



Australian Government  
The Treasury



Competition  
Review

# Merger Reform

Consultation paper

November 2023



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# Consultation process

## Request for feedback and comments

This paper seeks information and views to inform options for modernising Australia’s merger regulation.

Questions are included throughout the paper to guide comments. Interested parties may wish to provide responses to some or all the questions, or to comment on issues more broadly.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

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All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment.

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If you would like to share information and views that may be sensitive, you are welcome to indicate that you would like all or part of your submission to remain confidential. Treasury also welcomes the opportunity to discuss your views in a meeting.

### Closing date for submissions: 19 January 2024

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## Executive summary

Competition is an important driver of dynamism, productivity, and wages growth. Competition encourages productivity gains to be passed onto consumers through lower prices, higher quality, or an improved variety of products, and to workers through higher wages.

However, there is evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries. This reduction in competition is likely to have contributed to Australia's declining productivity performance over a long period. Many countries around the world face similar concerns and are reviewing their competition policy settings.

Mergers involve separate firms coming together to form a new firm. They may also involve the acquisition of shares or assets of one firm by another, even if that is less than a full 'merger'. Mergers are important for the efficient functioning of the economy. They can provide an important way for firms to achieve economies of scale and scope, diversify risk and exit businesses. Mergers can enhance competition if these efficiencies are passed onto consumers via lower prices, improved product quality, range, or service.

Most mergers do not raise competition concerns. However, a small proportion of proposed mergers, if allowed to proceed, would be anti-competitive. Merger control is about maintaining competitive market structures which lead to better outcomes for consumers. It is the legal regime and underlying process that enables a competition authority to consider mergers that could be harmful to the competitive process and, if necessary, amend or prevent harmful mergers. Ideally, merger control regimes would target those mergers that are anti-competitive and allow mergers that are pro-competitive or benign to proceed. In practice, this is hard to achieve. It is difficult to predict the future competition and efficiency impacts of proposed mergers. Merger control regimes therefore need to be risk-based, devoting more regulatory resources to those that are more likely to be anti-competitive and therefore more likely to cause the harm to the community.

## Emerging concerns

In Australia, productivity growth has slowed over a long period, and most measures of dynamism have declined. A range of competition indicators – including industry concentration, incumbency, and firm mark ups – suggest a deterioration in competition in Australia since the early 2000s. This is consistent with trends in many other advanced economies.

Australia's merger control regime has a prohibition on mergers that are likely to have the effect of substantially lessening competition,<sup>1</sup> assessed through voluntary informal merger review, voluntary merger authorisation and Federal Court proceedings. The Australian Competition and Consumer Commission (ACCC) has raised concerns about Australia's merger control regime, particularly that:

- it is 'skewed towards clearance' where there is uncertainty or a number of possible future outcomes. This is because of the emphasis courts place on having to predict the likely state of competition in the future with and without the merger, the information asymmetry between

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<sup>1</sup> *Competition and Consumer Act 2010 (Cth) s 50.*

merger parties and the ACCC, the weight often placed by courts on the evidence of the merger parties' senior executives and the reluctance of third parties to give evidence in court; and

- the existing voluntary system of merger notification and assessment is not as effective as it needs to be because, for example, merger parties are threatening to complete a merger transaction before the ACCC has completed its review, are failing to notify at all (including for international cross-border mergers), and/or are providing insufficient or inaccurate information to the ACCC.

However, others suggest that the ACCC's limited success in court is more due to its litigation strategy and reliance on economic theory that does not account for commercial realities. Further, cases where the ACCC has identified a completed merger and acted either to undo it or to seek penalties appear to be rare (although the ACCC does not publicise all investigations of mergers post-completion).

Internationally and in Australia, concerns have been raised that the anti-competitive effects of certain types of acquisitions by large firms are not adequately captured by current competition laws. These include:

- creeping or serial acquisitions – that is, a series of small acquisitions by large firms – which have been concerning in Australia in sectors such as supermarkets, liquor and hardware;
- acquisitions by large incumbents of nascent competitors. While nascent firms play a vital role in competitive markets as key sources of new ideas, products, and business models, it can be difficult to know whether they would have provided a meaningful competitive constraint in the future if not acquired; and
- expansions into related markets, including by digital platforms. For example, Google's major acquisitions in recent years include YouTube, DoubleClick, Waze, and Fitbit, and Meta's major acquisitions include Instagram and WhatsApp.

## Key elements of a merger control regime

Key elements to be considered in designing a merger control regime include:

- **Notification:** whether notification should be voluntary or mandatory; what ability should exist for the ACCC to deal with non-notified mergers; and whether mergers should be suspended for a period of time to allow the ACCC to assess;
- **Assessment:** whether the ACCC or the Federal Court should be the primary decision-maker; whether the default position should be to permit or block mergers where there is uncertainty; what should be taken into account in determining the impact of a merger on competition, including whether more focus should be given to the effect of a merger on market structure; and, whether the 'public benefits' of a merger should be considered; and
- **Enforcement:** whether a clearance model should be adopted that provides formal legal certainty; whether ACCC decisions should be subject to limited merits review by the Australian Competition Tribunal (the Tribunal); and how the Federal Court should interact with any notification regime.

## Possible policy options

The purpose of merger control is to identify and prevent the prospective anti-competitive effects of mergers. The possible options considered below group key elements of merger regimes drawing from experience globally.<sup>2</sup> This includes merger reform proposals provided to Treasury by the ACCC in March 2023.<sup>3</sup> Each option is a proposal to reform the current informal merger regime to address shortcomings given evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries.

### Changes to the merger control process

Stakeholders are invited to suggest alternative options or variations of these options and outline their benefits and risks, as well as provide views on whether the existing merger authorisation regime should be retained. Under all options, it is assumed the informal merger review process would be replaced by the reformed merger control process.

	Option 1	Option 2	Option 3 (ACCC's proposal)
Notification	Voluntary suspensory clearance	Mandatory suspensory notification	Mandatory suspensory clearance
Decision maker	ACCC (subject to review by the Competition Tribunal)*	Federal Court	ACCC (subject to review by the Competition Tribunal)
Test applied	Must be satisfied the merger <u>is not</u> likely to SLC**	Merger <u>is</u> likely to SLC	Must be satisfied the merger <u>is not</u> likely to SLC (or net public benefit)

\*The ACCC would be required to commence legal action in the Federal Court if the merger parties do not notify or decide to proceed, as is the case for Option 2.  
 \*\*SLC – Substantial lessening of competition

- **Option 1 – A voluntary formal clearance regime** could be introduced, where businesses could choose to notify a merger and the ACCC could grant legal immunity from court action under the prohibition against anti-competitive mergers in section 50 of the *Competition and Consumer Act 2010* (Cth) if satisfied the merger would not be likely to substantially lessen competition.
- **Option 2 – A mandatory and suspensory regime** could be introduced, with compulsory notification of mergers above a threshold. Transactions would be suspended for a period while the ACCC conducts its assessment. To prevent an anti-competitive merger, the ACCC would need to prove to the court that the merger would be likely to substantially lessen competition.
- **Option 3 (ACCC's proposal) – A mandatory formal clearance regime** could be introduced, with compulsory notification of mergers above a threshold and allowing the ACCC to 'call-in' transactions below the threshold where there are competition concerns. The ACCC would only

<sup>2</sup> See OECD (Organisation for Economic Co-operation and Development), *OECD Competition Trends 2021 – Volume II: Global Merger Control*, 2021, p 12, accessed 29 October 2023.

<sup>3</sup> The ACCC's 2023 merger reform proposals are a revised version of proposals released in 2020. This consultation paper refers to the ACCC's 2023 proposals, which are available at <https://www.accc.gov.au/inquiries-and-consultations/accc-submissions-to-external-consultations#toc-mergers>, unless stated otherwise.

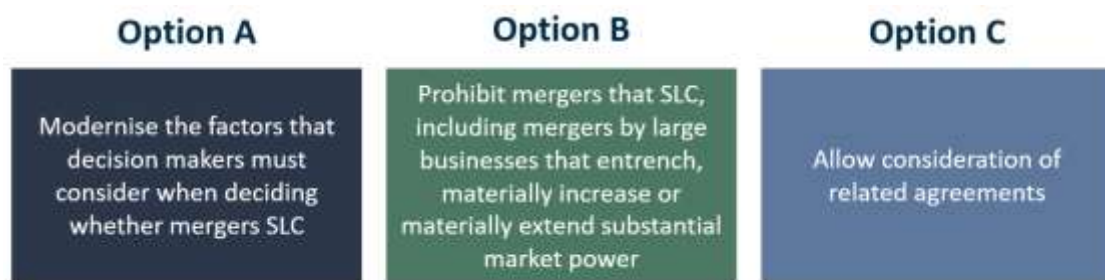
grant clearance if it was satisfied the merger was not likely to substantially lessen competition. Clearance would provide formal immunity from court action under section 50.

The first two options are 'judicial enforcement' merger control models relying on litigation to stop a merger considered by the ACCC to be anti-competitive if parties nevertheless decide to proceed. The third option is primarily an 'administrative' model with transactions requiring ACCC approval before they can proceed.

A significant proportion of mergers considered by the ACCC annually are effectively already subject to a mandatory notification and suspensory framework, as they involve foreign investment and are therefore subject to Australian foreign investment approval processes. In considering possible policy options, it would be important to ensure that the foreign investment and competition approval regimes worked effectively together.

## Changes to the merger control test

The ACCC has also proposed changes to the test for whether mergers are 'likely to substantially lessen competition' (under section 50) to better recognise the effect that some acquisitions – particularly by large firms – have on competition and the structure of the market. Options to reform the merger control test include:



\* SLC - Substantial lessening of competition

- **Option A:** Modernise the list of matters that the ACCC may, and the court must, consider when assessing the impact of mergers on competition (known as the 'merger factors' in section 50(3)). Alternatively, the test could be simplified by removing the merger factors from the legislation.
- **Option B:** The substantial lessening of competition test could be expanded to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.
- **Option C:** Related agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) could also be considered as part of the consideration of the effect of the merger on competition.

Each of these options could be implemented alone, together, or along with the changes to the process discussed above. For example, the ACCC's proposal is to adopt option 3, as well as giving greater focus to the effect of a transaction on market structure (that is, option 3, A, B, and C).

## Next steps

Feedback on these options will inform advice to Government on potential directions for merger reform. Each option could be implemented alone, or as a package. Once the Government has settled its preferred approach, and if change is proposed, further consultation will be undertaken as any change is implemented.



# Introduction

On 23 August 2023, the Australian Government announced that a review of competition policy by a Competition Taskforce established in the Australian Treasury would consider proposals for merger reform.<sup>4</sup>

This consultation paper seeks views on:

- whether Australia’s current merger control regime is effective, that is, whether it readily enables beneficial mergers to proceed while ensuring that mergers which may pose substantial competition risks are blocked; and
- to the extent that Australia’s merger control regime could be improved, the options available for reform and their benefits and risks.

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<sup>4</sup> The Hon Dr Jim Chalmers, Treasurer, and the Hon Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment, [A more dynamic and competitive economy](#) [media release], Australian Government, 23 August 2023, accessed 27 October 2023.

# Why Australia's merger control regime is important

Australia's merger control regime has a prohibition on mergers that are likely to have the effect of substantially lessening competition,<sup>5</sup> assessed through:

- informal merger review – a process which has developed without any legislative framework that enables merger parties to manage regulatory risk and seek the ACCC's non-binding view on whether a merger is likely to substantially lessen competition;
- merger authorisation – a formal legislative process<sup>6</sup> which allows the ACCC, and the Australian Competition Tribunal on review, to provide businesses with immunity from court action under competition law for a proposed merger if it is satisfied that the merger would not be likely to substantially lessen competition or that it is likely to result in a net public benefit; and
- Federal Court proceedings in which the ACCC or merger parties can seek orders relating to the merger. This can include an application by the ACCC to injunct to restrain the merger prior to completion or an order that the completed merger is void, with divestiture and substantial penalties, post-completion. Alternatively, the merger parties may seek a declaration that a merger does not substantially lessen competition. Such relief is at the discretion of the Federal Court of Australia and the evidentiary burden of proving the case is usually on the party seeking the orders.

