Introduction

The ACCC welcomes the opportunity to make this submission to the House of Representatives Standing Committee on Economics' Inquiry into Promoting Economic Dynamism, Competition and Business Formation.

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, business and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure and undertake market studies.

The Committee's inquiry is of significant interest to the ACCC. The Inquiry's terms of reference accord with the ACCC's purpose of making markets work for consumers, and our conviction that the process of competition is fundamental for promoting consumer welfare, driving innovation and assuring economic prosperity over time.

This submission is intended to contribute to the Committee's Inquiry by setting out the ACCC's observations across two broad themes: Competition and effectiveness of law in Australia and the role of Competition Market Studies and Price Inquiries. We look forward to the opportunity to contribute further to the Inquiry if required.

1. Competition and effectiveness of law in Australia

Competitive and dynamic markets are critical to the welfare and prosperity of Australians. Competitive markets encourage greater innovation and productivity, more attractive combinations of prices and quality, and a variety of choices that better reflect consumers' preferences than uncompetitive markets. Competitive markets also help protect and promote both consumer and upstream supplier welfare, and provide confidence that markets are appropriately fulfilling their role as one of the key organising institutions in our society. Ultimately, competitive markets help ensure that Australia's natural, capital and human resources are optimally utilised to benefit the population.

As the economy-wide regulator with responsibility for enforcing Australia's competition and consumer law, the ACCC has direct exposure to many of the issues considered by the Inquiry's terms of reference. The ACCC is not mandated to review or measure competition across the economy as a whole. However, as the ACCC is required to assess competition or the competitive effects of firm conduct and transactions in many of our functions, we have formed views about how competition is operating in the Australian economy.

Recent research indicates that Australia is experiencing an overall rise in industry concentration[1] that is correlated with increasing firm mark-ups.[2] Australia is not unique in this regard. Concerns about market concentration and increasing market power are being

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1 Bakhtiari, S, Trends in Market Concentration of Australian Industries, *The Australian Economic Review*, vol.54, no.1, March 2021, pp.57-75.

2 Hambur, J, Product Market Power and its Implication for the Australian Economy, Treasury Working Paper 2021-03, June 2021.

raised and considered globally, including in Europe and North America, and by organisations such as the OECD and International Monetary Fund.[3]

This increase in market power is occurring at a time where significant, structural changes are on the horizon. The shift to a more sustainable economy, alongside the increasing pace of technologically advanced and data-driven driven industries, will continue to transform Australia's markets. It is critical that competition is a central tenet of policy and economic development as these markets evolve.

In the current context, the ACCC has identified a number of specific areas that warrant investigation by the Committee. Assuring the regulatory settings are appropriate in these areas will help ensure that Australia's economy is dynamic, competitive and fosters both innovation among existing and emerging firms as well as strong opportunities for new firm formation and worker mobility.

Merger regulation

A strong and effective merger regime is an essential ingredient in the maintenance of competitive, dynamic and resilient markets. Merger law focuses on how acquisitions affect market structure, conduct and performance, and seeks to protect the underlying conditions for competition.

While most mergers are not anti-competitive and can be beneficial, some mergers result in sustained increases in concentration and reductions in competition which can have long-lasting detrimental effects. An effective merger regime therefore ensures that relevant transactions are able to be reviewed before they are completed and those that are likely to be anti-competitive are prevented.

Challenges with the current regime

In Australia, unlike most merger regimes in other mature economies around the world, there is no legal requirement for merger parties to notify the ACCC of certain proposed mergers or suspend completion until the ACCC has cleared the transaction on competition grounds.

Most mergers currently assessed by the ACCC are considered through the ACCC's informal merger review process, which has evolved without a statutory framework. Merger parties may also choose to apply for formal merger authorisation which, if granted, provides an exemption from section 50 of the CCA.[4] Alternatively, merger parties may seek a declaration from the Federal Court or just proceed without seeking the ACCC's view.

