AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Ex post review of ACCC merger decisions

February 2022

Contents

1. Introduction to the report

During 2021, the ACCC conducted ex post reviews of six past merger decisions to inform and improve our merger investigative processes, investigation efficiency and our decisions. These reviews have provided us with useful insights and lessons which are informing our current merger reviews, and the weight we give to different types of evidence from different interested parties.

The key takeaways which we have observed include:

- Confirmation that the removal of a vigorous and effective competitor can have a significant impact on competition, even where the merger results in a relatively minor increase in market concentration, and even where there are other vigorous and effective competitors remaining in a market. This emphasises the importance of the ACCC looking beyond market shares and at other market conditions that may heighten the risk that a merger will impact competition.
- The need to be skeptical as to whether the benefit of competitive constraints on a particular segment will be carried over to other segments. We have identified instances of successful price discrimination post-merger, such that competitive constraints which were relevant to a segment of customers, did not constrain the merged entity from imposing significant price increases on other customers.
- The likelihood of new entry and expansion, and the ability of third parties to exercise countervailing power, are both routinely over-estimated by merger parties and third parties. This supports the need for greater scrutiny of such claims and caution to be exercised where competitive constraints on a merger largely rely on new entry or by customers exercising countervailing power.
- There are instances where merger parties and third parties have distorted or omitted critical information relevant to the ACCC's analysis. This highlights the weaknesses in the current informal clearance regime, including where merger parties decide what information they provide to the ACCC upfront and during the review.

We will publish future learnings as and when we identify meaningful trends and insights from further ex post merger work. The selection of matters included in this report, and future work, is discussed in **Section 2** below.

We have completed in-depth ex post reviews of the following matters:

- Caltex Australia's acquisition of assets from Milemaker Petroleum (**Caltex/Milemaker**)
- Platinum Equity's (Winc) acquisition of OfficeMax Australia (**Winc/OfficeMax**)
- Complete Office Supplies' acquisition of Lyreco (**COS/Lyreco**)
- Emergent Cold's acquisition of AB Oxford Cold Storage Company (**Emergent/Oxford**)
- Propel Funeral Partners' acquisition of Gregson & Weight Funeral Directors (**Propel/G&W**)
- The remedy package in Landmark's acquisition of Ruralco (**Landmark/Ruralco**).

The report is divided into the following sections:

- **Section 2**: A summary of the approach taken to ex post merger reviews
- **Section 3**: An amalgamated summary of key insights
- **Section 4**: A high-level summary of the six in-depth ex post reviews conducted to date.

2. Summary of approach taken to ex post merger reviews

This is the first time the ACCC has published a report on ex post reviews of past merger decisions. In informing our approach, we have had regard to the practices and experience of overseas competition agencies. A variety of approaches have been adopted by other competition agencies, including whether to conduct the work internally, or engage external consultants, and whether findings from the work are made publicly available.

The reviews which are referenced in this report have been conducted internally. This enabled us to be flexible regarding the scope and timing of reviews, according to the availability of information. It also ensured that we minimised confidentially constraints and best managed our resources between ex post reviews and our usual mergers work.

Our focus when undertaking ex post merger reviews is not to determine whether specific ACCC decisions were correct or incorrect, compared to alternative decisions available to the ACCC at the time. Rather, we have focused on specific predictions (in relation to merger factors or remedies) made by the ACCC, merger parties and/or third parties at the time of a merger review that influenced the outcome. We have sought to identify when the situation played out as we predicted and when it did not. When it did not, we have sought to identify the reasons, and whether there are lessons to be learnt for future reviews.

Our goal from conducting ex post reviews is to:

- improve the quality of future ACCC merger decisions
- assess the effectiveness of tools and models used to make predictions about future market developments
- improve our processes and the efficiency with which we undertake merger reviews
- verify the soundness of the economic theories on which we base decisions
- improve transparency and confidence in the ACCC's processes and decision making
- evaluate the effectiveness of merger policy and ACCC interventions and contribute to a broader discussion around law reform.

Matter selection

We have selected matters according to a range of criteria, including the availability of information and data, the time elapsed since the merger, the unique issues raised, and the potential relevance to future ACCC investigations.

The matters considered in this report were all unopposed by the ACCC. They vary in terms of whether the ACCC published a Statement of Issues identifying preliminary competition concerns during its review. One matter was pre-assessed by the ACCC without a public review.

At this stage, we have not conducted in-depth ex post reviews of mergers which were opposed. Opposed matters can include:

- matters that were not completed after our oppose decision
- matters which were completed after our decision, as the merger parties successfully challenged the ACCC decision in the Federal Court or Australian Competition Tribunal.

The reasons for not having conducted detailed reviews of opposed matters at this stage include:

- too little time has passed to assess the effects of the merger, or conversely the merger was completed too long ago to offer insights relevant to the current work of the ACCC
- where a merger did not complete as a result of ACCC intervention, actual market developments were unlikely to yield useful information sufficient to assess ACCC predictions at the time of the initial review
- in relation to the small number of matters which were ultimately decided by the Court or Tribunal, the reasons for the decisions have been based on factors that cannot been tested through ex post review (for example, the intentions of a merger party to cease operating in the absence of a merger).

The ACCC has received complaints from industry participants concerning the level of competition and/or observed price increases involving markets that were relevant to several merger matters decided by the Court or Tribunal. These included but were not limited to, TPG/Vodafone,[1] AGL/Macquarie Generation[2] and Sea Swift/Toll Marine.[3]

While in isolation, it is not possible to conclude from these complaints and price increases that the merger was the cause, they may raise sufficient concerns to justify conducting in-depth ex post reviews of these matters in future. The decision to conduct an ex post review will depend on having adequate information available and whether the review is likely to provide insights relevant to future decision-making.

