Treasury Submission re Merger Reform

Dr Rhonda Smith University of Melbourne

Professor Deborah Healey UNSW Law and Justice

1. Introduction

Much has been written about the need for merger reform in Australia. The Australian Competition and Consumer Commission (ACCC) has argued for several years that processes and tests are not fit for purpose. It cites its monumental lack of successful cases under the current test. It states that 'consumers and businesses will pay higher prices if anticompetitive mergers are able to continue to proceed' and notes the impact on the economy of weakened competition in many sectors. [1] Others have focused on the distinctive nature of digital markets which present characteristics which favour concentration and appear to exacerbate existing difficulties with merger analysis.[2] Finally, commentators have noted increasing market concentration as a factor in the reduction of competition and this has been picked up by governments at a number of levels. Opponents strongly dispute most of these issues.[3] This Treasury consultation and submission on merger reform are made against this background, and against the background of the comments made by the authors in oral consultations.

2. The problems with mergers: the process

There is a real tendency in the arguments to identify the effects of the under-enforcement of the prohibition of anti-competitive mergers under section 50 of the Competition and Consumer Act (CCA) and then move directly to considering means of addressing the under-enforcement. However, in this submission we emphasise that it is essential to identify the cause of the problem and the

[1] See, for example, on 20 December 2023 'ACCC responds to merger reform proposals' https://www.accc.gov.au/media-release/accc-responds-to-merger-reform-proposals

[2] See, for example, Report of the Digital Competition Expert Panel, Unlocking Digital Competition (Furman Review), para. 1.68- 1.92, https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel

[3] See, for example, Hannah Wootten, Ex-ACCC chief Samuel labels Sims' merger reform proposal 'a quagmire,' Australian Financial Review September 21 2021 https://www.afr.com/policy/economy/ex-accc-chief-samuel-labels-sims-merger-reform-proposal-a-quagmire-20210831-p58njp

ACCC's difficulties before considering solutions. We attempt to do this in our submission below before addressing other issues arising.

In considering the cause of the problem, we consider that the primary, though not the only, issues are twofold: the requirement for evidence to conform with the Evidence Act 1995 when it is alleged that a merger will substantially lessen competition, and the approach of courts to the reception of economic evidence in merger cases. Providing evidence of the alleged substantial lessening of competition resulting from a merger, and particularly a digital merger, to a standard that satisfies the Evidence Act is extremely difficult, if not impossible. The merger is yet to occur so there is no direct factual evidence concerning the effect of the merger. This has several important consequences. First, the futurity limits the extent to which it is possible to fully appreciate the likely future nature of dynamic markets. This makes both the factual and the counter factual in a merger analysis unreliable given the dynamic nature of many markets today, especially digital markets. Second, and linked to the first point, it makes it difficult to take account of the role of potential competitors, a problem generally, but one that has particularly bedevilled analysis of the acquisition of nascent competitors and is linked to the issue of creeping acquisitions.

What are available to the court are the opinions and expectations of various witnesses, including the parties, and from their economic experts. The situation is compounded by the obligation of the ACCC to act as a model litigant. Amongst other things, this requires the ACCC only to litigate matters in circumstances where it has a reasonable chance of success, which limits more risky litigation the ACCC might be inclined to take, even in situations which it considers to be important to market competition or where a point of law needs clarification.[4]

It is far from clear that mere changes to court processes can adequately address these issues. Consequently, the most appropriate solution seems to be to remove merger adjudication from the court to allow for more flexibility in approach to evidence and also to ensure that independent assessment of economic evidence presented is available to the decision-maker through an economist Tribunal member.[5] If this is not the approach to be adopted, there would need to be a significant

[4] See ACCC, Accountability Framework for Investigations, April 2019, 10.5 available at https://www.accc.gov.au/about-us/publications/the-acccs-accountability-framework-for-investigations. The document refers to the Australian Government Legal Services Directions which bind legal work done by or on behalf of Australian Government agencies. The ACCC has stated that compulsory notification with court adjudication would not 'deal with its underlying concerns of the current enforcement-based merger regime.' ACCC above note 1.

