Law Council
OF AUSTRALIA
Business Law Section

19 January 2024

Competition Taskforce
The Treasury
1 Langton Cres
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Taskforce

Response to Competition Review Merger Reform Consultation Paper

The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia welcomes the opportunity to participate in the consultation being undertaken by the Competition Review (**Taskforce**) into Australia's merger review processes.

The Committee is also grateful for the opportunities that have been provided to members of the Committee to meet with the Taskforce directly to discuss the Taskforce consultation paper.

As discussed in those meetings, the Committee has previously provided detailed observations to Treasury on the implications of a mandatory and suspensory regime for merger notifications. The Committee does not repeat those submissions here, although we reattach that submission, which reflects a concern within the Committee that a mandatory and suspensory framework runs the practical risk of introducing administrative cost and delay into Australian deal-making, without delivering any material benefit.

Instead, the Committee encloses a submission which focuses on three distinct aspects of the Taskforce consultation paper which the Committee considers most significant:

- **Merger Test.** Changes proposed by the ACCC and referred to by the Taskforce as "Option 3" in the consultation paper to reshape the substantive merger test as a "satisfaction" standard coupled with a negative onus of proof, which together fundamentally alter the orientation of the Australian merger clearance process.
- **Review rights.** The significant and adverse implications of removing a right for merger parties to seek declaration in the Federal Court for merger matters. Alternatives pointed to by the ACCC, including judicial review or the limited merits review process used currently in merger authorisations, have proven inadequate here and overseas and offer substantially less robustness and administrative accountability.
- **Suggestions for practical reform**. The Committee acknowledges that there are a number of practical improvements that could and should be made to the current Australian merger clearance processes. For the most part, these could be

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undertaken quickly and without legislative amendment, in some cases through changes to ACCC practice or guidance.

While such improvements can (and should) be made, the Committee considers that the current model has proven over several decades to largely "strike the right balance". Our merger clearance model supports flexible, robust and timely deal-making in Australia and has contributed to our economy remaining attractive to global capital. The Committee remains doubtful that the case has been made to shift the merger regime radically away from this approach to greater regulatory discretion and substantially reduced independent oversight—a shift that risks doing materially more harm than good.

The Taskforce has indicated that it is currently undertaking analysis to further test, amongst other things, the implications of merger policy on competitiveness and productivity in an Australian context. The Committee considers that analysis is critical, and we look forward to engaging with the Taskforce further around that work once released.

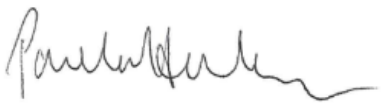
The Committee notes that 'no legislative change' is not presented as an option by Treasury, even though the Committee considers that the majority of the ACCC's concerns could be addressed by changes to ACCC review procedure and guidelines. The Committee continues to favour no legislative change, with improvements made to the current ACCC informal clearance process and guidance.

However, if changes are proposed, the Committee strongly opposes Option 3 and considers that Option 1 suffers from a similar problem with adoption of the 'satisfaction' standard for the ACCC/Tribunal assessment. (It is not entirely clear but is assumed that under Option 1 the s 50 evidentiary standard—and not the satisfaction test—would continue to apply before the Federal Court as occurs today if the ACCC challenged a merger.) Of the options proposed, the Committee's preferred approach is a combination of Options 1 and 2, incorporating a voluntary and suspensory regime in which both the ACCC and the Federal Court apply the existing, evidentiary s 50 standard and merger parties retain a right to seek declaration.

Our analysis is set out in this submission and in our previous submissions to Treasury, which we request be read together.

Please contact Lisa Huett, Chair of the Competition and Consumer Committee (lisa.huett@au.kwm.com or + 61 3 9643 4163) in the first instance.

Yours faithfully



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Competition Review consultation on merger reform

Submission to the Competition Review Taskforce

19 January 2024

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Executive Summary

1. The Committee considers that the two most significant substantive elements within the proposals currently before the Taskforce are:

   - **Substantive Test.** The ACCC proposal to amend the substantive test from a conventional evidentiary test (to the civil standard of a balance of probabilities) to an administrative discretion in the form of a 'satisfaction' requirement. This satisfaction test forms part of both Options 1 and 3 in the Taskforce's consultation paper.

   - **Review rights.** Removal of the rights of merger parties to seek a declaration in the Federal Court in response to any objection by the ACCC to a merger. In its place, the ACCC has proposed stakeholders would be limited to judicial review in the Federal Court or limited merits review before the Australian Competition Tribunal (**Tribunal**) as currently used for review of ACCC merger authorisation decisions.

2. The Committee acknowledges that these elements cannot be developed in isolation. Changes proposed to the substantive test will necessarily influence the form and availability of review rights.

3. The Committee notes that a third material component of the Taskforce consultation paper involves the proposed introduction of a mandatory and suspensory notification process for mergers. The Committee has previously provided its views on this issue to Treasury. A copy of that earlier submission is enclosed, so the issue is not revisited in this submission.

Substantive Test

4. The Committee has concerns with the use of the 'satisfied' test in Options 1 and 3.

5. The requirement to be 'satisfied' has been part of the authorisation test of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and its predecessor acts to authorise conduct that is per se unlawful or likely to constitute a substantial lessening of competition for almost 50 years.

6. Two elements of the use of 'satisfaction' in this context are critical:

   (a) First, the test has always been used in the context of a **voluntary** authorisation regime. In an authorisation, parties are approaching the ACCC, as regulator, to exercise an administrative discretion to authorise conduct that would otherwise be likely to be unlawful.

   (b) Second, the test is applied in the context of an administrative decision involving the balancing of public policy concerns—i.e. the application of a public benefit test. Where conduct is inherently anti-competitive but parties are seeking clearance from the ACCC based on public benefit, it is appropriate for the ACCC to be required to be 'satisfied' that the public benefit outweighs the detriment.

7. The genesis of the test was therefore that, in a voluntary authorisation process, the regulator must be satisfied that the public benefit outweighs the detriment—not satisfied that a contravention of the law has or has not occurred.

8. In circumstances where the vast majority of mergers do not raise competition concerns, it is not appropriate to require the ACCC to be 'satisfied' as a mandatory requirement that transactions are not anti-competitive.

9. The 'satisfied' test is also a subjective test that gives the regulator a high degree of discretion whether or not it is relevantly satisfied. In the Tribunal application by ANZ and Suncorp, the ACCC submitted that "satisfaction" requires only a state of mind that has been formed reasonably and upon a correct understanding of the law'.[1] It invites subjectivity and uncertainty as to the standard that is required to be met as the ACCC. In circumstances where the vast majority of mergers are not anti-competitive and involve normal economic activity, it should not be a requirement that they "satisfy" a regulator in this manner.

10. For this reason, the satisfaction test shifts the focus of any challenge to an ACCC decision from the substance of any competition concerns to the process and reasonableness of the ACCC decision making process, through judicial review. For the reasons set out in relation to review rights, the Committee is concerned that this significantly erodes the quality of oversight and regulatory accountability in merger cases and significantly increases deal uncertainty and risk for Australian transactions.

11. Another concern with Options 1 and 3 is that they would seem to cause more work for the ACCC mergers team for those mergers that are competitively benign, given the focus of decision making turns on fortifying decisions against administrative challenge through thorough (and potentially more rigid) procedural steps and reasons, rather than ensuring the substantive decision and any theory that supports it are sufficiently robust and evidence-based. A benefit of the current ACCC informal clearance regime is its focus on substance over process, which enables staff and Commissioners to engage flexibly with merger parties (and provide informal feedback throughout the process) than would be the case with administrative process focused on avoiding judicial review.

12. This combination of features would be likely to make any Australian model based on an 'administrative' standard more uncertain, costly, less flexible and more time consuming for global and local business.

13. The use of the 'satisfied' test would also be at odds with the approaches taken to merger clearance in other major developed antitrust regimes, including the EU, United States and the United Kingdom.

Review rights

14. As noted, a practical consequence of the satisfaction standard is likely to be that merger parties would lose the right to approach the Federal Court to seek a declaration as to the lawfulness of a merger. At most, any right to challenge an ACCC objection in the Federal Court would be limited to judicial review or a limited form of merits review in the Tribunal, applying the "satisfaction" standard (and not the civil evidentiary standard of the balance of probabilities).

15. The Taskforce in the consultation paper (at page 7) describes this removal of the Federal Court as a body that reviews the substantive merger determination by the

[1] ACCC submission in ACT Application by ANZ and Suncorp (27 November 2023), at [7] p 2 <https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0003/113808/22.-Outline-of-submissions-PUBLIC-ACCC.pdf>

ACCC as the difference between a "judicial enforcement" model and an "administrative" model for merger clearance.

16. While the Committee appreciates the formal legal distinction being drawn, it is important that this is not misconstrued to suggest that the Federal Court under the current model is, in any real or practical sense, the typical 'decision maker' in mergers. Except in rare cases, notwithstanding any right for merger parties to bring an application before the Federal Court, parties have not done so and the ultimate decision maker has remained the ACCC. There is no evidence at this stage that this situation is changing.

17. The ACCC therefore remains, and will remain, very much at the centre of the current "enforcement" model. Since 2002:

    (a) the ACCC has opposed approximately 74 transactions;

    (b) of those 74 transactions, only 8 were cleared over ACCC objections after being challenged (4 by the Federal Court and 4 by the Tribunal);

    (c) the ACCC's outcomes from Federal Court merger proceedings are reasonable. The ACCC has a 'success' rate in the Federal Court of approximately 40%— in 3 of only 7 cases brought to it (where 'success' includes mergers either withdrawn before trial so that proceedings were discontinued,[2] or where undertakings were given and accepted by the ACCC after litigation commenced);[3]

    (d) all Federal Court litigation to date has followed an ACCC informal clearance process of some kind (i.e. the ACCC has had an opportunity in all cases to consider the transaction and undertake enquiries);

    (e) where the ACCC has sought interlocutory relief to prevent parties completing a transaction, pending the Federal Court process, an injunction has been granted by the Federal Court.[4]

18. Put differently, ACCC opposition is effective in preventing a transaction in ***at least*** 90% of cases. Most of the time, merger parties do not seek any form of review. Even this rate of success understates the ACCC's effectiveness, given transactions are often withdrawn by merger parties following market feedback and before a formal "red light" decision to block is published by the ACCC.

