ACCC AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Outline to Treasury

ACCC's proposals for merger reform

March 2023

Summary

This paper outlines a proposal to strengthen the effectiveness of Australia's current merger regime and identifies why such reforms are particularly important now.

A strong and effective merger regime is an essential ingredient in the creation and maintenance of competitive, dynamic, and resilient markets. Competitive markets are important for consumer confidence, and drive innovation and economic prosperity.

The ACCC recognises that most mergers are not anti-competitive and can be beneficial, for example by allowing firms to achieve efficiencies, diversify risk or enter new markets. But some mergers can result in material structural and behavioural changes in a market, sometimes with a significant detriment to competition and the welfare of Australian consumers.

Merger control helps to ensure that relevant transactions are assessed and those that are anti-competitive can be prevented so that the products and services that consumers and businesses require are available at lower prices, with higher quality and greater choice. An effective merger regime seeks to maintain competitive markets and prevent businesses from gaining market power through anti-competitive acquisitions.

Thus, merger control holds an important and unique position in competition law. As noted by Dr Jill Walker, "it addresses market structure and is generally concerned with preventing future conduct, rather than addressing past or current conduct. … [Moreover] merger control is particularly important as the 'preventative medicine' of competition law. By 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".[1]

For some time, the ACCC has been 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 informal process has worked well for many years, the weaknesses inherent in a voluntary system with an enforcement model are increasingly evident in the face of significant global and domestic M&A activity where parties are prepared to test the boundaries and new challenges with market power in the digital economy.

The ACCC considers that the current model does not provide the necessary tools to effectively assess and prevent anti-competitive mergers, and that it is not possible to achieve meaningful change without a policy and law shift.

1 Dr Jill Walker, 'An Economic Perspective on Part IV', Chapter 3, Current Issues in Competition Law Vol 1, p 87

This concern is particularly heightened in the current environment where Australia is facing economic uncertainty and vulnerabilities, such as those created by supply chain pressures, geopolitical issues, and climate change transition. Furthermore, as technological developments and network effects drive structural changes and convergence between markets, we can expect to increasingly see mergers as a means by which some firms enter and establish market power in adjacent markets.

Part of the response to these vulnerabilities is to ensure that relevant markets remain competitive, innovative and dynamic.

The ACCC considers that merger control in Australia requires a significant shift in policy and design which recognises and supports the importance of preserving competition. A move to a formal clearance model would prevent transactions above a certain threshold from proceeding unless the merger parties are able to satisfy the ACCC, or the Australian Competition Tribunal on review, that the transaction would not be likely to substantially lessen competition.

In addition to improving the effectiveness of merger control, merger reform would be expected to result in broader benefits, including transitioning away from the existing taxpayer funded regime towards a user pays approach, and providing greater consistency in the assessment of foreign and non-foreign acquirers.

The reform options identified in this paper reflect the views of the ACCC Chair and Commissioners and take into account stakeholder feedback received following the ACCC's public statements in August 2021 which called for a debate on the need for reform and possible options.

The options contained in this paper are put forward as an interrelated package that involves reforms to both the merger review *process* and changes to the merger *test*. Ultimately, the elements work together as a package and changing certain elements may impact the balance of the package and therefore its effectiveness. While the ACCC strongly supports reform of the Australian merger regime, getting the design right is of critical importance as there is a risk that a poorly designed regime would be less effective than our current informal merger regime.

Next steps

We would like the opportunity to discuss the options set out in this paper in more detail with Treasury staff and discuss possible next steps, including the form of any consultation process on options for legislative change.

The current merger regime

Merger parties can choose from several options when contemplating a merger or acquisition: seeking the ACCC's informal view; applying for formal merger authorisation; seeking a declaration from the Federal Court; or just proceeding to complete without clearance.

Australia has a 'judicial' or 'enforcement' based merger regime. In instances where a merger is considered to be anti-competitive by the ACCC, and where the merger parties do not voluntarily abandon the transaction or offer remedies that address the competition concerns, the ACCC must persuade the Federal Court that the proposed acquisition is likely to have the effect of substantially lessening competition in the future, in breach of section 50 of *Competition and Consumer Act 2010* (Cth) (**CCA**).

