

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Non-price Effects of Mergers - Note by Australia**

**6 June 2018**

This document reproduces a written contribution from Australia submitted for Item 4 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/non-price-effects-of-mergers.htm](http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm).

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## Australia

### 1. Background to merger clearance in Australia

#### 1.1. Informal merger clearance

1. The majority of mergers assessed by the ACCC are conducted under its Informal Merger Review Process (informal review). The test applied by the ACCC is whether a proposed acquisition will breach s 50 of the *Competition and Consumer Act 2010* (CCA). Section 50 of the CCA prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia.

2. Under the informal review process, the ACCC does not make binding decisions on the mergers considered. Instead, at the end of its review, the ACCC provides merger parties with its view as to whether a proposed acquisition would likely contravene section 50 of the CCA. Parties have regard to that view when determining whether to proceed with the proposed acquisition. The ACCC may take legal proceedings should merger parties proceed with an acquisition that the ACCC considers would contravene s 50.

#### 1.2. Merger authorisation

3. The CCA permits parties to seek authorisation of proposed mergers from the ACCC under section 90(7) of the CCA.<sup>1</sup> The authorisation framework recognises that some mergers may give rise to benefits to the public that outweigh the public detriments that result. If merger authorisation is granted, the applicant obtains statutory protection from legal action under s 50 of the CCA in relation to that proposed acquisition. The ACCC may not grant authorisation unless it is satisfied either that:

- The proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- The proposed acquisition would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition.

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<sup>1</sup> Between 2007 and 2017, applications for merger authorisation were made to, and determined by, an independent statutory tribunal, the Australian Competition Tribunal. Since November 2017, the ACCC is the first instance decision maker for merger authorisations.

## 2. Background to non-price effects in merger matters in Australia

4. In this section, we provide an overview of the ACCC's approach to non-price effects of mergers, including by reference to the framework outlined in the ACCC's *Merger Guidelines*.

5. Informal clearance applies the substantial lessening of competition test, which provides for only limited consideration of merger efficiencies. (The ACCC will take efficiencies into account in its informal review process, but generally only when it involves a significant reduction in the marginal production cost of the merged firm and there is clear and compelling evidence that the resulting efficiencies directly affect the level of competition in a market and these efficiencies will not be dissipated post-merger.) Therefore, there have been few merger reviews considered by the ACCC where non-price merger efficiencies have been considered.

6. This submission, therefore, focuses on non-price effects where relevant to the competition assessment and does not consider non-price merger efficiencies in detail. For example, this submission outlines the ACCC's consideration of innovation in recent competition assessments, but does not outline innovation as a merger efficiency.

### 2.1. The Australian approach to non-price effects of mergers

7. The ACCC, the Australian Competition Tribunal and Courts consider non-price effects when assessing the effects of mergers. The ACCC's approach to merger assessment does not emphasize or prioritise either price or non-price effects. In all assessments, the ACCC examines the likely effects of a proposed transaction on all aspects of the competitive process relevant in any given case.

8. Non-price effects have a long history of consideration in competition law in Australia. In *Re QCMA and Defiance Holdings* (1976) ATPR 40-012 (QCMA) (a merger authorisation), the Australian Competition Tribunal set out the principles it considered to inform the operation of competition law in Australia. In doing so, it included the following statement, which inherently recognises the price and non-price elements of competition:

*In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.*

9. The ACCC recognises that, in most circumstances, a reduction in competition is likely to reduce the commercial imperative for the merged firm to invest in improving the quality of its products and to develop products that meet the evolving needs of customers. This is particularly important in markets where firms actively seek to differentiate their products and in markets where firms actively innovate in product features, design or service delivery. In these kinds of markets, price competition can be secondary to non-price competition.

10. At times, it may be necessary to trade-off the loss of short run static efficiencies through a reduction in competition (e.g. an increase in price) with the potential for longer term benefits of dynamic efficiencies (e.g. innovation). In such circumstances, merger parties can apply for merger authorisation where benefits to the

public resulting from the merger can be weighed against detriments (including, but not exclusive to, those resulting from any lessening of competition).

## 2.2. The ACCC Merger Guidelines and non-price effects

11. The ACCC *Merger Guidelines*<sup>2</sup> outline general principles that provide a framework for the ACCC's informal review process.