Merger control plays a critical gatekeeper function, preserving the integrity of markets by preventing mergers that may substantially lessen competition.

Mergers are important for the efficient functioning of the economy. They can provide a way for firms to achieve economies of scale and scope, diversify risk and exit businesses. Mergers can enhance efficiency and consumer welfare if these efficiencies are passed onto consumers via lower prices or improved quality, service, or range.

A significant number of mergers occur each year in Australia. Over the past 10 years, the ACCC considered 330 mergers each year on average. Most mergers do not raise competition concerns. However, a small proportion of proposed mergers, if allowed to proceed, would be anti-competitive. Australia's merger control framework recognises that:

[b]y altering market structure, the underlying conditions for competition, mergers may adversely affect efficiency and consumer welfare for many years, and such changes are not easily reversed.<sup>7</sup>

*Horizontal mergers* involve the merging of actual or potential competitors in the same or similar industry. Horizontal mergers eliminate the competitive constraint that the firms exerted on each other pre-merger. Whether the merger will in fact be anti-competitive depends on factors such as market

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<sup>5</sup> *Competition and Consumer Act 2010* (Cth) s 50.

<sup>6</sup> *Competition and Consumer Act 2010* (Cth) ss 88, 90(7).

<sup>7</sup> J Walker, 'An Economic Perspective on Part IV', in Gvozdenovic M and Puttick S (eds) *Current Issues in Competition Law: Vol 1*, Federation Press, 2021, p 87.

concentration, barriers to entry including regulatory or intellectual property constraints, import competition and product differentiation.<sup>8</sup>

*Vertical*<sup>9</sup> and *conglomerate*<sup>10</sup> mergers involve firms at different, adjacent or unrelated levels of the production supply chain. They have become more contentious in recent years partly as a result of developments in technology and modern commerce (particularly the growth of digital platforms), and a growing evidence base showing the potentially anti-competitive effects of these types of mergers.<sup>11</sup> Acquisitions by digital platforms, such as Booking.com's acquisition of eTraveli and Facebook/Meta's acquisition of Giphy, have attracted scrutiny from competition authorities around the world. In Australia, an example of vertical integration is Pacific National's acquisition of the Acacia Ridge Terminal from Aurizon, which was completed in 2021.

## Risk and design principles for Australia's merger control regime

The overarching policy objective of Australia's merger control regime should be to promote competition that enhances the welfare of Australians, consistent with the object of the *Competition and Consumer Act 2010* (Cth) (CCA).<sup>12</sup> 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.<sup>13</sup>

Ideally, mergers that are pro-competitive (or do little or no competitive harm) should proceed, while anti-competitive mergers should be blocked. In practice, this goal is challenging to achieve, given it is hard to predict the future effects of a proposed merger.

Acknowledging these uncertainties, a merger control regime must balance its risk tolerance for allowing anti-competitive mergers to proceed against the risk of blocking mergers that are pro-competitive (or that do little or no competitive harm). At the margin, a more *permissive* system will err towards allowing a greater proportion of anti-competitive mergers to proceed, while a *stricter* system will err towards blocking a greater proportion of mergers that may be pro-competitive or do little or no competitive harm.

Ideally, this regulatory stance would be informed by robust empirical evidence, including studies based on large datasets of merger activity over an extended period and across a range of markets. While this statistical analysis is to be developed further in Australia, internationally there is accumulating evidence that merger control regimes may have been, at the margin, too permissive.<sup>14</sup> Relatedly, the international evidence casts doubt on the frequency and extent to which mergers give rise to efficiencies,<sup>15</sup> and whether such efficiencies are then passed on to consumers.

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<sup>8</sup> ACCC, [Merger Guidelines](#), ACCC, Australian Government, 2008, para 1.4 and 3.9-3.13, accessed 27 October 2023.

<sup>9</sup> Vertical mergers involve firms operating at different functional levels of the same vertical supply chain: ACCC, [Merger Guidelines](#), ACCC, Australian Government, 2008, p 4, accessed 27 October 2023.

<sup>10</sup> Conglomerate mergers involve firms in different markets. Often the relevant firms supply goods or services that are, for example, products that are complementary in either demand or supply: ACCC, [Merger Guidelines](#), ACCC, Australian Government, 2008, p 4, accessed 27 October 2023.

<sup>11</sup> For example, the UK's Furman Review concluded that while most mergers by digital companies may benefit consumers, a minority are likely to have resulted in harm to competition: HM Treasury, [Unlocking digital competition – Report of the Digital Competition Expert Panel](#), Government of the United Kingdom, 2019, ISBN 978-1-912809-44-8, accessed 27 October 2023.

<sup>12</sup> *Competition and Consumer Act 2010* (Cth) s 2.

<sup>13</sup> Productivity Commission (PC), [On efficiency and effectiveness: Some Definitions](#), Staff research note, PC, Australian Government, 2013, accessed 27 October 2023.

<sup>14</sup> See further, Background Note: Economic literature relevant to mergers <https://treasury.gov.au/review/competition-review-2023>

<sup>15</sup> B Blonigen and J Pierce, 'Evidence for the Effects of Mergers on Market Power and Efficiency', Finance and Economics Discussion Series 2016-082, 2016, Board of Governors of the United States Federal Reserve System, <https://doi.org/10.17016/FEDS.2016.082>, 2016, accessed 27 October 2023.

Australia's merger control regime should also be consistent with good regulatory design principles. This includes being risk based, where the regulatory burden reflects the expected costs and benefits to the community. More resources should be devoted to analysing mergers more likely to harm competition.

According to the OECD, competition authorities should have sufficient powers to conduct efficient and effective merger review, and merger notification and review procedures should:

- be effective, efficient, timely and transparent;
- avoid imposing unnecessary costs, set reasonable information requirements, establish clear and objective notification criteria, and expedite review of mergers that do not raise material competitive concerns; and
- be procedurally fair, by providing the right to respond, the right to seek review, to hear from third parties and protect confidential information.<sup>16</sup>

### **Consultation questions**

1. *Are these the appropriate principles to use when considering reform of Australia's merger control regime? Are there any others? If so, please identify them.*
2. *What lessons can be learned from experiences overseas?*

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<sup>16</sup> OECD, [OECD Recommendation on Merger Review](#), 2005, accessed 28 October 2023.

# Emerging concerns

## Industry concentration is increasing in advanced economies

In Australia, productivity growth has slowed and many aggregate measures of dynamism have declined.<sup>17</sup> A range of competition indicators – including industry concentration, incumbency and firm mark ups – suggest an overall deterioration in competition in Australia since the early 2000s.<sup>18</sup> There is evidence that declining firm entry rates have contributed to a reduced rate of convergence to the productivity frontier within industries, and that the rate of convergence is slower within industries that have experienced the largest increases in markups.<sup>19</sup> The OECD in its recent economic survey of Australia has noted evidence that ‘a growing body of evidence links excessive concentration and market power with a range of poor economic outcomes’.<sup>20</sup>

This is consistent with trends in many other advanced economies. The International Monetary Fund finds that key measures of market power – markups of prices over marginal cost and the concentration of revenues among the four biggest firms in an industry – have increased significantly among publicly listed firms in advanced economies since the early 1980s.<sup>21</sup>

While numerous case studies provide some insights, there is a lack of comprehensive statistical evidence demonstrating the link between the merger control regime, industry concentration and market outcomes in Australia. However, the international evidence on these questions is growing, with an increasing number of retrospective econometric studies that take advantage of novel high-quality datasets.<sup>22</sup> While these studies find a variety of effects, on balance, they point to a surprisingly large proportion of mergers resulting in anti-competitive effects (increased market prices and/or reduced activity). Linked to this, some recent evaluation studies that investigate efficiency gains in the newly formed firm have found little or no evidence of such gains.<sup>23</sup>

Put simply, the evidence suggests that too many anti-competitive mergers have been allowed to proceed in these jurisdictions and that ‘merger enforcement has been too lax over the past 25 years’.<sup>24</sup> Another common finding is that market structure is important in determining outcomes. Broadly speaking, mergers in oligopolistic markets (with only 3 or 4 remaining firms) are significantly more likely to lead to higher prices and reduced output post-merger. While subsequent new entrants

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<sup>17</sup> D Andrews and D Hansell, ‘[Productivity-Enhancing Labour Reallocation in Australia](#)’, The Treasury, Australian Government, 2019, Working Paper No 2019-06, accessed 28 October 2023; D Andrews, J Hambur, D Hansell and D Wheeler, ‘[Reaching for the Stars: Australian Firms and the Global Productivity Frontier](#)’, The Treasury, Australian Government, 2022, Working Paper No 2022-01, ISBN 978-1-925832-41-9, accessed 28 October 2023; Productivity Commission, *5-year Productivity Inquiry: Advancing Prosperity*, Australian Government, 2023.

<sup>18</sup> I Day, Z Duretto, P Hartigan and J Hambur, ‘[Competition in Australia and its impact on productivity growth](#)’, The Treasury, Australian Government, 2020, accessed 28 October 2023.

<sup>19</sup> D Andrews, J Hambur, D Hansell and D Wheeler, ‘[Reaching for the Stars: Australian Firms and the Global Productivity Frontier](#)’, The Treasury, Australian Government, 2022, Working Paper No 2022-01, ISBN 978-1-925832-41-9, accessed 28 October 2023.

<sup>20</sup> OECD, *OECD Economic Surveys: Australia 2023*, 2023, p 57, accessed 28 October 2023.

<sup>21</sup> International Monetary Fund, *Rising Corporate Market Power: Emerging Policy Issues*, Staff Discussion Notes, 2021, ISBN 9781513512082/2617-6750, accessed 28 October 2023.

<sup>22</sup> See further, Background Note: Economic literature relevant to mergers <https://treasury.gov.au/review/competition-review-2023>

<sup>23</sup> In the United States manufacturing industry: B Blonigen and J Pierce, ‘[Evidence for the Effects of Mergers on Market Power and Efficiency](#)’, Finance and Economics Discussion Series 2016-082, Board of Governors of the Federal Reserve System, 2016, <https://doi.org/10.17016/FEDS.2016.082>, accessed 27 October 2023.

<sup>24</sup> C Shapiro, ‘[Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets](#)’, 2019, *Journal of Economic Perspectives*, 33 (3): 69-93. See also J Kwoka, ‘[Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice](#)’, Northwestern University, 2019, <http://dx.doi.org/10.2139/ssrn.3332641>, accessed 28 October 2023. Mergers may also have non-price effects – out of 26 studies of non-price effects, only 10 showed benefits to consumers arising from mergers: J Kwoka and S Kilpatrick, ‘[Non-price effects of Mergers: Issues and Evidence](#)’, *The Antitrust Bulletin*, 2018, 63(2), <https://doi.org/10.1177/0003603X18771756>.

or existing players could, in theory, mitigate the impact of an anti-competitive merger on a market's structure, it could take years or may not happen at all.<sup>25</sup>

While none of the above studies focus on Australia, their insights are relevant in considering the effectiveness of Australia's merger control regime in promoting competition that enhances the welfare of Australians, given its broadly comparable features.

Australia is not alone in considering reforms to its merger control regime.<sup>26</sup> The United States (US), Canada, the European Union (EU), the United Kingdom (UK) and South Korea are all conducting or have recently completed significant reviews or reforms. While Australia is unusual in not having mandatory notification (one of only three countries in the OECD),<sup>27</sup> other jurisdictions are grappling with similar issues to Australia. These include more concentrated markets, industries with one or more entrenched or dominant firms, serial or creeping acquisitions, acquisitions by digital platforms, common ownership of minority interests in competing firms and interlocking directorships. The OECD has recently recommended, in the context of medium-term priorities to boost living standards, that Australia consider introducing pre-merger notification, given indicators of competitive intensity in product markets have weakened.<sup>28</sup>

## Effectiveness of Australia's merger control test

### Forward-looking test

To determine whether a merger is likely to substantially lessen competition, merger assessment under section 50 requires a comparison of the future with and without the merger.<sup>29</sup> The ACCC is concerned that the forward-looking test combined with a judicial enforcement model is 'skewed towards clearance'.<sup>30</sup>

The OECD notes acquisitions of nascent firms, as a particular example, 'constitute a whole category of acquisitions of young firms with products whose competitive significance remains highly uncertain' and therefore challenging to assess within the framework of the forward-looking test.<sup>31</sup>

### Judicial enforcement model

The ACCC has raised concerns about the difficulties of proving a case in a judicial enforcement model. A judicial enforcement model requires the competition authority or a third party to take legal action and prove an alleged breach of the law in a court on the balance of probabilities.

