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Out-of-Market Efficiencies in Competition Enforcement – Note by Australia

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement.htm>.

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Australia

The Australian Public Benefit Test- allowing for a broad consideration of market efficiencies.

Introduction

1. Pursuant to the *Competition and Consumer Act 2010 (Cth)* (the **CCA**), the ACCC is able to grant authorisation for conduct, specified in the authorisation, to which one or more provisions of the CCA apply. The ACCC may authorise mergers and anti-competitive conduct. There are differences in the process for each, but both include a consideration of whether the conduct/merger would be likely to result in a net benefit to the public.
2. This paper explains Australia's authorisation tests for mergers and non-merger conduct, which allows for the weighing of public benefits and detriments as part of a public benefit test.
3. Consideration of the net public benefit entails identification and analysis of likely public benefits and public detriments, and the weighing of the two. The ACCC must not grant authorisation unless it is satisfied that the proposed merger or non-merger conduct wouldn't be likely to substantially lessen competition or would be likely to result in a net public benefit. The ACCC must be satisfied that there is a nexus between the proposed conduct or merger and the claimed public benefit.
4. This submission also provides case examples where the net public benefit test has included regard to environmental claims as an example of consideration of possible out of market efficiencies. In principle, the ACCC treats environmental claims, in the same way as out of market efficiencies, in the sense that both may be capable of recognition in the authorisation process provided that the ACCC can be satisfied they are real and verifiable. The ACCC will also give more weight to benefits which are enduring.

1. Legal framework - the authorisation regime

5. The Australian authorisation regime is a statutory process under the CCA. This regime is not common in many international jurisdictions, so the ACCC sees it worthwhile to explain the framework in more detail.
6. The ACCC may authorise mergers and anti-competitive arrangements. Public guidelines for both [merger](#) and [non-merger](#) authorisations are available on the ACCC's website.
7. Merger review can be carried out via an informal merger clearance process or by an application for **merger authorisation**, which is a formal process under the CCA.
8. Section 90(7) and (8) of the CCA states that the ACCC must not grant authorisation under section 88 unless it is satisfied that, in all the circumstances:
 - the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition (**the SLC limb**); 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 (**the net public benefit limb**).

9. This is the authorisation test for the merger and **non-merger conduct** that would or might breach the competition provisions in the CCA. For non-merger conduct that would or might breach one of the *per se* provisions in the CCA such as the cartel provisions, only the net public benefit limb of the test applies.

- The ACCC is able to grant authorisation for conduct, to which one or more provisions of Australia’s competition laws apply.
- The CCA does not expressly limit the range of public benefits (or detriments) which may be taken into account by the ACCC. This includes not limiting them to those that address market failure or improve economic efficiency.
- The ACCC’s authorisation regime also does not require the ACCC to quantify the level of public benefits and detriments. However, where possible applicants are encouraged to quantify benefit and detriment claims.

10. The elements of the public benefit test are explained within the context of the merger authorisation process at sections 2- 5.

2. The consideration of public benefits

11. While not defined in the CCA, the well-established and broadly accepted principle of public benefit is ‘anything of value to the community generally, any contribution to the aims pursued by the society’.¹

12. In the Australian Competition Tribunal’s assessment of public benefits and detriments of the Telstra TPG merger authorisation², the Tribunal noted the meaning of the benefit in Section 90(7) (b) test as:

- (a) *a benefit to the public includes anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) **the achievement of the economic goals of efficiency and progress***;

13. The concept of ‘public’ extends beyond consumers to the community at large and can include benefits that accrue to private firms. However, the extent to which benefits are retained by private firms is a matter to be weighed. The ACCC will give more weight to the benefits which flow through to the broader community and are sustained over time.³

14. **Public benefits** include the consideration of traditional in-market efficiencies; that is, allocative, productive or dynamic efficiencies.

¹ Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA) (1976) ATPR 40-012.

² Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2) [2023] ACompT 2

³ See 8.12 of ACCC Guidelines for authorisation of conduct (non-merger)

3. Other public benefits that can be considered

15. Section 90(9A) requires the ACCC to have regard to the following as benefits to the public (in addition to any other benefits to the public that may exist) when considering an application for merger authorisation:

- a significant increase in the real value of exports
- a significant substitution of domestic products for imported goods, and
- all other relevant matters that relate to the international competitiveness of any Australian industry.