[5] The Australian Competition Tribunal is made up of a judge as chair, a businessperson and an economist: CCA, s31 (2) states that the members other than the Presidential Member must be qualified by knowledge or

change in the mindset of judges in the application of the merger test. As was stated by Professor Stephen Corones in 2003:

'In relation to the evidence of expert economists and econometric quantitative models, problems arise because they rely on theories based on certain assumptions to explain behaviour. Theory without fact has an untested quality which judges find unpalatable. The cases reveal a strong preference for facts and for the evidence of industry representatives who can be cross-examined in the witness box.'[6]

This view is also held by the authors and is influential in the solutions proposed in this submission.

3. Suggested solutions- the process

We strongly support a process for mergers under which the ACCC makes an administrative decision as to whether a proposed merger is a breach of section 50 of the CCA. This would:

i. Avoid the evidentiary issue associated with the Evidence Act and enable the consequent problems to be addressed – this would not mean acceptance of speculative claims given the provision for review of its administrative decision;

ii. be consistent with the position of competition authorities in jurisdictions such as the EU and the UK.

The proposed change is less radical than it may appear and many would argue. The ACCC already makes administrative decisions in relation to formal clearance applications under the authorisation process, although this is relatively little used unless coupled with public benefit claims. It also reviews the most likely problematic mergers through its informal clearance process, so it has enormous practical experience with merger review.

We suggest that going forward, under a compulsory notification process set at particular turnover levels (see below) , the ACCC would first assess the effect of the merger on the competitive process.

experience in ' industry, commerce, economics, law or public administration'. It is suggested that in cases involving mergers there should always be an economist as part of the Tribunal.

[6] Stephen Corones, 'Foreword' in Caron Beaton-Wells, Proof of Antitrust Markets in Australia (The Federation Press, 2003), v. This quote was cited by the authors in The Art of Crystal ball gazing? Assessing digital mergers (2021) 28 Competition & Consumer Law Journal 292, 307. See also Ray Finkelstein, What is wrong with mergers in the Federal Court (2020) 27(2) Competition & Consumer Law Journal 79.

The merger may be very unlikely to substantially lessen competition and may be cleared on the documents supplied without public inquiries. Mergers that could not be cleared in this way should be subject to a full competition analysis informed by public inquiries and potentially under section 155 notices as appropriate, in the same way that current authorisation proceedings are conducted.

A second step should be available for any merger that is found likely to breach section 50 by the ACCC under the above process. This would be the option to apply for authorisation of the merger based on a claim that it would result in a net public benefit outweighing the likely public detriment, as is currently done in a merger authorisation. This contrasts with a previous recommendation by Rod Sims to remove this option.[7] This approach recognises that a merger may have anti-competitive effects while also conferring certain public benefits and has been long adopted under the CCA and its predecessor the Trade Practices Act (TPA). If the public benefits exceed the public detriments including anti-competitive impact, then allowing the merger will increase economic welfare and so it should proceed. Any claims that the difficulty of weighting appropriately the claimed public benefits or of balancing these against the public detriments is too difficult is not supported by an analysis of the merger authorisation decisions since November 2017. The number of mergers that have some adverse effects on the competitive process but give rise to significant public benefits is likely to be greater in future as industry responds to structural change, including due to climate change. These new authorisation decisions of the ACCC would continue to be reviewable by the Tribunal.

It is apparent from this that there would no longer be an informal clearance process.

4. Review by Australian Competition Tribunal

It is appropriate to provide for review of administrative decisions. We suggest that review appeal should be to the Australian Competition Tribunal (Tribunal) rather than an appeal to the court. This is because:

i. If this review is undertaken by the court the initial evidentiary problem will reappear and little will have been achieved.