12. The *Merger Guidelines* recognise that firms compete in many dimensions including price, service, technology and quality. Market power can be exercised by a firm raising the price of its product, lowering the quality of its product without a compensating reduction in price, reducing the range or variety of its products, lowering customer service standards and/or changing other relevant non-price parameters.

13. In relation to vertical mergers, a firm may have the ability and incentive to use its market power in one market to anti-competitively foreclose rivals in another market. The particular anti-competitive foreclosure strategies that a firm might adopt will depend on the circumstances of each case. Such strategies may include attempts to reduce the quality or variety of important inputs supplied to downstream competitors (or raising the price of such inputs without a commensurate increase in quality) to force the rival to use a more expensive or inferior quality alternative, thus reducing its competitiveness in downstream markets.

14. The *Merger Guidelines* clearly note the importance of non-price effects in the ACCC's informal review of mergers (see **Box 1** below).

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<sup>2</sup> [ACCC Merger Guidelines 2008](#)

### Box 1. Non-price effects in the ACCC Merger Guidelines<sup>3</sup>

The most obvious and direct manifestation of an increase in market power is the ability of one or more firms to profitably raise prices post-merger for a sustained period. Market power can, however, be exercised in other ways. For example, a firm with market power may:

- Lower the quality of its products without a compensating reduction in price
- Reduce the range or variety of its products
- Lower customer service standards, and/or
- Change any other parameter relevant to how it competes in the market.

While the exact nature of competitive detriment caused by a merged firm's increased market power will vary depending on the particular circumstances of the matter, the ACCC often characterises an increase in market power as the ability to raise prices. References to 'raising prices' in these guidelines should therefore be read as implicitly incorporating the exercise of market power in other non-price ways.

15. Innovation is also highlighted as an important consideration in informal reviews throughout the *Merger Guidelines*. Section 50(3)(g) of the CCA requires the ACCC to consider, amongst other things, "the dynamic characteristics of the market, including growth, innovation and product differentiation". In addition, section 50(3)(h) of the CCA requires the ACCC to consider the likelihood that the acquisition would result in the removal of a vigorous and effective competitor. In defining and considering whether a merger may remove a vigorous and effective competitor, the ACCC considers past and expected innovation, for example in design or production technology.<sup>4</sup> Consequently, innovation is an important factor in the ACCC's assessment of all merger theories of harm.

16. In addition to the Merger Guidelines, the ACCC *Media Merger Guidelines*<sup>5</sup> draw out key areas of focus for the ACCC when assessing mergers in the media sector. These will vary from merger to merger, but might include non-price issues such as diversity of media voices, the impact of technological change and access to content.

### 3. Non-price effects in recent merger matters in Australia

17. Drawing on the case studies outlined in Attachment A, in this section we discuss the ACCC's consideration of non-price effects in recent merger matters, particularly with respect to effects on quality and innovation. The section also considers cross-jurisdictional remedies for non-price effects, non-price effects in digital markets, at what stage of the analysis non-price effects have been relevant and substantiating price and non-price effects.

<sup>3</sup> ACCC, *Merger Guidelines 2008*, p.10.

<sup>4</sup> ACCC, *Merger Guidelines 2008*, p.46.

<sup>5</sup> [ACCC Media Merger Guidelines 2017](#)

18. Non-price effects are less frequently the focus of merger analysis in Australia than price effects. However, non-price effects have been an important consideration in a number of merger informal reviews in recent years.

19. The ACCC has considered mergers which have raised concerns under s 50 of the CCA having regard to theories of harm based wholly or significantly on innovation, quality and service. To date, the ACCC has not considered any mergers where privacy issues were a key consideration in the competition assessment.

### 3.1. Quality and service

20. Quality and service have long been a feature of merger assessments in Australia. This has particularly been the case in retail mergers in local markets. In Australia, these concerns have often arisen in the grocery sector where there are broader concerns about existing high market concentration and the expansion of the two major supermarket chains, Coles and Woolworths.

21. For example, the ACCC's assessment of Woolworths/Hawker Supa IGA (2013) considered the target's differentiated product range and service offering. Woolworths, a large national supermarket chain, proposed to acquire the Hawker Supa IGA, a single local supermarket. Although the target business was considered to be not as price competitive as the major supermarket chains, there were significant local consumer concerns raised regarding the potential loss of other non-price features offered by the store. Therefore, a key issue in this merger was the identification and measurement of the extent to which the proposed acquisition would lessen competition in terms of 'quality' of offering, product range and customer service. The ACCC ultimately decided it would not oppose the transaction.

