties.

Should a public benefit test be retained if a new merger control regime was introduced?

73. Economists have identified other forms of market failure apart from market power, such as those arising from information asymmetry, search and switching costs, transaction costs, economies of scale and scope, and hold-up. These market failures can be remedied through Government regulation, such as the Australian Consumer Law. Where businesses seek to remedy them through contractual restraints or through mergers, and this gives rise to a public benefit that outweighs any anti-competitive detriment, they should be capable of being authorised. The onus should be on the merger parties to prove a net public benefit and the test in s 90(7) should be retained.

S.G Corones
14 December 2023