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

Serial Acquisitions and Industry Roll-ups – Note by Australia

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More documents related to this discussion can be found at
www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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1. Overview of Australia's current merger control regime

1.1. Informal merger clearance

1. Under section 50 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), mergers and acquisitions are prohibited if they would have the effect, or are likely to have the effect, of substantially lessening competition in any market in Australia.

2. The majority of mergers¹ assessed by the Australian Competition and Consumer Commission (**ACCC**) are conducted under its Informal Merger Review Process (informal review). 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 merger or acquisition would be likely to substantially lessen competition in any market. Parties have regard to that view when determining whether to seek to proceed with the proposed merger or acquisition. The ACCC may take legal proceedings, including seeking an injunction to restrain completion, should merger parties seek to proceed with an acquisition that the ACCC considers would contravene section 50.

3. The ACCC can also investigate whether a completed acquisition has contravened section 50, including by making public inquiries and using compulsory information gathering powers to assist its investigation and, if appropriate, taking legal action. If the ACCC considers that a completed merger has contravened section 50 of the CCA, it may seek remedies in the Federal Court.

4. Australia does not have a mandatory merger notification requirement. Under the ACCC's merger guidelines, the ACCC recommends that certain mergers that may be subject to the CCA be voluntarily notified to the ACCC for review well in advance of completion.² Under the guidelines the ACCC encourages notification where both of the following apply:

- the products of the merger parties are either substitutes or complements, and
- the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s.³

1.2. Merger authorisation

5. An alternative to informal review is merger authorisation, which is a statutory process under the CCA. Like informal merger review, lodging an application for merger authorisation is voluntary.

6. If merger authorisation is granted, the applicant obtains statutory protection from legal action under section 50 of the CCA in relation to that proposed acquisition. The ACCC may not grant authorisation unless it is satisfied either that:

¹ A reference to a "merger" includes an acquisition of shares in a corporation or assets of a business.

² ACCC Merger Guidelines, Appendix 2.

³ ACCC Merger Guidelines, p 6.

- 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.
7. If parties (including interested third parties) are dissatisfied with an ACCC determination in relation to an application for merger authorisation, they may seek limited merits review before the Australian Competition Tribunal within a prescribed timeframe.

2. How Australia's current merger control regime applies to serial acquisitions and the associated competition issues

8. While the ACCC may consider the impact on competition from multiple acquisitions that may occur contemporaneously,⁴ there are challenges in applying section 50 to a series of acquisitions over time that may cumulatively substantially lessen competition where individual acquisitions in the series are not likely to substantially lessen competition.

9. As a result, serial acquisitions have the potential to enable firms to achieve a position of substantial market power and erode competition in that market. Serial acquisitions can also be used by firms that already benefit from a position of substantial market power to further extend or entrench it.

10. In Australia, several key sectors of the economy, such as banking and grocery retailing, are highly concentrated with a small number of large firms dominating the market. For example, in 2018–19, the largest four firms in each industry made up around 43% of total industry sales on average.⁵ Serial acquisitions by already large firms can further entrench high levels of market concentration and exacerbate competition issues as they extend their reach. As mentioned above, while serial acquisitions can create new positions of substantial market power, serial acquisitions by firms that already benefit from substantial market power can be particularly problematic to competition.

11. Depending on the facts of each matter, competition issues potentially include:
- Greater market concentration through incremental increases in market share. This can create large or dominant firms with greater control over price setting, service, quality and/or some other element of competition.
 - Reduced choice or variety for customers, including from the loss of smaller independent competitors and other rivals.
 - Reduced competition, innovation and/or dynamism by:
 - reduced longer-term investments,
 - the acquisition of a nascent competitor that may, but for the acquisition, contribute to eroding existing market power of the acquirer, or

⁴ For example, where a firm seeks to acquire multiple separate shares and/or assets within a single transaction or multiple transactions at the same point in time.

⁵ Day et al, Competition in Australia and its impact on productivity growth, Treasury Round Up, October 2022, p 14.

- increased homogeneity across firms' business models.
- Smaller or potential competitors may face increased difficulty reaching minimum competitive scale as a result of the contestable market being reduced. This can also impact purchasing power, marketing spend, and other similar elements.
- Large or dominant firms may also be able raise barriers to entry and expansion. This may include by way of by brand proliferation, where a firm has several differentiated brands targeting separate market segments, making it more difficult for potential entrants to establish a niche, particularly in smaller local markets.
- Serial acquisitions of minority interests, leading to common ownership of competing firms, may dampen incentives for firms to compete.