The 'informal' merger regime is voluntary and non-suspensory and has evolved over many years without a legislative framework. The vast majority of mergers assessed by the ACCC are considered under the informal merger review process.

While merger parties are not required to obtain 'clearance' before completing an acquisition, the informal merger regime started as a 'service' to the business community to allow firms to seek the ACCC's (and previously the TPC's) view about whether a proposed acquisition would be opposed and subject to litigation by the agency. There is no fee for this service. In the absence of this service, merging firms would have to rely on the advice of their legal advisers and bear the risk that the ACCC might take a different view and commence court action, including seeking an injunction to restrain completion of the acquisition.

Alternatively, merger parties may apply for formal merger authorisation which, if granted, provides an exemption from section 50 of the CCA. While merger parties must provide an undertaking not to complete the transaction until the ACCC or 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.

The informal regime is the main avenue used by businesses, although we have seen an increase in the use of merger authorisation in the past 6 months. We recently had three applications for merger authorisation under consideration at the same time, which all involve major transactions in markets that are of critical importance to our economy and consumers. In contrast, prior to 2022, the ACCC had only received three applications (one per year in 2019, 2020, 2021) since the legislation was amended to revert to the ACCC being the first instance decision maker in 2017.

While the informal regime has generally operated effectively over many years, this has predominantly relied on the willing participation and cooperation of the merger parties. However, the informal regime is becoming less effective as merger parties push the boundaries and are less cooperative. Increasingly, merger parties are threatening to complete their potentially anti-competitive transactions before we have completed our review and made a final decision. In addition, the upfront information we are provided is variable, often incomplete, and sometimes inaccurate. This leads to the situation where we are forced to negotiate with the merger parties to obtain sufficient information and time to conduct our review.

Why changes to Australia's merger regime are needed

The ACCC's decision to start a debate about the need for merger reform was prompted by concerns that the informal enforcement-based merger regime is no longer working as it should to adequately protect and promote competition in Australia. These concerns relate to the level of competition in many parts of the economy, challenges with being able to properly assess potentially anti-competitive mergers and consequently, our ability to prevent further consolidation should anti-competitive acquisitions proceed to completion.

The practical difficulties with the current regime arise from a combination of the informal process and the test in section 50. The effectiveness of the current regime relies on the voluntary compliance by the merger parties, and merger parties are increasingly pushing the boundaries. Further, under the enforcement model, the default outcome is skewed towards clearance where there is any uncertainty. We have included examples of the practical challenges the ACCC currently faces later in this section.

The importance of having the necessary tools to prevent anti-competitive mergers is highlighted by the economic and geopolitical issues Australia is currently facing. Dealing with the energy and climate change transition, the fast pace of technological change in the digital economy, and supply chain pressures will affect all sectors of the economy. Other jurisdictions with formal merger regimes are better equipped, and/or are improving their tools, to manage and review transactions in this period of uncertainty.

Why market concentration and merger control are important

Competitive and dynamic markets are critical to the prosperity of Australians. Competitive markets encourage greater innovation and productivity, lower prices, better quality and choice. This benefits consumers and leads to better outcomes for primary producers, small businesses, and workers. Mergers and acquisitions can play an important role in a well-functioning market economy. The ACCC recognises that the vast majority are not likely to harm competition and should proceed, without a significant regulatory burden.

However, some mergers can increase, entrench or extend market power and have long lasting anti-competitive effects to the detriment of consumer welfare and the Australian economy.

While there are exceptions, firms in concentrated markets generally earn larger mark-ups than firms in unconcentrated markets, and concentrated markets are more likely to contain a firm, or a small number of firms, able to exercise market power. Many Australian markets are already highly concentrated with a small number of providers retaining large market shares over long periods of time. These markets include banking, supermarkets, mobile telecommunications, internet service provision, energy retailing, gas supply and transport, insurance, pathology services, domestic air travel, internet search and social networking services. These markets are of critical importance for consumers and businesses.