22. This matter also provides an example of the way in which the ACCC can assess and measure non-price effects. In addition to conducting market inquiries, the ACCC also commissioned customer surveys in the local area. The results of the surveys gave the ACCC a better picture of the extent to which customers preferred to shop at the Hawker Supa IGA because of its competitive positioning on factors such as price, quality, range and service dimensions. The survey also gave the ACCC some insights on whether or not the proposed acquisition would have a meaningful detrimental impact on competition in the local market through a loss of consumer choice.

23. Although the ACCC does not usually carry out customer surveys in the course of its merger reviews, the ACCC formed the view that the surveys in that matter would assist it to understand Hawker Supa IGA's competitive position in the market. In particular, the ACCC sought to better understand whether the competitive response of the Hawker Supa IGA was so strong that its removal would be likely to lead to a substantial lessening of competition in the relevant market.

24. A further example of a merger where quality and service were important to the ACCC's competition analysis is News/ARM (2016), which the ACCC ultimately did not oppose. News Corporation, a national supplier of print newspapers, proposed to acquire ARM, which owned a number of regional and community newspapers in Australia. During the review, the ACCC considered whether potential non-price effects would cause consumer detriment by resulting in a loss of 'diversity', which in a media context refers to the range of media 'voices' that are available to consumers.

25. Aside from diversity, other non-price factors were particularly important in the ACCC's competition assessment of News/ARM (2016) in the market for the supply of community newspapers in local areas, as these newspapers are free.

26. Mergers considered by the ACCC involving vertical foreclosure theories of harm frequently include consideration of non-price discrimination alongside price discrimination. Where a merger party has significant market power at one level of the supply chain—for example through the ownership of near-monopoly infrastructure such as “below ground” railways and ports—non-price discrimination can be highly detrimental to competition. Such potential non-price discrimination is often with respect to quality and service standards.

27. As the ACCC considers a number of vertical mergers each year and the non-price considerations are generally applicable, this submission has not outlined any specific vertical merger case studies.

### 3.2. Innovation

28. The ACCC takes a case-by-case approach to considering the effects of potentially anti-competitive mergers on incentives to innovate, including incentives to introduce new products and maintain existing ones.

29. Innovation has been a focus of theories of harm considered by the ACCC in several informal reviews. The NAB/AXA (2010) and Dow/DuPont (2017) matters are examples. In both matters, the ACCC considered whether the proposed acquisition was likely to reduce innovation in the relevant market.

30. The NAB/AXA matter involved the combination of wealth management companies, each with its own retail IT investment platform. The ACCC took the view that the competitive tension between the merger parties was an important driver of innovation in the affected markets. It considered that market participants tended to compete more on non-price factors, such as functionality and service, than price. Ultimately, the ACCC opposed the acquisition and rejected the proposed remedies offered by the parties.

31. In recent global mergers, the ACCC has considered innovation/research and development in both its theories of harm and possible market definitions. In the Dow/DuPont matter, the ACCC noted that Dow and DuPont were leading innovators in crop protection products and seed research and development. The ACCC considered whether the removal of competition between them might lead to less innovation across a broad spectrum of products. The ACCC considered whether this could lead to a reduction in the rate at which new products come to the market in the longer term and whether it could reduce quality and/or increase prices for crop protection products.

32. In Bayer/Monsanto (2018), the parties were leaders in pesticides and seeds markets globally. The ACCC considered possible product markets for research and development in relation to seed traits and herbicides. Ultimately, the ACCC did not reach a conclusion on market definition or the competition effects in relation to innovation as the remedies accepted in other jurisdictions resolved the possible competition concerns in Australia. In both Dow/DuPont and Bayer/Monsanto, the ACCC decided it would not oppose the transactions after considering remedies accepted by the European Commission.

### **3.3. Cross-jurisdictional remedies for non-price effects**

33. For large global mergers such as Bayer/Monsanto and Dow/DuPont, the merger parties often conduct most or all of their research and development outside Australia. Nevertheless, the research and development may have an important impact on competition in Australia.