12. Australia's voluntary regime also means that firms are not legally required to notify the ACCC which can risk smaller individual acquisitions within a broader 'roll up' strategy not being notified to the ACCC. As explained above, while the ACCC can investigate whether a completed acquisition has substantially lessened competition and can seek remedies in the Federal Court, there are significant challenges in doing so, especially difficulties restoring competition with effective remedies post-completion.⁶

3. History and examples of serial acquisitions in Australia

13. Serial acquisitions have occurred across a broad range of industries in Australia, including grocery retailing, funeral homes, taxi services, insurance broking, childcare, pathology, fuel retailing, liquor retailing and other sectors.

14. Some of these sectors have evolved over time and current market conditions mean previous serial acquisitions are less of an issue now. For example, in the early to mid-2000s there were a series of acquisitions by Cabcharge, a taxi network operator that also offered taxi payment processing services, as it incrementally acquired multiple taxi companies in several metropolitan areas throughout Australia. Now, through technological advancement and the use of smartphones and apps, traditional taxi services compete with ridesharing services, such as Uber, DiDi, Shebah and Ola, and the industry is much more competitive and less of a focus for the ACCC for serial acquisition issues.

15. More recently Australia has observed an increase in serial acquisition strategies by large digital platform service providers and in relation to liquor retailing, and pet food supplies and services.

16. Many serial acquisition strategies in Australia involve the acquisition of firms competing at a local level, sometimes including a geographic market of only a few kilometres radius. In some cases, the ACCC considers that such individual local acquisitions are likely to substantially lessen competition in their own right. For example, the ACCC opposed Woolworths' proposed acquisition of a single grocery store in Karabar on two occasions, first in 2008 and again in 2023.⁷ Woolworths is one of the largest grocery

⁶ OECD, Disentangling Consummated Mergers - Experiences and Challenges - Note by Australia, 23 June 2022.

⁷ Woolworths Limited proposed acquisition of Karabar Supabarn (opposed on 25 June 2008) and Woolworths Limited - proposed acquisition of Supa IGA Karabar (opposed on 26 May 2023).

retailers in Australia, and the ACCC opposed the transaction on the basis that it would be likely to substantially lessen competition in the supply of groceries in the local area.⁸

17. The acquisition of a single store or site, such as a fuel station or grocery store, can also raise broader competition issues, such as:

- Reducing ‘chain-on-chain’ competition, whereby the acquiring firm owns several retail stores that operate under a common banner (a ‘chain’) and competition is reduced with firms that operate competing ‘chain’ stores on a wider regional, state or national level. For example, the loss of an individual competitor store that is part of a competing chain, may impact marketing efficiencies, awareness, and competitive presence of the competing chain.
- Reducing competition at different or multiple functional levels by limiting the size of an accessible downstream (or upstream) market. For example, where a wholesaler supplies independent or individual retailer stores, the greater number of retail stores that are acquired by a vertically integrated rival, the more difficult it may be for that wholesaler to maintain economies of scale and offer a competitive wholesale price to other independent or individual retail stores. A loss of upstream competition may flow through to harm retail competition, here being the same functional level in which the acquisition occurs.

18. However, these broader market competition issues are much less likely to arise as a result of a single acquisition when considered in isolation, even if they contribute to strengthening the firms’ position when combined with other similar acquisitions. The ACCC is considering similar issues in liquor retailing through a series of recent acquisitions by Endeavour Group Limited, a major Australian alcoholic drinks retailer and hotel operator.⁹

19. A further issue that has arisen in Australia is the expansion of large grocery chains, Woolworths and Coles, extending their serial acquisition strategies into other markets, such as liquor retailing, fuel retailing and in upstream markets. This has also been observed by leading hardware store, Bunnings, through expanding its presence via acquisitions of specialist providers from tools and equipment to tile providers. This pattern has further contributed to fewer and larger firms dominating across sectors and within supply chains.

20. At a global level, consistent with other jurisdictions, the ACCC has also observed large digital platform service providers using serial acquisition strategies to expand their ecosystems.¹⁰ The ACCC has also conducted several public informal merger reviews of acquisitions by digital platform service providers.¹¹

⁸ ACCC opposes Woolworths’ acquisition of SUPA IGA Karabar, media release, 26 May 2023.