In adversarial court proceedings, the evidentiary burden is on the party bringing the action, and findings of fact and evidence may be contested between the parties.

For example, in *Pacific National*, the Full Court accepted that while there would be increased barriers to entry as a result of the acquisition, there was a lack of evidence of new entry within the relevant timeframe (five years). As the competitive constraints facing Pacific National in the factual and

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<sup>25</sup> As an illustrative example, see A Collard-Wexler, '[Mergers and Sunk Costs: An Application to the Ready-Mix Concrete Industry](#)', *American Economic Journal: Microeconomics*, 2014, 6(4): 407-447, doi:10.1257/mic.6.4.407 - A study of the US concrete industry which showed that an entrant typically took 9-10 years to respond to a merger that had resulted in the market becoming a monopoly.

<sup>26</sup> For a historical discussion of previous proposals relating to Australia's merger review process, see Appendix C.

<sup>27</sup> OECD, [OECD Competition Trends 2021 – Volume II: Global Merger Control](#), 2021, p 12, accessed 31 October 2023; OECD, [OECD Economic Surveys: Australia 2023](#), 2023, p 57, accessed 28 October 2023.

<sup>28</sup> OECD, [OECD Economic Surveys: Australia 2023](#), 2023, p 60, accessed 28 October 2023.

<sup>29</sup> *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77, [103].

<sup>30</sup> ACCC, Outline to Treasury: ACCC's proposals for merger reform, 2023, p 7.

<sup>31</sup> OECD, [OECD Background Note: Start-ups, killer acquisitions and merger control](#), 2022, p 9, accessed 29 October 2023.

counterfactual were found to be the same, the structural changes in the market were not sufficient to find a substantial lessening of competition.

### **Weight placed on evidence**

The ACCC argues that ‘the weight placed on the evidence of the merger parties’ senior executives’<sup>32</sup> is an important factor explaining why the mergers test is ‘skewed towards clearance’:

the tribunal and the courts appear to give greater weight to evidence from the parties to the transaction who ... have a vested interest in the acquisition proceeding, rather than from the evidence from third party witnesses.<sup>33</sup>

In *Vodafone v ACCC*, the court emphasised that the ACCC was not the one making the relevant commercial decisions. Similarly, in *Sea Swift*, the Tribunal preferred the evidence of Toll’s executives to the ‘theoretically based speculation by the ACCC as to what Toll or some other person might do in the circumstances’.

However, Samuel, King and Cao argue the ACCC’s lack of success in proving in court that a merger is likely to substantially lessen competition is due to the ACCC’s tendency to rely on theoretical economic arguments.<sup>34</sup>

### **Reluctance of third parties to give evidence**

Evidence from competitors, customers, suppliers and other third parties is important in demonstrating the likely competitive effect of a merger. For example, third party evidence on market entry – and its credibility – significantly influenced the *Pacific National* case.<sup>35</sup> However, third parties can be reluctant to engage in the review process or give evidence in court because of concerns about time, cost, confidential information,<sup>36</sup> and/or possible retribution and adverse consequences. Such concerns might arise because the potential merged firm is a supplier, customer or competitor. The firm with relevant evidence may be worried that their interests might be harmed as punishment for their cooperation with the ACCC.

## **Effectiveness of Australia’s merger notification and assessment process**

The ACCC has raised concerns that Australia’s voluntary system of merger notification and assessment is not effective in preventing accrual of market power by firms over time.<sup>37</sup>

Concerns with the process raised by the ACCC include parties notifying but threatening to complete before the ACCC has completed its review, failing to notify, and/or providing insufficient or inaccurate information, which could all impede the ACCC’s ability to assess and successfully challenge mergers which raise competition concerns.

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<sup>32</sup> ACCC, *Outline to Treasury: ACCC’s proposals for merger reform*, 2023, p 7.

<sup>33</sup> ACCC, *Digital Platforms Inquiry - Final Report*, ACCC, Australian Government, 2019, p 108, accessed 29 October 2023.

<sup>34</sup> H Cao, S King, and G Samuel, ‘Contested mergers and the ACCC’s proposed merger reforms’, *Australian Business Law Review*, 2022, 5(34), p 46.

<sup>35</sup> *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77.

<sup>36</sup> OECD, *OECD Background Note: Economic analysis in merger investigations*, 2020, pp 24, 45-46, accessed 29 October 2023; OECD, *Investigative Powers in Practice - Breakout session 2: Requests for information: Limits and Effectiveness*, 2018, pp 5, 9, accessed 29 October 2023.

<sup>37</sup> ACCC, *Outline to Treasury: ACCC’s proposals for merger reform*, 2023.

## Completing or threatening to complete transactions before the ACCC has finalised its review

The ACCC has raised concerns that:

An increasing number of merger parties threaten to complete the transaction prior to the conclusion of the ACCC's review and/or put pressure on the timing of the review, which creates substantial inefficiencies and compromises the effectiveness of the informal merger review process.<sup>38</sup>

If merger parties attempt to complete their transaction before the ACCC has completed its review, the ACCC may commence court proceedings in which it seeks an injunction to stop or delay the merger (see Box 1). Injunctive relief is at the Court's discretion and if unsuccessful, the transaction may complete before the end of the ACCC's review.

Court proceedings are also time and resource intensive – placing greater demands on the ACCC, the impact of which may be broader than the matter in hand – and come at significant public cost. Before it can commence proceedings, the ACCC must obtain evidence that is of sufficiently high standard to meet the 'model litigant' obligations that apply to all Commonwealth parties. This can be difficult to do, particularly if the ACCC is relying on merger parties to provide complete and accurate information regarding the transaction, market structure and potential competitive effects.

The ACCC may also try to negotiate 'hold separate' undertakings to preserve the pre-merger status quo while it completes its review. However, merger parties have discretion about whether to offer an undertaking, and on what terms.

Failing this, it is difficult to use remedies to restore the status quo once a merger has been completed, even if a court subsequently finds it substantially lessened competition. Time limits apply to seeking remedies, and they can become harder to implement the more time has passed since the transaction.<sup>39</sup>

### Box 1: Virtus' proposed acquisition of Adora

On 30 August 2021, Virtus provided a letter informing the ACCC of its intent to acquire Adora, another provider of IVF services. On 3 September 2021, the ACCC notified Virtus that it was not possible to confidentially pre-assess the proposed acquisition. After receiving a supplementary submission and meeting with Virtus' legal advisors, the ACCC commenced a public review on 21 September 2021. On 8 October 2021, Virtus informed the ACCC that it intended to proceed with the proposed acquisition on 15 October 2021, notwithstanding the ACCC had not completed its informal public review. The ACCC requested an undertaking not to complete before its indicative decision date of 25 November 2021, which Virtus refused to provide.<sup>40</sup>

The ACCC commenced proceedings on 13 October 2021, obtaining an interim injunction until the Federal Court granted an interlocutory injunction on 25 October 2021 preventing the parties from completing the proposed acquisition until proceedings had been finalised in the Federal Court.

The Federal Court noted:

the respondents were aware of the requirements of s 50 and the available processes for seeking formal or informal approval of the Adora acquisition from the ACCC, but chose not to seek approval. The evidence suggests that Healius would not have agreed to sell the Adora business subject to a condition that

<sup>38</sup> ACCC, *Outline to Treasury: ACCC's proposals for merger reform, 2023*, p 6.

<sup>39</sup> ACCC, *Outline to Treasury: ACCC's proposals for merger reform, 2023*, p 5.

<sup>40</sup> *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295, [47]-[59].



required ACCC approval and both parties took the risk of the ACCC opposing the acquisition and seeking injunctive relief.<sup>41</sup>

The merger parties subsequently decided not to proceed with the transaction before there was a final hearing on the substantive competition issues.

## Failure to notify mergers

The ACCC has raised concerns that ‘in some cases, merger parties are choosing not to notify the ACCC of relevant proposed acquisitions’.<sup>42</sup>

It is difficult to assess how frequently this occurs. The ACCC does not assess mergers that complete without prior notification under the informal merger regime. Instead, the ACCC may launch an enforcement investigation and possible litigation seeking penalties alleging contravention of section 50. The ACCC does not announce enforcement investigations, and cases where the ACCC has publicly identified a completed merger and taken action to undo it<sup>43</sup> or seek penalties<sup>44</sup> appear to be rare (although there can be challenges with unwinding a merger). However, some notable examples include:

- In 2023, the ACCC commenced investigation into several completed acquisitions over a six-year period by specialty pet retailer Petstock and is currently consulting on possible divestiture undertakings.
- In 2015, Primary Health Care did not notify the ACCC prior to its acquisition of pathology sites from Healthscope which were subsequently divested after the ACCC conducted a lengthy investigation post completion and raised competition concerns in the supply of community pathology services.
- In 1996, the Federal Court imposed a penalty of \$4.8 million on Pioneer Concrete for completing an acquisition in breach of section 50.<sup>45</sup>
- In 1988, the Trade Practices Commission sought an order for divestiture against Australian Meat Holdings but an undertaking to the court was considered more appropriate.

## Concerns that insufficient or inaccurate information is provided by merger parties

### Insufficient information

The ACCC has raised concerns that merger parties are providing insufficient upfront information to enable it to properly assess the likely competitive effects of a merger.<sup>46</sup>

Merger parties decide what information to provide to the ACCC at the commencement of a merger review, with the result that the quality and timeliness of the information available to the ACCC is often not sufficient and

<sup>41</sup> *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295, [45]. In another example, Qube notified the ACCC of its proposal to acquire Newcastle Agri Terminals on 8 September 2021 and completed the acquisition on 30 September 2021 before the ACCC had concluded its review. The ACCC ultimately decided not to pursue enforcement action.

<sup>42</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, p 6.

<sup>43</sup> The ACCC has 3 years from when merger takes place to commence proceedings under *Competition and Consumer Act 2010* (Cth) s 81.

<sup>44</sup> S King ‘The Australian Competition and Consumer Commission’s Proposed Merger Reforms’, 2021, <http://dx.doi.org/10.2139/ssrn.3948278>, p 2; *Competition and Consumer Act 2010* (Cth) s 77.

<sup>45</sup> *ACCC v Pioneer Concrete (Qld) Pty Ltd* (Federal Court of Australia, Lockhart J, 20 December 1996).

<sup>46</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, p 6.

generally requires multiple requests for additional information during a review.<sup>47</sup>

When the ACCC becomes aware of a proposed merger, it initially assesses whether a public review is required. This pre-assessment is based on information from the merger parties and other information before the ACCC. If the ACCC is satisfied there is a low risk of a substantial lessening of competition, it decides that a public review is not necessary (i.e. it ‘pre-assesses’ the proposed merger). However, the lack of mandatory upfront information requirements results in variation in what and how much information merger parties provide to the ACCC. This impacts the ACCC’s ability to conduct pre-assessment efficiently and effectively. Information asymmetry hinders effective implementation of a risk-based regulatory regime.

The ACCC has the power to issue information gathering notices under section 155 of the CCA if the ACCC has reason to believe that the recipient is capable of providing information, documents or evidence relating to a matter that may constitute a contravention of the CCA. Meeting this test requires some upfront information suggesting the merger does raise competition concerns. In addition, for persons carrying on a business in Australia but who are not present in Australia, such inquiries could be better facilitated by enabling section 155 notices to be served on their Australian representatives, whoever they might be.

By contrast, competition authorities in the US or Canada can issue a broad ‘second’ request for information about a merger which stops the clock – often for several months – until the information is provided by merger parties.

### **Inaccurate information**

An ACCC ex post review of six mergers raised concerns about inaccurate information provided by merger parties.<sup>48</sup>

While there are penalties for parties negligently providing false or misleading information, this requires the ACCC to seek a court order for penalties or refer the matter for prosecution.<sup>49</sup>

A lack of information can hamper the effectiveness of a risk-based regulatory approach. The asymmetry of information between competition authorities and merger proponents increases the challenge to ensure the review is appropriately targeting mergers more likely to harm competition. Improving a competition authority’s access to information can improve its ability to appropriately target their compliance activities according to risk – that is, focusing more on mergers that are likely to substantially lessen competition, while permitting the rest.

