International
Center for
Law & Economics

Response to the Competition Taskforce's Merger Reform Consultation

International Center for Law & Economics

19 January 2024

Authors:

Dirk Auer, ICLE Director of Competition Policy
Geoffrey A. Manne, ICLE President and Founder
Lazar Radic, Senior Scholar of Competition Policy

I. About the International Center for Law & Economics

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center founded with the goal of building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies to inform public-policy debates and has longstanding expertise in the evaluation of antitrust law and policy.

ICLE's interest is to ensure that antitrust law remains grounded in clear rules, established precedent, a record of evidence, and sound economic analysis. Some of the proposals in the Competition Taskforce's Reform Consultation ("Consultation") threaten to erode such foundations by, among other things, shifting toward merger analysis that focuses on the number of competitors, rather than the impact on competition, as well as reversing the burden of proof; curtailing rights of defense; and adopting an unduly strict approach to mergers in particular sectors. Our overriding concern is that intellectually coherent antitrust policy must focus on safeguarding competition and the interests of consumers.

In its ongoing efforts to contribute to ensuring that antitrust law in general, and merger control in particular, remain tethered to sound principles of economics, law, and due process, ICLE has submitted responses to consultations and published papers, articles, and reports in a number of jurisdictions, including the European Union, the United States, Brazil, the Republic of Korea, the United Kingdom, and India. These and other publications are available on ICLE's website.[1]

II. Summary of Key Points

We appreciate the opportunity to comment on the Competition Taskforce's Consultation. Our comments below mirror the structure of the main body of the Consultation. Section by section, we suggest improvements to the Consultation's approach, as well as citing background law and economics that we believe the Treasury should keep in mind as it considers whether to move forward with merger reform in Australia.

- **Question 6 –** Australia should not skew its merger regime toward blocking mergers under conditions of uncertainty. Uncertainty is endemic in merger control. Since the vast majority of mergers are procompetitive—including mergers in what is commonly called the "digital sector"—an error-cost-analysis approach would suggest that false negatives are preferable to false positives. Concrete evidence of a likely substantial lessening of competition post-merger should continue to be the decisive factor in decisions to block a merger, not uncertainty about its effects.
- **Question 8 –** While potential competition and so-called "killer acquisitions" are important theories for the Australian Competition and Consumer Commission ("ACCC") to consider when engaging in merger review, neither suggest that the burden of proof needed to reject a merger should be changed, nor do they warrant an overhaul of the existing merger regime. Furthermore, given the paucity of evidence finding "killer acquisitions" in the real world, it

[1] INTERNATIONAL CENTER FOR LAW & ECONOMICS, https://laweconcenter.org.

is highly unlikely that any economic woes that Australia currently faces can be blamed on an epidemic of killer acquisitions or acquisitions of potential/nascent competitors. If the Treasury is going to adopt any rules to address these theories of harm, it should do so in a manner consistent with the error-cost framework (see reply to Question 6) and should not undercut the benefits and incentives that startup firms derive from the prospect of being acquired by a larger player.