19. Therefore, while the right to seek declaration in the Federal Court is seldom used and holds significant risks for merger parties, it remains a critical feature of the merger process. A decision by the ACCC to block a merger engages directly with legal rights of Australian companies to undertake transactions and therefore raises questions of fact and law that are suited to determination by a Court, applying the rules of evidence.

20. This also ensures consistency between section 50 matters and other parts of the CCA in terms of process, evidence and the development over time of substantive

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2 *Adelaide Brighton / Boral* and *Virtus / Healius*.

3 *Toll / Patrick*.

4 *ACCC v IVF Finance Pty Limited (No 2)* (2021) FCA 1295 (***Virtus***).

jurisprudence around legal tests such as the 'substantial lessening of competition' standard.

21. The Committee considers the criticism made of the current judicial model by the ACCC is not supported by experience. For example:

    (a) There is no indication that any of the 4 losses experienced by the ACCC in the Federal Court, to date, are due to a lack of evidence. On the contrary, the small number of merger cases that have been litigated over the last 20 years have all involved substantial evidence, including from third parties (as witnesses for the ACCC and under subpoena). The ACCC has used its investigatory powers in every case to date to obtain evidence and the Federal Court has proven careful and sceptical in handling evidence of merger parties.

    (b) The Federal Court applies economic concepts and principles in all competition law matters (including forward looking counterfactual analysis). It is not clear that any case has been made to remove merger matters alone from the Federal Court on this basis.

    (c) Experience demonstrates that the Federal Court typically expedites merger cases. While a small sample size, to date, the Federal Court has typically taken no more than 2–3 months longer to handle merger matters to judgment compared with the statutory, 180-day time period applicable to the Tribunal (which in recent times it has used). This modest timing benefit certainly does not justify the significant loss of substantive and procedural protections associated with forcing merger parties to submit to limited merits review.

22. To the extent that the Taskforce considered that the current model could be improved by providing access by Federal Court judges to additional expert advice or economic training (including merger matters), this could be facilitated within the current framework or, potentially, through creation of a specialist Competition list within the Federal Court.

23. By and large, experience with the current dual track review processes, involving Federal Court litigation for section 50 matters and Tribunal merits review of authorisation decisions, has proven robust and effective. The Committee therefore submits that the Tribunal should remain the administrative body with responsibility for merits review of authorisation decisions of the ACCC, where the 'satisfaction' standard and public interest test applied in those processes are more discretionary and policy-based and therefore suited to its form of administrative decision-making.

24. However, for reasons set out in this submission, the current limited merits review process does not afford sufficient procedural fairness to merger parties and offers an insufficient level of oversight of ACCC decision making, particularly where it operates to an administrative standard of 'satisfaction' only.

25. The position supported in this submission therefore broadly aligns with 'Option 2' referred to in the Taskforce consultation paper,[5] in relation to review rights. Although, for the reason set out above, the Committee would argue that the primary decision maker in this model for practical purposes remains the ACCC (and not the Federal Court).

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[5] Competition Taskforce, *Merger Reform: Consultation Paper* (Competition Review), November 2023 (**Taskforce consultation paper**).

26. The Committee submits that the current statutory limitations associated with limited merits review for merger authorisation (introduced post-Harper Review) should be removed.

Suggestions for policy improvement

27. A number of ACCC concerns with the current process focus on administrative matters such as the variable quality of information provided with requests for clearance, or that merger parties do not notify certain kinds of transaction (e.g. those that raise more complex market interactions, such as vertical effects or serial acquisitions).

28. The Committee agrees that these issues could usefully be addressed, together with other straightforward improvements to the process. However, this does not require radical and potentially damaging upheaval to the legal framework through removal of proper evidentiary standards and judicial oversight.

Administrative changes which do not require legislative amendment

29. Options for improvement include:

- **Information Requirements**—the ACCC could update its Informal Merger Review Process Guidelines to put merger parties clearly on notice of the information required and the timing for an informal review application to be accepted. The Informal Merger Review Process Guidelines have similarly remained largely unchanged since 2013.

- **Verification of Applications**—to address risk of parties providing incomplete or inaccurate information, the ACCC could require parties seeking clearance to certify their application is complete and the information submitted is believed to be accurate and that nothing material has been knowingly omitted.

- **Use of section 155 Powers**—the ACCC could make further use of its powers under section 155 of the Act to require merger parties (and third parties) more frequently to provide evidence and substantiation of information, if the ACCC is concerned that it has not been provided with all the information available to the merger parties which the ACCC considers is necessary for its review.

- **Update the Substantive Merger Guidelines**—the ACCC could consult on and revise its substantive Merger Guidelines to better articulate the concerns it has identified and provide more specific guidance on when particular mergers are likely to be challenged. This includes where the ACCC considers that new or emerging theories of harm (such as serial acquisitions) or particular sectors, warrant notification of particular types of transaction to the ACCC. The current Merger Guidelines remain largely in the same form as when released in 2008.

Minor legislative changes

30. Relatively modest legislative changes could also be considered to complement these improvements, without radically re-balancing the merger control regime in Australia.

31. For example:

- **Stop Orders—**amending the CCA to empower the ACCC to apply to the Federal Court for an interim injunction or "stop order" suspending the completion of a transaction, where the ACCC has concerns that parties are refusing to seek clearance or threatening to complete before the ACCC has completed its review.

32. Where the ACCC holds concerns at the potential implications for competition of a transaction, a Court application for a short term 'stop', could be permitted in a way which would not require the ACCC to prove substantive competition concerns nor require the Court to form any such views about the potential effects on competition.

33. The Committee notes however that the ACCC already has the ability to seek interim injunctions without giving the usual undertaking as to damages so it already has procedural advantages in pausing mergers that raise concerns. Access to this remedy was used recently and effectively by the ACCC in *Virtus*.

- **Amend section 155 for Merger Matters—**If there was genuine concern that the ACCC does not currently hold the power required to access information it needs in merger matters due to the threshold required by section 155 ('reason to believe there may be a contravention'), the Committee suggests the more expedient and lower cost alternatives are available to give the ACCC more generous powers to obtain such information, rather than compel every party to every transaction to file information with the ACCC in every case.

34. For example, section 155 could be amended in merger matters to give the ACCC more scope to require the production of information from parties who appear to be proposing a merger and who decline to cooperate with a 'please explain' inquiry from the ACCC, without requiring a reason to believe the transaction is or may breach section 50.

Submission

Substantive Merger Test

Background

35. Treasury's merger reform consultation paper (**Consultation Paper**) outlines that the Taskforce is considering a range of possible options for merger reform. It asks stakeholders to provide feedback on whether Australia's existing regime should be retained, and on three possible options for change (and for any alternative suggestions). The Consultation Paper notes that all options would replace the current informal process.

36. Of the three options put forward, Options 1 and 3 both require the ACCC to be 'satisfied' that a proposed merger is not likely to substantially lessen competition before clearing it. The Committee has concerns with the use of the 'satisfied' test in Options 1 and 3. The requirement to be 'satisfied' has been part of the ***authorisation*** test of the CCA and its predecessor acts to authorise conduct that is per se unlawful or likely to constitute a substantial lessening of competition. The genesis of the test was that the regulator must in those circumstances be satisfied that the **public benefit** outweighs the detriment, not satisfied that a contravention of the law has or has not occurred.

37. The practical effect of introducing an administrative "satisfaction" standard would also be to remove the Federal Court as a substantive decision maker, through declaration. Its role would be limited, at most, to judicial review of the lawfulness of the ACCC decision making process in each case.

38. Applying a satisfaction test to the assessment of all mergers under a mandatory model would reflect an underlying presumption that mergers are anti-competitive per se. It would also take Australia out of line with other jurisdictions.

The current regime

39. In both Options 1 and 3, the ACCC will only grant clearance if it is 'satisfied' the merger is not likely to substantially lessen competition (although it appears from the Consultation Paper that, under Option 1, if the ACCC is challenged by merger parties the ultimate decision would be made by the Federal Court on a different, evidentiary test[6]).

40. Currently, a merger is only unlawful if it will have the effect or likely effect of substantially lessening competition in contravention of section 50 of the CCA.

41. It follows that:

- If the ACCC decides to take court action to prevent a merger, it is required to prove a likely substantial lessening of competition relevantly caused by the merger.

[6] It is not clearly expressed in the Consultation Paper, but the Committee understands Option 1 involves retaining a right for merger parties to seek a declaration to challenge an ACCC decision in the Federal Court (or for the ACCC to take steps to seek an injunction to prevent completion) on the evidentiary standard and not subject to a 'satisfaction' test, given that the court would be likely to find difficult to apply such a standard (being a test of administrative policy making rather than a determination of any contravention of s 50 based on fact and law).

- If parties wish to seek a declaration from the Federal Court as to the lawfulness of a transaction, they must prove to the same standard that the deal is not likely to substantially lessen competition in contravention of section 50.

42. The courts have interpreted 'likely' to mean a 'real chance' (which must be proved on the balance of probabilities). This is a low threshold, but it has generally been fit for purpose in the context of the current voluntary regime where only those mergers that may pose competition issues are opposed by the ACCC. If litigated, whether a merger is likely to have the effect of substantially lessening competition is then ultimately a question of fact and law, best suited to determination by the Federal Court.

43. The 'satisfied' test is a feature of the current merger authorisation process. Under section 90(7) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that:

    a) the conduct would not be likely to substantially lessen competition; or

    b) the likely public benefit from the conduct would outweigh the likely public detriment.