The ACCC is concerned that the design of the current merger regime in Australia is not fit for purpose and is out of step with international best practice. While the current model worked well in the past, the weaknesses inherent in a voluntary system with an enforcement-based model are increasingly evident.

The informal regime is the main avenue used by businesses and has generally operated effectively over many years. It enables businesses to seek the ACCC's view on whether the proposed acquisition is likely to have the effect of substantially lessening competition.

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[3] G Koltay and S Lorincz, 'Industry concentration and competition policy' (2021); OECD, 'Market Concentration: Issues paper by the Secretariat', OECD Competition Committee, June 2018, p 7-10; K Georgieva, FJ Díez, R Duval and D Schwarz, 'Rising Market Power – A Threat to the Recovery?', *IMFBlog*, International Monetary Fund website, 15 March 2021; U Akcigit, W Chen, FJ Díez, R Duval, P Engler, J Fan, C Maggi, MM Tavares, D Schwarz, I Shibata and C Villegas-Sánchez, 'Rising Corporate Market Power: Emerging Policy Issues', International Monetary Fund Staff Discussion Notes No. 2021/001, 15 March 2021; Marinescu, I, Prepared Testimony for the Parliament of Australia House of Representatives: Competition in Labor Markets and Antitrust Policy, 30 March 2023.

[4] While merger parties must provide an undertaking not to complete the transaction until the ACCC or Australian Competition Tribunal (on review) reaches a final view, the CCA does not prohibit merger parties from completing the transaction where the ACCC (or the Tribunal) has denied authorisation.

Merger parties do not pay a fee for this 'service'. The Harper Review acknowledged the benefits of its flexibility.[5] However, it relies on the willing participation and cooperation of the merger parties, and in recent times, the informal regime has become less effective. Increasingly, merger parties are threatening to complete their potentially anti-competitive transactions before the ACCC has completed its review and made a final decision. In addition, the upfront information the ACCC is provided can be variable, incomplete, and sometimes inaccurate. Some merger parties give low priority to timely notification and engagement with the ACCC, particularly in global transactions where parties may prioritise engagement with overseas jurisdictions with mandatory notification and formal processes.

In instances where the ACCC considers a merger to be anti-competitive, and where the merger parties do not voluntarily abandon the transaction or offer remedies that address the competition concerns, the ACCC may take action in the Federal Court to prevent or unwind the transaction. The ACCC bears the evidentiary burden to demonstrate that the proposed merger is likely to have the effect of substantially lessening competition in the future, in breach of section 50 of CCA.

The future is inherently uncertain and is particularly so where markets are dynamic and there are complex commercial environments, as is increasingly the case. This is particularly difficult in circumstances involving the acquisition of a potential or nascent competitor, where the potential for competitive harm can be profound but where there is also considerable uncertainty about the future of competition. Since a court must be convinced of the future state of the market, this uncertainty can be the driving factor behind difficulties proving a breach of section 50 rather than an absence of risk to competition. Where there are risks that a merger will result in significantly less competition, it is the public interest rather than the merger parties, that ends up bearing the risk in our current merger regime.

The ACCC considers that merger control in Australia requires a meaningful shift in policy and design to recognise and support the importance of preserving competition. The ACCC considers that changes are required to both the merger review *process* and the merger *law*.

Changes to the merger[6] review process

Australia's enforcement-based model for merger control requires the ACCC to establish why a potentially anti-competitive merger should not be allowed to proceed, rather than a clearance model that requires the merger parties to demonstrate that the transaction should be allowed because it does not significantly reduce competition.

Australia's merger control regime would be strengthened and recalibrated by adopting a mandatory suspensory formal clearance regime. Mergers above prescribed notification thresholds would fall within the formal regime and would be prohibited from completing unless approved by the ACCC or Tribunal on review.

Determining the thresholds requires careful consideration but, consistent with international merger regimes, 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.