There is growing evidence to support the view that Australian markets are becoming more concentrated. Treasury calculations of industry concentration show that concentration has increased since the early 2000s.[2] Bakhtiari similarly finds average industry concentration in the form of the Hirschman-Herfindahl Index for firm income shares rose since 2005, driven by increases in already-concentrated industries.[3] Further, there is evidence that higher concentration has been associated with increases in firm mark-ups. A 2021 Treasury Working Paper by Hambur[4] suggests that higher mark-ups in the Australian context are

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2 A Leigh, 'A More Dynamic Economy', FH Gruen Lecture, Australian National University, Canberra, 25 August 2022.

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

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

more likely to be attributable to a decline in competition than to the reallocation of resources towards more productive firms.

Concerns about increasing market concentration are reflected in comments by Minister Leigh who recently noted that "[i]t's hard to ignore the growing body of evidence that suggests excessive market concentration can lead to economic problems. Dominant firms in a market may have less incentive to carry out research and development. They may have less incentive to produce new products. And in some cases, they may have less incentive to pay their employees fairly."[5]

Australia is not unique in this regard. Concerns about market concentration and increasing market power are being raised and considered globally, including in Europe, and by organisations such as the OECD and International Monetary Fund.[6]

An effective merger regime is therefore an essential tool to ensure markets remain competitive by protecting against increases in market concentration that are likely to be durable to the detriment of consumers and counterparties. It is important that Australia's merger regime is effective in preventing increases in concentration *before* they occur. Once an anti-competitive merger is completed, and the businesses and assets of the acquirer and target are combined, it can be extremely difficult to unwind the competitive harm and restore the status quo *ex-ante*, even if a court subsequently finds the acquisition breached competition laws. Furthermore, once a firm attains market power by acquiring its rivals, there are limitations to dealing with the adverse effects of the exercise of that power via *ex-post* enforcement using other provisions in Part IV of the CCA. Not only is *ex-post* enforcement a blunt, costly and slow tool but, importantly, the use of market power can have a detrimental impact on consumers, for example by enabling the unilateral raising of prices, without it amounting to a misuse of market power in breach of the CCA.

The challenges with current Australian merger control model

As noted, Australia has a judicial, enforcement-based merger model combined with a forward-looking test. This presents challenges to both the ACCC and the Courts to reach a sufficient finding of the facts to make a positive finding that there is a likely substantial lessening of competition in breach of section 50. As noted by Justice Jagot:

> *Because the statutory causes of action are civil they operate by reference to the civil standard of proof so what is currently required is that the court must conclude that it is more probable than not that the conduct in issue involves a real chance of the proscribed effect [of substantially lessening competition].*[7]

The ACCC's ability to discharge this burden depends on whether it can establish and positively prove on the evidence the likely future state of competition with ('factual'), and without ('counterfactual'), the merger. This is particularly difficult in circumstances where there is uncertainty about the future or multiple counterfactuals, for example in dynamic markets such as digital platforms or complex commercial environments. A result of these challenges is that where there is uncertainty, the default position becomes to clear or permit the merger.

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[5] A Leigh, 'Market Power and Markups: Malign Markers for the Australian Macroeconomy', Address to the Sydney Institute, Sydney, 7 December 2022.

[6] 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.

[7] Justice JM Jagot, 'Some thoughts about proof in competition cases', Judicial address, UniSA & ACCC Competition and Economics Law Workshop, 15 October 2021.

The challenges with the current test are noted by former Federal Court judge, Ray Finkelstein AO QC:

> *"the view that undue concentration results in anti-competitive effects is the government's policy that lies behind s 50. The insistence that there should be positive proof of anti-competitive effects thwarts the operation of the section. The reality is there will be many cases where it is simply impossible to obtain evidence to prove the merger's anti-competitive effects and others where such evidence is non-existent.*"[8]

The challenges with the current regime in practice

The challenges with the current regime that the reform proposals are intended to address are summarised as follows:

Process

- The existing merger enforcement model is focused on the ACCC establishing why a potentially anti-competitive transaction should not be allowed to proceed, as opposed to a clearance model which instead requires the merger parties to demonstrate that the transaction should be allowed on competition grounds.
- 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.
- In some cases, merger parties are choosing not to notify the ACCC of relevant proposed acquisitions.
- In global transactions, some merger parties give low priority to the timely notification and engagement with the ACCC under our informal regime, in preference to engagement with overseas jurisdictions which impose mandatory notification requirements and formal processes.
- 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 generally requires multiple requests for additional information during the course of a review.
- The complexity that arises due to the availability of multiple avenues for seeking review and the informality and optional nature of the merger clearance process.
- The current merger regime is inconsistent with mandatory/suspensory regimes that have applied in other mature economies around the world for many years.