16. Each of these factors has been a consideration in particular merger authorisations.⁴

17. Other benefits that may be of broader value to the community may also be taken into account. For example:

- an improvement in health and safety standards
- assurance to the community of continued provision of service⁵
- environmental benefits.⁶

4. Public detriments

18. In most conduct and merger authorisation assessments, public detriments are most often characterised as those arising from in-market lessening of competition, such as higher prices, lower quality and/or reduced choice. Such competitive detriments need not be considered ‘substantial’ to be considered in the net public benefit trade-off.⁷

19. When identifying the potential detriments, the ACCC is not limited to those resulting from substantial lessening of competition. While public detriment is not defined in the CCA, the Australian Tribunal has described it as:

*... any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...*⁸

⁴ For example, CSR/Mackay Sugar where benefits included a likely increase in exports. Secondly, the application for authorisation lodged under s.88(1) of the Trade Practices Act by Qantas Airways Limited and British Airways Plc -(granted 12 May 1995) considered the creation of a strong and efficient Australian business operating in an international market as a benefit.

⁵ Sea Swift/Toll

⁶ ACI Operations Pty Ltd (1991) ATPR (Com) 50-108 at 56,066-56,067. See also, 1996 joint venture authorisation of DuPont (Australia) Limited and Ticor Limited, where ACCC found public benefits (including the environmental benefit of a net decline in nitrous oxides and greenhouse gases) outweighed potential anti-competitive detriment.

⁷ See, for example, Australian Competition and Consumer Commission v Australian Competition Tribunal [2017] FCAFC 150 at [11]: ‘a mandatory consideration in the Tribunal’s assessment of an acquisition will include any non-trivial competitive detriment which will result, or is likely to result, from the acquisition whether it occurs on a market-wide basis or not.’

⁸ 7-Eleven Stores Pty Limited (1994), ATPR 41-357 at [page 42] 42,683... See also Medicines Australia at [108] and [115].

20. As such, public detriments need not occur in the market in which the merger takes place. Public detriments other than competitive detriments can occur outside of the immediate market or markets affected by the merger.

21. Potential non-competition detriments could include a likely increase in pollution or reduction in public health or safety.

5. The net public benefit test and environmental claims

22. The transition to net zero, circular, and nature positive economies is resulting in the creation of new markets and opportunities, and correspondingly, new regulatory concerns and risks.

23. As the economy continues to transition, the ACCC must closely monitor for anti-competitive conduct and arrangements. One of the ACCC's interests is for emerging markets to be set up from the outset to function with integrity and in a pro-competitive, pro-consumer manner. Competitive markets promote innovation, which will help drive environmental and associated economic benefits.

24. The ACCC also recognises that as industries decarbonise or look to achieve other environmental outcomes, there may be instances where it's more efficient and effective for companies to collaborate in order to achieve common environmental goals. Collaboration between competitors can assist in removing first mover disadvantage and free-rider problems. Industry schemes can also be used to provide a positive guide for participants on best practice benchmarks, going further than minimum legal requirements.

25. It is important that a perception of competition law risk or confusion about the way that competition law operates does not have a chilling effect on the implementation of legitimate private sector sustainability initiatives that do not raise competition law issues. This issue is being considered by regulators around the world, and is particularly relevant for small to medium enterprises that may not have sophisticated sustainability departments or understanding of competition law.

26. In Australia, where businesses are unsure about the risk associated with proposed collaborations or where collaborations may raise competition law risk, the authorisation framework enables businesses to seek an exemption from the competition law for proposed agreements between competitors where there is a 'net public benefit.'

27. The ACCC will carefully assesses the claimed public benefits and detriments to avoid the outcome where businesses claim to be working together under a sustainability banner, but their coordinated activities do not achieve meaningful environmental benefits.

28. A comparison of the expected position "with and without" the conduct for which authorisation is sought plays an important role in the net public benefit assessment.

29. In this regard, businesses seeking authorisation need to substantiate their environmental claims and the ACCC will test them publicly. For example, it is expected that businesses explain why any proposed collaboration is required to achieve the claimed public benefits.

30. While the onus is on the applicant for authorisation to satisfy the ACCC that the authorisation test is met, the ACCC will conduct its own inquiries in order to be satisfied.

31. Ultimately, the ACCC must be satisfied that the proposed conduct is likely to achieve the public benefits identified.

32. However, where applicants for authorisation do establish the existence of environmental benefits, the ACCC also recognises that some environmental claims can be a public benefit of considerable weight.