34. This presents a challenge for the ACCC where concerns are raised that a proposed acquisition would be likely to lead to a reduction in research and development affecting markets in Australia. In such cases, the ACCC may delay its assessment so it can take into account any remedy proposed to address these concerns in other jurisdictions where the research and development occurs.

35. The ACCC will consult closely with these competition authorities and may then choose to rely on a remedy accepted by that authority if the ACCC concludes that the remedy sufficiently addresses the competition concerns in Australia (as was the case in the Bayer/Monsanto and Dow/DuPont matters). Alternatively, the ACCC may require a separate remedy be directly given to the ACCC which gives effect to the remedy proposed overseas and also includes specific obligations to the ACCC (as has occurred in the past). For example, the ACCC may require that the parties comply with an overseas remedy to divest a business or assets, and that the purchaser of the divestiture business or assets must be approved by the ACCC. The high level of engagement and cooperation between competition authorities has enabled smaller jurisdictions such as Australia taking a more tailored approach to merger reviews and remedies in certain circumstances.

### **3.4. Non-price effects in digital markets**

36. The ACCC has conducted a number of informal reviews of mergers in the context of digital markets. However, to date none has been based on a non-price theory of harm.

37. The ACCC has typically focused on barriers to entry and network effects. The Carsales/The Trading Post (2013) matter, which the ACCC opposed, is an example of such a matter. The merger parties offered services in a two-sided market, with advertisers on one side and the audience, or end consumers, on the other side. End consumers using the Carsales and The Trading Post websites did not pay fees. While both sides of the market were relevant to the ACCC's assessment, the focus of the ACCC's review was the likely effect of the merger on competition in the supply of online automotive classified advertising.

38. The network effects that Carsales enjoyed as the market leader meant barriers to entry were already high. The ACCC concluded the proposed acquisition would reinforce these barriers and opposed it.

### **3.5. The stage at which the ACCC has considered non-price effects**

39. The ACCC has considered non-price effects in informal reviews both when defining relevant markets and when considering the competitive effect of a merger.

40. As discussed above, the ACCC has recently considered innovation/research and development markets, but did not reach a concluded view on market definition. However, the ACCC does not routinely seek to define innovation markets. Instead, the

ACCC tends to consider the effects of mergers in more traditional product and technology markets, including actual and future markets.

41. For example, a merger may weaken or eliminate a significant current or potential competitor that constrains the behaviour of firms already in the market. The weakening of competitive constraints may enable a reduction in quality without a compensating reduction in price. Alternatively, a merger may eliminate a likely future competitor, which in turn may have implications for the speed and degree of innovation, including improvements in product quality and variety.

### 3.6. Substantiating price and non-price effects

42. Whether considering price or non-price effects, the ACCC gives most weight to analysis that is supported by evidence. The ACCC places less weight on price and non-price effects that are less likely to occur, for which the evidence is less strong or which may not be realised for some time.

43. Given the voluntary nature of the informal merger process, the ACCC is often hampered by a lack of adequate data to perform robust quantitative analysis. Therefore, the ACCC's assessment of price and non-price effects frequently relies upon qualitative evidence. Quantitative analysis based on questionable assumptions or data should not supersede high standard, qualitative evidence of the likely consequence of a merger on non-price effects. In every case, evidence of the facts and likely consequences will guide the ACCC's decision-making.

## 4. The ACCC's Digital Platform Inquiry

44. Under Part VIIA of the CCA, the Australian Government can direct the ACCC to undertake in-depth inquiries into certain matters. Inquiries under Part VIIA involve extensive investigation: the ACCC has compulsory information gathering powers as well as the power to hold hearings in carrying out such inquiries.

45. On 4 December 2017, the Treasurer, the Hon Scott Morrison MP, directed the ACCC to hold an inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms on the state of competition in media and advertising services markets (the **Digital Platforms Inquiry**). The ACCC published an Issues Paper on 26 February 2018 and must submit a preliminary report to the Treasurer by 3 December 2018. Both the preliminary report and the final report (due on 3 June 2019) will be published. The Digital Platforms Inquiry may lead to range of outcomes including recommendations to the Government for law or policy change or ACCC enforcement action to address any behaviour that raises concern under the CCA.