[7] Rod Sims, Protecting and promoting competition in Australia keynote speech, Competition and Consumer Workshop 2021 - Law Council of Australia, 27 August 2021. https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia-keynote-speech

ii. Importantly, the Tribunal is not required to apply the Evidence Act, although information concerning the outcome of the merger should not be accepted if it is merely speculative. [8]

iii. The issues associated with mergers are increasingly complex and the economic models which may provide useful insights into the likely outcomes from them are also more complex. The composition of the Tribunal – a judge with a business person and an economist – makes it a more appropriate body to assess what is in large part commercial and economic material.

We return to aspects of the review process below.

Review of a merger is not a rehearing and does not currently allow for the introduction of new material, although there is some discretion in the Tribunal to do so if it is satisfied that it was not in existence at the time of the ACCC determination.[9] This discretion could be expanded to include other material as relevant subject to Tribunal discretion with strict controls. Despite the express direction in the CCA about the rules of evidence and the addition of non- lawyer Tribunal members, it has always operated in a very legalistic fashion, despite comments on the Federal Court website to the following effect:
"Proceedings are conducted with as little formality and technicality and with as much expedition as the requirements of the Act and a proper consideration of the matters before the Tribunal permit".

In contrast, as was stated long ago by Donald and Heydon:

" Despite this attempt to make the Tribunal less legalistic, the relentless ability of lawyers, particularly barristers, to turn any forum into a curial one has already made the Tribunal virtually indistinguishable from a court…"[10]

However, the Tribunal is different in one crucial respect from the Federal Court: an economist generally forms part of the decision-making panel, which has the capacity to ensure that there is

[8] CCA section 103(1)(c).
[9] CCA s 102(9).
[10] Bruce G. Donald and J.D.Heydon, Trade Practices Law Volume 1, Law Book Company (1978), 28.

an economist not linked to one of the parties scrutinising all economic arguments. Going forward it should be mandatory to have an economist on the Tribunal for merger reviews.

If these changes are implemented, Declaration in the Federal Court should no longer be available. This is necessary to avoid gaming. If Declaration remains available and it is believed that the court process favours the merger parties, parties will always opt to avoid the clearance process and proceed directly to court. Following the suggested changes, the role remaining to the court would be to issue injunctions and determine penalties for gun-jumping or failure to abide by a section 87B undertaking in relation to a merger. There would be limited appeal from the Tribunal to the court on questions of law.

5. Issues arising from change to administrative decision-making

1) Mandatory notification

Currently, there is no mandatory requirement for businesses to notify the ACCC of a proposed merger. This contrasts with the position in most jurisdictions, including the United States and the European Union. Anecdotally it appears that the Australian experience has been relatively favourable in that most significant mergers have been notified on an informal basis. However, the ACCC has complained more recently about gun jumping and parties notifying so close to consummation that the ACCC has been unable to adequately investigate the proposal before completion. It may also be that with a significant proportion of multi-national mergers, without the requirement for notification, informing the ACCC is overlooked/ignored/ left too late for a proper review. This is important because in global mergers there may be significant Australian market distinctions which would lead to a different competitive outcome. The option to impose conditions or even reject a merger which impacts Australian markets should be retained, even if it might not be regularly exercised. Given this we support a mandatory suspensory regime. However, setting the thresholds is critical – if they are set too low the ACCC will be overwhelmed; if they are set too high mergers that are anti-competitive will be permitted. In our view, the thresholds should be set based both on the runover of the acquirer –and the position of the combined entity, but not focussing on the **change** in position alone.

2) Test and onus

The ACCC has proposed changing the test in section 50 from the need to prove that the merger will or is likely to substantially lessen competition to the need to prove that it will not substantially lessen competition. This means that the merger parties have the onus of proof. Such a reversal under an administrative system would place little by way of extra demands on the merger parties. Under the informal process, the process most frequently used by merger parties, at least one of the parties, generally the acquirer, already has to provide information to the ACCC about the merger and explain why it will not be anti-competitive or how any such effects will be mitigated. Further, under the current merger regime, as the ACCC does not make an administrative decision concerning a merger, the merger parties may seek a Declaration from the court as to whether the merger would contravene s.50. In this case, the onus of proof is also already reversed.