⁹ Recent public informal merger reviews of Endeavour Group Limited include: Endeavour Group Limited’s proposed acquisition of each of the Beach Hotel, Crown Inn, Tower Hotel and Whitehorse Inn located in South Australia (not opposed subject to undertakings on 23 December 2022); Endeavour Group Limited’s proposed acquisition of Beachfront Hotel (not opposed on 23 February 2023); Endeavour Group Limited’s proposed acquisition of Rye Hotel (under consideration) and Endeavour Group Limited’s proposed acquisition of the Prince Consort hotel (under consideration).

¹⁰ The ACCC recently provided the Australian government on 27 September 2023 with the seventh interim report of the Digital Platform Services Inquiry on expanding ecosystems of digital platform service providers. This report is due to be publicly released.

¹¹ Recent public informal reviews of large digital platform service providers: Microsoft Corporation’s proposed acquisition of Activision Blizzard Inc (No decision on 16 October 2023), Amazon.com, Inc’s proposed acquisition of MGM Holdings Inc (Not opposed on 16 December

4. Industry roll-ups by private equity firms in Australia

21. A common strategy of private equity firms is to embark on industry consolidation by acquiring several small competing firms and combining them into one large industry participant. As a result, the ‘roll-up’ enjoys more market power and greater influence over the industry and customers regarding pricing and other strategies that could potentially be detrimental to healthy competition.

22. In Australia, private equity firms have used industry ‘roll-ups’ in several sectors, including healthcare, notably in radiology and imaging clinics, cancer care clinics, ophthalmology clinics, and in the childcare sector and pet retailing. For example, the following private equity firms have interests in the following firms that have rapidly expanded using various strategies, including serial acquisitions:

- GenesisCare, backed by China Resources Group and Australian private equity firm KKR, operates several cancer related clinics.
- Quadrant Private Equity has investments in Qscan, a leading operator of radiology clinics and CancerCare Associates, a cancer care provider and has been expanding its network of centres.
- ICON Group, backed by private equity firm EQT Group, has rapidly expanded in cancer care centres.
- I-Med Radiology Network, a diagnostic imaging clinic provider, is backed by private equity firm Permira and operates several radiation clinics across Australia.
- In childcare, Quadrant Private Equity acquired Affinity Education Group in 2021, a leading operator of childcare centres in Australia, which acquired several other childcare centres since. Another leading childcare centre operator, Guardian Childcare & Education is also backed by private equity firm Partners Group.¹²
- In pet retailing, private equity firm TPG Capital backs Greencross which owns and operates several specialty pet retail stores and is currently seeking to expand its network by proposing to acquire Habitat.¹³

23. While many of these acquisitions have not raised significant competition concerns individually, they have contributed to further consolidation in particular industries over time with fewer independent competitors providing a competitive constraint.

24. For overseas investors, certain transactions are also subject to the *Foreign Acquisitions and Takeovers Act 1975* that requires foreign investors to notify the Treasurer of proposed foreign investments that meet certain criteria. Completion of such investments are suspended while the Treasurer's review is conducted, which includes consideration of the impact on competition.¹⁴

2021), Microsoft Corporation proposed acquisition of Nuance Communications Inc. (Not opposed on 7 October 2021), Google LLC's proposed acquisition of Mandiant, Inc. (Not opposed on 11 August 2022), Google LLC's proposed acquisition of Fitbit Inc (No decision on 15 January 2021).

¹² The ACCC's interim report of the childcare inquiry 2023 also noted significant interest in buying and selling childcare companies in recent years, noting the significant investments by these private equity firms.

¹³ Greencross' proposed acquisition of Habitat (currently under ACCC consideration).

¹⁴ OECD, *The Relationship between FDI Screening and Merger Control Reviews – Note by Australia*, 30 November 2022.

5. Previous consideration of options to address serial acquisitions in Australia

25. Australia has previously considered the challenges raised by serial acquisitions on several occasions. There have been numerous public reviews and law reform proposals into dealing with serial acquisitions, but there has been little legislative change implemented.¹⁵

26. On 1 September 2008, Treasury released a discussion paper seeking submissions on how to deal with serial acquisitions.¹⁶ Options arising out of this discussion paper and further papers included:

- An aggregation model, whereby the combined effect of previous acquisitions within a specified time period could be taken into account in determining whether there is a substantial lessening of competition.
- A substantial market power model, whereby a corporation would be prohibited from making an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to a substantial lessening) of competition in that market. Further variations to this have also been considered including incorporating an enhancement of that corporations' substantial market power into the model. Similar changes are considered below at paragraph 31.
- Market share caps, including prohibiting a firm from acquiring another firm in a market if it would result in it exceeding a market cap or prohibiting a corporation with a large or substantial share of a market from acquiring shares or assets if it would have the effect of lessening competition.
- An additional merger factor, as discussed below at paragraph 32.
- A purpose test, this option would prohibit acquisitions where the acquirer has the purpose, through a series of acquisitions, to substantially lessen competition in a market.
- Declarations, whereby application of a serial acquisition provision would apply to corporations or sectors that are designated or declared by a Minister.
- Variations of mandatory notifications.