44. Unlike a court in a section 50 proceeding, the merger authorisation test does not require the ACCC, or the Tribunal on review, to determine on the balance of probabilities, or any other standard of proof, that a merger would, or would not, be likely to substantially lessen competition.[7]

45. Rather, the power conferred on the ACCC to authorise conduct is discretionary and administrative in character, and it may decide not to grant authorisation even where the net public benefit condition is met (for example, because it does not want to sanction conduct which generates a sufficient yet weak public benefit).[8] That is, the "satisfaction" test is suited to a question of whether a policy discretion ought to be exercised in the circumstances and not whether the facts demonstrate a legal contravention has or would be likely to occur.

Legislative history of the 'satisfied' requirement

46. The requirement to be 'satisfied' has formed part of the conduct authorisation test under the CCA[9] for nearly 50 years in different forms and in its current form since 2017. Over that time, Parliament has offered limited guidance in extrinsic materials as to why the requirement has been retained throughout new iterations of the legislation.

47. The 'satisfied' requirement appears in the original formulation of the test under s 90(5) of the *Trade Practices Act 1974* (Cth) (**TPA**) as first enacted:

> *Subject to sub-sections (9) and (11), the Commission shall not make a determination granting an authorization unless it is satisfied that the contract, arrangement, understanding or conduct to which the application relates results, or is likely to result, in a substantial benefit to the public, being a benefit that would not*

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7 Gina Cass-Gottlieb, 'Law Council Annual Competition and Consumer Law Workshop' (Speech, 1 September 2023) <https://www.accc.gov.au/about-us/media/speeches/law-council-annual-competition-and-consumer-law-workshop-speech>.

8 *Re Medicines Australia Inc* [2007] ACompT 4 at [106].

9 Including the *Trade Practices Act 1974*.

otherwise be available, and that, in all the circumstances, that result, or that likely result, as the case may be, justifies the granting of the authorization.

48. The Second Reading Speech is silent on this point, but the Explanatory Memorandum provides:

> *In determining applications for authorizations the Commission will be bound to have regard to the grounds set out in clause 90(5). The Commission must be satisfied that an authorization is justified by reason of a specific and substantial benefit resulting to the public from the practice in question.*

49. Relevantly, in the context of mergers, the 'satisfied' requirement has always been used in the context of a **voluntary** authorisation regime. Parties, including merger parties, are approaching the ACCC, as regulator, to exercise an administrative discretion to authorise conduct that would otherwise be likely to be unlawful.

The problem with the 'satisfied' test in a mandatory merger regime

50. The genesis of the 'satisfaction' test is for the regulator to allow inherently anti-competitive conduct for which there was a public benefit. Until recently, it was generally used where the ACCC or Tribunal was "satisfied" that a public benefit outweighed an anti-competitive detriment.

51. In this context, the regulator being "satisfied" is appropriate, insofar as it involves an administrative discretion being exercised on public policy grounds.

52. Traditionally, in a non-merger context, the types of conduct that require authorisation under the CCA and are therefore subject to the 'satisfied' test, are those that would otherwise be contraventions *per se*, such as cartels, secondary boycotts and resale price maintenance, or conduct which in fact substantially lessens competition but where such an effect is outweighed by a public benefit. This reflects an underlying presumption by Parliament that those types of conduct by their 'very nature have an anti-competitive effect' but that there may also be cases where they are sufficiently beneficial when weighed against any public detriment such that they should be allowed.

53. In *Re Application by Jools*,[10] the Tribunal said:

> *It must be remembered that … an authorisation may be granted in respect of conduct which if engaged in in the absence of authorisation will result in the commission of a per se offence, that is an offence which parliament has assumed will* ***by its very nature have an anti-competitive effect****. One should also not forget the very high penalties that can be imposed in respect of a contravention of provisions for which an authorisation may be granted. These factors at least suggest that something more than a negligible benefit is required before the power to grant authorisation can be exercised. Even if the power to grant an authorisation were treated, these factors at the least indicate that if particular conduct will give rise to only a negligible benefit perhaps the conduct should not be authorised.*

54. Arguably, where conduct is inherently anti-competitive but parties are seeking clearance from the ACCC based on public benefit, it is appropriate for the ACCC to be 'satisfied' that the public benefit outweighs the detriment.

55. In the mergers context, until 2017, authorisation similarly could only be sought from the ACCC or the Tribunal if the merger was anti-competitive but the public benefit outweighed the detriment. In respect of the original formulation of the test under

[10] (2006) 233 ALR 115 at 120–121.

section 90(5) of the *Trade Practices Act 1974* (Cth), the Explanatory Memorandum provided:[11]

> *In determining applications for authorizations the Commission will be bound to have regard to the grounds set out in clause 90(5). The Commission must be **satisfied** that an authorization is justified by reason of a specific and substantial benefit resulting to the public from the practice in question.*

56. Again, the implication is that it is the **public benefit** that the regulator must be satisfied of, not the contravention of the law.

57. In 2007, a formal merger clearance process was introduced alongside the informal process. That formal clearance process was also subject to a 'satisfied' test but was a voluntary process for parties who wished for more certainty over the clearance and timeframes. The Explanatory Memorandum provided:[12]

> *The Dawson Review found that the Commission's current informal system is relatively speedy and inexpensive—the voluntary nature of the process minimises the possibility of unduly delaying mergers that are unlikely to be in breach of section 50. The Dawson Review considered that the weaknesses of the system are evident in the absence of an effective mechanism for review and the absence of reasons for the Commission's decisions … This Subdivision creates a voluntary formal mergers process that will operate in parallel with the existing informal system, retaining the advantages of the informal system, and overcoming some of its disadvantages.*

58. After 2017, the authorisation and formal merger clearance processes were merged to allow for authorisation on the basis of no substantial lessening of competition or the public benefit outweighing public detriment. However, seeking authorisation is still voluntary. A very small number of parties choose to seek formal authorisation for a merger compared to informal clearance. It is generally only used where the nature of a proposed merger is significant enough to raise potential competition concerns and usually on the basis of there being some countervailing public benefit. In these circumstances, the 'satisfied' test is apt for the assessment of mergers under this process. It is therefore not entirely accurate to suggest that *'parties have been prepared to meet, and have met, this test*'[13] on the basis of the existence of the formal merger authorisation process.

59. The use of the 'satisfied' requirement for merger authorisation in Australia has always been in the context of a voluntary regime (for both merger and non-merger activity). Use of the 'satisfied' test in a mandatory context will result in a shifting of the burden of proving that a transaction does not substantially lessen competition to the parties. This is not appropriate in circumstances where the vast majority of mergers are not anti-competitive (and there is no presumption that they are illegal). In addition, the 'satisfied' test invites subjectivity on the part of the regulator by giving it a high degree of discretion to decide whether or not it is 'satisfied'.

60. The ACCC states *'requiring applicants to satisfy the ACCC that the merger would not be likely to substantially lessen competition is not nove*l' on the basis that it already forms a part of the current test in the formal merger authorisation process.[14] However,

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11 Explanatory Memorandum, Trade Practices Bill 1974 (Cth) at 12.

12 Explanatory Memorandum, Trade Practices Legislation Amendment Bill (No 1) 2005 (Cth) at 22.

13 ACCC submission to Treasury on ACCC preliminary views on options for merger control process (20 December 2023), at [66] p 10 <https://www.accc.gov.au/system/files/accc-submission-on-preliminary-views-on-options-for-merger-control-process.pdf>

14 ACCC submission to Treasury on ACCC preliminary views on options for merger control process (20 December 2023), at [66] p 10 <https://www.accc.gov.au/system/files/accc-submission-on-preliminary-views-on-options-for-merger-control-process.pdf>

the ‘satisfied’ test in this context is part of a voluntary process that is used in specific circumstances which make the test apt for the assessment of mergers under this process, compared to a mandatory process, notably the important role played by an assessment of countervailing public benefits.

61. In circumstances where the vast majority of mergers do not raise competition concerns, it is not appropriate to require the ACCC to be ‘satisfied’ that they are not anti-competitive.

62. The ‘satisfied’ test is, in essence, a subjective test that gives the regulator a high degree of discretion whether or not it is relevantly satisfied. As a decision standard, the test focuses on the ACCC’s *state of mind* and not compliance with a legal standard based on evidence.[15] In the Tribunal application by ANZ and Suncorp, the ACCC further submitted that “satisfaction” is a state of mind that has been formed reasonably and upon a correct understanding of the law’.[16] The requirement that the ACCC need only ‘reasonably’ form the view it is not ‘satisfied’ that a merger is not likely to substantially lessen competition creates an undue burden for the merger parties. It invites subjectivity and uncertainty as to the standard that is required to be met as the ACCC effectively has wide discretion to adopt novel theories of harm and, on the basis of those theories, form the view it is not ‘satisfied’. There is no way to objectively ascertain or test whether the ACCC has reasonably formed its view on the theories of harm or whether the merger parties have met their evidentiary burden. In circumstances where the vast majority of mergers are not anti-competitive and involve normal economic activity, it should not be a requirement that they “satisfy” a regulator in this manner.

63. The High Court has observed that the requirement for a decision-maker to be ‘satisfied’ will often be a matter of subjective judgment:[17]

> *Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts… Where the authority is required to be satisfied of*

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15 *Applications by Telstra Corporation Limited and TPG Telecom Limited* (No. 2) [2023] ACompT 2 at [99] (***Telstra No. 2***). The ACCC in its Final Reasons in ANZ / Suncorp referred to *Telstra No. 2* and noted (at [2.9]),

> “*The word ‘satisfied’ in the context of an administrative decision is not amenable to the application of an evidentiary burden of proof, such as the balance of probabilities. However, this does not mean there is an absence of a legal standard of satisfaction. In respect of section 90(7), to be ‘satisfied’ requires ‘an affirmative belief’. Both tests in section 90(7) require the ACCC to be ‘satisfied in all the circumstances’: the statutory precondition for the ACCC’s power under section 88(1) to arise is the ACCC’s state of mind.”*

16 ACCC submission in ACT Application by ANZ and Suncorp (27 November 2023), at [7] p 2 <https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0003/113808/22.-Outline-of-submissions-PUBLIC-ACCC.pdf>

17 *Buck v Bavone* (1976) 135 CLR 110 at 118–119, quoted in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 653–654.

the existence of particular matters of objective fact, the position may be very different. It may then be possible to show clearly not only that the material facts existed but that an authority acting in accordance with its duty could have reached no other conclusion than that they existed.