- **Question 9 —** Merger control should remain tethered to the analysis of competitive effects within the framework of the significant lessening of competition test ("SLC test"), rather than seeking to foster any particular market structure. Market structure is, at best, an imperfect proxy for competitive effects and, at worst, a deeply misleading one. As such, it should remain just one tool among many in merger analysis, rather than an end in itself.
- **Question 13 —** In deciding whether to impose a mandatory-notification regime, Australia should be guided by error-cost considerations, and not merely seek to replicate international trends. While there are sound reasons to prefer a system of mandatory-merger notifications, the Treasury cannot ignore the costs of filing mergers or of reviewing them. It should be noted that some studies suggest that voluntary merger notification may achieve objectives similar to those achieved by compulsory systems at lower cost to the merging parties, as well as to the regulator. If the Treasury nonetheless decides to impose mandatory notification, it should seek to contain unnecessary costs by setting a reasonable turnover threshold, thereby filtering out transactions with little-to-no potential for anticompetitive harm.
- **Question 17 —**Australian merger control should require that a decisionmaker be satisfied that a merger would likely and substantially lessen competition before blocking it, rather than effectively reversing the burden of proof by requiring that merging parties demonstrate that it would *not*. In a misguided attempt to shift the costs of erroneous decisions from the public to the merging parties, the ACCC's proposal forgets that false positives also impose costs on the public, most notably in the form of foregone consumer benefits. In addition, since the vast majority of mergers are procompetitive, including mergers in the digital sector, there is no objective empirical basis for reversing the burden of proof along the proposed lines.
- **Question 18 —** The SLC test should not be amended to include acquisitions that "entrench, materially increase or materially extend a position of substantial market power." First, the Consultation seems to conflate instances of anticompetitive leveraging with cases where an incumbent in one market enters an adjacent one. The latter is a powerful source of competition and, as such, should not be curtailed. The former is already covered by the SLC test, which equips authorities with sufficient tools to curb the misuse of market power post-merger. Third, it is unclear what the term "materially" would mean in the proposed context, or what it would add to the SLC test. Australian merger control already interprets "substantial" lessening of competition to mean "*material* in a relative sense and meaningful." Thus, the term "materially" risks injecting unnecessary uncertainty and indeterminacy into the system.
- **Question 19 —** As follows from our response to Question 9, Section 50(3) should not be amended to yield an increased focus on changes to market structure as a result of a merger. It is also unclear what is gained from removing the factors in Section 50(3). More than a "modernization" (as the Consultation calls it), this appears to be a redundancy, as the listed factors already significantly overlap with those commonly used under the SLC test. To the

extent that these factors place a "straitjacket" on courts (though in principle they are sufficiently broad and flexible), they could be removed, however, so long as merger analysis remained tethered to the SLC test and respects its overarching logic.

- **Question 20** — Non-competition public benefits should play a limited role in merger control. Competition authorities are, in principle, ill-suited to rank, weigh, and prioritize complex and incommensurable goals and values. The injection of public-benefits analysis into merger review magnifies the risk of discretionary and arbitrary decision making.

III. Consultation Responses

A. Question 6

Is Australia's merger regime 'skewed towards clearance'? Would it be more appropriate for the framework to skew towards blocking mergers where there is sufficient uncertainty about competition impacts?

In order for a merger to be blocked in Australia, it must be demonstrated that the merger is likely to substantially lessen competition. In the context of Section 50, "likely" means a "real commercial likelihood."[2] Furthermore, a "substantial" lessening of competition need not be "large or weighty… but one that is 'real or of substance… and thereby meaningful and relevant to the competitive process.'"[3] This does not set an inordinately high bar for authorities to clear.

In a sense, however, the ACCC is right when it says that Australian merger control is "skewed towards clearance."[4] This is because all merger regimes are "skewed" toward clearance. Even in jurisdictions that require mandatory notifications, only a fraction of mergers—typically, those above a certain turnover threshold—are examined by competition authorities. Only a small percentage of these transactions are subject to conditional approval, and an even smaller percentage still are blocked or abandoned.[5] This means that the vast majority of mergers are allowed to proceed as intended by the parties, and for good reason. As the ACCC itself and the Consultation note, most mergers do not raise competition concerns.[6]

But while partially accurate, this statement is only half true. Most mergers are, in fact, either benign or *procompetitive*. Indeed, mergers are often an effective way to reduce transaction costs and generate economies of scale in production,[7] which can enable companies to bolster innovation post-merger. According to Robert Kulick and Andrew Card, mergers are responsible

---

[2] *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77, [246].

[3] *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77, [104].

[4] *Outline to Treasury: ACCC's Proposals for Merger Reform*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (2023), 5, 8, *available at* https://www.accc.gov.au/system/files/accc-submission-on-preliminary-views-on-options-for-merger-control-process.pdf.