27. Following extensive consideration of this issue and alternative proposals by the Australian government, legislative change was implemented via the *Competition and Consumer Legislation Amendment Act 2011* with an amendment to section 50 so that it applies to 'any market' rather than a 'substantial market' or 'a market'.¹⁷ The change to

¹⁵ Public inquiries included the 2003 Trade Practices Act Review (Dawson Review) that did not recommend legislative change and the 2015 Competition Policy Review (Harper Review) that did not recommend legislative change.

¹⁶ Treasury discussion paper on creeping acquisitions in 2008.

¹⁷ The Australian government also considered the Trade Practices (Creeping Acquisitions) Amendment Bill (2007) which proposed provision that would deem a substantial lessening of competition if acquisitions within a 6 year period together have that effect or are likely to have that effect. This Bill was not passed. It also considered the Richmond Bill (2009-10) which proposed to replace "substantially" in the substantially lessening of Competition test in section 50 with "materially" and prohibit acquisitions by corporations with a "substantial share of a market" from acquiring shares or assets that would have "the effect of lessening competition in a market". The Senate did not pass this bill. The Law Council of Australia's submission to Senate Economics Committee on Trade Practices Amendment (Material Lessening of Competition – Richmond

section 50 was intended to make it clear that section 50 can apply to a local market and allow for the consideration of multiple markets.

6. Competition review

28. In August 2023, the Australian Government announced a Competition Review to provide advice to it on how to improve competition across the economy. A Competition Taskforce has been established in Australian Treasury to conduct the review over 2 years. Initial issues to be considered include merger reform, aviation, non-compete clauses and other restrictions on workers, the net zero transformation and the care economy.¹⁸

29. On merger reform, the Competition Review is considering proposals put forward by the ACCC in March 2023. It expects to release a consultation paper this year.

30. The ACCC's proposals include a shift to a formal merger clearance regime, with mandatory notification, a call-in power for proposed transactions below the thresholds and amendments to section 50 of the CCA.¹⁹ The proposed changes by the ACCC relevant to serial acquisitions are considered briefly below.

31. The ACCC has proposed a model that would include amendments to section 50 so that the substantial lessening of competition test includes "entrenching, materially increasing or materially extending a position of substantial market power".²⁰ The ACCC considers this proposal would beneficially focus section 50 on the enhancement of a dominant position of the acquirer in a market, not just on the magnitude of the incremental change arising from an individual acquisition. The change would also assist with addressing serial acquisitions, where there is a pattern of acquiring smaller firms over time, each of which may not amount to a substantial lessening of competition on their own.

32. Section 50(3) of the CCA sets out a non-exhaustive list, known as merger factors, to be considered when assessing whether a merger would be likely to substantially lessen competition. The ACCC has proposed changes to these merger factors, including new factors relevant to serial acquisitions and whether the acquisition entrenches or extends a position of substantial market power.

33. The ACCC has also proposed a shift to a mandatory notification regime. Under this proposal, all merger proposals that meet the relevant thresholds would be notified to the ACCC and would require clearance before proceeding. Additionally, the ACCC has proposed that it have a call-in power to enable transactions that do not trigger the notification threshold, but nonetheless raise potential competition concerns, to be included in the formal clearance regime. This proposal is aimed at addressing the particular challenge of smaller transactions within a broader serial acquisition pattern not being notified because they are under the threshold.

Amendment) Bill 2009 also contemplated several models to potentially address issues regarding serial acquisitions.

¹⁸ A more dynamic and competitive economy, media release, 23 August 2023.

¹⁹ ACCC FOI Request 100067/2022-2023 - Document 5, p 10 - 13.

²⁰ ACCC Chair Gina Cass-Gottlieb, The role of the ACCC and competition in a transitioning economy address to the National Press Club 2023, 12 April 2023.