64. For these reasons, the Committee submits that careful thought should be given to the commercial and economic implications of applying a 'satisfied' test to a mandatory merger notification regime as it treats all mergers as inherently anti-competitive, creates substantial uncertainty for merger parties and risks leading to the loss of potentially beneficial economic investment.

The merger test in other jurisdictions

65. The use of the 'satisfied' test would also be at odds with the approaches in other major jurisdictions.

(a) United Kingdom

66. In the United Kingdom (**UK**), where notification is voluntary, the Competition and Markets Authority (**CMA**) is required to assess whether a merger is expected to substantially lessen competition, rather than be positively satisfied that the merger would not.

67. The test for merger control under section 33 of the *Enterprise Act 2002* (UK) provides:

> *(1) The CMA shall, subject to subsections (2) and (3), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—*
>
> *(b) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and*
>
> *(c) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.*
>
> *(2) The CMA may decide not to make a reference under this section if it believes that—*
>
> *(a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference;*
>
> *(b) the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference; or*
>
> *(c) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.*

68. The CMA must decide 'whether it is satisfied on the balance of probabilities that there will be an SLC [substantial lessening of competition] caused by [the transaction]'.[18] By contrast, the 'satisfied' requirement in the Australian context does not impose a

[18] *Tobii AB (publ) v CMA* [2020] CAT 6 at [341].

standard of proof, which confers a broad discretion on the ACCC in deciding whether or not to grant authorisation.

(b) European Union

69. In the EU, where notification is mandatory, the European Commission (**EC**) **must clear** a merger if it finds that the merger would not significantly impede effective competition in the common market. Unlike the 'satisfied' test, this poses an objective question for the EC to decide, and requires the EC to clear a merger if it finds the merger would not affect competition, rather than only being allowed to clear the merger if it is satisfied it does not (and still retaining a discretion) as is proposed for the ACCC.

70. Article 6(1) of Regulation (EC) No 139/2004 on the control of concentrations between undertakings (***EU Merger Regulation***) provides:

> *The Commission shall examine the notification as soon as it is received.*
>
> *(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.*
>
> *(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market…*
>
> *(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings…*

71. Where the Commission finds that a merger raises 'serious doubts' as to its compatibility with the common market, it is obliged to initiate a second phase of investigation.[19] This is an objective test which again is more appropriate in the context of a mandatory notification process, unlike the requirement under the CCA for the ACCC to be subjectively 'satisfied'.

72. The European General Court has held that the EU Merger Regulation is 'not based on a presumption that concentrations are incompatible with the internal market'.[20] The same may not be true for the CCA in the context of a mandatory merger regime, as the formulation of the test as 'the ACCC must not grant authorisation unless it is satisfied' would suggest that mergers are regarded presumptively as anti-competitive unless proven otherwise.

(c) United States

73. In the US, where notification is mandatory, the Federal Trade Commission or the Antitrust Division of the Department of Justice will review mergers to determine whether their effect 'may be substantially to lessen competition, or to tend to create a monopoly'. This does not invite the agency's discretion or consideration of subjective matters in the manner of the 'satisfied' test. Further, to block a merger, the agency must establish in court that the merger is likely to be anti-competitive.

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19 *Cisco Systems Inc and Messagenet SpA v Commission* (2013, Case T-79/12) at [49].

20 *Cisco Systems Inc and Messagenet SpA v Commission* (2013, Case T-79/12) at [48].

74. As the tests for merger control in these other advanced jurisdictions are framed more objectively and adopt a lower threshold for opposition, we do not see a basis for any mandatory regime in Australia to adopt the 'satisfied' test. Doing so will likely see deals blocked in Australia that are cleared by our overseas counterparts, which has significant implications for economic activity in Australia.

Rights of Review

Background

75. The Committee considers that, having regard to the current model and the three options set out in the Consultation Paper, there Taskforce has at least four alternatives before it in relation to rights of review in merger cases:

	Current review process	Federal Court with economic advice	No declaration with full Competition Tribunal merits review	No declaration with limited Competition Tribunal merits review
First instance decision maker	ACCC / Federal Court[21]	Per option 1	ACCC only	ACCC only
Decision on Review	**s 50**—right to declaration in the Federal Court **Authorisation**—limited merits review in the Tribunal	Per option 1	**s 50 and Authorisation** – mandated requirement for Competition Tribunal review, but as a full rehearing	Per option 3, but with current limited merits review in Tribunal
Nature of review	**Federal Court**—full substantive hearing of s 50 case with rules of evidence **Tribunal**—limited merits review for authorisation[22]	Per option 1, but Federal Court with increased role for independent economic assistance to the Court in s 50 matters	**Federal Court**—likely judicial review only **Tribunal**—revert to pre-Harper full rehearing of merger cases (all cases)	Per option 3, but substantive and procedural limits on Tribunal review as per current CCA.

76. This chapter briefly canvasses the issues that arise in relation to each of these alternatives with the Committee expressing a strong preference for the first two, which retain the role of the Federal Court as a substantive decision maker.

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[21] This reflects the reality that all litigated mergers (and Competition Tribunal applications) over the last two decades have been subject to some form of prior review by the ACCC. In two instances (*Tabcorp / Tatts* and *Virtus / Healius*), applications to the Tribunal or Federal Court were launched before ACCC processes were fully concluded and a formal decision was published. Nonetheless, even in those cases, ACCC engagement had been undertaken to a point where the merger parties formed a view regarding the likely attitude of the ACCC to the deals.

[22] Per the current ss 102(9) and (10) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Current Review Process

77. While it has played only a limited direct role hearing cases under section 50 over the years, the right to access the Federal Court promotes a higher degree of regulatory accountability than other, lesser forms of review (such as judicial review) and promotes the consistent development of legal principles across cases and over time.

78. Among other things:[23]

- Parties in the Federal Court have rights of discovery that permit them substantial access to evidence, including access to documents or information obtained by the ACCC or transcripts of compulsory interviews undertaken by the ACCC during its merger review process.

- Rules of evidence apply to all evidence filed in any proceeding.

- The *Federal Court Rules 2011* (Cth) provide guard rails around the handling and filing of expert evidence, including expert economic evidence. Proceedings in the Federal Court also permit open testing of experts, including through joint expert reports and conclaves.

- Parties have the ability to cross-examine witnesses and experts. This capacity for direct cross examination of witnesses has proven highly influential in a number of merger cases (e.g. *Pacific National* / *Aurizon* and *TPG* / *Vodafone*).

- Third parties with sufficient interest have rights to seek to intervene in the Federal Court, ensuring their role is public and formally acknowledged.

79. The above rights—in particular, the right of discovery and the right to test ACCC (or third party) evidence—are not guaranteed under the ACCC's administrative decision-making process or the current limited merits review process in the Tribunal. Neither process affords the same level of transparency or the same standards of scrutiny of evidence as the Federal Court.

80. The ACCC has expressed criticism of the Federal Court as the appropriate review body for merger matters, including on the following grounds:

(a) the ACCC has been largely unsuccessful in merger litigation before the Federal Court (reflecting an inherent bias in the legal and evidentiary standard towards clearance of complex mergers);[24]

(b) the Federal Court places too much emphasis on evidence of current market conditions and is insufficiently sceptical of merger parties, making it challenging to establish forward-looking counterfactuals;[25]

(c) the Federal Court lacks dedicated economic expertise;[26] and

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23 LCA submission, 21.

24 G Cass Gottlieb, *Law Council Annual Competition and Consumer Law Workshop speech*, 1 September 2023.

25 R Sims, *Protecting and promoting competition in Australia* (Competition and Consumer Workshop 2021, Law Council of Australia), 27 August 2021.

26 ACCC, *Outline to Treasury: ACCC's proposals for merger reform*, March 2023, 10 (quoted in the Taskforce consultation paper at 35).

(d) the Federal Court process is too costly and time consuming for merger parties, compared with the Tribunal.[27]

81. With respect to the ACCC, none of these criticisms is fair or well grounded.

(a) The ACCC's success rate in the Federal Court in merger matters is good and comparable to the Tribunal

82. With respect, the Committee submits that the ACCC is wrong to argue that it has found it difficult to successfully prevent contested mergers under the current process, including before the Federal Court.

83. First, where the ACCC opposes complex deals, it is rare for merger parties to challenge that decision in the Federal Court. There have been only seven section 50 matters brought before the Federal Court since 2002, as set out in the **Annexure**.[28] Put in context, over the same period, the ACCC reviewed 1,633 mergers through its public informal clearance process. Of these: [29]

- 5 remain under consideration;
- 62 were withdrawn before the ACCC made a decision (in many cases this is likely to reflect the ACCC indicating concerns to the merger parties during the process);
- the ACCC assessed and cleared 986 mergers on an unconditional basis;
- the ACCC cleared 72 mergers subject to undertakings; and
- the ACCC opposed 74 mergers, although 21 of these matters were ultimately cleared based on further inquiries or s 87B undertakings.[30]

84. In short, fewer than 1% of the total number of mergers that are listed by the ACCC as having been subject to public review through informal clearance moved to litigation (noting that even this does not include any of the vast majority of deals which are pre-assessed). More relevantly, fewer than 10% of deals that were opposed by the ACCC resulted in applications to the Federal Court under section 50.

85. Second, the ACCC's outcomes from Federal Court merger proceedings are mixed but reasonable. While a very small sample, the ACCC has a 'success' rate in the Federal Court of 3 out of 7 cases or approximately 40% in merger matters (i.e. where 'success' includes mergers either withdrawn before trial,[31] or where undertakings were given and accepted by the ACCC after litigation commenced).[32]

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27 H Wootton, *ACCC warns merger reform option could make deals cost more, take longer* (Australian Financial Review), 23 November 2023.

