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## **Global Forum on Competition**

### **ECONOMIC ANALYSIS IN MERGER INVESTIGATIONS – Contribution from Australia**

**- Session III -**

**9 December 2020**

This contribution is submitted by Australia under Session III of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/mergerinv](https://oe.cd/mergerinv).

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## *Economic Analysis in Merger Investigations*

### **- Contribution from Australia –**

#### **1. Background**

1. The Australian Competition and Consumer Commission (ACCC) is Australia's peak competition and consumer protection agency.
2. The ACCC uses a range of tools to encourage compliance with and prevent breaches of Australia's competition and consumer protection laws<sup>1</sup>, including business and consumer education, and working closely with stakeholders and other agencies. The ACCC can also pursue enforcement remedies, including court-based outcomes and court enforceable undertakings.
3. The ACCC has a dedicated team of specialist economists (the 'Economic Group') that sits within the agency's Legal and Economic Division. The Economic Group includes approximately 15 economists that work across the full range of ACCC functions which include competition, consumer protection, economic regulation and market studies and inquiries. Around 10 of the economists, including the Chief Economist, are involved in work on competition cases, including merger reviews.
4. Many agency staff, outside of the Economic Group, are trained in economics and have some economics qualifications.
5. For the purposes of this document when referring to 'economists' we intend this to be a reference to the economists that work within the Economic Group.

#### **2. Proportion of ACCC merger review cases involving economists**

6. The ACCC considered 288 merger matters in 2019-20 and, of these, 257 mergers were assessed as not requiring a public review.<sup>2</sup> The remaining 31 mergers were subject to public reviews which are typically in-depth phase I and phase II reviews.<sup>3</sup>
7. The matters that are pre-assessed (89% in 2019-20) do not typically involve specialist economic input.
8. In contrast, the vast majority of publicly reviewed mergers involve economists: 28 out of 31 public reviews had economists involved in the review.

#### **3. Scope of economist involvement**

9. Economists can be involved at any stage, however it is more common for involvement to commence once a transaction is subject to an in-depth public review. Our practice is generally to involve an economist as early as possible in the public review to

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<sup>1</sup> Contained in the *Competition and Consumer Act 2010* (Cth)

<sup>2</sup> These 257 mergers are described as having been 'pre-assessed'

<sup>3</sup> 2019-20 ACCC Annual Report, p.12

enable input on things like information and data requests and formulating early thinking on theories of harm that could be examined.

10. Once an economist is allocated to a merger review, they essentially become an ‘embedded’ part of the case team. This usually involves attending weekly case team meetings, suggesting avenues of enquiry/research for case team members to follow up on, contributing text to and review of papers and public documents.

11. At an early stage in a merger review, economists regularly assist the case team to draft questions for market consultations and often sit in on key meetings with market participants to hear evidence first-hand and assist the case team to identify any incomplete or inconsistent responses.

12. While economists are involved in the vast majority of public merger reviews, it is sometimes decided that an economist will not be needed, at least at the early stages of review, where the relevant economic concepts and facts are relatively straightforward, such as in some horizontal mergers in familiar industries.

13. Economists are almost always involved in phase II reviews given the greater potential for the ACCC to oppose the merger and the inputs into that decision being often more complex and benefiting from economic expertise. In this role, economists can provide another voice at the table when decision makers are considering whether the transaction should be opposed, cleared or cleared with remedies.

14. It is almost always the case that economists are involved in mergers that are subject to litigation as these processes often examine economic issues and the ACCC’s in-house economists can provide assistance in testing economic evidence.

15. Economists are often involved in discussions regarding the design and assessment of merger remedies, for example by assisting the case team and Commission in determining whether proposed remedies will be sufficient to mitigate competitive harm caused by a merger.

#### 4. Types of quantitative analysis the ACCC uses

16. ACCC economists have employed the following types of quantitative analysis in merger review:

- econometric techniques
- diversion ratios
- critical loss analysis
- upward pricing pressure
- tender win-loss analysis
- difference in difference analysis

17. The choice of quantitative analysis is made on a matter-by-matter basis. It depends on the data that is available, the complexity of the matter and the likelihood of the approach shedding light on the likely competitive effects of the merger.

## 5. Use of surveys

18. Surveys are not commonly used in merger reviews by the ACCC. The lack of evidentiary value in legal proceedings in Australia is one of the primary reasons the ACCC does not widely use and rely on surveys in merger review cases. The time and cost involved in conducting surveys is another limitation (particularly for customer exit surveys at brick and mortar retailers).

19. One example of a survey that has been used in a merger review was in the ACCC's review of Woolworths acquisition of Hawker Supa IGA in 2013.<sup>4</sup> This merger involved the acquisition of a local supermarket by a large supermarket chain, so the survey was useful to understand the shopping habits and intentions of local supermarket customers. Our lessons from that experience have been that best practices in the use of surveys should include:

- Outsourcing the conducting the survey to an experienced provider
- Consulting of the survey design and questions with the merger parties

The ACCC would be likely to apply these principles in future uses of surveys in merger analysis.

## 6. Optimal approach to quantitative analysis

20. The use of quantitative analysis is assessed on a case-by-case basis. The main considerations in its use are:

- whether there are relevant and reliable data sources available
- whether the use of a quantitative technique is likely to be the best way to help determine a key issue in the review
- what other evidence, for example qualitative evidence, is available that complements or could be used instead of quantitative analysis

21. The first of the above points can be a key barrier to the use of quantitative analysis. In many industries there is not readily available reliable data of the kind that is useful in merger analysis. However, other industries, particularly retail industries where transaction data is recorded as a matter of course (e.g. through checkout scan data) can be very useful.

22. An example of a sector where quantitative analysis has been used extensively by the ACCC is the retail fuel industry. In part this is because there are rich datasets on retail fuel prices that the ACCC has been able to draw upon. Some of these datasets include retail fuel prices at 15 minute intervals.

23. Aside from the availability of data, the other considerations mentioned above are judgement calls that are made in respect of each case. The ACCC will generally look to use a variety of quantitative and qualitative analysis in each merger review as our experience is that different techniques and sources of evidence complement each other.

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<sup>4</sup> See <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/woolworths-ltd-proposed-acquisition-of-supermarket-in-hawker-act>

## 7. Qualitative evidence

24. ACCC economists are involved in analysis of qualitative evidence. It is routine for our economists to be involved in helping design information requests and in reviewing qualitative information.

25. Examples of the types of qualitative evidence considered by economists include:

- Submissions from merger parties and interested parties
- Documentary evidence, for example internal documents from the merger parties obtained under compulsory powers
- Expert evidence from technical and economic experts

26. Qualitative evidence can be useful in providing factual information about key aspects of a market (for example, how a supply chain operates). The role of the economist in reviewing these types of materials is to assist the merger review team in formulating and testing theories of harm with a view to helping the Commission make a decision as to whether or not to oppose the merger.

## 8. External economic experts

27. The ACCC does make use of external economic experts. Generally, this can be done in two ways:

- An expert economist may be engaged to assist with the merger review process where the economic issues are particularly complex and/or require specialised expertise in a particular area of economics or experience in analysing certain kinds of economic issues.
- An expert economist may be engaged by the ACCC to provide expert evidence in court or tribunal proceedings. As economic issues are commonly the subject of disagreement in litigated proceedings, economics experts are often used by both the ACCC and merger parties to provide expert evidence to the court or tribunal.

28. In the latter case, the ACCC's engagement of an expert economist is in the capacity of facilitating expert and independent evidence to the court. In these situations the expert economist has a duty to the court to provide independent and impartial expert opinion.