Merger test

- There is an insufficient focus on changes to the structural conditions resulting from a merger that may make markets less competitive.
- The current merger factors are not framed around the competition that would be lost if a merger proceeds, and do not reflect the importance of potential competition and data as a driver of competitive advantage (as noted in the Digital Platforms Inquiry's Final Report[9]).
- The current test does not sufficiently address acquisitions by a dominant firm of smaller or nascent 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

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8 Ray Finkelstein, *What is wrong with mergers in the Federal Court* (2020) 27 CCLJ 79.

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

acquisition results in a substantial lessening of competition, rather than on whether the acquisition (or a number of acquisitions – i.e. creeping acquisitions) increases or enhances a position of market power.

This is a particular concern in digital platforms. Markets involving digital platforms are prone to tipping, where network effects result in one or two firms being dominant. Threats to these established platforms are most likely to come from nascent rivals. However, established platforms in these markets can, and it would appear often do, reduce the potential for future competitive constraint by acquiring nascent competitors before they can become a substantial threat. Large digital platforms can also extend their market power into related markets, in particular by leveraging their data advantages.

The ACCC's Digital Platforms Services Inquiry report on regulatory reform, provided to Government in September 2022,[10] emphasised the competitive harms arising from the serial strategic acquisitions by major digital platforms which remove potential competitive threats or extend positions of market power. However, the report did not include specific recommendations to address this concern, and instead suggested that it would be best assessed in the context of a broader economy-wide review of the Australian merger regime.

- Jurisdictions such as the United States and United Kingdom can take a robust approach to block certain global transactions. While we are able to review and seek remedies in some of these cases, merger parties are aware that the ACCC would be unlikely to successfully block a global transaction, such as a digital platform merger, given the nature of the test, and difficulties with overcoming jurisdictional enforcement hurdles when the ultimate parent entity is based in another country.
- The current test is unlikely to be able to be applied to prevent expansion of dominant firms' reach via acquisitions in related markets (including acquisitions where the acquirer has a vertical relationship with the target, or acquisitions of firms in adjacent or emerging areas).
- The forward-looking nature of the test in a judicial enforcement model has moved the balance too much toward avoiding the risk of opposing a benign merger (Type I errors) at the expense of increasing the risk of clearing anti-competitive mergers (Type II errors). In complex mergers where the ACCC is concerned that the risk of clearing an anti-competitive merger is high due to uncertainty, it is the public not the merger parties that bear the cost of this type of error. The emphasis on having to predict the likely state of competition in the future with ('factual') and without ('counterfactual'), the information asymmetry between merger parties and the ACCC, the weight placed on the evidence of the merger parties' senior executives and the reluctance of third parties to give evidence all present significant hurdles for the ACCC, which is required to positively prove future anti-competitive effects on the balance of probabilities. This means that the default position is skewed towards clearance where there is uncertainty or a number of possible outcomes in the future.

[10] ACCC, Digital Platform Services Inquiry Fifth Interim Report - Regulatory reform, 11 November 2022.

Broader benefits from the proposed reforms

There are also expected to be broader benefits from merger reform. These include:

- **Requiring merger parties to contribute to cost recovery** – A formal regime with filing fees would ensure applicants, which are predominantly large businesses, contribute to the significant costs involved in reviewing proposed mergers, and is consistent with obtaining other regulatory approvals, such as FIRB clearance.
- **Achieving consistency in approach to foreign and non-foreign acquirers** – Moving to a formal merger regime would also ensure that foreign firms and Australian firms would face a mandatory suspensory regime. This would address any perceptions of discriminatory treatment unfavourable to foreign acquirers relative to domestic acquirers, and make it clear that foreign acquirers must deal directly with the ACCC on competition issues raised by proposed investments that are over specified thresholds.