### **Serial acquisitions**

There have been long-standing concerns about serial or creeping acquisitions (Appendix B),<sup>50</sup> historically in the grocery sector, and more recently in sectors such as retail liquor and hardware.<sup>51</sup>

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<sup>47</sup> ACCC, *Outline to Treasury: ACCC’s proposals for merger reform*, 2023, p 6.

<sup>48</sup> The ACCC found that some mergers that were not opposed have resulted in significant price increases for segments or markets; the likelihood of new entry and expansion can be overstated (although as noted earlier this can take significant time in some markets); the removal of a vigorous and effective competitor can harm competition even when market shares appear relatively low; and third parties are poor assessors of their own countervailing power. ACCC, *Ex post review of ACCC merger decisions*, ACCC, Australian Government, 2022, p 6-7, accessed 29 October 2023.

<sup>49</sup> *Competition and Consumer Act 2010* (Cth) s 92 and ss 155(5), (6A), (8A); *Criminal Code 1995* (Cth) s 137.

<sup>50</sup> See OECD, *OECD Background Note: Serial Acquisitions and Industry Roll-ups*, 2023, pp7, 9-10, 13, accessed 31 October 2023.

<sup>51</sup> Australian Parliament Senate Select Committee on the Cost of Living, *Interim Report: Chapter 6 – Food and groceries*, Parliament of Australia, 2023, ISBN 978-1-76093-488-0, p 73 [6.20].

In 2011, the CCA was amended to assist in targeting creeping acquisitions. The 2015 Harper Competition Policy Review did not recommend further changes to address this type of acquisition.<sup>52</sup>

However, the ACCC considers this is still a concern,<sup>53</sup> and other jurisdictions have sought to address the issue of serial acquisitions, including by requiring notification in certain sectors or by businesses with substantial market power, or considering aggregate transactions within a certain timeframe.<sup>54</sup> In the UK, designated grocery retailers are required to notify the Competition and Markets Authority (CMA) of any acquisition of a grocery store with over 1,000 m<sup>2</sup> of retail space.<sup>55</sup>

### Acquisitions by large firms

Internationally and in Australia, concerns have been raised that the anti-competitive effects of acquisitions by large firms are not adequately captured by current competition laws.<sup>56</sup> These include a series of small acquisitions by large firms (known as ‘creeping or serial acquisitions’); acquisitions by large incumbents of nascent competitors (including ‘killer acquisitions’); and expansions into related markets, often digital platforms.

In some cases, these types of mergers may not be found to breach competition laws that prohibit mergers likely to ‘substantially’ lessen competition. For example, where the target firm is a new, innovative, or small firm it may be difficult to predict its future growth. In addition, the focus on an individual transaction does not capture the pattern and effect of the series of transactions overall. In jurisdictions with voluntary notification such as Australia, if merger parties consider the acquisition of a small firm is unlikely to substantially lessen competition, they may be unlikely to notify the acquisition to the competition authority.

### Nascent competitors

Concerns have been raised by the ACCC and internationally about the acquisition of nascent competitors by dominant firms. These firms have traditionally been considered too small to provide a meaningful competitive constraint, and in most cases, these transactions are too small to be captured by notification thresholds.<sup>57</sup> However, small firms are increasingly recognised as being important innovative disruptors.<sup>58</sup> The ACCC has raised concerns about acquisitions by digital platforms (Box 2).

## Box 2: Facebook’s acquisition of Instagram

One of the issues faced by competition authorities in considering mergers in highly dynamic markets is predicting how those markets and will evolve both with and without the merger. As noted by the ACCC:

Facebook’s acquisition of Instagram highlights an inherent challenge for competition agencies reviewing potential acquisitions by digital platforms: the need to speculate about changing digital habits by consumers, and the likelihood of firms to grow and develop to match those changing habits in the absence of a proposed acquisition.<sup>59</sup>

In 2012, Facebook acquired Instagram for USD 715 million. At the time of the merger, competition authorities such as the US Federal Trade Commission (FTC), the UK Office of Fair Trading (now the Competition and

<sup>52</sup> I Harper, P Anderson, S McCluskey, M O’Byrne AC, *Competition Policy Review – Final Report*, ‘Harper Review’, 2015, pp 321-323, accessed 29 October 2023. Defined as firms accumulating market power via a series of small acquisitions.

<sup>53</sup> ACCC, *Outline to Treasury: ACCC’s proposals for merger reform*, 2023, pp 6-7.

<sup>54</sup> OECD, *Secretariat background note: Investigations of Consummated and Non-Notifiable Mergers*, OECD Working Party No.3 on Co-operation and Enforcement, 2014, DAF/COMP/WP3(2014)1, pp 15-17, accessed 31 October 2023.

<sup>55</sup> Competition and Markets Authority (CMA), *Groceries Market Investigation (Controlled Land) Order 2010 (UK)*, art 11.

<sup>56</sup> See Appendix B.

<sup>57</sup> OECD, *OECD Background Note: Start-ups, killer acquisitions and merger control*, 2020, p 7, accessed 29 October 2023.

<sup>58</sup> OECD, *OECD Background Note: Start-ups, killer acquisitions and merger control*, 2020, p 1, accessed 29 October 2023.

<sup>59</sup> ACCC, *Digital Platforms Inquiry - Final Report*, ACCC, Australian Government, 2019, p 81, accessed 29 October 2023.

Markets Authority) and the European Commission did not raise competition concerns about the merger. The ACCC did not consider the merger.

In its 2019 Digital Platforms Inquiry report, the ACCC considered that:

in acquiring Instagram, Facebook eliminated a potential competitor. At the time of the acquisition, Instagram was primarily a photo-sharing app, and did not sell advertising inventory. Following the purchase, however, Facebook developed Instagram into a broader social media platform, with the ability for users to share information and photos, to message other users, and to now sell advertising inventory. While... it is difficult to determine how Instagram would have developed in the absence of its acquisition by Facebook, Instagram had at least the potential to develop into an effective competitor...

In 2019, the UK CMA published an independent ex post analysis of mergers including Facebook/Instagram which found that the original assessment ‘underestimated Instagram’s potential to grow into a significant competitive force as a social network’ and that ‘the acquisition of Instagram has provided a competitive advantage to the merged entity ... which has resulted in unmatched growth’.<sup>60</sup>

In 2020, the US FTC took action against Facebook for allegedly engaging in a years-long course of anti-competitive conduct to eliminate threats to its personal social networking monopoly, including through its acquisition of Instagram. The complaint cited Facebook CEO Mark Zuckerberg’s view, expressed in a 2008 email, that “it is better to buy than compete”, and message to a colleague the day Facebook announced the acquisition acknowledging Instagram was “our threat” and that “[o]ne thing about startups... is you can often acquire them.”<sup>61</sup>

### **Killer acquisitions**

Acquisitions of nascent competitors can substantially lessen competition when large companies acquire smaller competitors and discontinue development of the target’s product/innovation – so-called ‘killer acquisitions’. This can be difficult to prove for a single acquisition. The OECD notes this has been of concern in the technological, chemical and pharmaceutical sectors. In the US pharmaceutical sector, it has been estimated almost 6 per cent of all acquisitions of firms with drug projects in development are killer acquisitions, which, if correct, would amount to around 50 acquisitions each year.<sup>62</sup>

### **Large firms expanding into related markets**

The ACCC argues that, under the current substantial lessening of competition test, it may be difficult to stop acquisitions that lead to a dominant firm extending their market power into related or adjacent markets.<sup>63</sup> This has been raised as a particular concern in digital platform markets, given the rapid expansion of large digital platforms across a range of services.<sup>64</sup> However, the ACCC’s view was that this issue should be addressed as part of the consideration of any industry-wide merger reform.

<sup>60</sup> E Argentesi, P Buccirossi, E Calvano, T Duso, A Marrazzo and S Nava, [Ex-post assessment of Merger Control Decisions in Digital Markets - Final Report](#), Lear Economics Consultancy, 2019, report to the UK Competition and Markets Authority, accessed 29 October 2023.

<sup>61</sup> [Federal Trade Commission v Facebook Inc](#), Complaint for Injunctive and other Equitable Relief, DC Cir 1:20-cv-03590-JEB, Document 51 (redacted), filed 13 January 2021, p 2; US FTC, [FTC Sues Facebook for Illegal Monopolizations](#), United States Government [FTC Media Release], 9 December 2020, accessed 29 October 2023.

<sup>62</sup> C Cunningham, F Ederer and S Ma, ‘Killer Acquisitions’, *Journal of Political Economy*, 2019, 129(3):649-702, <http://dx.doi.org/10.2139/ssrn.3241707>. As cited in OECD, [OECD Background Note: Start-ups, killer acquisitions and merger control](#), 2020, pp 13-14, accessed 29 October 2023.

<sup>63</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, pp 6-7.

<sup>64</sup> ACCC, [Digital Platform Services Inquiry 2020-25: September 2022 interim report – Regulatory reform](#), ACCC, Australian Government, 2020, pp 39-40, accessed 29 October 2023.

## Minority interests and interlocking directorships

Acquisitions of minority interests that result in control or influence over competing firms may change incentives for firms to increase prices or increase the risk of commercially sensitive information being shared amongst rivals to facilitate collusion.<sup>65</sup> With the increase in assets under management by private equity firms and other investors, the issue of whether acquisitions which result in commonly owned, cross owned or managed minority interests may dampen competition has been considered by the OECD, in the EU and US.<sup>66</sup> Recent enforcement action has also been taken in the US to unwind instances of directors simultaneously serving on the boards of competitors.<sup>67</sup>

## Cross-border mergers

International cross-border merger transactions are increasingly important. Cross-border mergers are estimated to be around 30 percent of the total number and 37 percent of the total volume of acquisitions around the world in recent years.<sup>68</sup>

The ACCC has commented that merger parties may not notify it of global mergers in a timely way.<sup>69</sup> For example, the ACCC was not notified of Facebook/Meta's acquisition of Giphy prior to completion of the transaction.<sup>70</sup> Data limitations mean it is difficult to assess how frequently this occurs. The ACCC is also concerned about its ability to block global transactions.<sup>71</sup>

Section 50A of the CCA deals with mergers occurring outside Australia, but which have competition effects in Australia. However, section 50 is broad enough to cover most anti-competitive mergers producing anti-competitive effects in Australia, so section 50A has been little, if ever, used.

## Post-merger evaluation

Periodic evaluation of the effectiveness and impact of a merger regime, including post-merger evaluation, is important to ensure policy settings remain appropriate for the times. The OECD recommends periodic review of merger laws and practices on a regular basis to seek improvement and convergence towards recognised best practices.<sup>72</sup> Indeed, the ACCC recently conducted an ex post review of ACCC merger decisions to 'inform and improve [the ACCC's] merger investigative processes, investigation efficiency and [its] decisions'.<sup>73</sup> However, the ACCC's ability to conduct such ex post

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<sup>65</sup> OECD, *OECD Background Note: Common Ownership by Institutional Investors and its Impact on Competition*, 2017, accessed 31 October 2023, pp 17-21.

<sup>66</sup> OECD, *OECD Background Note: Common Ownership by Institutional Investors and its Impact on Competition*, 2017, accessed 31 October 2023; F Thépot, F Hugon and M Luinaud, '*Interlocking Directorates and Anticompetitive risks: An Enforcement Gap in Europe?*', *Concurrences N° 1-2016*, 2016. Partial ownership or minority interests are highlighted in one of the 13 guidelines in the US Department of Justice and Federal Trade Commission's recent draft merger guidelines: Department of Justice and Federal Trade Commission, '*2023 Draft Merger Guidelines*', 2023, accessed 31 October 2023. The OECD also previously considered issues relating to minority shareholdings and interlocking directorates in 2008: OECD, *Antitrust issues involving minority shareholding and interlocking directorates*, 2008.

<sup>67</sup> Department of Justice, *Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates* [media release], Department of Justice, 9 March 2023, accessed 31 October 2023.

<sup>68</sup> I Erel, Y Jang and M Weisbach, 'Cross-Border Mergers and Acquisitions', Fisher College of Business, Working Paper No. 2022-03-011, Charles A. Dice Center, Working Paper No. 2022-11, 2022, Research Paper Forthcoming, <http://dx.doi.org/10.2139/ssrn.4253979>.