We propose a notification waiver option for proposals that meet the thresholds but which raise a low risk of a substantial lessening of competition. This would capture many of the benefits of the current pre-assessment triage process and would enable the ACCC to deal with the majority of merger proposals in a quick and efficient way.

There should be upfront information requirements and specified review timeframes.

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5 Competition Policy Review Final Report ('Harper Review'), 31 March 2015, p326.

6 In referring to a "merger" the ACCC is referring to any acquisition of the shares or assets of a business, not just "mergers" in the sense of the combining of two entities to form another entity.

Where a transaction does not trigger the notification thresholds, but nonetheless raises potential competition concerns, the ACCC could be given the discretion to 'call in' the transaction so it can be assessed in the formal regime. There are many examples in overseas regimes of how such a call-in power could operate. For example, it could apply on a case-by-case basis or to certain firms or sectors where there is a risk that potentially problematic transactions would not be captured by the notification thresholds.

The ACCC, or Tribunal on review, would make a decision to clear a merger where it is satisfied that the transaction is not likely to substantially lessen competition. A competition-based clearance test is consistent with merger regimes internationally. The requirement for the decision maker to be positively satisfied that the test is met is consistent with the current merger authorisation test and recalibrates the policy balance between preventing or allowing mergers where there is a risk of competitive harm.

If clearance was not granted on competition grounds, a second stage public benefit test could be available to provide the flexibility to approve a merger where the competition effects are outweighed by real, verifiable and substantial public benefits.

Under the proposed framework, parties could seek judicial review of ACCC and Tribunal decisions in the Federal Court. The Federal Court would also continue to hear applications for declaratory relief and its current role in considering merger enforcement cases would continue for mergers that do not trigger the notification thresholds.

An appropriately designed formal clearance system would provide greater transparency, accountability and ensure the ACCC has sufficient time to consider the competition effects of proposed mergers, while providing more timing certainty for the merger parties. It could also transition from the existing taxpayer funded regime towards a user pays approach, and provide greater consistency in the assessment of domestic and foreign acquirers (which are subject to a mandatory and suspensory regime under the *Foreign Acquisitions and Takeovers Act 1975* (Cth)). In addition, the notification waiver process explained above would allow for a quick and simple process for the many mergers that do not give rise to competition concerns.

Changes to the merger law

The ACCC considers that changes to section 50 are desirable to better focus the merger assessment on the structural conditions for competition in markets most at risk of the exercise of market power, and on identifying the competition lost when the acquirer has substantial market power.

Section 50 does not sufficiently address acquisitions by a dominant firm of smaller or potential competitors (either one off or as part of a strategy of creeping acquisitions) because the focus is on whether the incremental change from a single acquisition results in a substantial lessening of competition, rather than on whether the acquisition (or series of acquisitions) increases or enhances a position of market power. This is a particular concern in digital platforms.

Our proposal to address these issues is to expressly state in section 50 that a substantial lessening of competition includes entrenching, materially increasing or materially extending a position of substantial market power.[7]

It would also be beneficial to update the guiding factors in section 50(3) of the CCA. In particular:

[7] This would be similar to the European Commission's merger test which expressly states that mergers are prohibited if they significantly impede effective competition "in particular as a result of the creation or strengthening of a dominant position".

- the factors could be updated to reference changes that result from a merger (for example the current factor "the height of barriers to entry to the market" could include the following additional guidance, "*and any increase in the height of barriers to entry*");
- there should be a new factor in relation to the removal of potential competition (as recommended in ACCC's Digital Platforms Inquiry Final Report;[8])
- there should be a new factor in relation to access to or control of data and technology (as recommended in ACCC's Digital Platforms Inquiry Final Report;[9])
- there should be a new factor in relation to creeping acquisitions. For example, 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.[10]

Monopoly

The ACCC considers that inadequate regulatory frameworks for key supply chain infrastructure can undermine future productivity growth. There are two main sources of concern:

- the inability of the National Access Regime in Part IIIA of the CCA to act as a constraint where monopoly pricing, rather than denial of access, is the problem access seekers face; and
- the manner in which monopoly infrastructure assets are privatised to maximise sale price rather than long-term benefits to consumers and the economy.