In particular, in relation to TPG/Vodafone, the ACCC has raised concerns regarding recent price increases observed across a range of post-paid plans by Telstra, Optus and Vodafone after the merger.[4] Some have been direct price increases or indirect by reducing expiry periods on pre-paid plans. These increases have occurred since the TPG/Vodafone merger was completed. The ACCC has also received complaints and market feedback that the intensity of competition between the mobile network operators has significantly reduced.

During its consideration of the TPG/Vodafone merger, the ACCC identified evidence that the three mobile network owners reacted strongly to the potential competitive threat of a new TPG network. However, the Federal Court considered that the merger would be pro-competitive, allowing TPG/Vodafone to compete more effectively against Telstra and Optus.

We will continue to monitor pricing across these mobile plans. We are also aware of the recently announced agreement between Telstra and TPG relating to access to each other's mobile network infrastructure and spectrum. This will be considered by the ACCC in due course.

1 TPG Telecom Limited's merger with Vodafone Hutchison Australia Pty Ltd. The ACCC announced its decision to oppose the merger in May 2019. Vodafone instituted proceedings in the Federal Court, and in February 2020 the Court declared the merger between TPG and Vodafone would not substantially lessen competition.

2 AGL Energy Limited acquisition of Macquarie Generation assets in NSW. The assets included two coal-fired power plants in Bayswater and Liddell. The ACCC opposed the acquisition on the basis that it was likely to substantially lessen competition in the retail supply of electricity in New South Wales. However, the matter was subsequently authorised by the Australian Competition Tribunal in June 2014.

3 Sea Swift Pty Ltd' acquisition of assets associated with the Toll Marine Logistics business. Sea Swift and Toll Marine provided scheduled marine freight services and marine freight charter services in northern Australia. The ACCC contended that, in the absence of the acquisition, Toll would wind up the Toll Marine business in a manner which provided the opportunity for an alternative competitor to establish itself in the market. The acquisition was subsequently authorised subject to conditions by the Australian Competition Tribunal in July 2016.

4 ACCC media release - Australian consumers now paying more for mobile plans, 21 June 2021.

Limitations of ex post reviews

There are practical and methodological challenges when undertaking ex post reviews. In particular:

- it is impossible to perfectly understand all events that have taken place since a merger, or would have taken place in the absence of a merger, and the effect that these have or would have had on competition
- without compulsory information gathering powers, our ex post reviews rely on the voluntary provision of sensitive commercial information by parties that have little incentive to provide such information. In the course of our work, we have often relied on anecdotal information about price changes through interviews with industry participants. Where possible, we have obtained detailed data from market participants voluntarily, but this has rarely been comprehensive enough to perform rigorous econometric assessments. The exception is the ex post study of the Caltex/Milemaker matter where the ACCC has detailed pricing information
- the impact of COVID-19 has created major disruptions in many markets, such that the effects of a merger on competition may have been amplified or muted compared to what may have otherwise been expected. While our analyses have sought to control for this impact where possible, this has not always been the case.

Ex post reviews and the ACCC's merger law reform proposals

The ACCC recently started a debate on merger law reform with proposals for changes to the mergers test and merger review process in Australia. The ACCC proposed replacing the current informal review process with a new formal merger regime, possible amendments to section 50 of the *Competition and Consumer Act 2010* (Cth) and tailored merger control rules for large digital platforms.

Our ex post review work has been conducted independently from our law reform proposals, and its purpose is to focus on our internal investigative processes and decision making. However, some findings are relevant to the discussion about merger review processes in Australia.

Confidentiality of information and findings

The ACCC's ex post reviews rely on a large range of confidential information obtained voluntarily from interested parties now and at the time of the mergers, and information obtained compulsorily at the time of the merger. It is therefore not possible to publish the ACCC's detailed ex post analyses of specific matters. This report provides a summary of the high-level findings and takeaways.

3. Key takeaways

The ACCC's review of past merger decisions has provided useful insights for ACCC case teams and decision makers. The key takeaways are summarised below.

The removal of a vigorous and effective competitor can harm competition, even when market shares appear relatively low

The removal of a vigorous and effective competitor can have a significant impact on competition, even where the merger results in a relatively minor increase in market concentration, and there are other vigorous and effective competitors active in a market.

Market shares are a key input to determine market concentration and are a starting point in the assessment of the potential competitive harm arising from a merger. The ACCC will generally calculate market shares according to sales, volume and capacity, although other metrics are considered as appropriate. However, market shares may underplay or overplay the competitive effects of a merger, and it is important to examine other market conditions to understand competition post-merger.

For example, the combined Caltex/Milemaker accounted for approximately 11% of retail petrol sites in Melbourne, with many other major retailers remaining after the acquisition. However, despite this relatively low share of sites in the metropolitan area, we identified a quantifiable reduction in price competition as a result of the acquisition.

The reduction in price competition is a result of the removal of Milemaker as a vigorous and effective competitor, but importantly, it has taken place even where other vigorous and effective competitors remain.

Some cleared mergers have resulted in significant price increases for segments of markets

Our ex post work to date has brought into focus the potential for different outcomes to be experienced by different classes and sizes of customers as a result of a merger. This is particularly the case in markets where providers have differentiated service offerings, and some customers have less available alternative suppliers than others.

The reviews showed the need for greater skepticism as to whether the benefit of competitive constraints on a particular segment will be transferred to other segments. We have identified instances of successful price discrimination, such that competitive constraints which were relevant to a segment of customers (such as the threat of self-supply by large customers) did not constrain the merged entity with regard to other customers.