<sup>69</sup> ACCC, Outline to Treasury: ACCC's proposals for merger reform, 2023, p 6.

<sup>70</sup> Natasha Gillezeau, '*ACCC to investigate Facebook's acquisition of Giphy*', *Australian Financial Review*, 8 June 2020, accessed 29 October 2023. After investigation, the UK CMA concluded that the completed acquisition would be likely to result in a substantial lessening of competition and ordered Facebook to divest Giphy to Shutterstock: UK CMA '*Facebook, Inc (now Meta Platforms, Inc) / Giphy, Inc merger inquiry*', 12 June 2020, accessed 29 October 2023.

<sup>71</sup> ACCC, Outline to Treasury: ACCC's proposals for merger reform, 2023, p 7.

<sup>72</sup> The OECD recommends periodic review of merger control regimes: OECD, *Recommendation of the Council on Merger Review*, 2005, OECD/LEGAL/0333, page 6, accessed 2 November 2023.

<sup>73</sup> ACCC, *Ex post review of ACCC merger decisions*, ACCC, Australian Government, 2022, p 2, accessed 2 November 2023.

evaluations is limited to public information or information otherwise before it, impeding its effectiveness.

Issues include:

- whether merger parties should be required to report on the outcomes of mergers and provide data to the ACCC, which enables the ACCC to assess whether efficiency claims made at the time of the merger clearance decision have been realised; and
- whether the ACCC should have enhanced information-gathering powers to support periodic evaluation of the merger regime and post-merger impact evaluation.

### **Consultation questions**

3. *What concerns about the current system should be considered in the design of a new regime?*
4. *What role, if any, have mergers played in reducing competitive pressures in Australia?*
5. *Is Australia's voluntary merger control regime effective at ensuring anti-competitive mergers are blocked while allowing pro-competitive or benign mergers proceed?*
6. *Is Australia's merger regime 'skewed towards clearance'? Would it be more appropriate for the framework to skew towards blocking mergers where there is sufficient uncertainty about competition impacts?*
7. *Should there be periodic evaluation of the effectiveness of Australia's merger regime, including post-merger impact evaluation? If so, how should the ACCC obtain the necessary information?*
8. *Is there evidence of acquisitions by large firms (such as serial or creeping acquisitions, acquisitions of nascent competitors, 'killer acquisitions', and acquisitions by digital platforms) having anti-competitive effects in Australia?*
9. *Should Australia's merger regime focus more on acquisitions by firms with market power, and/or the effect of the acquisitions on the overall structure of the market?*
10. *Should the ACCC have greater powers to address international cross-border mergers that affect competition in Australia? Are any changes required to the CCA to allow the ACCC to exercise its existing powers more effectively? Should section 50A be repealed, since it is seldom used?*
11. *Are there other issues with the current regime that should be addressed?*

# Foreign investment and competition approval processes

The foreign investment framework requires foreign investors to notify the Treasurer of proposed investments, including acquisitions of Australian businesses, that meet certain criteria. The Treasurer, advised by the Foreign Investment Review Board (FIRB), assesses these acquisitions to ensure they are not contrary to the national interest.

Competition is one of a number of factors considered in the Treasurer's assessment. Transactions that are being assessed under the foreign investment framework are prohibited from being completed before the Treasurer has made a decision. This means that, in practice, a sizeable proportion of the proposed mergers considered by the ACCC – almost two-thirds in 2022-23 – are effectively subject to mandatory notification and suspension requirements imposed via the foreign investment framework.<sup>74</sup>

If the Government were to move to a formal merger regime, it would be important to ensure that the foreign investment and competition approval regimes worked effectively together. A referral mechanism from the FIRB to the ACCC may be required.

## **Consultation questions**

12. *Are there any issues arising for foreign investors from the interaction of the foreign investment and competition approval processes?*

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<sup>74</sup> Data provided by the ACCC shows that for merger assessments commenced in 2022-23, 233 of the 366 mergers considered by the ACCC were subject to foreign investment approval. The ACCC became aware of 186 of these 233 matters exclusively via FIRB referral. 11 of the matters referred by FIRB were returned to FIRB on the basis that the ACCC did not view referral as necessary.

# Key elements of a merger control regime

Broadly, elements of merger control regimes can be grouped thematically into three categories: notification, assessment and enforcement.

## Notification

### Voluntary or mandatory notification

A merger control regime could provide for voluntary notification of proposed mergers – as is currently the case in Australia, New Zealand and the UK – or it could require merger parties to notify the competition authority – as is the case in the US and Europe.

If notification is voluntary, merger parties would choose to notify a proposed merger to the ACCC. Confidential pre-notification approaches to the ACCC could facilitate self-assessment. Voluntary regimes can reduce the regulatory burden for proposed mergers which are unlikely to raise competition concerns, particularly as the ACCC provides guidance on when merger parties should notify. However, these regimes have a higher risk of proposed mergers that may raise competition concerns not being notified to the ACCC.

A mandatory notification regime would require mergers to be notified to the ACCC if certain predefined criteria or thresholds are met.

Clear notification thresholds can provide certainty to businesses about when to notify the competition authority and reduce the risk of proposed mergers that may raise competition concerns not being notified. However, mandatory notification can impose regulatory burdens on mergers that do not raise competition concerns. Penalties for failing to notify would also need to be set at a level to ensure compliance (discussed below).

### Notification thresholds

Designing thresholds for notification can be difficult.<sup>75</sup> If thresholds are set too high, a number of anti-competitive mergers may evade merger control scrutiny.<sup>76</sup> If thresholds are set too low, there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and authorities. Thresholds therefore need to reflect the relative risk weighting of these costs.

However, whatever levels they are set at, thresholds do need to be clear to reduce the costs of uncertainty and strategic game-playing. Turnover and asset values are commonly used measures, market shares less so.<sup>77</sup> The ACCC has suggested:

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<sup>75</sup> See OECD, *Secretariat background Note: Local Nexus and Jurisdictional Thresholds in Merger Control*, OECD Working Party No.3 on Co-operation and Enforcement, 2016, DAF/COMP/WP3(2016)4/REV1, p 6.

<sup>76</sup> J Kepler, V Naiker and C Stewart, 'Stealth Acquisitions and Product Market Competition' *Journal of Finance*, 2021, forthcoming, <http://dx.doi.org/10.2139/ssrn.3733994> provides evidence suggesting that, across all industries, a disproportionate number of deals fall just below *Hart Scott Rodino Act* reporting thresholds.

<sup>77</sup> OECD, *Secretariat background Note: Local Nexus and Jurisdictional Thresholds in Merger Control*, OECD Working Party No.3 on Co-operation and Enforcement, 2016, DAF/COMP/WP3(2016)4/REV1, p 6. Turnover and asset value are generally preferred by the OECD, as they allow authorities to target transactions involving parties above a certain economic size and with a sufficient local nexus. Market share may be a better predictor than other thresholds for whether a transaction is likely to raise competition concerns but could impose significant costs on merging parties to calculate. The OECD also recommends competition authorities should only review mergers which raise competition concerns in their territory.



[the threshold] could be set with reference to the value of the proposed transaction, the size of the business being acquired globally and/or within Australia, or a combination of these factors. Based on our preliminary analysis of past ACCC informal public reviews, an acquirer or target turnover threshold of \$400 million or global transaction value threshold of \$35 million could be appropriate.<sup>78</sup>

For cross-border mergers, jurisdictions typically also outline a threshold level of domestic turnover that triggers notification, reflective of OECD best practice to only investigate mergers that pose competition concerns within that jurisdiction.

The actual design of mandatory notification thresholds is an implementation issue that would only need to be addressed if the Government decides to adopt a mandatory notification regime.

### Which mergers should be notified?

In some jurisdictions, only mergers involving acquisition of shares above a certain percentage threshold or conferring a certain level of control (such as voting rights, ability to appoint directors) may need to be notified. For example, in the US, acquisitions of stakes of 10% or less that are solely for the purpose of investment are exempt from notification.<sup>79</sup> In other jurisdictions, such as the UK, the legislation may not specify a percentage stake and the competition authority may review a broad range of transactions provided it gives the acquirer a degree of control or the ability to exercise material influence over the target.<sup>80</sup> The issue of which mergers would need to be notified would need to be addressed as an implementation issue, particularly if mandatory notification were to be adopted.

### Ability to deal with non-notified mergers

Mergers of all sizes are potentially capable of raising competition concerns. While ideally mandatory notification thresholds would ensure all proposed mergers raising competition concerns are notified to competition authorities, in practice, mergers below the threshold may raise concerns from time to time. Both voluntary and mandatory notification regimes can allow for competition authorities to take action against mergers that are not otherwise required to be notified. The ACCC currently may investigate all mergers, even if they are not notified.

For example, the UK merger control regime provides for voluntary notification of proposed mergers, along with the power for the UK CMA to impose 'Interim Measures' to prevent or halt pre-emptive action, such as integration of the acquirer's and target's businesses, within 4 months of completion of a merger.<sup>81</sup> The CMA considers that 'it is essential to the functioning of the UK's voluntary, non-suspensory merger regime that Interim Measures to preserve the pre-merger competitive structure of markets should be effective'.<sup>82</sup> Once imposed by the CMA, the Interim Measures continue until the CMA has concluded its investigation, subject to any variation, release or revocation by the CMA.<sup>83</sup>

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<sup>78</sup> ACCC, *Outline to Treasury: ACCC's proposals for merger reform*, 2023, p 8.

<sup>79</sup> *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 USC § 18a.

<sup>80</sup> CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure*, CMA, Government of the United Kingdom, 2022, pp 19-22, accessed 2 November 2023.

<sup>81</sup> CMA, *Interim measures in merger investigations*, CMA, Government of the United Kingdom, 2021; *Enterprise Act 2002* (UK) s 24.

<sup>82</sup> CMA, *Interim measures in merger investigations*, CMA, Government of the United Kingdom, 2021, p 3, accessed 2 November 2023.

<sup>83</sup> CMA, *Interim measures in merger investigations*, CMA, Government of the United Kingdom, 2021, p 7, accessed 2 November 2023.

In merger control regimes such as the US and Canada where, to block a merger, competition authorities must prove it is anti-competitive in court (US) or a tribunal (Canada), these authorities retain the discretion to take mergers falling below the notification threshold to court. That is, the legislative prohibition on anti-competitive mergers applies to all mergers, whether above or below the mandatory notification threshold.

In some European merger control regimes, such as Norway, Sweden and Ireland, where competition authorities themselves may block anti-competitive mergers (subject to review by the courts), competition authorities have the power to 'call-in' or request notification for mergers below mandatory notification thresholds.

If notification was voluntary, to incentivise notification of mergers where competition concerns may arise, the ACCC could 'call-in' or require notification of proposed mergers where the ACCC has reason to believe the merger may be likely to substantially lessen competition, but which have not been voluntarily notified. This could involve requiring merger parties to provide information about the merger to the ACCC and/or hold the target's and acquirer's businesses separate while the ACCC considers that information, similar to the regime in the UK.

If notification was mandatory above a threshold, mergers below the threshold which raise competition concerns could be similarly 'called-in' or required to notify if certain conditions are met. This could be where the ACCC has reason to believe that competition concerns may arise (as proposed by the ACCC) or reserved for specific firms or sectors where competition issues have been identified (as in Germany, Norway and Sweden). While such a feature helps ensure that all proposed mergers potentially of concern are subject to a competition assessment, it potentially undermines a claimed benefit of mandatory notification, that is, certainty for merger parties about when they need to notify competition authorities.

An example of a call-in power that currently exists in an Australian context is the Treasurer's ability to call in investments for review that are 'reviewable national security actions' which are not otherwise notified to the FIRB. If an action is called in for review, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) allows the Treasurer to issue a no objection notification, impose conditions, prohibit the action or require divestment.<sup>84</sup>

### Upfront information requirements

For an effective and low-cost merger regime, merger parties need to provide competition authorities with sufficient upfront information to undertake a competition assessment when notifying. Information is crucial to the speedy processing of low-risk mergers and the targeting of mergers that pose higher risks of anti-competitive outcomes for the community. Competition authorities may also need to request further information from merger parties as issues become clearer.