28 Justice Michael O'Bryan refers to these cases (except Virtus) in his article, *Section 50: Should the Burden of Proof be Shifted?*, which is chapter 8 in M Gvozdenovic and S Puttick, *Current Issues in Competition Law*, Practices and Perspectives (Vol II, 2021) at 175 (**Gvozdenovic and Puttick**).

29 Per ACCC informal merger review register accessed as at 18 December 2023.

30 Of these 74 cases, two involve withdrawal of existing s87B undertakings, 20 were ultimately not opposed subject to s87B undertakings and one was ultimately not opposed following further targeted market inquiries.

31 *Adelaide Brighton / Boral* and *Virtus / Healius*.

32 *Toll / Patrick*.

86. Put another way, of the 74 mergers that the ACCC register identifies as opposed since 2002, only 8 were subsequently cleared or authorised over the ACCC's objections:[33]

    (a) 4 were successfully challenged and cleared by the Federal Court; and

    (b) 4 were authorised by the Tribunal.

> An approximate success rate of 90% does not reflect a merger process that makes it systematically difficult for the ACCC to oppose or block contentious mergers. The full list of merger matters heard before the Federal Court and Competition Tribunal is set out in the **Annexure**.

(b) Evidence has not proven difficult for the ACCC to lead in Federal Court merger litigation

87. It is also not apparent that any difficulties the ACCC has experienced in the Federal Court are because it is hamstrung from obtaining or leading evidence in merger cases.

88. All merger litigation to date has followed an ACCC informal clearance process during which it has had the opportunity to (and typically did) undertake market inquiries and exercised investigatory powers under section 155 of the CCA. This is in addition to rights of discovery and subpoena rights available to any litigant, including the ACCC, once proceedings commence.

89. In terms of the two most recent Federal Court processes: [34]

    (i) <u>Pacific National / Aurizon</u>

    This case involved very substantial counterfactual evidence being led by the ACCC from a number of industry participants both voluntarily and under subpoena.

    Amongst other evidence, the Court heard extensive and direct testimony (including cross examination) from the managing director and a senior executive of Qube. Qube was the ACCC's primary witness in respect of the competitive importance of access to the Acacia Ridge rail terminal for market entry in the intermodal rail haulage market.

    (ii) <u>TPG / Vodafone</u>

    Again, substantial lay and expert evidence was filed by the ACCC, including material from third parties under subpoena (e.g. Telstra). There were no less

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[33] We note that *AGL / Loy Yang* does not appear on the register but was one subject to a rejection by the ACCC and subsequent clearance by the Federal Court but is included as one of the 4 losses in the Federal Court. Similarly, *Tabcorp / Tatts* was not formally recorded as 'opposed' in the register (since it moved to the Tribunal prior to a final decision being reached).

[34] This issue, and a more detailed overview of the evidence led in *Pacific National* and *TPG / Vodafone*, are canvassed by F Roughley in *Evaluating Evidence in Contested Merger Proceedings*, Chapter 11 in Gvozdenovic and Puttick.

than 25 lay witnesses (5 called by the ACCC) and 9 experts (3 called by the ACCC) in the proceedings.

The high-profile counterfactual evidence of TPG Executive Chairman, Mr David Teoh, as to TPG's likely conduct absent the deal was central to the case. He was cross-examined at length by the ACCC. Middleton J made clear that the Court was alive to the risk that such evidence may be coloured by self-interest. Nonetheless, the credibility of Mr Teoh's evidence was not challenged and was ultimately given substantial weight.

90. In those four merger cases where the ACCC has lost in the Federal Court, none of the decisions turned on a lack of evidence. Substantial evidence was tendered in each case, including by the ACCC. The Federal Court simply did not accept the ACCC case had been established on the basis of that evidence.

91. The Federal Court is more experienced than other bodies to handle and test evidence. The Court has indicated it is alert to the risks of self-interest and, by and large, proven pragmatic, disciplined, and appropriately sceptical when handling evidence in merger matters.

(c) Economic expertise and Federal Court judicial decision making

92. The Federal Court has generally proven capable of navigating and handling economic evidence in merger matters.[35] The Consultation Paper acknowledges the comments of both Professor Maureen Brunt AO and Dr Philip Williams AM in support of the role of the Courts in engaging with the economic substance of merger matters.[36]

93. In any event, criticism of the Federal Court's lack of economic capability cannot be blamed for the ACCC's outcomes on review. The Tribunal is a body which includes an economist and industry representative as lay members. Nonetheless, as noted in the **Annexure**, the ACCC has also had very limited success in those matters that have proceeded to trial before the Tribunal (with the ACCC losing in 4 of 5 completed Tribunal proceedings).

94. Moreover, the Federal Court will continue to adjudicate all other litigation under Part IV of the CCA. These are matters that involve the application of many of the same substantive economic principles and concepts as section 50. By and large, to date, the Federal Court has proven more than capable in doing so.

95. If there is a concern that the Federal Court requires more focused resources to deal with economic concepts in competition litigation, it would be more appropriate to consider such refinements in a way that has more general application across Part IV.

96. For example, presently, competition law is a discrete sub-area within the Commercial and Corporations National Practice Area of the Federal Court. Competition law matters are included on the Corporations List. While the Committee considers that the current approach of the Federal Court works well and that judges on this list are generally experienced at handling substantive economic argument, it would be possible to recommend the establishment of a dedicated Competition Law Practice Area, with specialist training for judges on that list in relation to economic principles, if this was thought necessary.

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35 LCA submission, 20-21.

36 Taskforce consultation paper, 34-35.

97. Alternatively, the Federal Court could utilise independent court-appointed economic advice under existing processes, where this would assist. This is an issue discussed below.

(d) The time and cost of Federal Court processes

98. The Federal Court has proven both willing and capable of expediting merger matters. As a consequence, the time and cost associated with the Federal Court is comparable to (if slightly longer than) the Tribunal.

99. This also reflects the fact that in all cases, to date, any litigation has followed extensive ACCC market inquiries (often including use of investigation powers), so that the ACCC has obtained substantial evidence.

100. For example:

(a) *AGL / Loy Yang*—the period between filing and judgment was 95 days (about 3.1 months).[37]

(b) *Franklins / Metcash*—the period between filing and judgment was 8.5 months (with a subsequent appeal heard and judgment issued within about 3 months).[38]

(c) *TPG / Vodafone*—the period between filing and judgment was similarly approximately 8.5 months.[39]

(d) *Virtus / Healius*—while the matter never proceeded to trial, it had been set down for a hearing within 6 months of commencement, inclusive of the Christmas period (i.e. filed in October with hearing scheduled for March).

101. This compares with the Tribunal, where under the amended process:

(a) The *Telstra / TPG* matter took the full 180 days in the Tribunal from commencement to judgment under the first limited merits review process that was completed.

(b) The timeframe in *ANZ / Suncorp* looks likely to be similar, with the Tribunal having already extended the statutory period with an end date of 20 February 2024, with the 9-day hearing itself commencing over 3 months after the application was filed.

(c) Moreover, the Tribunal process does not prevent the potential cost and time associated with judicial review applications to the Federal Court (as occurred in Tabcorp / Tatts).

102. While a small sample size, experience suggests that the Federal Court is likely, on average, to take no more than 2–3 months longer to handle merger matters to judgment compared with the statutory, 180-day time period applicable to the Tribunal. This modest timing benefit does not justify the significant loss of substantive and

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[37] Filing date: 15 September 2003, judgment date: 19 December 2003 (https://www.comcourts.gov.au/file/Federal/P/VID880/2003/actions#;javascript:void(0)).

[38] Statement of claim: 8 December 2010, judgement date: 25 August 2011 (https://www.comcourts.gov.au/file/Federal/P/NSD1714/2010/actions). Judgment was appealed to the FCAFC where judgment was handed down on 30 November 2011.

[39] Filing date: 24 May 2019, judgment date: 13 February 2020 (https://www.comcourts.gov.au/file/Federal/P/NSD818/2019/actions).

procedural protections associated with forcing merger parties to submit to limited merits review (discussed in more detail below).

Federal Court with enhanced economic capability for competition matters

103. As noted above, to the extent that there is any concern that Federal Court judges are not adequately equipped to handle and apply economic principles in merger litigation, there are existing steps that could be taken to address any such deficiency.

104. Other international models have adopted specialist economic input into competition cases. For example, s 77 of New Zealand's *Commerce Act 1986* (NZ), allows for the Governor-General to appoint *"lay members"* with *"knowledge or experience in industry, commerce, economics, law, or accountancy"* to the New Zealand High Court. These lay members of the court are directly involved in the decision-making of the court. However, the decisions of the High Court are determined by a majority of judges.[40] Practically this means that lay members cannot decide a majority judgment if they do not also have the support of a majority of the judges. These features of New Zealand High Court litigation apply to all competition cases and are not limited to merger matters.

105. In Australia, there would be difficulties in establishing a similar framework. The *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) restricts the exercise of Federal Court jurisdiction to a single judge or the Full Court and precludes lay people from appointment as Federal Court judges.[41]

106. However, as noted above, if the Taskforce considered that there was value in ensuring more focused economic expertise was available to the Federal Court when handling competition matters (including mergers), practical options would include:

    (a) The establishment of a dedicated Competition Law Practice Area within the Federal Court, with additional or specialist training for judges on that list in relation to economic evidence and associated concepts.

    (b) The Federal Court could, in appropriate cases, appoint an expert economist as an independent adviser to the Court in competition cases. The Federal Court already has a reasonably broad power to appoint specialist advisers for the purpose of ensuring just, efficient and cost-effective management of litigation.[42] This has been done in a limited number of cases,[43] although we are not aware of an expert economist being appointed to assist the Court. It may be open, in appropriate cases, for the ACCC to make submissions to the Federal Court recommending that such an adviser be appointed.

No declaration right (judicial review only in the Federal Court) with full merits review in the Tribunal

(a) The ACCC's proposed approach would mean Federal Court declaration is not available to merger parties

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40 *Commerce Act 1986* (NZ), s 77(10).