3) Form of Tribunal reviews – modified merits review

The review by the Tribunal would not be de novo. To avoid gaming, parties should not be able to introduce material for the review that was available but not submitted at the time of the application to the ACCC for clearance, as is currently the case. Information that became available subsequently may be submitted at the Tribunal's discretion. This would avoid treating the ACCC process as a means of shifting full determination to the Tribunal.

The review should be a 'modified merits review'. This would mean that the Tribunal could call witnesses for examination, although these should be either representatives of the parties or experts who provided information to the ACCC. In unusual circumstances other witnesses could be allowed at the discretion of the Tribunal based on identified factors of relevance.

This review process again raises an issue that was apparent at the time when applications for merger authorisations went directly to the Tribunal, that is, that the Tribunal has no staff to undertake such an assessment and given the sporadic nature of reviews, it would be inefficient to provide staff on an ongoing basis. Previously, the ACCC provided support to the Tribunal but this would be inappropriate under the proposed changes. Rather, consideration should be given to seconding suitably qualified people from academia and perhaps business and consulting firms to perform this function on an ad hoc basis. A fee could apply to the party seeking review to fund all or part of this.

4) Timing

The timelines for decision-making by the ACCC and for review by the Tribunal need to be clearly laid out and strictly adhere to. The Brookfield authorisation decision illustrates how during the period of assessment circumstances may change, possibly preventing the merger even if approved by the regulator. There is no reason why the changes suggested should lengthen the process for obtaining a final decision concerning a merger. The ACCC merger investigation processes are already subject to relatively strict time limits. These may need to be lengthened, but not significantly. The Tribunal should be required to provide a determination within three months, the same period as applied to authorisation of a merger in the period prior to November 2017. Compared to the time taken to litigate a merger, possibly through to the High Court, the suggested approach may well be significantly faster.

If the ACCC does not make a decision within the required time period, the merger should be deemed:

i. to be a breach of section 50 if the delay is attributable to the parties failing to fully co-operate;
ii. not to be in breach of section 50 if the ACCC is responsible for the delay.

One of the reasons why ACCC decisions may be delayed is due to provision for 'stopping the clock'. It ought not to be in the interest of either the applicants or the ACCC to cause delays. However, perhaps clear specification of the material that needs to be provided to the ACCC would assist to avoid such delays – a short initial period might be provided during which the ACCC considers the proposed merger and then specifies the information required from the parties. After this time, the clock would begin to run.

Consistent with the EU, the ACCC proposal for merger reform proposed special treatment of digital platforms. Australian competition law is already very proscriptive and this may reduce its flexibility. There is benefit in having provisions that are neutral in terms of technology and business structure. If section 50 and the processes for its enforcement are sufficiently clearly specified and are applied outside of the court, there should be no reason for special treatment of digital platforms.

6. In the alternative – reform of court processes

While we strongly support a change in the arrangements for merger control away from the court to administrative decision-making by the ACCC with provision for review by the Tribunal, should the role of the court be retained then changes to its processes will be necessary for effective merger control. These include:

i. Reversing the onus of proof such that this falls to the merger parties. This reflects the fact that they are better placed for this purpose as they possess much of the required information. Earlier comments show why this is not such a revolutionary proposal.

ii. Rather than an assessment of the facts, the role of the court is to carry out a risk analysis based on the opinion evidence before it – for example balancing a small risk of the merger being anti-competitive against the significant harm if it is anti-competitive.

iii. It will also be important for the court to recognise that traditional indicators of competition effects may need to be assessed differently in digital markets. For example, the role of multi-homing rather than single homing by buyers may constrain a supplier post-merger.

Section 50(3) provides guidance as to the factors that must be considered in assessing a merger. The list has grown since the provision was added to the Act in 1993. It needs to be reevaluated – some factors could be removed and new factors need to be added. In particular section 50 does not require consideration of the purpose for the merger, yet this may be particularly informative as to its likely effect.

Documents developed prior to the proposed merger may be most helpful in this respect. Similarly, an acquirer's conduct may also provide insights into its purpose for the acquisition, its past pattern of acquisitions and its conduct post-merger.