Outline of the ACCC's merger reform proposals

The ACCC has carefully considered the package of reforms we consider are necessary to strengthen Australia's merger regime. The suggested reforms comprise of two distinct but related components – changes to the merger review process and changes to section 50. We have briefly outlined the key elements of a formal merger clearance regime and other changes to address the nature of the test in section 50 of the CCA that we put forward for consideration. We are able to provide more detail and reasons for our proposals if this would assist.

Introduction of formal merger clearance

1. **Mandatory notification**

   Mergers above prescribed notification thresholds (i.e. a notifiable transaction) would fall within the formal regime and would be prohibited from completing unless approved by the ACCC or Tribunal on review.

   Determining the thresholds will require careful consideration but, consistently 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. 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.

   Upfront information requirements would reduce the need for information requests and would help to ensure the information provided to the ACCC is accurate and complete.

   Filing fees would require the merger parties, who are often large businesses, to contribute to the costs of the review.

2. **Suspensory effect and review timeframes**

   To ensure there is sufficient time to consider the competition effects, notifiable transactions, proposed acquisitions that are called-in, or where the merger parties voluntarily opt-in for formal clearance, would not be able to complete until clearance is granted (unless the notification requirement was waived).

   Specified timeframes would provide certainty for merger parties.

   Timeframes could be extended in specified circumstances, including where remedies are offered, where there are delays in responses to information requests or with the agreement of the merger parties.

3. **Notification waiver for non-contentious transactions**

   To replicate the positive features of the informal regime which allows non-contentious mergers to be cleared expeditiously, merger parties could seek a waiver as a pre-

notification option. This would reduce the burden and expedite the handling of proposed transactions that, while meeting the notification thresholds, raise a low risk of a substantial lessening of competition.

This process could have a short timeframe, require less upfront information and adjusted fees.

If a notification waiver is granted, the transaction could progress without going through the formal review process. If a notification waiver is not granted, the merger parties would proceed to file a notification seeking formal merger clearance.

4. **Clearance test applied by ACCC and Tribunal on review**

   Under the preferred framework, notifiable transactions would be considered and cleared only if the ACCC, or the Tribunal on review, is satisfied that the transaction is not likely to substantially lessen competition. This 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.

   A competition-based clearance test is consistent with merger regimes internationally. If clearance was not granted on competition grounds, a second stage public benefit test could apply. This differs from the current merger authorisation test (which in itself is rare in merger regimes) but is important to preserve the integrity of the process.

   In our view, 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.

   The requirement for the decision maker to be positively satisfied that the test is met is consistent with the current authorisation test and would recalibrate the policy balance between preventing or allowing mergers where there is a risk of competitive harm.

5. **Call-in power for proposed transactions below the thresholds**

   Where a transaction does not meet the notification thresholds, but nonetheless raises potential competition concerns, the ACCC could exercise discretion to 'call in' the transaction so it can be assessed in the formal regime.

   While we do not envisage that a call-in power would be used extensively, we note that such a power is available in many overseas merger regimes, including those in the UK, EU, Norway, Sweden and Ireland, as a means to bring transactions below the thresholds for consideration in the formal regime.

   Based on how the call-in power operates in overseas regimes, 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. Individual transactions could be called-in where there is a reason to believe competition issues may arise. Alternatively, or in addition, in sectors where competition concerns have been identified, firms could be required to notify all acquisitions for a set period of time (eg. two years).

   How much the formal regime relies on the thresholds or the call-in power to capture the range of potentially anti-competitive mergers is a question of balance between a number of factors including transparency, certainty, flexibility and under/over capture.

6. **Transparency for procedural fairness and good decision making**

   To provide transparency in the formal merger regime, we consider it is important that the fact that the ACCC has received a merger notification should be made public, with sufficient information about the transaction to provide the opportunity for third parties to make submissions and raise concerns, and for the ACCC to take these submissions and concerns into account in its decision.

We also consider there may be opportunities to publish information about notification waiver requests, though this may be more limited and published after a slight delay to address business concerns about the confidentiality of a proposed merger at the time the waiver is sought.