46. The Terms of Reference for the Digital Platforms Inquiry direct the ACCC to look at, in particular, the impact of the digital platforms in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers. The Terms of Reference also identify certain matters to be taken into consideration in the course of the Inquiry, which include but are not limited to:

- The extent to which platform service providers are exercising market power in commercial arrangements with the creators of journalistic content and advertisers
- The impact of platform service providers on the level of choice and quality of news and journalistic content to consumers
- The impact of platform service providers on media and advertising markets
- The impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets, and
- The impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets.

47. In examining the impact of digital platforms on competition in media and advertising markets, the ACCC will look at the implications for media content creators, advertisers and consumers. In making these assessments, the ACCC will look at the terms and conditions on which digital platforms contract with media content creators, and the terms and conditions on which advertising services are made available to advertisers, agencies or adtech businesses. In relation to consumers, the ACCC will look at the terms and conditions governing consumers' use of digital platforms and, in particular, the platforms' access to and use of consumer data. Importantly, the ACCC's assessment will not focus purely on the price impacts of any market power.

48. In addition to considering all of the terms, which govern the relevant contractual relationships, the ACCC will consider the impact of digital platforms on the level of choice and quality of journalism and information asymmetry, as well as the role of innovation and technological change.

49. The impact of previous acquisitions by the major digital platforms will also be potentially relevant to the ACCC's market power assessment in the Digital Platforms Inquiry. In particular, the Issues Paper has invited submissions on whether digital platforms have engaged in any behaviour that enhances their market position by excluding potential or actual competitors, including through the acquisition of rivals.

50. Accordingly, the Digital Platforms Inquiry's findings will provide guidance for the ACCC's consideration of future merger assessments in digital markets, including the potential implications of non-price effects. For example, the Digital Platforms Inquiry may provide guidance on the interdependence between the multiple sides of a digital platform market, the network effects associated with different sides of particular platforms, and the potential barriers to entry created by the accumulation of large amounts of consumer data in the hands of a few major providers.

## 5. Conclusion

51. Non-price competition, including in relation to innovation, quality and service, raise important and sometimes complex issues for merger assessments in Australia. This submission has focused on providing an overview of the ACCC's experience with respect to non-price effects in past merger assessments. It also highlights the

Digital Platforms Inquiry, which will provide important insights for the ACCC's consideration of non-price effects in digital markets in the future.

52. The assessment of certain non-price effects in merger assessments is an evolving area, particularly with respect to innovation. The ACCC will observe with interest future developments in other jurisdictions in the assessment of non-price effects in mergers and welcomes this discussion.

### *Attachment A: Case studies*

In this section, the ACCC outlines case studies of public informal merger reviews where non-price merger effects were important to the competition assessment or where the ACCC examined mergers in digital markets. Further information about each of these reviews is available on the ACCC's public mergers register.<sup>6</sup>

#### **2018: Acquisition cleared after EC divestitures—Bayer AG's proposed acquisition of Monsanto Company**

In this large global transaction, Bayer AG proposed to acquire Monsanto Company. The companies were leaders in pesticides and seeds markets globally.

The ACCC did not form a concluded view on the appropriate market definition. However, the key products the ACCC considered were:

- Weed management systems, comprising non-selective herbicides and genetic traits conferring tolerance to that herbicide, for use in the production of canola
- Vegetable seeds
- Digital agriculture software solutions
- Research and development in relation to seed traits and herbicides
- The supply of cotton seed treatments.

In a number of these products, the ACCC was considering whether the proposed acquisition was likely to remove the competitive tension between two key competitors. In relation to research and development specifically, the merger parties were key industry participants and were developing emerging products, which may have been important to future competition, particularly in the supply of traits and herbicides.

Ultimately, the ACCC did not reach firm conclusions about non-price effects relevant to this matter, including research and development. The divestitures the parties agreed with the European Commission resolved the concerns identified by the ACCC in Australia. The divestiture of certain areas of research and the licensing of Bayer's digital agriculture products enhances future competition in these areas.

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<sup>6</sup> ACCC, Mergers Register: <http://registers.accc.gov.au/content/index.phtml/itemId/750991>

### 2017: Acquisition cleared after EC divestitures—proposed merger of The Dow Chemical Company and E.I. Du Pont de Nemours and Company

In this large global transaction, the Dow Chemical Company (Dow) and E.I. Du Pont de Nemours and Company (DuPont) proposed to merge their two companies and spin out the merged entity into three separate companies focusing on Agriculture, Material Science and Specialty Products.