Regulation of non-vertically integrated monopoly infrastructure

Infrastructure users have regularly raised concerns that access to non-vertically integrated monopoly infrastructure reflects poor value because the monopoly provider's charges are inefficiently high and / or service levels are not optimal. This leads to inefficient use of and investment in the monopoly infrastructure, which drags on productivity in downstream industries. For an example of the potential impact, in Australia's domestic and export industries most trade passes through Australia's airports and ports that remain largely unregulated.

The ACCC is of the view that the National Access Regime under Part IIIA of the CCA is not functioning as an effective constraint on monopolists engaging in anti-competitive conduct such as monopoly pricing for non-vertically integrated monopoly services. The regulatory gap arises from the fact that this type of conduct does not fit within scope for regulation under Part IIIA, nor meet the elements required to constitute a breach of general competition laws under Part IV of the CCA.

Privatisation of monopoly assets

When implemented appropriately, privatisation can improve the efficiency of the infrastructure and facilitate innovation in the interests of users. However, the extent to those benefits from privatisation are realised will depend upon the extent to which the resulting

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8 ACCC, Digital Platforms Inquiry Final Report, 26 July 2019, p 105-108.

9 ACCC, Digital Platforms Inquiry Final Report, 26 July 2019, p 105-108.

10 Law Council of Australia Trade Practices Committee, Submission on Commonwealth Government Discussion Paper – Creeping Acquisitions, 15 October 2008, p 18. See also Law Council of Australia Trade Practices Committee, Submission to the Commonwealth Treasury in Response to Creeping Acquisitions Discussion Paper, 12 June 2009, p 21-22.

market structure supports competition and/or provides appropriate regulatory oversight (where necessary) from the outset.

Privatisations provide governments with a unique opportunity to properly address competition issues arising from market structure and/or implement regulatory oversight for the long-term benefit of Australians. The ACCC is of the view that economy-wide benefits from privatisation will be maximised where there is strong potential for competition (on both the supply and demand side) or where, in the absence of competition due to monopoly or near monopoly characteristics, there is sufficient regulatory oversight to ensure that competition in upstream or downstream markets is not hindered and the infrastructure owner cannot engage in monopoly pricing.

Governments must adequately consider and appropriately deal with these issues early and up-front in the privatisation process. Without a credible threat of regulation, monopoly infrastructure service providers would be capable of extracting monopoly rents and deterring efficient future investment in upstream and downstream markets. While governments may benefit in the short-term from the proceeds of sale or investment, the cost to users could increase over time through higher prices and less efficient use of the infrastructure. This imposes an unnecessary impediment on productivity and the broader economy.

Moreover, as digitisation accelerates in the Australian economy, it is imperative that appropriate frameworks are in place to minimise the unintended consequences of future privatisations of digital infrastructure.

For these reasons, the ACCC recommends a national discussion on improving the frameworks for privatisation and regulation of monopoly infrastructure.

2. Competition Market Studies and Price Inquiries

Targeted market studies and price monitoring play an important role in advancing competition policy. They can help foster a better understanding of market dynamics and the key factors driving firm behaviour, including in relation to price, and can assist in clarifying the nature and extent of any market failures.

The ACCC has been tasked by current and previous governments to conduct several detailed price inquiries and market studies into critical Australian markets. These roles generally follow a formal Direction from the government, activating the ACCC's information gathering powers within the Direction's terms of reference. This allows the ACCC to provide detailed and considered insights and recommendations regarding how to improve competition, consumer outcomes and market efficiency.