In Emergent/Oxford, where large customers appear to have faced price increases which are in line with historical price movement, mid-sized customers appear to have faced far more significant price increases. At the time of our initial review, we had predicted new entry and expansion would prevent the merger from lessening competition in the mid-sized customer segment. However, to date, new entry/expansion does not appear to have constrained the merged firm in this segment.

The likelihood of new entry and expansion is routinely exaggerated

Barriers to entry are typically a focus of inquiry in our merger reviews. If barriers to entry are low, then the merged firm may be constrained by the threat of entry and substitution by customers to the goods or services of the potential entrants. The key question for a merger review is whether the likelihood of entry will be sufficient to constrain the exercise of market power in a timely manner post-merger. In some cases, during a merger review, there may be existing plans for entry that can be assessed, and in other cases, the ACCC will consider the conditions for entry more generally.

The ACCC relies on a range of information to assess barriers, but it is heavily informed by the submissions of merger parties and third parties. Across the ex post reviews conducted to date, we identified numerous claims by industry participants across various industries about potential new entry. However, the ACCC identified that in almost none of these cases had any entry transpired in the time since the merger.[5]

5 We note that the lack of new entry does not preclude that, in some circumstances, a credible threat of new entry alone may prevent any attempt to exercise market power.

It is understandable that merger parties' submissions, in presenting information to the ACCC, tend to emphasise the prospect of new entry that will constrain the merged entity. However, the ACCC also identified instances where third parties had made bullish claims about their own, or others' likelihood of entry, which had not transpired.

The ACCC often assesses the likelihood of new entry from overseas entities that are not present in Australia, and this may be considered a mitigating factor that reduces any potential harm from a merger. However, even where a market has in the past seen entry from overseas firms, this may not be indicative of likely future greenfield entry.

For example, in Emergent/Oxford, our investigation indicated that the threat of potential overseas entry would provide some degree of constraint on the merged entity. However, the only entry observed to date has been through the acquisition of local firms by overseas companies, which has not created any additional competitive tension in the market. Furthermore, global consolidation has reduced the number of available global entities who could enter Australia to the extent that during our ex post inquiries, no market participants identified any potential overseas entrants.

The ACCC is considering the information it requires of parties in relation to entry and the weight it places on general assertions about entry that are not supported by clear and direct evidence.

Third parties are poor assessors of their own countervailing power

Countervailing power refers to a situation where customers are able to prevent the exercise of increased market power by suppliers. Only if the buyer is in a position to prevent the exercise of increased market power post-merger, for example if they are in a position to vertically integrate or sponsor entry, will a buyer truly have countervailing power.

The ex post reviews identified several instances, across different industries, where market participants at the time of the review were overly confident about their ability, or the likelihood, of exercising countervailing power. This included examples where, post- merger, these market participants had been subjected to price increases, and yet were not in a position to exercise countervailing power to constrain the merged entity.

The exercise of countervailing power potentially requires a greater capital and labour commitment than was contemplated by interviewees during ACCC market inquiries. The ACCC will carefully review information from parties in relation to countervailing power and the weight it places on general assertions by merger parties and third parties. This highlights the importance of information which supports whether a threat to bypass a merged entity is likely on commercial grounds, not just whether it is possible.

Merger parties and third parties may distort or omit relevant information

The ex post review uncovered several instances where information was presented to the ACCC at the time of the merger in a distorted manner, or was omitted, and this impacted the ACCC's assessment regarding specific merger factors. This is demonstrated in the following examples:

- In one review, detailed information was submitted to the ACCC that a particular party was a viable competitor, with imminent expansion plans that would increase its competitiveness. A matter of weeks later, in a different review, the ACCC received contradictory information that the same party was a failing firm with imminent risk of closure. This re-enforces the need for the ACCC to closely examine claims about entry/expansion and claims about failing firms. The evidence required to demonstrate that a merger will not substantially lessen competition due to the prospective failure of one of the merger parties is outlined in the ACCC's Merger Guidelines.

- An acquirer's internal documents anticipated material revenue increases that would result from a merger, attributed to price increases that would be possible post-merger. These forecasts were omitted from later versions of the document - at the time engagement with the ACCC was anticipated. This is not unexpected, as the ACCC often observes during merger investigations that the assessment of the benefits of a merger in internal documents materially changes over time. However, in this instance, the ex post review suggests the initial forecast was the accurate one - with observable price increases imposed by the merged firm likely having led to the revenue gains predicted in the original version of the document.
- A merger party made definitive submissions about how a merger was necessary to give it the ability to upgrade and expand a target's facility to bring about further competition against other major players. The ACCC weighed this pro-competitive expansion, which would have potentially increased competition with other major players, against the lessening of competition arising from the merger. This expansion has not happened to date, and the ex post review did not identify any information which suggests the plan was contemplated further following the submission to the ACCC.
- A merger party did not disclose its imminent acquisition by another overseas participant. This omission affected the accuracy of that party's written submissions, and the ACCC's competition analysis, which identified new greenfield entry by overseas firms as a competitive constraint.

The ACCC's merger reviews rely on the provision of complete and accurate information by merger parties, and therefore the instances identified above are very concerning. Further, we have conducted only six in-depth ex post reviews to date, and it may be expected that further ex post work will identify further issues with information provided to the ACCC by merger parties and third parties.

Other takeaways

We have identified further insights, which are of particular relevance to certain types of mergers and/or industries.

Transparency of pricing may be distorting competition

Our ex post review identified that some industries suffer from a concerning lack of clarity and transparency in pricing information provided to customers. In such industries, ACCC investigations may consider pricing transparency as an element of a suppliers' service, to ensure that a reduction in competition is not likely to exacerbate this issue (for example, if a target has better practices than an acquirer). Our review indicates that such opaque pricing may be distorting competition, and some suppliers may have the potential to be stronger competitors if pricing is more transparent.