Issues include:

- who would set upfront information requirements; for example, the ACCC could approve a form setting out these requirements, similar to the current merger authorisation application form. Alternatively, the ACCC could issue guidance (similar to the UK) or it could be given the power to set out information requirements in regulation (similar to the US);

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<sup>84</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 66A; Foreign Investment Review Board (FIRB), [Guidance Note 8 – National Security](#), FIRB, Australian Government, 1 July 2023, p 11; [Explanatory Memorandum](#), Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (Cth), para 1.57.

- what checks and balances could be incorporated into the process for setting information requirements to ensure that they are not overly onerous;
- how the ACCC can ensure information received is accurate and what penalties should apply for providing misleading information; for example, senior executives or directors of merger parties could certify or attest that the information provided is true, accurate and correct; and
- how merger parties would be able to provide additional information to the ACCC as its assessment proceeds, including to respond to any competition concerns raised.

### Filing fees

Many overseas merger control regimes charge fees for notifying proposed mergers to competition authorities,<sup>85</sup> with the European Commission being a notable exception.<sup>86</sup> Filing fees are typically charged at a uniform flat rate or a variable rate based on case specific metrics including turnover, transaction or asset value, market share, complexity or the quantity of services required.<sup>87</sup>

Currently, the average cost for an informal public merger review by the ACCC that does not proceed to litigation is in the region of \$300,000 to \$350,000. Under cost recovery principles, where an identifiable group creates extra or specific demand for a specific regulatory activity, they should generally be charged for the activity – that is, fees should reflect the resources the competition authority needs to efficiently carry out the regulatory work associated with investigating and approving mergers.<sup>88</sup> The main reason cited by competition authorities for not charging fees is that merger control is seen as a public service that ought to be funded by general tax revenue rather than burdening the merger parties.<sup>89</sup> While there are no fees for the informal merger reviews (which make up the vast majority of mergers considered by the ACCC), a \$25,000 fee currently applies for merger authorisation applications.<sup>90</sup>

### Suspension

Suspension prevents merger parties from completing their transaction for a specified period of time, to allow the ACCC to conduct a review of the proposed merger. Issues include:

- how the suspension is implemented;
  - for instance, the competition authority may be empowered to refuse to consider a proposed merger unless merger parties undertake not to complete for a period of time;
  - alternatively, merger parties could be legislatively prohibited from completing a transaction for a specified period of time, consistent with most mandatory notification regimes across the OECD (Appendix D);

<sup>85</sup> OECD, *OECD Competition Trends 2021 – Volume II: Global Merger Control*, 2021, pp 2-13 and figure 2.3, accessed 31 October 2023.

<sup>86</sup> The European Commission rejected a recommendation by the European Court of Auditors in 2020 to consider introducing filing fees: European Court of Auditors, *Special Report: The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight*, p 51, accessed 31 October 2023.

<sup>87</sup> International Competition Network (ICN), *Merger Notification and Filing Fees: A Report of the International Competition Network*, 2005, p 7, accessed 31 October 2023.

<sup>88</sup> Department of Finance, *Australian Government Charging Framework: Cost Recovery Policy*, Department of Finance, Australian Government, 2023, accessed 2 November 2023.

<sup>89</sup> ICN, *Merger Notification and Filing Fees: A Report of the International Competition Network*, 2005, p 2, accessed 31 October 2023.

<sup>90</sup> *Competition and Consumer Regulations 2010 (Cth)*, sch 1B item 2.

- when a suspensory period should commence (for example, when information requirements are satisfied);
- how long mergers should be suspended for – that is, how long the ACCC would have to complete its assessment;
  - unduly short periods could undermine the ACCC’s ability to adequately assess a proposed merger. Unduly long periods could result in a proposed (and potentially competitively benign) merger not proceeding for commercial reasons;
  - in the OECD, most merger control regimes typically have two stages, with an initial ‘phase 1’ review which may be followed by a ‘phase 2’ review if there are competition concerns or if a remedy is proposed.<sup>91</sup> In general, jurisdictions have around 30 to 40 working days for phase 1 assessment and around 30 days to 5 months for phase 2. However, the overall assessment time can be longer because the clock only ‘starts’ in specified circumstances and may ‘stop’ for some time between phases 1 and 2 (Appendix D). The International Competition Network (ICN) recommends that initial review periods should be completed within 6 weeks and that extended review periods should be completed within 6 months;<sup>92</sup>
- what flexibility should exist for the suspensory period to be extended;
  - this could occur where remedies are offered, where there are delays in responses to information requests, to allow the ACCC to request further information, or with the agreement of the merger parties;
- what should occur if timelines expire before the ACCC has completed its assessment – in several jurisdictions, the merger is deemed to be approved, but under Australia and New Zealand’s merger authorisation processes, the application is deemed to be denied; and
- what penalties should apply for breach of the suspensory obligation; and
  - in overseas merger regimes, taking steps to implement a merger prior to receiving approval, colloquially known as ‘gun jumping’, is generally subject to substantial penalties so as to deter this conduct. Penalties need to be sufficiently high to make it commercially uneconomic to be tempted to ‘gun jump’.

## Assessment

### Decision-maker – Competition authority or court

Broadly speaking, there are two approaches to merger control regimes. In a judicial enforcement model, the competition authority prosecutes the cases that it brings in an adversarial proceeding in a courtroom. In an administrative model, the competition authority investigates and adjudicates cases, typically with some form of separation between the investigators and the decision-maker.<sup>93</sup> Some jurisdictions adopt one model or the other and some adopt a combination of the two.

The ACCC proposes shifting Australia to an administrative model for merger proposals above the thresholds, voluntarily notified or otherwise called in, where clearance would be required before a

<sup>91</sup> OECD, *OECD Competition Trends 2022*, 2022, p 76, accessed 31 October 2023.

<sup>92</sup> ICN, *ICN Recommended Practices for Merger Notification and Review Procedures*, 2018, p 11, accessed 31 October 2023.

<sup>93</sup> F Jenny, ‘The institutional design of Competition Authorities: Debates and Trends’, *ESSEC Business School*, 2016, doi:10.2139/ssrn.2894893.

merger could proceed. This is similar to the current merger authorisation process in Australia. The ACCC's decision would, however, be reviewable by the Australian Competition Tribunal, and the Federal Court would provide judicial review. The ACCC would not have to take action in the Federal Court to block a notifiable merger.

### Procedural fairness

Administrative decision-making requires procedural fairness mechanisms. These could include (many of which are part of the current merger authorisation process):

- **Public notifications:** whether merger notifications (or a summary) should be public to provide sufficient information about the transaction for third parties to make submissions.
- **Opportunity to respond:** whether the ACCC would allow parties the opportunity to respond to concerns (for instance through providing a draft decision), and whether this would be left to the discretion of the ACCC or required by legislation.
- **Evidence:** whether merger parties (and potentially third parties) would have the right to access the information the ACCC relied on to make its decision, such as third-party submissions<sup>94</sup> and economic reports, or whether the release of such information would be at the ACCC's discretion.
- **Providing reasons for decision:** whether the ACCC would be required to publish its reasons or only provide them to parties.<sup>95</sup>
- **Timelines:** the timeframes that could apply to the proposed process (or to individual steps within it), where they would be set out and how they would be enforced.
- **Confidentiality:** how confidential information is protected, noting ACCC processes already exist.

### Test for the decision-maker to apply

#### 'Substantial lessening of competition' test

As noted above, section 50 prohibits acquisitions that are likely to have the effect of substantially lessening competition (see Appendix A for further information). The interpretation of the test in section 50 is guided by a list of factors in the legislation which the Federal Court must take into account.<sup>96</sup> The 'substantial lessening of competition' test is used across the CCA in various prohibitions against anti-competitive conduct.

#### 'Satisfaction' test

The merger authorisation process in Australia currently requires the decision-maker to be satisfied that the transaction is not likely to substantially lessen competition or that a net public benefit is likely. A similar 'satisfaction' test could be adopted, as is applied in the current clearance and authorisation

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<sup>94</sup> Subject to confidentiality claims by persons lodging submissions.

<sup>95</sup> Currently, the ACCC provides detailed reasons for its decisions on merger authorisations (given these decisions are reviewable by the Competition Tribunal). In informal public merger reviews, the ACCC only publishes a detailed summary of its reasons – known as a Public Competition Assessment (PCA), and even then, not in all cases, and usually not until some weeks after it announces its decision. The ACCC publishes a PCA for merger it opposes; for which enforceable undertakings are made; when requested by the parties; or when the ACCC considers the merger raises important issues. The ACCC aims to publish PCAs within 30 days, unless longer is needed because the matter is complex or becomes the subject of litigation; ACCC, [Merger Guidelines](#), ACCC, Australian Government, 2008, para 2.68 and 2.70.

<sup>96</sup> *Competition and Consumer Act 2010* (Cth) s 50(3).

process in New Zealand and was part of the voluntary formal clearance process that existed in Australia between 2007-17 (Appendix C).

The ACCC has proposed that notified proposed mergers would be cleared only if the ACCC, or the Tribunal on review, is satisfied that the merger is not likely to substantially lessen competition, with consideration of public benefits only if a merger cannot be cleared on competition grounds (discussed below). The ACCC argues that a satisfaction test is warranted because it:

...means that the risk of error is borne by the merger parties rather than the public. In the cases where this difference matters (for example where there is uncertainty or a number of possible future outcomes), the default position should be to leave the risk with the merger parties, not to put at risk the public interest in maintaining the state of competition into the future.<sup>97</sup>

In effect, this would shift the default position from allowing mergers to proceed where there is uncertainty to a position where, if there is sufficient uncertainty about the effect of a merger, it would not be cleared. One potential benefit of such a change is that it could encourage merger proponents to invest more in outlining the likely impact on competition given they are in a better position of having such information than the competition authority.

In general, there are trade-offs between the risks of false positives and false negatives in designing a merger test. A more lenient system will allow more anti-competitive mergers to proceed, ensuring that fewer competitively benign or pro-competitive mergers are not blocked. The converse will be true for a stricter system. Both allowing anti-competitive mergers and blocking pro-competitive mergers can lead to lower output, higher prices, lower quality and less innovation. However, allowing anti-competitive mergers means that merger parties benefit at the expense of consumers.

Requiring a decision-maker (judicial or administrative) to apply the precautionary principle, where there is a risk of serious or irreversible competitive harm,<sup>98</sup> could potentially achieve a similar effect of leaving the risk with the merger parties, rather than put the public interest at risk.

Internationally, an administrative 'clearance' system can require the competition agency to be *positively* satisfied as to the existence of certain facts before prohibiting a merger, as is the case in the UK.<sup>99</sup> Alternatively, an administrative 'clearance' system can require the applicant to *disprove* the existence of facts to satisfy the decision-maker (i.e. the applicant must demonstrate that their transaction will *not* be likely to substantially lessen competition). This approach is used in Australia's merger (and non-merger) authorisation process, and New Zealand's merger clearance and authorisation process.

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<sup>97</sup> ACCC, Outline to Treasury: ACCC's proposals for merger reform, 2023, p 9.

<sup>98</sup> The precautionary principle is applied in other areas of law, such as environmental law in Australia and internationally where there is a risk of serious or irreversible harm to the environment: Justice JM Jagot, 'Some thoughts about proof in competition cases', Judicial address, University of South Australia & ACCC Competition and Economics Law Workshop, 15 October 2021, accessed 29 October 2023.

<sup>99</sup> In the UK, the CMA must believe that a merger has resulted, or may be expected to result, in a substantial lessening of competition before deciding to remedy, mitigate or prevent it: *Enterprise Act 2002* (UK) ss 35, 36. Notably, the UK is less permissive of mergers as the CMA must refer a merger to a Phase II review if there is a realistic prospect of a substantial lessening of competition. This has an effect in practice, as merger parties may for commercial reasons offer remedies to avoid a Phase II review, or abandon the transaction at this point.

## **Amending the ‘substantial lessening of competition’ test to include acquisitions by firms with substantial market power**

Concerns about some highly concentrated markets (discussed earlier) raises the question of whether Australia’s merger control test should more explicitly consider market structure. Market structure can affect competitive pressures in that market.<sup>100</sup>

The ACCC proposes the prohibition against mergers that ‘substantially lessen competition’ should include mergers that ‘entrench, materially increase or materially extend a position of substantial market power’.<sup>101</sup> Other jurisdictions, notably the EU,<sup>102</sup> more explicitly consider market structure in their merger test (Appendix D).