41 See ss 6, 14 and 17.

42 See Division 3.1 of the *Federal Court Rules 2011* (Cth), discussed in *Tyler v Thomas* (2006) 150 FCR 357 at [29].

43 See, for example, *Trade Practices Commission v Arnotts Ltd (No 4)* (1989) 21 FCR 318.

107. If the ACCC's proposal was to be adopted, merger parties would lose access to the Federal Court for anything other than judicial review.

108. In circumstances where the CCA is silent as to the availability of declaration but instead incorporates a standard review right to the Tribunal, the Federal Court would typically refuse to exercise discretion to accept an application for declaration.

109. In *Forster v Jododex Australia Pty Ltd*, Gibbs J stated:

> *… when a special tribunal is appointed by a statute to deal with matters arising under its provisions and to determine disputes concerning the granting of rights or privileges which are dependent entirely upon the statute, then as a general rule and in the absence of some special reason for intervention, the special procedures laid down by the statute should be allowed to take their course and should not be displaced by the making of declaratory orders concerning the respective rights of the parties under the statute.*[44]

110. This is especially the case where the merger test was amended to involve an administrative (rather than evidentiary) standard and involved the application of a public benefit test—as proposed by the ACCC. On this latter point, French J in *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* stated:

> *An application for authorisation need not answer the question whether a proposed acquisition if it proceeded would contravene s 50. It brings to bear as an important consideration, quite extraneous to the construction and application of s 50, the question whether there is public benefit resulting or likely to result from the acquisition. That is a matter for which the Act provides a means of assessment which is administrative in both a functional and constitutional sense. It involves polycentric decision-making of a kind which the Court is not institutionally competent, nor authorised by statute or the Constitution, to undertake.*[45]

111. The practical consequence of this is that where a satisfaction test is introduced alongside Tribunal review, the Federal Court would play a role only as a judicial review body in merger matters.

(b) Judicial review is not an effective alternative to substantive merits review

112. Judicial review is a weak and inadequate alternative to a robust right for merger parties to seek merits review of ACCC decisions.

113. There are features of judicial review that mean it is not fit for purpose as a means of review in merger cases:

    (a) First, judicial review focuses on fundamental legal or statutory failures by an administrative body and not on the substance of a merger decision. Indeed, the Federal Court will often reject judicial review claims precisely on the basis

[44] (1972) 127 CLR 421. This commonly quoted passage was also cited by O'Bryan J in canvassing a number of other similar cases regarding this issue: *OPENetworks Pty Ltd v Myport Pty Ltd* [2019] FCA 486.
[45] (2003) 137 FCR 317 at [607].

that the aggrieved party is seeking to use judicial review to 'reopen' the merits of the administrative decision.[46]

(c) Second, the threshold for challenging an administrative decision is high. To succeed on judicial review, a party must establish that the regulator exceeded their statutory power, misconstrued their statute, acted entirely irrationally or without evidence, ignored relevant considerations, acted on irrelevant considerations or failed to grant procedural fairness.[47]

(d) Third, even if successful on review, the typical remedy is for the decision to be remitted to the decision-maker to be remade according to law. In most cases, this results in the same decision—as occurred in *Tabcorp / Tatts*, where the ACCC successfully challenged the original Tribunal decision to grant authorisation,[48] only to have it made again in almost identical terms by the Tribunal on remittal corrected for the relevant legal error.

114. For the same reason, the approach to merger review adopted in the United Kingdom does not provide sufficient accountability for the regulator.

115. The ACCC's proposal would shift Australia's merger clearance framework at least as far, if not further, than the judicial review model that operates in the United Kingdom. In the UK, the only available form of review from a merger decision of the CMA is to apply to the Competition Appeal Tribunal (**CAT**). The CAT does not re-hear the merits of a case but determines the appeal with reference to principles of judicial review. In *Meta/Giphy*, the CAT made clear that it is not its task to decide if the CMA made the right decision, but rather, to determine if the decision was made lawfully.[49]

116. Merger parties and practitioners in the UK have expressed private frustration at the extremely limited nature of this review model and the adverse implications it has had for CMA engagement and decision making.

(e) The Federal Court remains the appropriate and preferable body for determining s 50 compliance compared with full merits review in the Tribunal

117. The Federal Court is the appropriate body to determine matters of fact and law, based on due process and evidence. An administrative tribunal, such as the Tribunal, with its more inquisitorial process and lay membership is suited to resolving questions involving administrative discretion and technical or policy judgement.

118. As noted in a separate submission, the Committee considers that the substantive merger test should remain an evidentiary one, on the balance of probabilities. It is, in that sense, a legal and factual question better suited to judicial determination than determination by an administrative tribunal.

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46 *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2017] FCA 316 at [205].

47 See the list of grounds in ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Substantially equivalent grounds operate at common law and can be brought to the Federal Court under s 39B of the *Judiciary Act 1903* (Cth).

48 *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150.

49 *Meta Platforms, Inc v Competition and Markets Authority* [2022] CAT 26.

119. To the extent that an ACCC decision (including under any mandatory process) has the effect of preventing a merger from proceeding on the basis that the ACCC considers it would be likely to contravene section 50, such a decision raises a clear question of law and fact that should properly be open to challenge and final determination by a Court.

120. The Tribunal should continue to play its current role as the merits review body for authorisation decisions, which operate to the 'satisfaction' standard and therefore reflect the exercise of an administrative discretion. For the same reason, this is also the forum that is likely to remain better suited to determination of the policy question at the heart of the public interest test.

121. Justice French summarised this different and distinct role of the Tribunal as follows:[50]

> *Courts have neither the resources nor, as a general rule, personnel with the skills and experience necessary to undertake wide ranging inquiries of the kind that may be necessary for the resolution of public benefit or efficiency issues in authorisation applications. The investigative process, the receipt of submissions from interested groups and parties, the evaluation of their roles and interests in the relevant market and the striking of compromises which may be reflected in the conditions attached to authorisations are not within the functions to which courts are confined.*

122. For the reasons set out below, any role for the Tribunal should remove the current restrictions associated with the limited merits review process and ensure the Tribunal is free to engage with matters as a full rehearing. This would allow the Tribunal to properly hear and test evidence (both lay and expert) and to properly engage with ACCC findings in a manner that best utilises the expertise of the Tribunal.

Option 4 - No declaration right (judicial review only in the Federal Court) with limited merits review in the Tribunal

123. If any decision is made to replace the traditional Federal Court process for merger matters with merits review in the Tribunal, the current limited merits review regime is not fit for purpose.

124. The recent determination in *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 highlights the significant challenges facing merger parties before the Tribunal given the limitations placed on merits review by amendments made to sections 102(9) and (10) in 2017:[51]

    (a) In 'clarifying' information or evidence that was previously before the ACCC, for the purpose of section 102(10)(d), the Tribunal's role is not to test the reliability or credibility of that material. Merger parties cannot seek leave to tender further evidence, or to request cross examination of witnesses or

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[50] R French, *Role of Courts in the Development of Australian Trade Practices Law* in Hanks and Williams (eds) Trade Practices Act – A Twenty Five Year Stocktake (Federation Press, 2001) pp 98-116 at 108, quoted by French J in *AGL / Loy Yang* at [607].

[51] The following are taken from S Muys, *Substantive, procedural and practical implications of Telstra and TPG (No. 2) for merger parties and the merger reform process – An adviser perspective* (Law Council of Australia, Competition and Consumer Law Workshop, 2 September 2023).

attendance by experts, to test or evaluate the cogency or weight to be afforded to evidence or findings relied upon by the ACCC.

(a) The Tribunal is unlikely to have the power to issue a summons under section 105(2) to compel a witness to attend the hearing to be questioned or to produce documents.

(b) The Tribunal process does not offer a means to correct any perceived procedural fairness failures in the ACCC process. This includes where parties have not had access to material information, evidence or ACCC findings prior to the ACCC determination.

(c) There is very limited scope for the Tribunal to allow new information that "*was not in existence at the time the Commission made the determination*" (section 102(1)(9)). It is not enough that such material was not available to the merger parties or that it was in existence but not produced to the ACCC. Gaps in the evidentiary record may be unfortunate but they cannot be remedied by the Tribunal. Leave is likely to be granted to allow new material under section 102(9) only in cases where the Tribunal is satisfied that the relevant information or evidence concerns "*facts and matters that did not exist at the time the ACCC made its determination*". This might include, for example, evidence related to a material change in market dynamics, or a subsequent transaction, that occurs only after the ACCC determination, but which may have a bearing on the Tribunal's analysis.

125. It is also not the case that the limited merits review process has enabled the ACCC and Tribunal to operate more quickly than was the case with full merits review before the Tribunal prior to the amendments:

- The three completed Tribunal merger authorisations in the decade prior to the amendments were dealt with in almost half the total time taken in *Telstra / TPG*. This was despite those earlier Tribunal hearings involving multiple parties (including the ACCC and intervenors) and a full merits assessment with substantial lay and expert evidence.

- Taking both the ACCC and Tribunal decision periods together, the total periods required for the only two cases to proceed to the Tribunal following the 2017 amendments (*Telstra / TPG* and *ANZ / Suncorp*) look likely to require approximately 400 days or more. This is longer than two of the three authorisations since 2007 (*Tabcorp / Tatts* (363 days) and *Macquarie Generation / AGL* (206 days)).

126. In short, the new merger authorisation process, with its limited merits review in the Tribunal, has stripped merger parties of substantial procedural and substantive rights without delivering improvements in terms of timing over the full merits review process as it operated prior to the amendments.

127. While the procedural and substantive limitations placed on merger parties may be justified in circumstances where they have agreed to voluntarily submit to an authorisation process—it would be inappropriate as the only means of merits review for merger deals, where parties are mandatorily forced to notify transactions to the regulator.