ACCC studies and inquiries have a particular competition and consumer lens. This means ACCC market studies and price inquiries have a different focus than other government reviews and inquiries with clear focus on what is happening in markets, factors impacting costs, profits and pricing, and demand side choice and behaviour. They can provide unique observations and areas for action that will not necessarily emerge in other industry reviews.

The ACCC currently has work underway into gas, retail electricity, ports, airports, airlines, retail deposit markets, digital platforms, insurance, regional mobile infrastructure, childcare and petrol. Since 2017, the ACCC has completed price inquiries into dairy, digital advertising, foreign currency conversion services, home loans, water markets in the Murray-Darling Basin, Northern Australia insurance, markets for perishable agricultural goods, residential mortgages and retail electricity pricing.

The ACCC has outlined a number of key recommendations from a select number of these inquiries below. The ACCC considers that these are particularly important in the current regulatory and cost of living environment.

Northern Australia Insurance Inquiry

On 25 May 2017, the then Treasurer directed the ACCC to conduct a wide-ranging inquiry into the supply of residential building (home), contents and strata insurance in northern Australia.

Interim reports were released on 18 December 2018 and 20 December 2019. A final report was released on 28 December 2020 with a number of recommendations. These recommendations are designed to make it easier to search for and compare insurance providers, choose the right amount of cover, deal with conflicts of interest, improve affordability, improve consumers' rights and reduce risk.

Key outstanding recommendations:

Recommendation 13.1: The Australian Government, and state and territory governments, should expand the remit of the Australian Building Codes Board to explicitly include property protection as an objective to pursue through the National Construction Code and referenced Australian Standards.

Recommendation 18.7: The Australian Government should consider developing a national home insurance comparison website. It should require the participation of all insurers active in relevant markets, allow consumers to compare policies by features, and make it quick and easy for consumers to act on the results.

Recommendation 19.1: The Corporations Regulations should be amended to remove the exemption for general insurance retail products from the conflicted remuneration provisions as they apply to insurance brokers.

Recommendation 20.2: Consumers should be provided with the right to choose whether their home building insurance claim is settled through a cash settlement or with a repair/rebuild managed by the insurer. The insurer must inform the consumer they have this choice at the time a consumer lodges a claim.

Recommendation 21.3: The insurance industry should work with governments to identify specific public mitigation works (e.g. flood levees) that could be undertaken and insurers should provide estimates of the premium reductions they anticipate if the works proceed.

Digital Platform Services

On 10 February 2020, the then Treasurer directed the ACCC to conduct a 5-year inquiry into digital platforms, the Digital Platform Services Inquiry (DPSI). The ACCC has so far provided 6 interim reports to the Government as part of the DPSI. The Government is currently considering its response to the fifth report of the DPSI, which recommended a range of reforms relating to markets for the supply of digital platform services. These recommendations include:

- New measures to address competition harms, including powers to make service-specific mandatory codes of conduct that would operate under and be guided by high-level principles established in legislation. These codes would only apply to digital platforms that meet certain qualitative and/or quantitative criteria reflecting their significance and their ability and incentive to harm competition in digital platform markets. The ACCC has recommended the codes should be able to include targeted obligations to address, as relevant, a wide range of harmful conduct.

- A new economy-wide prohibition on unfair trading practices to address certain practices not covered by the Australian Consumer Law, including certain 'dark patterns'.[11]
- New measures to address consumer harms through targeted requirements on digital platforms to:
    - Provide user-friendly processes for reporting scams, harmful apps, and fake reviews, and to respond to such reports;
    - Verify certain business users, with additional requirements for advertisers of financial products and services;
    - Publish review verification processes to help readers assess the reliability of online reviews;
    - Report on scams, harmful apps and fake reviews, and measures the platform has taken to address them; and
    - Meet minimum internal dispute resolution standards. This obligation would be supported by the establishment of a new digital platform ombuds scheme.