The ACCC argues this change would ensure there is sufficient scrutiny of the impact of mergers on the structural features that promote competition, especially in concentrated markets as the impact on competition is more likely to be significant and long-lasting.<sup>103</sup>

Issues include:

- whether the current merger test impedes the ability for the ACCC to challenge anti-competitive mergers, and whether the ACCC’s proposals would address any limitations;
- whether the proposal might discourage innovation, by undermining the business model of small firms pioneering innovative products with a view to being bought out by a large firm better placed to bring their product to market;
- whether the ACCC’s proposal would have any unintended consequences, for example, prohibiting proposed mergers that would lead to efficiencies or impacting other provisions of the CCA; and
- whether any other proposals or the approach taken in any other jurisdiction should be considered.

## **Merger factors**

The ACCC argues the merger factors in section 50(3) should be amended to increase the focus on changes to market structure as a result of a merger.<sup>104</sup> The ACCC has proposed amending the merger factors to consider:

- changes in market structure as a result of the merger – for instance, ‘the height of barriers to entry and any increase in the height of barriers as a result of the merger’;
- whether the acquisition entrenches or extends a position of substantial market power;
  - this would be similar to Canadian competition law amendments in 2022, which require the Competition Tribunal to have regard to, among other things, ‘whether the merger or

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<sup>100</sup> For instance, there is international evidence that suggests that prices increase if there are only three or four major market participants post-merger: O Ashenfelter, D Hosken and M Weinberg, ‘Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers’, *Journal of Law and Economics*, 2014, 57(S3), doi/abs/10.1086/675862.

<sup>101</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, p 10.

<sup>102</sup> The European Commission must consider whether the merger can be expected significantly to impede effective competition, in particular through the creation or enhancement of a dominant position.

<sup>103</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, p 11.

<sup>104</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, p 11.

proposed merger would contribute to the entrenchment of the market position of leading incumbents’;<sup>105</sup>

- whether the acquisition is part of a series of acquisitions. This could be over a particular time period;<sup>106</sup>
  - this would help address creeping acquisitions as the current section 50 only refers to an ‘acquisition’ in the singular;
- the likelihood that the acquisition would result in the removal from the market of a potential competitor;
  - this would help address concerns about acquisitions by dominant firms, including digital platforms (Box 2);
- the nature and significance of assets, including data and technology, being acquired directly or through the body corporate;
  - this would apply economy-wide but would be particularly relevant to digital platforms.

Alternatively, Australia could remove the merger factors and instead revert to a simple substantive test (i.e. ‘substantial lessening of competition’ test), similar to the US and the UK. This would enable mergers to be assessed on competition criteria but not prescriptively identify which competition criteria should be taken into account. It may permit more flexible application of the law and a greater degree of economic analysis in merger decision-making.

Issues include:

- whether the proposed merger factors relating to creeping acquisitions and entrenching market power would be necessary if other ACCC proposals to address these issues (discussed below) were adopted;
- whether, if the other ACCC proposals to address these issues (discussed below) were not adopted, amending the merger factors as proposed would be beneficial;
- how concerns about the removal of potential competitors and creeping acquisitions could be assessed in practice – for instance, what time period is relevant, and how changes in market structure should be taken into account over that period;
- whether there are any other merger factors that should be included to deal with issues of common ownership of minority interests in competing firms and interlocking directorates; and
- whether there are any merger factors that should be removed or if the merger factors should be removed entirely.

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<sup>105</sup> ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, fn 13.

<sup>106</sup> The ACCC has proposed that this could be: “by requiring prior acquisitions by the firm within a specified period to be taken into account when assessing whether or not an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. A proposal along these lines was previously suggested by the Law Council of Australia when reforms to address creeping acquisitions were previously considered”: ACCC, ACCC Submission to the Australian House of Representatives Standing Committee on Economics inquiry into promoting economic dynamism, competition and business formation, 2023, [Submission 34](#), p 4, accessed 29 October 2023.



## Related or ancillary agreements

The ACCC proposes that the competitive effects of other related agreements between merger parties should be able to be taken into account in the assessment of the effect of a merger on competition under section 50 of the CCA.

Other agreements which are connected to a merger transaction may have effects on competition. For example, in *Pacific National*, the merger parties entered into agreements where Aurizon was, among other things, made the operator of the Brisbane Multi-User Terminal in a separate agreement from its agreement to acquire the Acacia Ridge Terminal, which affected assessment of the future without the merger.

The competitive effects of non-merger agreements can be considered under the prohibition in section 45 of the CCA.<sup>107</sup> Section 45(7) of the CCA prevents overlap with the prohibition against anti-competitive mergers in section 50. While the agreements may be considered in assessing the state of the market assumed when considering the future with the merger, the competitive effects of these other agreements must be considered separately from the section 50 substantial lessening of competition assessment.

In the EU, restrictions that are directly related to and necessary for the merger are deemed to be covered by the European Commission's decision on a transaction.<sup>108</sup> This includes agreements not to compete for a set period, licence agreements, and purchase and supply agreements.<sup>109</sup> While the European Commission is not obliged to assess and individually address such restraints, if an agreement is ancillary, it provides a level of comfort to the merger parties that the agreement will not be challenged under competition law.

## Public benefits

At present, merger authorisation allows for the consideration of public benefits. However, a question arises whether merger authorisation should be retained as a separate approach, or alternatively, if it could be abolished. If merger authorisation was abolished, a question arises whether a public benefit test should be retained, and if so, whether it should be a second-stage test.

The ACCC has proposed retaining a public benefit test:

If clearance was not granted on competition grounds, a second stage public benefit test could apply. This differs from the current merger authorisation test... but is important to preserve the integrity of the process.<sup>110</sup>

Further, the ACCC considers that:

...for public benefits to outweigh a substantial lessening of competition, they should be real, verifiable, significant and beyond the efficiencies that can already be taken into account as part of the competition assessment.<sup>111</sup>

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<sup>107</sup> *Competition and Consumer Act 2010* (Cth) s 45 prohibits contracts, arrangements or understandings that has the purpose, or would have or be likely to have the effect, of substantially lessening competition.

<sup>108</sup> *Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* 'EUMR', art 6(1)(b).

<sup>109</sup> European Commission, '[Commission Notice on restrictions directly related and necessary to concentrations](#)', 2005/C 56/03.

<sup>110</sup> ACCC, *Outline to Treasury: ACCC's proposals for merger reform*, 2023, p 9.

<sup>111</sup> ACCC, *Outline to Treasury: ACCC's proposals for merger reform*, 2023, p 11.

Public benefits have been relevant considerations in recent ACCC merger authorisations. For example, despite competition concerns, the ACCC recently authorised Brookfield's acquisition of Origin Energy on public benefit grounds as it would be likely to accelerate Australia's renewable energy transition.

## Consultation questions

13. *Should Australia introduce a mandatory notification regime, and what would be the key considerations for designing notification thresholds?*
14. *Should a merger regime include a 'call-in' power for mergers either falling below the notification threshold or not voluntarily notified which may raise competition concerns? If so, what should the criteria for exercising such a power be?*
15. *Should filing fees be introduced? How should they be set?*
16. *Should mergers be suspended for a period of time while they are reviewed?*
17. *Should Australia's merger control regime require the decision-maker to be satisfied that a proposed merger:*
  - *would be likely to substantially lessen competition before blocking it; or*
  - *would not be likely to substantially lessen competition before clearing it?*
18. *Should Australia's substantial lessening of competition test be amended to include acquisitions that 'entrench, materially increase or materially extend a position of substantial market power'?*
19. *Should the merger factors in section 50(3) be amended to increase the focus on changes to market structure as a result of a merger? Or should the merger factors be removed entirely?*
20. *Should a public benefit test be retained if a new merger control regime was introduced?*
21. *Should additional procedural fairness safeguards be introduced if Australia moved more towards an administrative merger control regime? If so, what?*

## Enforcement

### Effect of decision

Whether and what the ACCC decides depends on the design of the regime. If a clearance model is adopted using a 'satisfaction test', the ACCC could grant merger parties formal immunity from legal action. If a model was adopted similar to the one in the US and Canada, the ACCC could simply let the assessment period expire and then take action through the courts or indicate to merger parties that it would not do so.

### Section 50 and the role of the Federal Court

Section 50 of the CCA provides a general prohibition on mergers that substantially lessen competition. The Federal Court can grant a declaration that a merger does or does not substantially lessen competition.<sup>112</sup>

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<sup>112</sup> If there is a justiciable issue to be decided: *Australian Gas Light Company v ACCC* (No 3) [2003] FCA 1525, [612].

If a new merger control regime were introduced that involved mandatory notification of mergers and administrative clearance of decisions, consideration would need to be given to whether section 50 would be retained and how it would interact with the new regime, including:

- whether mergers that are **required** to be assessed through the administrative clearance process would be excluded: for example, notifiable transactions and those that have been ‘called in’:
  - this would prevent a different decision-maker and possibly a different test being applied to decisions over and under the notification thresholds;
  - it would require merger parties to go through the administrative process rather than through the Federal Court for a declaration;
  - whether section 50 should apply for transactions that the ACCC has cleared, but significant competition concerns arose after the transaction completed; and
  - removing section 50 for particular transactions may require enhanced procedural fairness safeguards to reflect greater reliance on the administrative decision-making process;
- whether mergers that could be subject to administrative clearance at the ACCC’s discretion should also be subject to section 50, and if so, whether time limits should apply;
  - excluding transactions that can be called in from the operation of section 50 would be simpler if the criteria for exercise of the call-in power were more factual, and more complicated if the criteria require the ACCC to hold a belief;
- what role section 50 would have alone or in conjunction with other remedies;
  - removing section 50 for particular transactions would curtail the ACCC’s ability to use section 50 as a ‘safety valve’ where parties complete without going through the administrative process, increasing the reliance on fines and other penalties;
- what provision for third-party rights would be retained in an administrative system should section 50 be removed or curtailed;
  - third parties would no longer be able to bring a case in the Federal Court for transactions not subject to section 50. This occurs rarely. However, third parties can make submissions to the ACCC’s public merger reviews; and
- whether any other restrictions should be placed on section 50 – for instance, whether some significance threshold should apply for minority acquisitions and joint ventures, as the current drafting of section 50 applies to all mergers and acquisitions.

### The courts and the economic nature of competition law

Concerns have been raised about the role of the courts in enforcing competition law since the early years of the *Trade Practices Act 1974*. In 1976, Professor Maureen Brunt AO wrote that ‘legal process is not well-suited to extended rule of reason analysis of market power’.<sup>113</sup>

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<sup>113</sup> M Brunt, ‘Lawyers and Competition Policy’ in Hambly D and Goldring J (eds) *Australian Lawyers and Social Change*, The Law Book Co, 1976, Sydney, p125.

However, Professor Brunt later revised her view in light of the 1989 High Court decision in *Queensland Wire*.<sup>114</sup> She recognised that in that judgement there was ‘a willingness to get to the economic substance of the statutory terms’.<sup>115</sup> Similarly, Dr Philip Williams AM has noted that ‘[s]ince QWI, the courts have treated us to extended economic analysis on many occasions...[t]hey have shown themselves quite willing to adopt economic modes of reasoning when the law requires them to do so’.<sup>116</sup>

In the EU, the European Commission has a margin of discretion in assessing economic matters which is recognised by the courts of the European Union. The courts of the European Union will not second-guess conclusions if based on sufficient evidence, unless the European Commission has made a manifest error.<sup>117</sup> In New Zealand, the High Court recognises the experience and economic expertise of the NZCC in assessing mergers as first instance decision-maker.<sup>118</sup>

The ACCC considers that, consistent with merger authorisation, the Tribunal is an appropriate review body in a formal clearance regime due to the Tribunal consisting of ‘a President and a number of Deputy Presidents who are judges of the Federal Court, and other lay members with knowledge of or experience in industry, commerce, economics, law or public administration’.<sup>119</sup> The Takeovers Panel is another example of a specialist review body largely comprised of takeovers experts.