Practical suggestions for merger process improvement

Background

128. The Committee supports the risk and design principles for Australia's merger control regime reflected in the Consultation Paper, namely:

> *"An efficient and effective merger control regime should seek to achieve its policy objective at the lowest cost possible and in a timely manner, with appropriate powers and resources for the competition authority" (p10)*

129. Introduction of a mandatory filing and suspensory system will significantly increase transaction costs and red tape for both business and the ACCC. To date there is a lack of available evidence that a significant number of mergers have occurred which reduced competition in Australia and which the ACCC did not have an opportunity to review.

130. The Committee suggests that, instead of imposing the costs of a mandatory notification system for mergers 'across the board', there are more targeted options available for the ACCC and to the Australian Government to address many of the concerns raised by the ACCC. These options will be less costly and not require substantial legislative change to the current process for reviewing mergers.

ACCC concerns with current merger process

131. The ACCC has raised various concerns about the current merger review process and referred to weaknesses which impede the ACCC's ability to assess and successfully challenge mergers which raise competition concerns, including that:

- parties notifying but threatening to complete before the ACCC has completed its review;
- parties failing to notify the ACCC at all; and/or
- parties providing insufficient or inaccurate information to the ACCC to enable it to perform its review.

132. In those transactions where foreign parties require the approval of the Australian Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (***FATA***) parties cannot complete a merger transaction until approval is recommended by the Foreign Investment Review Board (**FIRB**), which will not grant approval until the ACCC has completed its review.

133. Therefore the concerns raised by the ACCC will generally only arise in those transactions not notifiable under the FATA.

134. The ACCC has raised concerns that an increasing number of merger parties threaten to compete the transaction prior to the conclusion of the ACCC's review or put pressure on the timing of the review. The ACCC also cites some unspecified *'global transactions [where] some parties give low priority to the timely notification and engagement with the ACCC under our informal regime, in preference to*

engagement with overseas jurisdiction which impose mandatory notifications and formal processes'[52].

135. The Committee's experience in global mergers is extensive and it suggests that, more commonly where coordinating counsel in Brussels or New York are managing clearance processes in many jurisdictions, they have regard to ACCC guidelines which specify timeframes that may no longer be accurate. If the ACCC published more up to date guidelines about the ACCC's expectations and timing, this should help address the timely filing of global mergers.

136. For global transactions, the fact that Australia is a much smaller economy than others such as the United States or Europe may also explain why merger parties may focus their attention on merger control in those jurisdictions ahead of the Australian regime. However where FIRB approval is required for a global transaction, the parties will have no choice but to approach the ACCC for clearance even if they do so at a later stage than their filings in other jurisdictions.

137. As the ACCC has not published any statistics or information about the number of these specific instances of parties filing with the ACCC at a very late stage, it is difficult for the Committee to comment as to how large a problem this is for the Australian merger control regime.

138. In its 2023 annual report the ACCC reported that-

> " *In 2022–23 we assessed 305 mergers that were notified to the ACCC under the informal review regime or that were referred to the ACCC by other regulatory agencies or identified through monitoring and intelligence gathering.*
>
> *Of the 305 mergers that were assessed:*
>
> - *284 were pre-assessed and*
> - *21 were subject to a public review*
> - *10 were not opposed*
> - *2 were opposed outright*
> - *6 were not opposed after acceptance of a remedy*
> - *3 were withdrawn, 2 of which were withdrawn after a statement of issues was released.*

139. A review of recently completed ACCC merger matters indicates that in practice, where a public review occurs, the ACCC takes substantial periods to compete its public review of mergers and that timing has not been unduly abbreviated.

140. For example: the ACCC Annual Report for 2023 records that all stage 1 merger reviews were completed within 12 weeks (excluding 'stop the clock' i.e. time periods where information was outstanding). For Stage 2 reviews the ACCC took more time - only 56% were completed within 24 weeks, excluding time periods where information was outstanding.

141. The following table summarises the period of the ACCC review in a number of recent public reviews-

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52 See *'Outline to Treasury of the ACCC's proposals for merger reform'* dated March 2023,

Table1. Recent ACCC Reviews

Matter	Total Review Days
Australian Clinical Labs / Healius	102 days
Woolworths / PetStock	38 days however the timeline was suspended between March and December 2023 with the total review period being 11 months
Viva Energy / OTR Group	116 days
Endeavour Group / Rye Hotel	113 days
Coles / Saputo Dairy Fresh Milk plants	92 days however the timeline was suspended at times between May and December 2023 with the total review period being 7 months
Bega Cheese / Betta Milk	52 days
Microsoft / Activision Blizzard	33 days review; completed without decision after 14 months
Transurban / Horizon Roads	124 days

142. Many mergers are assessed by the ACCC on a confidential basis using the pre-assessment process which reflect an ACCC assessment that the transaction presented a low risk of competition concerns[53]. In its 2022/23 Annual Report the ACCC reported that 93% of merger matters reviewed were determined by pre-assessment.[54] The ACCC does not publish details of the time taken for pre-assessment reviews.

143. It is a matter for the ACCC whether it is prepared to 'pre-assess ' a transaction or to require a public review to be undertaken.

144. There are few public matters reported where parties have threatened to complete without permitting the ACCC to complete its review. The infrequency of these matters does suggest the problem the ACCC describes is not common.

145. The Consultation Paper acknowledges that, if merger parties attempt to complete their transaction before the ACCC has completed its review, the ACCC may commence court proceedings to seek an injunction to stop or delay the merger.

146. The Consultation Paper refers to the most recent example concerning Virtus' proposed acquisition of Adora in 2021, in which, 12 days after the ACCC filed its application, the Federal Court held an urgent hearing and granted the ACCC an interim injunction, restraining the parties completing the acquisition. The parties were ordered to pay the ACCC its legal costs in relation to the application.

53 ACCC and AER annual report, 2022-23 (**ACCC Annual Report**), p68
54 ACCC Annual Report, p 67, Table 3.7

147. In *Virtus* the ACCC commenced proceedings by a short form Concise Statement, which is a five page outline of the issues. The ACCC evidence in support of its application was reasonably confined- being an affidavit sworn on "information and belief" by the ACCC's solicitor using the information gathered through market inquiries by ACCC staff.[55] No industry witness was required to give evidence for the ACCC.

148. The nature and outcome in ***Virtus*** broadly supports the Committee's submission on the effectiveness of the current merger regime. While the ACCC had to articulate its concerns under section 50 and the court had to consider those only at an interlocutory stage (i.e. in considering whether to grant an interlocutory injunction), the Court agreed with the ACCC. Its decision to grant an injunction effectively sent a reminder to the business community that there are substantial costs associated with not affording the ACCC the timing it requires to complete its review of the acquisition.

149. Justice O'Bryan specifically commented[56] on the ACCC's Guidelines:

> *"There is no requirement at law for companies to notify the ACCC of a merger or acquisition or to seek ACCC approval of a merger or acquisition. Nevertheless, it is widely known across the business community, and must be assumed to be known, that the ACCC is empowered to enforce the prohibition in s 50 of the Act by seeking an order under s 80 to restrain a merger or acquisition that contravenes s 50, an order under s 81 requiring the divestiture of shares or assets acquired in contravention of s 50 and/or an order under s 76 imposing a pecuniary penalty on a person who has acquired shares or assets in contravention of s 50 and any person knowingly concerned in the contravention"*

150. As noted above, in relation to review rights, applications of the kind considered in the *Virtus* are not common. Moreover, in many cases the ACCC does not need to seek an injunction because merger parties undertake to withhold completion until after the litigation is completed. In the Committee's submission the relatively few examples of the ACCC seeking such interim Court orders for merger transactions suggests that it is not common that parties threaten to proceed to complete an acquisition in the face of the ACCC conducting its review or the Federal Court resolving any subsequent challenge.

151. In addition, the ACCC is able to put parties and senior management at the risk of penalties for breach of section 50 which are very substantial.

152. However, if the Taskforce consider the tasks for the ACCC in seeking an interim injunction in such cases are too onerous and not efficient, it would be open to simplify the process by amending the CCA to allow the ACCC to apply for a stop order in any matter where a merger is threatened, without requiring a prima facie case of breach of section 50.

Stop Orders

153. In meetings with the Consultation Taskforce the Committee made the suggestion that the ACCC's powers could be enhanced to seek Court orders to suspend transactions in cases where the ACCC believed it was either the subject of inappropriate pressure or lacked the information it required.

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55 *Virtus* at [15]. The ACCC also filed affidavits from two economists.

56 Virtus at, [44].

154. The ACCC's concerns could be addressed by a simple amendment to the CCA to enable the ACCC to apply for an interim injunction from the Federal Court in any matter where the Commission can put evidence before the Court that the ACCC wishes to review a proposed merger transaction against the risk of a breach of section 50 and requires further time and or information to do so.

155. A simple amendment could be proposed which removes the need for the ACCC to demonstrate a *prima facie* case of a breach of section 50.

156. The Committee would not oppose a simple amendment allowing the ACCC to apply for an interim injunction which the court could be empowered to grant if satisfied that the ACCC requires further time in which to complete its review.

157. An amendment could indicate, for example that the usual period of such an interim injunction should not exceed say 60–90 days without further order of the Court. The Court would have an ability to balance the requirements of the ACCC for additional time, against due process to the merger parties.

Failure to notify the ACCC

158. The Committee notes the ACCC has also raised concerns where merger parties decline to notify the ACCC at all. As noted above this is only possible if no FIRB approval is necessary.

159. In such a matter the ACCC retains the power to seek penalties from parties after the event.

160. Since the *Pioneer* case in the 1990s (referred to in the Consultation Paper at page 16), there have been no penalty proceedings brought by the ACCC for parties breaching section 50 and failing to notify the ACCC.

161. The Consultation Paper also refers to the *Primary Health Care/Healthscope* matter in 2016 where the transaction was not notified to the ACCC. After completion the ACCC accepted undertakings from Primary Health to divest the assets it had acquired.

162. The ACCC recently granted informal clearance to Woolworths acquiring a majority investment in Petstock, a retailer of animal pet products and services but accepted an undertaking that Woolworths and Petstock would divest 41 specialty pet retail stores, 25 co-located veterinary hospitals, four brands and two online retail stores[57] previously acquired by Petstock and which had not been notified to the ACCC.