Remedies

Our ex post review of Landmark/Ruralco identified that competition from small competitors can replace the constraint provided by a national chain, if the right conditions are present. However, there are number of factors in this case that are likely to have contributed to the ongoing viability of the divestiture businesses when operated independently:

- Retailers in the market are generally selling commodity products, and where they are not, there are limited instances of any exclusivity arrangements – such that independent retailers are able to stock the same or equivalent products as large chains.

- The market is one in which local ownership, and knowledge and experience with the local geographic area, is a selling point and valued by customers.
- The customer base is well-informed and discerning.
- The remote locations of these businesses result in large national chains deriving less efficiencies of scale (particularly in terms of distribution when the nearest stores are hundreds of kilometres away) than would be experienced by chains with stores closer together.

In other cases, without these factors present, small independent businesses may be less able to maintain the same competition position as large national chains.

Timing of purchase approval process

In situations where there are small businesses, and/or local staff impacted by a divestiture business, the timing of the approval process for buyers of the divested business can have a significant impact. If uncertainty results in staff attrition, this could affect the viability of the ongoing business and the efficacy of the remedy.

4. Summaries of ex post merger reviews

The ACCC has undertaken six in depth ex post merger reviews to date.

Caltex Australia Petroleum Pty Ltd - assets from Milemaker Petroleum

Merger review commenced: 17 November 2016
Statement of Issues: 16 March 2017
Outcome: Not opposed on 4 May 2017

ACCC decision

In May 2017, Caltex[6] acquired the Milemaker retail petrol business. This involved Caltex taking over the operation of 33 retail petrol sites[7] in Melbourne (**the Milemaker sites**), two in Geelong and 11 in regional Victoria. Pre-acquisition, these sites were operated by Milemaker who set the retail petrol prices at the sites. Milemaker acquired wholesale fuel from Caltex and sold retail petrol under the Caltex brand. Since the acquisition Caltex has set retail petrol prices at the sites.

The ACCC considered the competitive effects of the proposed acquisition in markets for:

- the retail supply of petrol in the local areas in the vicinity of each Milemaker site
- the retail supply of petrol in the Melbourne metropolitan area.

The ACCC considered whether the proposed acquisition would be likely to substantially lessen competition by removing a vigorous and effective competitor from the relevant markets.[8]

6 In 2020, Caltex Australia Limited changed its name to Ampol Limited. Caltex commenced re-branding its sites from Caltex to Ampol in mid-2020.

7 Including one site that was in development at the time.

8 ACCC's Public Competition Assessment (25 July 2018).

The ACCC's theory of harm had the following elements:

- Milemaker is a vigorous and effective price competitor in petrol retailing
- post-acquisition, Caltex will adopt a less aggressive pricing strategy in setting prices at the Milemaker sites
- as a result, the price competition faced by petrol retailers that compete on a local basis with the Milemaker sites will be lessened
- this will result in higher petrol prices in the local areas in the vicinity of Milemaker sites, and possibly, more broadly, across the Melbourne metropolitan area.

The ACCC concluded that Milemaker was a vigorous and effective price competitor that exerts competitive pressure on retail petrol prices in Melbourne,[9] and that Caltex was likely to change the way the Milemaker sites were operated such that a vigorous price competitor will be removed from petrol retailing in Melbourne. However, the ACCC cleared the merger on the basis that:

- there were a number of other vigorous and effective price competitors in petrol retailing in Melbourne who were larger than Milemaker and who competed more directly with Caltex on a local site basis
- sufficient competitive pressure would remain in petrol retailing in Melbourne to prevent the acquisition from having the effect or likely effect of substantially lessening competition.

Petrol price cycles

Price cycles are a prominent feature of retail petrol prices in Australia's largest cities, including Melbourne. Petrol prices have two distinct phases:

- the restoration phase - a substantial increase in prices that generally occurs across a metropolitan area
- the discounting phase - a more prolonged phase of decreasing prices.

The restoration phase is generally initiated by one or two retailers increasing prices substantially at a small number of retail sites. If other retailers respond to this move with similar increases, then the increased price usually spreads across most retail sites within a metropolitan area in a matter of days.

Some retailers follow shortly after the first mover raises prices; others take longer to follow the price increase. This is because there is an incentive for individual retailers to delay their price response during the restoration phase of the price cycle, thereby potentially gaining a temporary increase in sales and a reputation for low prices.

The risk for retailers who delay is that the first mover (or those that follow quickly) may abandon their attempt to increase prices, and return their prices to the previous, lower levels. The longer other retailers delay in following an attempted restoration, the greater the likelihood that the first mover or early followers will abandon their price increase.

Generally during the restoration phase, retailers increase prices to the same or a similar price point across different local areas within a metropolitan area.

The discounting phase involves a slower process of fuel retailers undercutting or matching each other's prices on a local basis in small amounts. This process can take a number of weeks.

During the discounting phase, the rate at which retailers reduce their prices from the cyclical peak tends to vary on a site-by-site basis depending on factors that include the prices at nearby sites. As a result, during the discounting phase, there will often be a degree of variability in the prices across a retailer's sites in a city.

9 ACCC's Public Competition Assessment (25 July 2018).

Ex post findings

The ex post review focused on the price of regular unleaded petrol (**RULP**) in Melbourne. Immediately prior to the acquisition, Caltex set RULP prices at 59 sites, or around 7% of the sites in Melbourne (**the Caltex sites**). The Caltex-Milemaker acquisition had the effect of increasing this share to around 11% of sites.