7. Undertaking a competition analysis

Irrespective of whether the competition analysis for a merger decision is provided to the court or to the ACCC or whether it is undertaken by the ACCC, it may be time to consider a more holistic approach to merger analysis to that of the modified Structure-Conduct-Performance framework still being used. In markets today relationships and changes in those relationship often play a much more significant role than in the past. Porter's well-known Five Forces model of business activity started from the premise that '…the key structural features of an industry determine the

strength of the competitive forces and hence industry profitability.' The firms in the particular industry [or market] which are in a rivalrous relationship form the hub. Two issues arise: (i) what is the industry [market] structure? And (ii) given this, operating strategically, how can a firm alter industry relationships to its commercial advantage? The other four forces that shape the industry [market]environment are the threat of entry from potential entrants; the threat of displacement by substitutes supplied by other industries; the bargaining power of suppliers; and the bargaining power of buyers. Each of these factors potentially constrains the firms in the industry, and the factors that determine the strength of these constraints are identified. The issue for the firms in the industry is how they can strategically alter these relationships in their favour.

Essentially, competition analysis seeks to understand the purpose and/or effect of a firm's conduct by interrogating these same factors. The framework is capable not only of identifying existing competitive constraints, but it should also prompt questions about relevant relationships within and beyond the market, and it should enable responses to an initial change in conduct to be "tracked" both in terms of their implications for other parties and through time. Further, given its emphasis on conduct by firms to change the environment in which they operate, Porter's model may enable a more comprehensive and dynamic approach, especially when analysing mergers.

Arguably, the risk of underenforcement within the existing legal framework can be reduced by focussing on a wider range of possible concerns in the merger factors. It has been suggested that less attention is currently paid to the longer-term implications of a merger, and in particular the effect on potential competition and potential for disruptive entry, than is paid to short term implications. [11] In that context, we agree with authors such as Ryan, Butt and Walker[12] that more evidence is generally available to assess short run effects on competition than on the longer run effects. In this context we agree with their suggestions that there is a wider range of questions relevant to the consideration, such as:

- Likely impact of the target on the acquirer's future profits and its disruptive threat?
- Importance of the asset to an alternative acquirer?
- Conferral of network effects?
- Conferral of unassailable advantage?

[11] See Robert Ryan, James Rutt and Mike Walker, How to address under-enforcement in digital markets? In Ioannis Kokkoris and Nicholas Levy, Research Handbook on Global Merger Control, Edward Elgar 2023 147, 154.
[12] Ibid at 157.

The same authors suggest the examination of a broad range of evidence to assess the impact of the transaction.[13]

4. Conclusion

Based on our comments, we believe that amendments to the system and the test are warranted given that the ACCC failed to stop at least 50% of the mergers it took to Court or the Tribunal between 2003 and present. These numbers also include the cases where s87B undertakings settled the matter (2), or the application was withdrawn or discontinued by the parties as the transaction did not proceed (not necessarily because of competition law concerns) (3). In only one case was the ACCC successful before the Tribunal in an authorisation case. [14] There is currently an appeal of one merger authorisation before the Tribunal. While the number of contested mergers has been relatively small, between 1974 and currently, the ACCC has ultimately won no cases in court under the 'substantial lessening of competition test', while it did win several cases under the older, supposedly higher threshold test of 'dominance.' This is clearly a cause for concern.

References:

Rhonda L. Smith & Deborah Healey, Effective Merger Review: A Question for Australian Courts? Antitrust Bulletin, 67 (4) December 2022.

Deborah Healey and Rhonda L. Smith, Mergers Down Under, Research Handbook on Global Merger Control, Ioannis Kokkoris, and Nicholas Levy (eds) 2023, chapter 17.

Deborah Healey & Rhonda L. Smith, The Art of Crystal Ball Gazing, CCLJ 28(3) 292-315

[13] Ibid 158-162.
[14] Telstra/TPG [2023]ACompT 2.