163. The ACCC cites this case as supporting its case for stricter laws requiring mandatory notification of transactions to the ACCC.

164. The Committee sees the challenge raised by the Petstock matter as whether a mandatory notification should be adopted at the level which is low enough to have required Petstock to have notified the ACCC of those acquisitions.

165. The Committee understands from the ACCC media release the acquisitions of concern in the Petstock matter occurred over a number of years from 2017. Each acquisition concerned a separate retail pet business. While the ACCC release

[57] See https://www.accc.gov.au/media-release/woolworths-acquisition-of-controlling-interest-in-petstock-not-opposed-as-petstock-gives-undertakings-relating-to-past-acquisitions

indicates that one of the businesses acquired (Best Friend Pets) was substantial, being the third largest omni channel retailer with both an online and retail stores across multiple Eastern states, it can be inferred that the other pet businesses acquired were smaller and localised in nature, for example Animal Tuckerbox in Launceston, Tasmania.

166. To require all these acquisitions to be notified by law to the ACCC would likely require setting the transaction value which triggers an obligation to notify, at a very low level- probably less than A$5 million.

167. The Committee does not support mandatory notification especially if the threshold is set so low.

The risks of the ACCC having inaccurate or incomplete information

168. The Committee assumes the ACCC's concerns about not receiving sufficient information from merger parties relate to parties not complying with the ACCC Merger Process Guidelines (which are voluntary).

169. In July 2006 the ACCC published the Merger Process Guidelines to inform the business community of the ACCC's information requirements for a merger clearance application (see Appendix A. to the Guidelines) The ACCC has not reviewed these Merger Process Guidelines since they were first issued.

170. It would appear to be open to the ACCC to update the Guidelines (even if voluntary) in order to strengthen these Guidelines to ensure merger parties are in no doubt as to the ACCC's expectations.

171. After all the ACCC is not compelled to accept an application for informal merger clearance. It always remains open to the ACCC to decline to consider an application if the ACCC believes it has not been provided with sufficient information to form a properly informed view.

172. If the ACCC is concerned that it is given incomplete or inaccurate information by parties, it would also appear to the Committee to be open to the ACCC to impose some more rigour about its information requirements before agreeing to consider a clearance application. For example, the ACCC could introduce a requirement by its informal Process Guidelines to increase the obligations of the merger parties to provide all relevant and accurate information before the ACCC will agree to consider the request for informal clearance.

173. The ACCC could also require an applicant for informal clearance to provide a certificate to the ACCC signed by a senior representative of the applicant to the effect that all relevant information required by the ACCC's Guidelines has been provided and that nothing material has been omitted and that all information provided is believed to be accurate.[58]

174. The Committee also points to the increasing use by the ACCC in merger reviews of the powers under section 155 to require information and documents to be provided under compulsion and for persons to appear before the ACCC for compulsory examination on oath. The ACCC's latest annual report signalled that *"it will use its*

[58] See Criminal Code Act 1995, section 137.1 - a person commits an offence if the person gives the information to another person knowing that the information is false or misleading or omits any matter or thing without which the information is misleading and the information is given to a Commonwealth entity or a person who is exercising powers or performing functions under a law of the Commonwealth.

compulsory information gathering powers increasingly in merger investigations where concerns warrant increased evidence gathering. We exercised these powers in 11 merger assessments this year".[59]

175. It is open for the ACCC to issue a notice under section 155 in most merger review as a means of ensuring that the Commission is provided with all relevant and accurate information that is required to complete its task. It is an offence for a party to fail to comply with a section 155 Notice unless the person is not capable of compliance.[60]

176. Such notices could be issued to both the seller and the buyer or the target / bidder and to relevant third parties in any merger transactions if the Commission thought there needed to be additional rigour around the provision or the information furnished to it.

177. The Consultation Paper notes the powers in section 155 first requires some 'upfront' information suggesting the merger does raise competition concerns. However, this is not in the Committee's experience considered a difficult test to meet.

178. The Consultation Paper notes that section 155 is limited to persons carrying on business in Australia which may not always apply to an offshore global transaction. The issue of jurisdiction raises broader issues including the overall scope of Australian merger control generally. Section 155 has recently been amended to allow the service of notices outside Australia.

179. The Taskforce may have a concern that the current threshold for the ACCC to issue a section 155 notice *(*that is, *a reason to believe the matter may constitute a contravention*) is too onerous for the ACCC to adequately require parties to a suspected merger to provide basic information. If so, the Committee suggests a small change would be to give the ACCC more generous powers to obtain such information in relevant merger cases where it has been requested and refused, rather than compel every party to every transaction to file information in every case.

180. Section 155(2) could be amended to specifically refer to merger matters, so as to give the ACCC more scope to demand information from parties who appear to be proposing a merger and who decline to cooperate with a 'please explain' inquiry from the ACCC even if the potential contravention is unclear.

Difficulties in obtaining evidence

181. The ACCC also raises concerns that the Court may in some matters place too much weight on the evidence of the merger parties in preference to the economic concerns raised by the ACCC. The ACCC has also submitted that it may be difficult in some matters for the ACCC to obtain evidence from third parties or to give evidence in Court because the concerns about the time, cost or retribution or adverse consequences of doing so.

182. There are two issues here - (1) ACCC ability to get evidence and (2) whether the court should prefer lay evidence over economic concerns.

183. As noted earlier in relation to review rights, the Committee is not convinced that gathering evidence has proved to be a substantial impediment to the ACCC enforcing section 50. The ACCC has the ability to compel third parties to provide

59 ACCC Annual Report, p68
60 s155(5)-(5A) CCA.

information and evidence under the provisions of section 155. In the experience of the Committee members the ACCC uses its powers under section 155 for merger reviews against third parties in a significant number of matters. Much of the evidence that may be required in a merger review will be in documentary form, being business records held within participants in the markets affected by the merger. The willingness of third parties to give viva voce evidence in Federal Court proceedings is not always necessary. In any event, in many merger proceedings (both before the Federal Court and the Tribunal), such third party evidence is readily obtained (see, for example, *Pacific National / Aurizon, Tabcorp / Tatts, Telstra / TPG and ANZ / Suncorp*).

184. On the Court's reliance on business/lay evidence, there is a point of principle that whether a merger breaches the law is properly a matter for the Court, and the Court is best placed to make a decision based on all the evidence, including economic and lay evidence, and to test that evidence.

Annexure A: Federal Court and Tribunal applications involving s 50 (2003–present)

Case	Year	Review body	Result
Australian Gas Light Co v Australian Competition and Consumer Commission (No 3) (2003) 137 FCR 317 (**AGL / Loy Yang**)	2003	Federal Court (declaration)	ACCC loss
Qantas Airways Ltd [2004] ACompT 9 (**Qantas / Air New Zealand**)	2004	Tribunal (authorisation)	ACCC loss (although transaction did not proceed, as a reciprocal authorisation was not granted in New Zealand)
Australian Competition and Consumer Commission v Boral Limited (VID699/2004) (**Boral / Adelaide Brighton**)	2004	Federal Court (ACCC prosecution)	Discontinued as transaction did not proceed
Australian Competition and Consumer Commission v Toll Holdings Ltd (VID105/2006) (**Toll / Patrick**)	2006	Federal Court (ACCC prosecution)	Discontinued as ultimately not opposed, subject to s 87B undertaking
Australian Competition and Consumer Commission v Metcash Trading Ltd (2011) 198 FCR 297 (**Franklins / Metcash**)	2011	Federal Court (declaration)	ACCC loss
Application by Murray Goulburn Co-Operative Co Limited for merger authorisation (ACT 4 of 2013) (**Murray Goulburn / WCBF**)	2014	Tribunal (authorisation)	Application withdrawn as transaction did not proceed
Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1 (**Macquarie Generation / AGL**)	2014	Tribunal (authorisation)	ACCC loss

Case	Year	Review body	Result
Application by Sea Swift Pty Ltd for merger authorisation of the proposed acquisition of certain assets of Toll Marine Logistics Australia's marine freight operations (ACT 9 of 2015) (**Toll / Sea Swift 1**)	2015	Tribunal (authorisation)	Application withdrawn, further application subsequently brought
Application by Sea Swift Pty Ltd [2016] ACompT 9 (**Toll / Sea Swift 2**)	2016	Tribunal (authorisation)	ACCC loss
Application by Tabcorp Holdings Limited [2017] ACompT 1 (**Tabcorp / Tatts**)	2017	Tribunal (authorisation)	ACCC loss
Australian Competition and Consumer Commission v Pacific National Pty Ltd (2020) 277 FCR 49 (**Pacific National / Aurizon**—acquisition of Acacia Ridge Intermodal Terminal)	2019	Federal Court (ACCC prosecution)	ACCC loss
Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission [2020] FCA 117 (**TPG / Vodafone**)	2020	Federal Court (declaration)	ACCC loss
Australian Competition and Consumer Commission v IVF Finance Pty Ltd (No 2) [2021] FCA 1295 (**Virtus / Healius—**acquisition of Adora)	2021	Federal Court (declaration)	ACCC obtained interlocutory injunction, discontinued as transaction did not proceed
Application by Controlabill Pty Ltd for review of merger authorisation MA 1000020 (ACT 3 of 2021) (**BPAY / eftpos / NPPA**)	2021	Tribunal (authorisation)	Withdrawn as ultimately not opposed, subject to s 87B undertaking
Applications by Telstra Corporation Limited and TPG	2023	Tribunal (authorisation)	ACCC win

Case	Year	Review body	Result
Telecom Limited (No 2) [2023] ACompT 2 (**Telstra / TPG**)			
Applications by Australia and New Zealand Banking Group Limited and Suncorp Group Limited (ACT 1 of 2023) (**ANZ / Suncorp**)	2023	Tribunal (authorisation)	Ongoing

Annexure B: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Dr Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

The Section's website is www.lawcouncil.asn.au/business-law.