The ACCC should publish written reasons for its decisions.

7. **Opportunity for limited merits review of ACCC decisions by the Tribunal**

   We consider that the Tribunal is well placed to be the review body[11] for merger decisions in a formal clearance regime, with the Federal Court continuing to be able to consider applications for declaration or judicial review.

   The Tribunal would apply the same clearance test as the ACCC and take into account the information that was provided to the ACCC, with new evidence to be limited to events that occur after the conclusion of the ACCC's review and impact on the competitiveness of the relevant markets. This is consistent with the current position that applies to Tribunal reviews of ACCC merger authorisation determinations.

8. **Role of Federal Court**

   The Federal Court would continue to be able to consider applications for declaration or judicial review. This would not be a final clearance option but would ensure that procedural fairness is afforded to merger parties and third parties. We note that we

Changes to section 50

1. **Clarifying section 50**

   We consider that changes to section 50 would be beneficial to focus the merger assessment on the structural conditions for competition in markets most at risk of the exercise of market power and identifying the competition lost when the acquirer has substantial market power. It is not uncommon for markets with high barriers to entry, high levels of concentration and a small number of participants to have firms with substantial market power. Therefore, acquisitions in these markets are more likely to have significant and long-lasting effects on competition, and resulting detriments for consumers in terms of higher prices, less innovation and choice, and lower quality and service levels.

   A greater focus on the effect of mergers on the structural conditions for competition could be achieved by expressly stating in section 50 that a substantial lessening of competition includes entrenching, materially increasing or materially extending a position of substantial market power.

   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".[12]

   We consider a change of this nature also makes it clear that section 50 is capable of dealing with anti-competitive acquisitions by digital platforms with substantial market power and would allow serious consideration of creeping acquisitions by large firms with market power. In this way, clarifying section 50 may also prevent or discourage some creeping acquisitions, reducing the likelihood of the accretion of market power through a strategy of small serial acquisitions.

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[11] The Tr bunal consists 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.

[12] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Article 2(3) provides: "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

The challenges in the current formulation of section 50 in being able to respond to the competition effects from creeping acquisitions has been a long-standing concern. The proposed reframing of section 50 and the clearance process, where potentially anti-competitive mergers are not cleared where there is uncertainty about whether there is a likely substantial lessening of competition, is a more sophisticated and less blunt change compared to options that have been previously considered.

2. **Revising and modernising the merger factors in section 50(3)**

   We consider it would be beneficial to improve the legislative guidance provided by the merger factors.

   Most of the factors in section 50(3) are focused on the market features (eg. "the height of barriers to entry to the market"). Revising the wording of the factors to include reference to changes as a result of a merger (eg. "the height of barriers to entry and any increase in the height of barriers") would provide more effective guidance on the conditions that distinguish anti-competitive mergers from benign or pro-competitive mergers.

   We also consider there is an opportunity to implement one of the recommendations in the ACCC's Digital Platforms Inquiry relating to adopting new merger factors relating to the loss of actual or potential competitive rivalry, and/or increased access to or control of data, technology or other significant assets.

   In addition, we propose new merger factors to focus consideration of the following in the competition assessment:

   - creeping acquisitions i.e. a series of relevant acquisitions made by a firm and the impact on competition of these acquisitions when combined with the proposed acquisition; and
   - whether the acquisition entrenches or extends a position of substantial market power.[13]

3. A housekeeping amendment to **allow consideration of other agreements between merger parties in merger assessments**

   While there is an argument that this change is not necessary, following issues raised in the *Pacific National* case,[14] we consider that it would be helpful to make it clear that the competitive effects of other agreements between merger parties may be considered in the assessment of likely lessening of competition resulting from the merger.

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[13] In Canada, amendments were made in 2022 to section 93 of the *Competition Act* so that the Tribunal may have regard to (emphasis added):

> *"(g.1) network effects within the market;*
>
> *(g.2) whether the merger or proposed merger would contribute to the* ***entrenchment of the market position of leading incumbents****;*
>
> *(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy".*

[14] *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] FCAFC 77.