As part of its review of this transaction, the ACCC considered the impact of the transaction on:

- Competition in upstream markets for the development of new technology for crop protection products, given that Dow and DuPont were both leading innovators in crop protection products. The ACCC considered whether the transaction might lead to less innovation, which in the longer term could lead to a reduction in the rate at which new products come into the market. The ACCC also considered whether it would result in a reduction in quality and/or increase in prices for crop protection products, and
- Competition for the research and development for new varieties of canola seeds for the Australian market, given that Dow and DuPont were both important global suppliers involved in seed research and development.

Ultimately, it was not necessary for the ACCC to reach a concluded view about the potential impact of the transaction on the supply of insecticides and herbicides. Divestiture commitments made by DuPont to the European Commission addressed the overlap between the merger parties in the supply of insecticides and herbicides, including in Australia.

In relation to canola seeds, the ACCC found that there were other breeders, developers and suppliers of canola seed with larger market shares than the parties. These competitors were likely to continue to stimulate competition in canola research and development post-merger. The ACCC also took into account the fact that Dow's offering targeted a specific segment of the canola seed market, which DuPont did not target.

Accordingly, taking into account DuPont's divestiture commitments to the European Commission, the ACCC concluded that the proposed acquisition would not substantially lessen competition in any relevant market in Australia.

### 2016: Acquisition not opposed by ACCC—News Corporation's proposed acquisition of the Australian Regional Media division of APN News & Media Limited

News Corporation (**News**) proposed to acquire the Australian Regional Media division (**ARM**) of APN News & Media Limited (**APN**) (**proposed acquisition**) in 2016. The ACCC considered the effect of the proposed acquisition on a number of markets, and ultimately found that it was unlikely to raise competition concerns in these markets.

The ACCC considered the impact of the proposed acquisition in a number of markets, including:

- The supply of paid newspapers (**paid regional newspapers**) in a number of regions across Queensland
- The supply of free, community newspapers (**community newspapers**) in a number of local areas across Queensland.

At the time, the merger parties were the two largest newspaper publishers in the state of Queensland.

In respect of the paid regional newspapers, the ACCC's preliminary view was that ARM's regional newspapers and *The Courier Mail* (the leading regional newspaper in Queensland) were substitutes for at least some customers. Similarly, the ACCC found that there was significant overlap between the merger parties' community newspapers, both in terms of the content of these newspapers as well as the distribution areas.

Accordingly, the ACCC expressed preliminary concerns that the proposed acquisition may, in each of the relevant markets:

- Reduce choice for readers, in terms of editorial content and perspective on news stories
- Lead to a reduction in the quality of content contained in the newspapers and/or online
- Lead to a reduction in the total offering (e.g. discontinuance of one or more of ARM's newspapers).

In considering the effect of the proposed acquisition on the market for paid regional papers, the ACCC noted that reductions of quality could occur through a loss of media 'diversity'. 'Diversity' in a media context broadly refers to the range of media 'voices' available to consumers. Post-acquisition, the merged firm may reduce media 'diversity' by altering the types of stories covered in the ARM newspapers or changing the angle of reporting on certain issues, leading to a loss of ARM's alternate voice and therefore a loss of diversity.

Following further phase II inquiries, the ACCC ultimately formed the view that the proposed acquisition would be unlikely to substantially lessen competition, on the basis that a sufficient range of choices would remain available to readers in the relevant areas. The ACCC also noted that in the face of growing competition from alternative local advertising opportunities and the need for News to maintain readership levels, the merged entity would be unlikely to decrease the quality of the local content after the proposed acquisition.

### 2013: Acquisition opposed by ACCC—Carsales acquisition of The Trading Post

Carsales.com Limited proposed to acquire rights to use The Trading Post brand and acquire the associated assets from Telstra Corporation Limited in 2012. Carsales and The Trading Post overlapped in the supply of online automotive classifieds, in both dealer and private advertiser markets.