[5] For example, in the EU, 94% of mergers are cleared without commitments, whereas only about 6% are allowed with remedies, and less than 0.5% of mergers are blocked or withdrawn by the parties. *See* Joanna Piechucka, Tomaso Duso, Klaus Gugler, & Pauline Affeldt, *Using Compensating Efficiencies to Assess EU Merger Policy*, VOXEU (10 Jan. 2022), https://cepr.org/voxeu/columns/using-compensating-efficiencies-assess-eu-merger-policy.

[6] Consultation, 4; ACCC 2023: 2, point 8e.

[7] Ronald Coase, *The Nature of the Firm*, 4(16) ECONOMICA 386-405 (Nov. 1937).

for increasing research and development expenditure by as much as $13.5 billion annually.[8] And as Francine Lafontaine and Margaret Slade point out in the context of vertical mergers:

> In spite of the lack of unified theory, over all a fairly clear empirical picture emerges. The data appear to be telling us that efficiency considerations overwhelm anticompetitive motives in most contexts. Furthermore, even when we limit attention to natural monopolies or tight oligopolies, the evidence of anticompetitive harm is not strong. [9]

While vertical mergers are generally thought to be less likely to harm competition, this does not cast horizontal mergers in a negative light. It is true that the effects of horizontal mergers are empirically less well-documented. But while there is some evidence that horizontal mergers can reduce consumer welfare, at least in the short run, the long-run effects appear to be strongly positive. Dario Focarelli and Fabio Panetta find:

> …strong evidence that, although consolidation does generate adverse price changes, these are temporary. In the long run, efficiency gains dominate over the market power effect, leading to more favorable prices for consumers.[10]

Furthermore, and in line with the above, some studies have found that horizontal merger enforcement has even harmed consumers.[11]

It is therefore only natural that merger regimes should be "skewed" toward clearance. But this is no more a flaw of the system than is the presumption that cartels are harmful. Instead, it reflects the well-documented and empirically grounded insight that most mergers do not raise competition concerns and that there are myriad legitimate, procompetitive reasons for firms to merge.[12]

It also reflects the principle that, since errors are inevitable, merger control should prefer Type II over Type I errors. Indeed, legal decision making and enforcement under uncertainty are always difficult and always potentially costly.[13] Given the limits of knowledge, there is always a looming risk of error.[14] Where enforcers or judges are trying to ascertain the likely effects of a business practice, such as a merger, their forward-looking analysis will seek to infer

[8] Robert Kulick & Andre Card, *Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications*, NERA ECONOMIC CONSULTING (Feb. 2023), available at https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf.

[9] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45(3) *Journal of Economic Literature* 677 (Sep. 2007).

[10] Dario Focarelli & Fabio Panetta, *Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits*, 93(4) AMERICAN ECONOMIC REVIEW 1152 (Sep. 2003).

[11] B. Espen Eckbo & Peggy Wier, *Antimerger Policy Under the Hart-Scott-Rodino Act: A Reexamination of the Market Power Hypothesis*, 28(1) JOURNAL OF LAW & ECONOMICS 121 (Apr. 1985).

[12] *See*, *e.g.*, in the context of tech mergers: Sam Bowman & Sam Dumitriu, *Better Together: The Procompetitive Effects of Mergers in Tech*, THE ENTREPRENEURS NETWORK & INTERNATIONAL CENTER FOR LAW & ECONOMICS (Oct. 2021), *available at* https://laweconcenter.org/wp-content/uploads/2021/10/BetterTogether.pdf.

[13] Geoffrey A. Manne, *Error Costs in Digital Markets*, in JOSHUA D. WRIGHT & DOUGLAS H. GINSBURG (eds.), THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY, 33-108 (2020).

[14] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88(5) YALE LAW JOURNAL 950-97, 968 (Apr. 1979).

anticompetitive conduct from limited information.[15] To mitigate risks, antitrust law, generally, and merger control, specifically, must rely on certain heuristics to reduce the direct and indirect costs of the error-cost framework,[16] whose objective is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct ("false positives," or "Type I errors"); (2) erroneous allowance and under-deterrence of harmful conduct ("false negatives," or "Type II errors"); and (3) the costs of administering the system.