6. Case Examples

6.1. Merger authorisation and environmental claims

33. Public benefits from an accelerated transition to renewable energy were a consideration in the ACCC's recent decision to grant merger authorisation for the proposed acquisition of Origin Energy by Brookfield and MidOcean.⁹ See Box 1.

Box 1. Merger authorisation Brookfield and MidOcean's acquisition of Origin

In October 2023, the ACCC granted authorisation with conditions for the proposed acquisition of Origin Energy by Brookfield and MidOcean.

The acquisition parties

- Brookfield is a Canadian global asset manager which, through its Infrastructure business unit, holds interests in AusNet Pty Ltd (AusNet) and Intellihub. AusNet's assets include the vast majority of the state of Victoria's high-voltage electricity transmission system and one of the five electricity distribution networks in Victoria, which provides electricity to approximately 802,000 customers.
- MidOcean is an LNG company formed by EIG, a US-headquartered institutional investor in the global energy and infrastructure sectors.
- Origin Energy is a major Australian electricity generator and retailer of electricity and natural gas. It currently owns 13 per cent of the National Electricity Market's electricity generation capacity.

The acquisition

The proposed acquisition comprised two interdependent transactions. The transaction would result in a consortium led by the Brookfield Global Transition Fund owning Origin's energy markets business, including Origin's electricity generation and electricity and gas retail businesses. MidOcean would own Origin's upstream gas interests.

The ACCC's test

- Under the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the proposed acquisition would not be likely to substantially lessen competition, or that the likely public benefits would outweigh the likely public detriments.

⁹ <https://www.accc.gov.au/media-release/accc-authorises-brookfield-and-midocean%E2%80%99s-acquisition-of-origin>

- On the first limb of the test, the ACCC was not satisfied that the proposed acquisition would not be likely to substantially lessen competition. The ACCC found that the public benefits and public detriments in this matter were finely balanced. Likely detriments, particularly anti-competitive effects from vertical integration were weighed against likely benefits to Australia's renewable energy transition.
- The ACCC considered that the acquisition would likely result in an accelerated roll-out of renewable energy generation, leading to a more rapid reduction in Australia's greenhouse gas emissions.
- The ACCC considered undertakings offered by Brookfield, AusNet and MidOcean in this weighing process, and drew extensively on engagement with industry participants.

Public benefits

- The ACCC concluded that an accelerated build-out of Origin's renewable energy generation would be a material benefit to the Australian public, as it would assist in lowering Australia's emissions by replacing some fossil fuel generation with renewable capacity earlier than would occur without the proposed acquisition.
- The ACCC considered what investments Origin and Brookfield would make in renewable energy generation without the acquisition to identify benefits that are causally linked to the acquisition and therefore relevant to the ACCC's assessment.
- The ACCC considered that a reduction in greenhouse gas emissions is a public benefit of considerable weight.

Public detriment

- The competition concerns with the acquisition mainly arose from the resulting vertical integration in the electricity supply chain in Victoria. After the acquisition, Brookfield would control AusNet, which owns significant energy network infrastructure in Victoria, and Origin's energy retailing and generation business.
- The ACCC had regard to Brookfield's ability to influence AusNet to obstruct rival generators from connecting to the transmission grid or operate the transmission network to favour Origin's generators.
- The ACCC was not satisfied there would not be a substantial lessening of competition given these concerns. However, when weighing the overall public detriments likely to result from the acquisition, to weigh against the likely public benefits, the ACCC also considered the mitigating factors that will limit obvious or extreme discrimination.
- While the public benefits and public detriments were finely balanced, the ACCC weighed the likely detriments, particularly anti-competitive effects from vertical integration, against likely benefits to Australia's renewable energy transition.
- After a detailed review, the ACCC was ultimately satisfied that the proposed acquisition was likely to result in public benefits that would outweigh the likely public detriments. Authorisation was granted with conditions.

6.2. Non-Merger authorisation and environmental claims

34. There are several instances where the ACCC has granted authorisation to agreements between competing businesses to achieve better environmental outcomes under the net public benefits test.