The information available to the ACCC for this ex post review is somewhat unique. As a result of several past merger investigations, the ACCC has been able to compile a dataset of “time of day” RULP prices at almost all retail petrol sites in Melbourne extending over the period 2015 to 2019. This enabled the ACCC to assess the effect of the acquisition (which occurred in May 2017) on RULP prices.

This ex post review involved extensive analysis of RULP pricing data in combination with confidential and commercially sensitive information obtained from petrol retailers in past merger reviews. The results of the analysis reported in this paper are a small part of the analysis undertaken in the review. This is necessary to protect this commercially sensitive information.

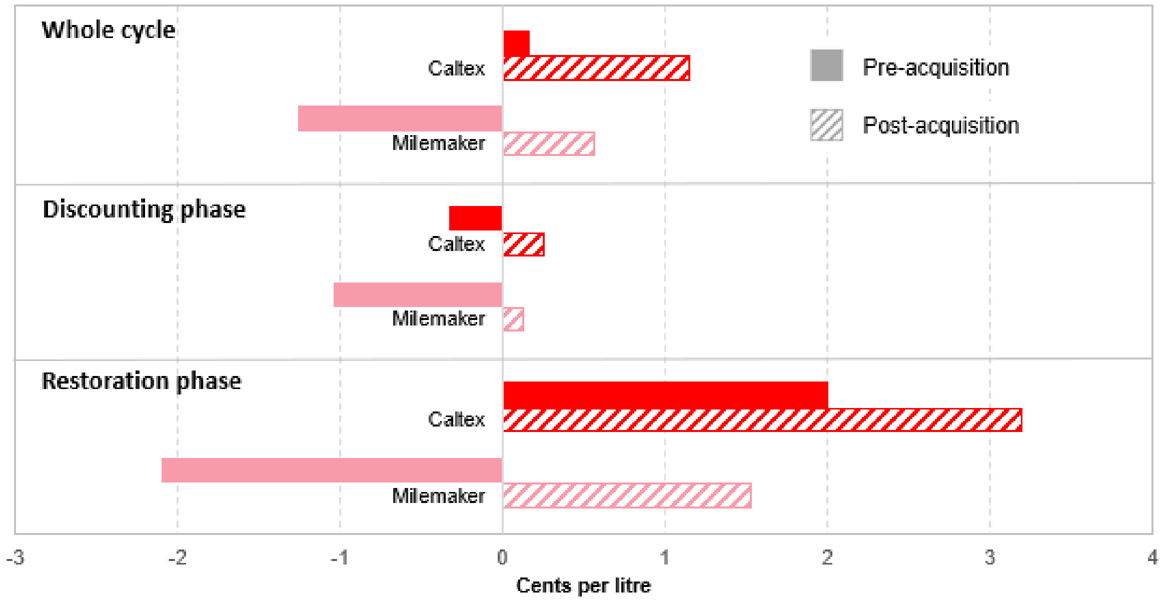
The ex post analysis revealed that Milemaker was a vigorous and effective price competitor in the retailing of RULP in Melbourne and that Caltex adopted a much less aggressive pricing strategy at the Milemaker sites post-acquisition. As noted above, the ACCC considered these effects were likely at the time it assessed the acquisition.

Figure 1 displays the average RULP prices at the Caltex sites and the Milemaker sites relative to the average RULP price across all sites in Melbourne. Pre-acquisition[10] the RULP prices at the Milemaker sites were, on average, more than 1 cent per litre below the Melbourne average. Post-acquisition they were around 0.5 cents per litre above the average. Furthermore:

- RULP prices at the Milemaker sites were, on average, the second lowest among the major retailers in Melbourne pre-acquisition compared to one of the highest post-acquisition.
- RULP prices at the Milemaker sites were, on average, the lowest among the major retailers pre-acquisition during the discounting phases compared to one of the highest post-acquisition.
- Post-acquisition, Caltex was quicker to increase prices at Milemaker sites (relative to other retailers), than Milemaker did pre-acquisition.

10 The acquisition was completed on 9 May 2017. The pre-acquisition period is 1 January 2015 to 17 April 2017. The post-acquisition period is 7 July 2017 to 31 December 2019. The period from 18 April 2017 to 6 July 2017 is a transition period. It covers the two price cycles that include some periods when the pricing of the Milemaker sites were transitioning to Caltex.

Figure 1: Merger parties' RULP prices compared to Melbourne average



The ex post analysis also revealed that the less aggressive pricing strategy adopted by Caltex at the Milemaker sites had the effect of lessening the price competition faced by petrol retailers in the vicinity of those sites. This resulted in higher RULP prices in the local areas in the vicinity of the Milemaker sites. The ACCC considered this was not likely when it assessed the acquisition, given the number of other vigorous price competitors in the vicinity of the Milemaker sites.

Analysis of the effects of the less aggressive pricing strategy adopted by Caltex at the Milemaker sites on the price competition faced by other retailers was based on confidential information sourced from major retailers on the sites they actively monitor when setting RULP prices at each of their own sites. These sites are often referred to as marker sites. Major retailers include BP, Caltex, Coles, 7 Eleven, Woolworths and United. Specifically, for each of these major retailers RULP prices at sites that 'mark' a Milemaker site were compared to the prices at their sites that do not 'mark' a Milemaker site.