The ACCC formed the view that the proposed acquisition would be likely to result in a substantial lessening of competition in markets for the supply of online automotive classified advertising to dealers and private advertisers. This was because:

- It would remove one of the closest and most effective competitors of Carsales, with an offer that was attractive to dealers and private advertisers, differing in important ways from the Carsales' offer
- Actual or potential competitors would be unable to impose a sufficient competitive constraint on Carsales to prevent a substantial lessening of competition from arising as a result of the proposed acquisition, including because
  - Carsales was already the clear market leader and its inventory and audience positions would be strengthened by the proposed acquisition
  - Other competitors were limited in their ability to constrain Carsales, had much smaller audiences, smaller dealer and / or private advertiser inventory, and were unable to match aspects of Carsales' offer, including additional services
  - Barriers to entry and expansion were already high and would increase as a result of the proposed acquisition, including because of network effects and vertical integration.

Relevantly, non-price differences between the merger parties were important to the ACCC's assessment of competition. The ACCC's review also involved consideration of two-sided markets.

### 2013: Acquisition not opposed by the ACCC—Woolworths' proposed acquisition of the Hawker Supa IGA

In late 2012 and early 2013, the ACCC conducted a public review of Woolworths Limited's (**Woolworths**) proposed acquisition of a supermarket in Hawker, a suburb of the Australian Capital Territory, branded as Hawker Supa IGA (**Hawker Supa IGA**).

In this matter, the ACCC examined both price and non-price effects of the proposed acquisition. It provides a good example of the way in which non-price factors can be important in multiple aspects of the competition assessment. The ACCC's competition assessment considered non-price factors in the market definition and the competition analysis.

The ACCC considered that the proposed acquisition would have the effect of removing an entity (Hawker Supa IGA) which competed strongly to attract customers on non-price offerings in particular.

Non-price factors were relevant in defining the relevant market. In considering the boundaries of the market, the ACCC considered what outlets were substitutes for Hawker Supa IGA. Factors such as the format of the outlet, its size, its breadth and depth of product range and level of service at the outlet were important in considering which outlets were substitutes for Hawker Supa IGA.

Non-price factors were relevant in our consideration of the extent to which various supermarkets in the area operated as constraints. The ACCC focused on the following non-price attributes in our competition analysis:

- Location and parking
- Quality, range and service.

Price factors were also relevant in the ACCC's competition assessment. The ACCC considered Hawker Supa IGA's weekly promotional cycle and in-store discounting and considered the effect of the proposed acquisition on these price dimensions. The ACCC ultimately found that customers would continue to have the opportunity to shop at a variety of supermarkets within the local area, and accordingly would be able to take advantage of, and benefit from, other promotional offers.

Ultimately, the ACCC concluded that the proposed acquisition would not be likely to substantially lessen competition in the relevant market.

### **2010: Acquisition opposed by the ACCC—NAB's proposed acquisition of AXA Asia Pacific's Australian and New Zealand businesses**

National Australia Bank Ltd (**NAB**) proposed to acquire AXA Asia Pacific Holdings Limited's Australian and New Zealand businesses (**AXA**) in 2010. In April 2010, the ACCC opposed the proposed acquisition.

When conducting its informal review of the proposed acquisition, the ACCC primarily focused on the competitive effects of the proposed acquisition on markets in the wealth management sector. The wealth management sector consists of a number of constituent markets, one of which is the market for the supply of retail investment platforms for investors with complex investment needs.

The ACCC formed the view that NAB was a strong competitor in the relevant market (through its Navigator platform), and AXA was an emerging vigorous and effective competitor (through its North platform, which was an innovative next generation full service wrap platform).

In the relevant market, the ACCC considered that price competition was weak and that there were disincentives to competing on platform administration fees. The ACCC considered the key basis of rivalry and differentiation between platform providers to be in innovation competition; that is, platform providers' ability and incentive to continue to invest in platform functionality and service.

The ACCC ultimately formed the view that the proposed acquisition would:

- Remove expected strong competitive tension between AXA's North platform and NAB's Navigator platform, by reducing the incentive for NAB to continue to develop the North platform and also reducing its incentive to continue to enhance its existing platforms
- Remove a vigorous and effective competitor with significant distribution, scale and reputation capable of generating a competitive response from leading

platform providers, and diminish the incentives of large platform providers to continue to invest in platform innovation, and

- Reduce the prospect of price competition.

After the ACCC's decision to oppose, NAB and AXA proposed remedies to address the ACCC's competition concerns. The remedies provided for, amongst other things, the divestiture of the North platform operated by AXA. The ACCC did not accept the proposed remedies, as they were considered insufficient to address the competition concerns.