35. Examples of such authorisations include:

- **joint buying groups that pool their energy demand and collectively tender for ‘green’ power.** In August 2021, the ACCC considered that proposed joint purchasing arrangements by the Barwon Region Renewable Energy Project and the Western Australian Local Government Association (WALGA) energy group were likely to result in public benefits in the form of transaction cost savings, environmental benefits through a reduction in greenhouse gas emissions, and greater investment in and competition for the supply of electricity. The authorisations involved volumes of electricity which accounted for a relatively small proportion of electricity demand in the relevant markets and so the risk of any public detriment arising from the proposed conduct was considered minimal.¹⁰
- **industry stewardship schemes** where a levy is imposed to support the recycling and/or end of life disposal of environmentally harmful products. See Box 2 .
- **collaboration to facilitate soft plastic recycling.** To allow major supermarkets to work together on a short-term solution to manage soft plastics stockpile and facilitate the resumption of in-store collections for recycling.¹¹ See Box 3.

Box 2. Industry Stewardship Schemes

In the [Battery Stewardship Scheme case](#), the ACCC in March 2020, authorised an agreement among battery importers, retailers, and recyclers to introduce a levy on battery price and commit to deal with only other parties of the agreement. The public benefits considered were reduced chemical pollution, public awareness, and increased incentives to invest in battery recycling. The potential harms encompassed both competition concerns, such as increased price, dealing restrictions, non-member exclusions, as well as safety risks.

In the [Recycle My Mattress Scheme](#), the ACCC granted conditional authorisation to enable a levy (initially set at \$10 per mattress) to be paid by participants in the Scheme and passed through the supply chain to consumers as a visible fee on the sale of a new mattress. Participants in the Scheme will be manufacturers, importers, wholesalers and retailers, including manufacturers and retailers that only sell online or direct to consumers. The public benefits considered were environmental, health and safety benefits, pricing that better reflects the cost of supply and disposal of mattresses, and employment opportunities for people that experience social disadvantage. Public detriments included the impact on competition between participants in the Scheme, increased prices for mattresses, and limiting mattress suppliers’ ability to deal with non-accredited collectors and recyclers. The ACCC ultimately considered that the proposed

¹⁰ <https://www.accc.gov.au/about-us/media/media-updates/accc-authorises-renewable-energy-buying-groups-in-victoria-and-western-australia>

¹¹ <https://www.accc.gov.au/media-release/cooperation-to-continue-on-soft-plastics-recycling-after-recycle-collapse>

Scheme is unlikely to generate significant public detriment because the imposition of the levy is unlikely to impact competition in the supply chain for mattresses, any increase in the retail prices of mattresses resulting from the levy represents a relatively small proportion of the overall retail prices of mattresses (it is also likely to more closely reflect the full cost of the supply of mattresses (including the costs of proper disposal)) and participation in the Scheme is voluntary, and any restriction on the ability of mattress suppliers to deal with non-accredited collectors and recyclers under the Scheme is not likely to give rise to significant public detriment.

Box 3. REDcycle

REDcycle was a return-to-store, soft plastics recovery program in Australia that facilitated the collection and processing of soft plastics into a variety of durable recycled plastic products. Following the collapse of the REDcycle program, in November 2022 the ACCC granted interim authorisation, with conditions, to allow major supermarkets to engage in conduct that had the purpose of considering, developing or implementing a short-term solution for the management of soft plastics.

Following the ACCC's interim authorisation, the supermarkets collectively released a 'Roadmap to Restart', which is a short-term plan to restore community access to soft plastics recycling through Australian supermarkets.

In June 2023, the ACCC granted these supermarkets authorisation for 12 months to allow the major supermarkets to continue collaborating on a short-term solution to manage the soft plastics stockpile and to facilitate the resumption of in-store collections for recycling.

In this circumstance, the ACCC considered the risk for public detriment, including increasing barriers to other industry participants being able to develop separate recycling schemes and the potential for the conduct to facilitate anticompetitive conduct. The ACCC considers this risk is limited by the conduct being proposed to be authorised for only 12 months and was outweighed by the benefits, which included a collaborative and collective approach to developing an interim solutions to soft plastic recycling, increased potential to divert some soft plastics from landfill, including through collaborative efforts to address the current stockpile and future diversion by recommencement of collections, and alleviating community concerns by enabling consistent and united public messaging.

7. Conclusion

36. Australia's authorisation regime enables businesses to seek an exemption from the ACCC for proposed agreements between competitors where there is a 'net public benefit.' The regime also allows for authorisation of mergers via the same net public benefit test.

37. In this way, Australian competition law provides a mechanism to facilitate evolving and green transitioning economies. Businesses wishing to manage their potential risk of legal action for joint arrangements that are likely to achieve better environmental outcomes may seek authorisation and operate with the certainty such authorisation provides.