Figure 2 displays these comparisons for each price cycle over the period 2015 to 2019. Each observation in the figure represents the average difference between RULP prices at sites where the retailer 'marks' a Milemaker site (i.e. are close local competitors to a Milemaker site) and prices at sites where the same retailer does not mark a Milemaker site. This is done for individual price cycles.[11]

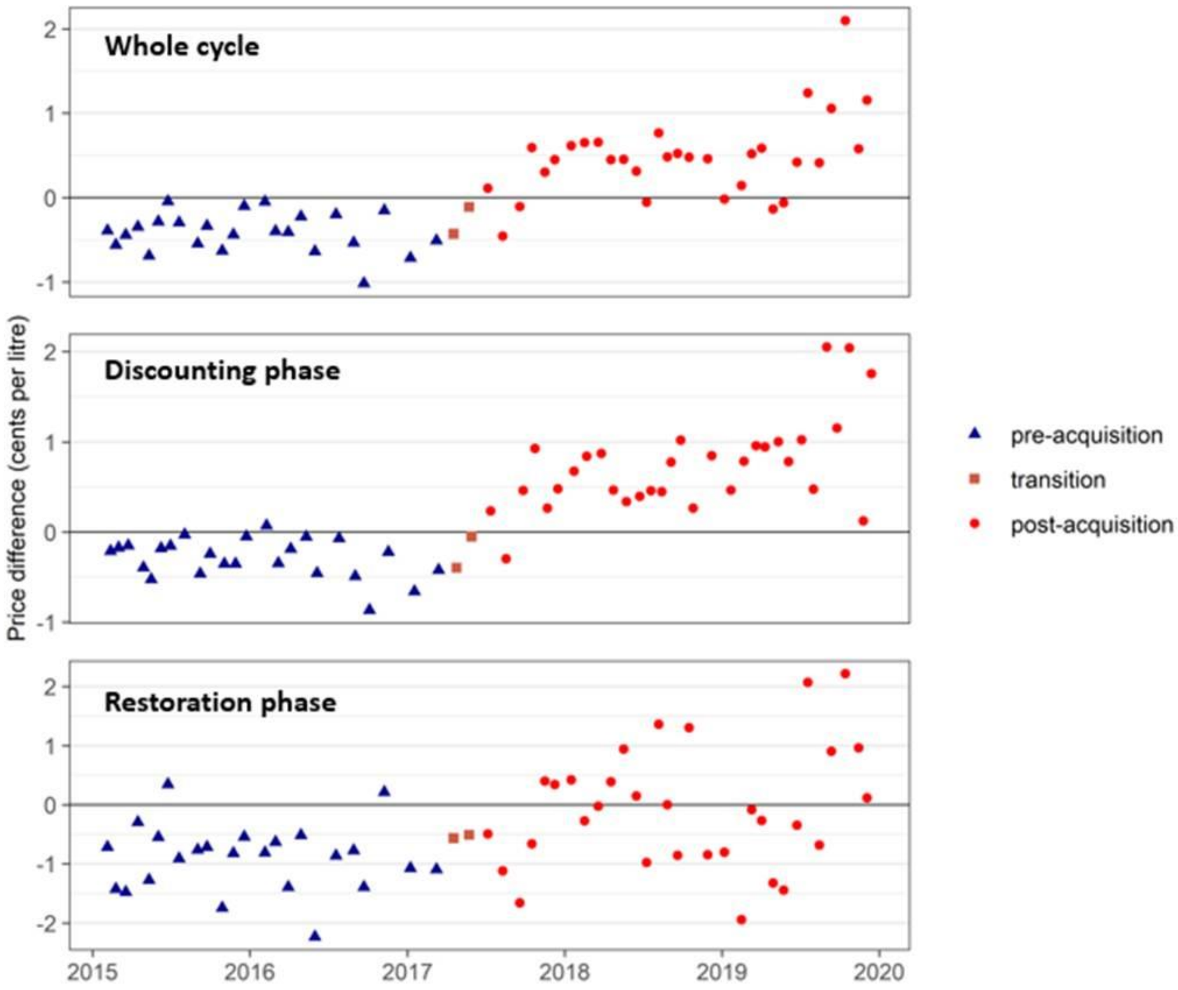
Figure 2 shows that:

- pre-acquisition RULP prices at sites that 'mark' a Milemaker site were, on average, *lower* than the prices at sites that do not 'mark' a Milemaker site – this difference largely varied between 0 and 1 cents per litre depending on the price cycle
- post-acquisition RULP prices at sites that 'mark' a Milemaker site were, on average, *higher* than the prices at sites that do not 'mark' a Milemaker site – this difference largely varied between 0 and 1 cents per litre depending on the price cycle.

11 These comparisons are of RULP prices at sites that mark a Millemaker site and sites that do not mark a Milemaker site for each major retailer. So, for a BP site that 'marks' a Milemaker site, it is the average difference between the RULP price at the BP site and the prices of all BP sites that do not 'mark' a Milemaker site.

Put simply, post-acquisition, the prices at the sites that major retailers consider to be close local competitors to a Milemaker site increased relative to the prices at their sites that they do not consider to closely compete with a Milemaker site. Moreover, it is clear from **Figure 2** that the effect on the pricing of local competitor sites occurred contemporaneously with the acquisition. This strongly suggests that the acquisition explains the increase in RULP prices at these sites.

Figure 2: Price difference between sites that compete with Milemaker sites and those that do not



Source: Based on confidential information obtained by the ACCC

On the basis of our analysis we estimate that the acquisition had the effect of:

- increasing RULP prices in local areas near Milemaker sites by around 0.8 cents per litre (on average)
- increasing the margins of petrol retailers in local areas near Milemaker sites by around 6% (on average)
- increasing the total cost of RULP to motorists by around $6 million per annum.

The ex post review supports the ACCC's theories of harm in other retail petrol mergers, including for example the ACCC's opposition of BP's proposed acquisition of Woolworths' retail petrol sites.[12] The removal of a vigorous and effective price competitor can matter to the outcomes in local petrol markets where price cycles are present. This can occur even if there are other strong price competitors in the same local area. Removing a vigorous and effective price competitor reduces the competitive pressure on other retailers who compete aggressively on price. These effects can result in higher petrol prices across local areas of competition, and even into adjoining areas.