The report also notes that the effective targeted regulation of digital platforms must be supported by appropriate enforcement and monitoring tools. These tools should account for the fact that many digital platform services are provided by firms based overseas, often with minimal or no significant infrastructure or employees located in Australia.[12]

Some of these recommendations reiterate or supersede recommendations made in earlier DPSI reports released between March 2021 and March 2022, and as part of the Digital Platforms Inquiry (2017-2019) and the Digital Advertising Services Inquiry (2020-2021), which remained outstanding at the time of the fifth report of the DPSI.

Home Loan Price Inquiry

On 14 October 2019, the then Treasurer directed the ACCC to conduct an inquiry into home loan pricing. The Direction required the ACCC to focus on two issues:

- prices charged for home loans since 1 January 2019; and
- impediments to consumers switching to alternative home loan suppliers.

An interim report focusing on the first issue was delivered on 27 April 2020. A final report focusing on the second issue was delivered on 25 November 2020.

Key outstanding recommendations:

Recommendation 1: A prompt for variable rate borrowers with older loans that communicates the potential benefits of switching and compares their interest rate to those for similar new loans.

Recommendation 2: A standardised Discharge Authority form.

Recommendation 3: A maximum timeframe for existing lenders to process discharge requests.

Recommendation 4: Continued monitoring of competition and prices in the home loan market.

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[11] 'Dark patterns' refers to the design of user interfaces to intentionally confuse users, make it difficult for them to express their actual preferences, or manipulate them into taking certain actions. See ACCC, Digital platform services inquiry - September 2022 interim report - Regulatory reform, September 2022, pp 44 and 65-69.

[12] ACCC, Digital Platforms Services Inquiry September 2022 report, 11 November 2022, p 193-194.

Container Stevedoring Monitoring

The ACCC has, since 1998-99, undertaken monitoring of container terminal operators in Australia. It currently monitors prices, costs and profits at the container ports of Adelaide, Brisbane, Fremantle, Melbourne and Sydney.

The ACCC has published a yearly report since 1999. In the 2021-22 Container Stevedoring Report, the ACCC outlined a number of key reforms needed to improve the efficiency of the container freight supply chain:

- There is a need to bolster regulation of privatised container ports to ensure they do not levy excessive rents and charges on port users and provide inferior services. At a minimum, these ports should be subject to greater regulatory oversight. However, price monitoring alone is not sufficient. An industry-specific negotiate-arbitrate model should be implemented at all monopoly container ports to assist port users in negotiations.
- Cargo owners in Australia need more protection against unreasonable detention fee practices. This could potentially be resolved by repealing the exemption for shipping contracts from the ACL's unfair contract terms regime or creating a distinct prohibition on unfair trade practices.

Further, the ACCC expressed support for a number of findings in the Productivity Commission's draft report *Lifting productivity at Australia's container ports: between water, wharf and warehouse*, including the repeal of Part X of the CCA, assuring industrial relations settings are appropriate and improving the measurement and benchmarking of productivity and performance of Australian container ports.

Agricultural Machinery Market Study

Throughout 2020 and 2021, the ACCC undertook a self-directed market study into the agricultural machinery market. Where the ACCC undertakes a self-directed market study, it is able to consult with stakeholders and consider voluntarily provided information, but does not have the compulsory information gathering powers.

On 28 February 2020 the ACCC release a discussion paper for consultation. On 4 May 2021 the ACCC released the final report for the market study.

Key outstanding recommendations:

The ACCC recommended that agricultural machinery be considered for inclusion in the motor vehicle service and repair information sharing scheme.

The ACCC recommended that agricultural machinery be included as part of any broader right to repair scheme introduced in Australia.

The ACCC recommended that manufacturers and dealers provide information to purchasers about data issues at the earliest practical opportunity in the sales process and before the point of sale. This includes information about machinery interoperability, how purchasers can access and transfer their data and how the manufacturer will use data captured by the machine.

The ACCC recommended that manufacturers continue to adopt ISO data standards to promote interoperability between brands of machinery.