### Review of administrative decisions

Where the ACCC makes an administrative decision, this is subject to merits and judicial review. If a new merger control regime were introduced, consideration would need to be given to whether review rights – particularly merits review – should be altered under the new regime.

Currently, limited merits review of ACCC merger authorisation determinations is conducted by the Competition Tribunal and parties may seek judicial review on points of law in the Federal Court.

The ACCC proposes that its merger clearance decisions would be subject to limited merits review by the Competition Tribunal, as is currently the case for merger authorisations. Currently, for reviews of merger authorisation decisions, the Tribunal is limited to considering:

- information that was referred to in the ACCC's reasons;
- information requested from the ACCC by the Tribunal;
- information given to the ACCC by the merger parties and third parties during its consideration of the proposed merger;
- information sought by the Tribunal to clarify this information; and

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<sup>114</sup> *Queensland Wire Industries v BHP* (1989) 167 CLR 177. In this case Queensland Wire Industries (QWI) was successful in its claim against BHP for a misuse of market power by constructively refusing (setting the price excessively high) to supply steel products to QWI which were an essential input required for QWI to compete against a wholly owned subsidiary of BHP in the downstream fencing market.

<sup>115</sup> M Brunt, ‘The Australian Antitrust Law after 20 Years – A Stocktake’, 1994 in Brunt M (2003) *Economic Essays on Australian and New Zealand Competition Law*, Kluwer Law International, pp 311-312.

<sup>116</sup> P Williams, [Merger authorisation processes in Australia in the light of the Tabcorp decision – Comments by Philip Williams on a paper by Dave Poddar](#), Frontier Economics, 2018, para 22, accessed 29 October 2023.

<sup>117</sup> Case C-12/03 P, *Commission vs Tetra Laval BV*.

<sup>118</sup> *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, [49].

<sup>119</sup> ACCC, Outline to Treasury: ACCC's proposals for merger reform, 2023, p 10.

- new information not in existence at the time the Commission made its decision.<sup>120</sup>

The Tribunal recently clarified that merger parties cannot test material provided to the ACCC in reviews of merger authorisation determinations before the Tribunal.<sup>121</sup>

Limited merits review is intended to ensure parties have the incentive to put all relevant material before the ACCC, and to reduce the cost and delay of the Competition Tribunal considering large amounts of new evidence.<sup>122</sup> However, this may create incentives to ‘over-provide’ the ACCC with information to allow this information to be considered by the Tribunal if review was sought. In its decision on the 2023 TPG/Telstra merger authorisation, the Tribunal noted that:

The information, documents and evidence given to the ACCC in connection with the making of its determination was vast in quantity. The parties placed that vast quantity of material before the Tribunal, although in their written and oral submissions the parties referred to a relatively small part of the material.<sup>123</sup>

Some parties have criticised limited merits review as lacking procedural fairness, including the Law Council of Australia.<sup>124</sup>

One option could be to expand the scope of limited merits review so that parties can test evidence before the Tribunal. Another option could be to allow full merits review.

### Penalties and Remedies

A change to the merger regime could result in the introduction of new penalties. For instance, if a mandatory notification regime was introduced, a breach of the requirement to notify would attract penalties. Proceeding without clearance could be a separate civil penalty such as a fine. This could include where parties complete without allowing the ACCC to finalise its review under the statutory timelines. Consideration would need to be given to setting civil penalties at a sufficiently high level to have a deterrent effect to encourage compliance.

The ACCC is currently able to seek orders from the Federal Court for pecuniary penalties (up to 6 years after the completion of a merger) and divestiture (up to 3 years post-completion of a merger).<sup>125</sup> Third parties are also currently able to seek damages for loss resulting from a merger.<sup>126</sup> It is assumed that these remedies would be retained. Consideration would need to be given to whether the ACCC should continue to be required to seek divestiture through the courts.

In certain circumstances, protecting competition and consumer welfare can sometimes only be achieved by blocking a merger outright. However, in other circumstances merger parties may also

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<sup>120</sup> *Competition and Consumer Act 2010* (Cth) ss 102 (9), (10); I Harper, P Anderson, S McCluskey, M O’Bryan AC, [Competition Policy Review – Final Report](#), ‘Harper Review’, 2015, p 312, accessed 29 October 2023. See also ACCC, Outline to Treasury: ACCC’s proposals for merger reform, 2023, p 10; [Explanatory Memorandum](#), Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), para 9.79-9.81.

<sup>121</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1, [84-85].

<sup>122</sup> This limitation on the role of the Tribunal was introduced in 2017 when the ACCC was restored as the decision-maker at first instance; The Harper Review found that a ‘full rehearing...would be likely to dampen the incentive to put all relevant material to the ACCC in the first instance’: I Harper, P Anderson, S McCluskey, M O’Bryan AC, [Competition Policy Review – Final Report](#), ‘Harper Review’, 2015, p 66.

<sup>123</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, [26].

<sup>124</sup> Law Council of Australia, [ACCC’s updated merger law reform proposals – discussion paper in response](#), 2023, p 23, accessed 29 October 2023.

<sup>125</sup> *Competition and Consumer Act 2010* (Cth) ss 76, 81.

<sup>126</sup> *Competition and Consumer Act 2010* (Cth) s 82.

offer structural or behavioural remedies to address competition concerns. The ACCC is not obliged to accept remedy proposals put forward by merger parties, and offering structural or behavioural remedies does not alter the threshold of proof required to prohibit a merger. Under any reform, it is assumed that parties will continue to be able to offer remedies under section 87B of the CCA to address competition concerns.

Cross-border mergers require a high degree of co-ordination and co-operation between the competition authorities reviewing the merger, particularly on remedy proposals. Design of remedies must be appropriate to effectively address the competition concerns identified in Australia including where the merger parties and/or their assets are located abroad.

### ***Consultation questions***

22. *Should the ACCC or the courts be the primary decision-maker for notifiable transactions?*
23. *If Australia was to move more towards an administrative decision-making regime as proposed by the ACCC, should ACCC decisions be subject to limited merits review by the Competition Tribunal, similar to existing merger authorisations?*

## Possible policy options

This section canvasses possible options, including the ACCC’s proposals, for reforming Australia’s merger control regime in the event that, following this consultation process, the Government concludes that change is needed.

The purpose of merger control is to identify and prevent the prospective anti-competitive effects of mergers. The possible options considered below group key elements of merger regimes in a coherent way drawing from experience globally.<sup>127</sup> Each option is a proposal to reform the current informal merger regime to address shortcomings in light of evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries. Stakeholders are invited to suggest alternative options or variations of these options and outline their benefits and risks, as well as provide views on whether the existing merger authorisation regime should be retained. Under all options, it is assumed the informal merger review process would be replaced by the reformed merger control process. The first two options are ‘judicial enforcement’ merger control models relying on litigation to stop a merger considered by the ACCC to be anti-competitive if parties decide to proceed. The third option is primarily an ‘administrative’ model with transactions requiring ACCC approval before they can proceed.

### Changes to the merger control process

	Option 1	Option 2	Option 3
<b>Notification</b>	Voluntary	Mandatory	Mandatory
<b>Suspension</b>	For notified transactions	Mandatory	Mandatory
<b>Test</b>	must be satisfied that the merger is not likely to substantially lessen competition	is likely to substantially lessen competition	must be satisfied that the merger is not likely to substantially lessen competition (or net public benefit)
<b>Primary decision-maker</b>	ACCC (for notified transactions)	Federal Court	ACCC

- **Option 1: A voluntary formal clearance regime** could be introduced, similar to the voluntary formal clearance process that operated in Australia between 2007-17 and elements of the current process in New Zealand and the UK. Where businesses choose to notify, the transaction would be suspended for a period of time while the ACCC conducts its assessment. Upfront information requirements would be introduced. If this option were to be adopted, it would need to be supplemented with additional procedural features to encourage notification of mergers which may raise competition concerns, such as call-in powers. The ACCC would only grant clearance if it was satisfied the merger was not likely to substantially lessen competition, and the ACCC’s decision would be reviewable by the Tribunal. Clearance would provide formal immunity from court action under the provision that makes it unlawful to proceed with a merger that leads to a substantial lessening of competition (section 50). However, if merger parties did not

<sup>127</sup> See OECD, *OECD Competition Trends 2021 – Volume II: Global Merger Control*, 2021, p 12, accessed 29 October 2023.

voluntarily notify or decided to proceed with the merger even after the ACCC expressed concerns, then judicial enforcement would be required under section 50.

- **Option 2: A mandatory notification and suspensory regime** could be introduced, broadly based on the approach taken in the US and Canada. This option would require mandatory notification of transactions above a threshold, although the ACCC would not be precluded from investigating mergers below the threshold. Transactions would be suspended for a period of time while the ACCC conducts its assessment. Upfront information requirements would be introduced. At the end of the formal process, if the merger is likely to substantially lessen competition and parties do not voluntarily abandon their proposal, the ACCC would need to commence court action under section 50.
- **Enforcement element of options 1 and 2:** At the end of the voluntary or mandatory formal process in options 1 and 2, if the ACCC has concerns that the merger is likely to substantially lessen competition, it can invite the parties to discontinue the transaction. If the parties decide to proceed with the transaction, the ACCC could gather evidence and commence a court case seeking an injunction preventing the parties from going ahead with the merger. In those court proceedings, the ACCC would be obliged to prove to the Federal Court on the balance of probabilities that the proposed merger is likely to substantially lessen competition under section 50.
- **Option 3 (ACCC's proposal):** An **administrative mandatory formal clearance regime** could be introduced, as proposed by the ACCC. This option would require mandatory notification of transactions above a threshold and allow the ACCC to 'call-in' transactions below the threshold where there are competition concerns. Transactions would be suspended for a period of time while the ACCC conducts its assessment. Upfront information requirements would be introduced. The ACCC would only grant clearance if it was satisfied the merger was not likely to substantially lessen competition, and the ACCC's decision would be reviewable by the Tribunal. Clearance would provide formal immunity from court action under section 50.

## Changes to the merger control test

The ACCC has also proposed changes to the test for whether mergers are 'likely to substantially lessen competition' (under section 50) to better recognise the effect that some acquisitions – particularly by large firms – have on competition and the structure of the market.

Options to reform the merger control test include:

- **Option A:** Update and modernise the list of matters that the ACCC may, and the court must, take into account when assessing the impact of mergers on competition (known as merger factors in section 50(3)).
  - Some or all the changes discussed above could be implemented, including: changes in market structure as a result of a merger; whether the acquisition entrenches or extends a position of substantial market power; whether the acquisition is part of a series of acquisitions; whether the acquisition would result in the removal of a potential competitor; the nature and significance of assets acquired; and interlocking directorships.
  - Alternatively, the merger factors could be omitted entirely, simplifying to a substantial lessening of competition test.



- **Option B:** The substantial lessening of competition test could be expanded to include transactions that ‘entrench, materially increase or materially extend a position of substantial market power’. The ACCC argues that acquisitions in markets with high barriers to entry, high levels of concentration and a small number of participants are more likely to have significant and long-lasting effects on competition.
- **Option C:** Related agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) could also be considered as part of the consideration of the effect of the merger on competition, as these agreements may have effects on competition.

These options are summarised in the table below.

	Current competition assessment	Possible change
<b>Option A</b>	The Federal Court must have regard to the ‘merger factors’ in section 50(3) of the CCA	<p><b>Add:</b> Creeping acquisitions, loss of potential competition, access to or control of data and other significant assets, market power, interlocking directorships</p> <p><b>Amend:</b> Expressly refer to the changes in market features resulting from a merger</p> <p><b>Remove:</b> Omit the merger factors, simplifying to a substantial lessening of competition test</p>
<b>Option B</b>	Prohibition against mergers that ‘would have the effect, or be likely to have the effect of substantially lessening competition’	<b>Add:</b> ‘including through entrenching, materially increasing or materially extending a position of substantial market power’
<b>Option C</b>	Excludes consideration of related agreements	<b>Add:</b> Related agreements

Each of these options could be implemented alone, together, or along with the changes to the process discussed above. For example, the ACCC’s proposed option is to adopt Option 3, as well as giving greater focus to the effect of a transaction on market structure (that is, option 3, A, B, and C).

### Consultation questions

24. *What is the preferred option or combination of elements outlined above? What implementation considerations would need to be taken into account?*