Platinum Equity (Winc) - OfficeMax Australia

Merger review commenced: 15 May 2017
Statement of Issues: 24 August 2017
Outcome: Not opposed on 30 November 2017

ACCC decision

Platinum Equity (which owns Winc – formerly Staples Australia) and OfficeMax overlapped in the supply of office products.

The ACCC ultimately concluded that although the acquisition was likely to lessen competition, it was unlikely to substantially lessen competition in the market for the supply of traditional office products to large commercial and government customers in Australia.

The ACCC considered that the presence of two remaining (albeit much smaller) suppliers COS and Lyreco, and the ability of large customers to switch suppliers and purchase off-contract, would constrain the merged entity.

Ex post findings

These are considered below in conjunction with COS/Lyreco.

Complete Office Supplies – Lyreco

No public merger review: Pre-assessed in March 2018

ACCC pre-assessment

The ACCC pre-assessed the acquisition, taking into account the analysis in the public reviews of Platinum Equity/Office Max, and COS' proposed acquisition of OfficeMax.[13]

The ACCC concluded that a combined COS/Lyreco was likely to be constrained by the market leader, Winc, as well as by the ability of customers to purchase off contract and low switching costs. In addition, we considered that existing suppliers of office products, including Officeworks, would be likely to be able to expand if prices and margins were to increase post-acquisition.

12 ACCC public register – BP proposed acquisition of Woolworths' retail service station sites.

13 COS' proposed acquisition was a competing, and ultimately unsuccessful, bid to Platinum Equity's. The ACCC conducted a public review and announced we would not oppose the proposed acquisition on 16 November 2017.

Ex post findings

The ACCC conducted a combined ex post review of both Platinum Equity/Office Max and COS/Lyreco. The two acquisitions resulted in a shift in market structure from four to two main national suppliers of office stationery to large customers.

The ex post review relied primarily on a large number of interviews with customers and other interested parties. We were unable to obtain data sufficient to perform rigorous quantitative analysis, but the limited data we have obtained was supportive of the qualitative information gathered through interviews. During the ex post review, no market participant identified significant negative competitive effects as a result of the acquisitions.

We would normally expect to identify some degree of competitive harm resulting from a change in market structure from four main suppliers to two main suppliers. However, our inquiries suggest that the combination of factors considered by the ACCC in its initial assessments, taken together, are providing sufficient constraint on Winc and COS following the acquisitions. These include:

- In relation to the constraint on Winc, COS' acquisition of Lyreco enabled it to expand more quickly than it may have been able to organically, and provide greater competitive tension than it otherwise would have.
- There is at least a small amount of competitive tension provided by small Indigenous-owned businesses in the industry. These businesses are generally partnered with existing suppliers which they rely on for their back-end, warehousing and logistics. They are not genuine independent competition, but may represent an opportunity for smaller suppliers to capture market share from Winc and COS.
- Government customers have a tendency to contract in ways that allow them to multi-source their requirements, by establishing a panel of suppliers. This means that despite Winc and COS' large size relative to other suppliers, there are opportunities for much smaller suppliers to be successfully listed on government panels. It also makes it easy for large government customers to switch between alternative contracted suppliers and punish Winc or COS for price increases or deterioration in service quality.
- There appears to be competition at the margins by retail office products suppliers. In particular, rather than ordering from their contracted office products supplier, office or procurement managers are increasingly making ad hoc purchases from Officeworks, and more recently, Amazon.
- There appears to be a small amount of competitive constraint provided by suppliers other than the traditional 'one-stop shop' suppliers of traditional office products. For example, customers identified the ability to move ink and toner requirements away from office product suppliers to vendors of managed printing services.
- The office products market is in a period of long-term decline. This trend has been accelerated by COVID-19 seeing employees work from home and offices closed resulting in no office product spend.

Emergent Cold - AB Oxford Cold Storage Company

Merger review commenced: 3 June 2019
Statement of Issues: 15 August 2019
Outcome: Not opposed on 23 October 2019

ACCC decision

Emergent and Oxford were both large suppliers of cold storage in Victoria. Cold storage suppliers provide customers with access to commercial scale refrigerators and freezers of various levels of sophistication, along with some associated logistics services.

The acquisition reduced the number of large cold storage providers active in Victoria from four to three. The ACCC concluded that the acquisition was unlikely to substantially lessen competition in any relevant market. The ACCC noted that it was a finely balanced decision[14] but:

- Emergent would still face considerable competitive constraint from NewCold, Americold and some small suppliers following the acquisition
- there was potential for expansion by these competing suppliers in the coming years, and the ability of some larger customers to sponsor such expansion if required
- Emergent was likely to be constrained by the prospect of some larger customers turning to self-supply.

Ex post findings

The ex post review relied on a large number of interviews with customers, competitors and other interested parties. We also constructed an illustrative dataset of pre- and post-acquisition pricing through voluntary information provided by a number of interested parties.

Lineage (a multinational cold storage and logistics business) acquired Emergent in June 2020 and the business has since rebranded as Lineage. For convenience, this report will use Emergent to refer to the business both before and after its rebranding as Lineage.

The ACCC's ex post review identified varying impacts of the Oxford acquisition on different customers, according to the scale of their operations, and the type of service they require. A number of customers provided detailed accounts of incurring significant price rises directly as a result of the loss of competition tension resulting from the acquisition.

- The acquisition does not appear to have had a material impact on large customers. Large customers, due to their scale, have the ability to underwrite the expansion of competitors, or construct their own facilities (or are able to credibly threaten to do so). Large customers appear to have effectively wielded this countervailing power to prevent price rises resulting from the reduction in competition caused by the acquisition.
- On the other hand, a number of mid-sized customers report that as a result of the acquisition, they are faced with limited, if any, viable alternatives to Emergent. Self-supply is not typically a feasible option for this class of customer as they either lack sufficient scale or require seasonal fluctuations in capacity such that a single user facility would not be viable.

14 ACCC public media release – Emergent Cold and Oxford cold storage deal not opposed, 23 October 2019.

- Information obtained during the ex post review suggests a number of customers of cold storage in have been faced with significant price increases in the order of 5-10%, directly as a result of the acquisition.
- The severity and endurance of these price increases appears to be greater than anticipated by the ACCC based on the information before it at the time.
- To date, potential entry or expansion by existing suppliers does not appear to have contributed competitive tension to replace the loss of Oxford.

Propel Funeral Partners Limited - Gregson & Weight Funeral Directors

Merger review commenced: 27 September 2019
Statement of Issues: None
Outcome: Not opposed on 7 November 2019

ACCC decision

Propel (ASX: PFP) acquired Sunshine Coast based Gregson & Weight Funeral Directors at the end of 2019. The parties overlapped in the supply funeral directing services and cremation services in the Sunshine Coast region.

Gregson & Weight was the clear market leader in the Sunshine Coast region for the supply of funeral directing services. However, Propel only had a small presence in the region under its Premier Funerals brand.

The ACCC concluded that while the acquisition would result in an increase in market concentration, competition in the market would not significantly change as a result of the acquisition.

The ACCC's review focused on whether the acquisition would result in Propel foreclosing the supply of cremation services at its Buderim Crematorium to third party funeral directors. Based on information received from the market and the parties, the ACCC concluded that this was unlikely to occur, and that Propel's incentives to provide third party access to this crematorium would remain the same following the acquisition.

Ex post findings

The ACCC's ex post review relied primarily on interviews with industry participants. We were unable to obtain data sufficient to perform rigorous quantitative analysis, but the limited data we have obtained was generally supportive of the qualitative information gathered through interviews.

During our ex post inquiries, a number of concerns were raised by interested parties in relation to dominance by Propel and Invocare in the industry nationally. However, these concerns do not appear to be created, or materially heightened, by the acquisition. Prices for crematoria services in the area appear to be somewhat higher than nearby areas, but these do not appear to have increased as a result of the acquisition.

Barriers to entry were not determinative of the ACCC's initial decision. However, barriers in the industry may be higher than contemplated by the ACCC during its initial review. Information obtained during the ex post review suggests there is a very low likelihood that new entry would add meaningful competitive tension to the funeral directing market in the Sunshine Coast region. Reasons for this conclusion include:

- We are not aware of any examples of new entry or likely new entry in the future, with a physical presence in the region. The only example of a new entrant that operates from outside the region is a national phone and online provider that organises cremation without any services, and does not appear to be competing directly with full-service funeral providers.
- Customers are very sticky when it comes to funeral services. Consumers engage funeral service providers during difficult periods in their lives and with time pressure. They are less likely to be discerning or shop around and are more likely to engage firms that are known and trusted. This makes brand recognition critical for the success of a funeral director. The large national providers have expanded through the acquisition of known and established brands in local areas, which they often maintain (as is the case with Propel maintaining the Gregson & Weight brands), rather than organic growth.

Landmark - acquisition of Ruralco – remedy package

Merger review commenced: 22 March 2019
Statement of Issues: 13 June 2019
Outcome: Not opposed subject to undertakings on 22 August 2019

ACCC decision

Landmark and Ruralco both supplied a range of agriculture-related products and services. The ACCC considered the competitive effects of the acquisition on competition at a national and local level primarily in markets for:

- retail supply of rural merchandise
- wholesale supply of rural merchandise.

The ACCC identified preliminary concerns that the acquisition may reduce competition in the supply of rural merchandise by:

- combining two of the three largest retail chains with a national presence
- removing one of few competitors to Landmark in certain local areas where the parties' stores overlap.

In August 2019, the ACCC decided not to oppose Nutrien's acquisition of Ruralco after accepting a section 87B undertaking from Nutrien to divest its rural merchandising stores in Alice Springs, Broome and Hughenden.

In Australia, Nutrien operated under the Landmark brand, and will be referred to as Landmark where relevant throughout this paper. Since the merger, Landmark and Ruralco corporate-owned stores have been rebranded as Nutrien Ag Services.

The ACCC found that the removal of Ruralco as a competitor was likely to substantially lessen competition in Broome, Alice Springs and Hughenden.

Landmark offered a section 87B undertaking to divest its stores in Broome, Alice Springs and Hughenden and the ACCC accepted the undertaking on the basis that it would address competition concerns in each area.

Ex post review of remedy package

The ACCC’s ex post review focused only on the remedy package in both Hughenden and Alice Springs. The ex post review did not attempt to analyse the merger more broadly, or the remedy package in Broome.

We relied primarily on a number of interviews with industry participants. We were unable to obtain basic data from interested parties, such that no quantitative assessment was able to be performed.

However, based on interviews, we consider that the divested Landmark businesses are operating as effective competitors in Hughenden and Alice Springs, and the market structure has been stable since the Landmark/Ruralco acquisition and divestments. With the exception of the acquirers of the divested businesses, no new rural merchandising businesses have entered and no existing businesses have closed.

Interested parties provided mixed comments in relation to whether the divested Landmark businesses were maintaining the same competitive tension in the relevant markets that was provided by Landmark pre-acquisition. However, in general, interested parties considered that the divestiture had been effective, and speculated that if Landmark had not divested the businesses, the markets would be less competitive and prices would be higher.