Accordingly, "skewing" the merger-analysis framework toward blocking mergers could, in theory, be appropriate where the enforcer or the courts knew that mergers are always or almost always harmful (as in the case of, *e.g.*, cartels). But we have already established that the opposite is, in fact, true: most mergers are either benign or procompetitive. The Consultation's caveat that this would apply only in cases where "there is sufficient uncertainty about competition impacts" does not carve out a convincing exception to this principle. This is particularly true given that, in a forward-looking exercise, there is, by definition, always some degree of uncertainty about future outcomes. Given that most mergers are procompetitive or benign, any lingering uncertainty should, in any case, be resolved in favor of allowing a merger, not blocking it.

Concrete evidence of a likely substantial lessening of competition post-merger should therefore continue to be the decisive factor in decisions to block a merger, not uncertainty about its effects (see also the response to Question 17). Under uncertainty, the error-cost framework when applied to antitrust leads in most cases to a preference of Type II over Type I errors, and mergers are no exception.[17] The three main reasons can be summarized as follows. First, "mistaken inferences and the resulting false condemnations are especially costly, because they often chill the very conduct the antitrust laws are designed to protect."[18] The aforementioned procompetitive benefits of mergers, coupled with the general principle that parties should have the latitude in a free-market economy to buy and sell to and from whomever they choose, are cases in point. Second, false positives may be more difficult to correct, especially in light of the weight of judicial precedent.[19] Third, the costs of a wrongly permitted monopoly are small compared to the costs of competition wrongly condemned.[20] As Lionel Robbins once said: monopoly tends to break, tariffs tend to stick.[21] The same is applicable to prohibited mergers.

In sum, Australia should not skew its merger regime toward blocking mergers under uncertainty.

---

[15] *See*, *e.g.*, in the context of predatory pricing, Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89(2) YALE LAW JOURNAL 213-70 (Dec. 1979).

[16] Manne, *supra* note 13, *at* 34, 41.

[17] *Id.*

[18] *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

[19] Frank H. Easterbrook, *The Limits of Antitrust*, 63(1) TEXAS LAW REVIEW 1-40, 2-3, 15-16 (Aug. 1984).

[20] *Id.*, ("Other things equal, we should prefer the error of tolerating questionable conduct, which imposes losses over a part of the range of output, to the error of condemning beneficial conduct, which imposes losses over the whole range of output.")

[21] LIONEL ROBBINS, ECONOMIC PLANNING AND INTERNATIONAL ORDER, 116, (1937).

B. Question 8

Is there evidence of acquisitions by large firms (such as serial or creeping acquisitions, acquisitions of nascent competitors, 'killer acquisitions', and acquisitions by digital platforms) having anti-competitive effects in Australia?

We do not know whether there have been any such cases in Australia. We would, however, like to offer more general commentary on the relevance of nascent competition and killer acquisitions in the context of merger control, especially as concerns digital platforms.

One of the most important concerns about acquisitions by the major incumbent tech platforms is that they can be used to eliminate potential competitors that currently do not compete, but could leverage their existing network to compete in the future—a potential that incumbents can better identify than can competition enforcers.[22]

As the Furman Review states:

> In mergers involving digital companies, the harms will often centre around the loss of potential competition, which the target company in an adjacent market may provide in the future, once their services develop.[23]

Similar concerns have been raised in the Stigler Report,[24] the expert report commissioned by Commissioner Margrethe Vestager for the European Commission,[25] and in the ACCC's own Fifth Interim Report of the Digital Platform Services Inquiry.[26] Facebook's acquisition of Instagram is frequently cited as a paradigmatic example of this phenomenon.

There are, however, a range of issues with using this concern as the basis for a more restrictive merger regime. First, while doubtless this kind of behavior is a risk, and competition enforcers should weigh potential competition as part of the range of considerations in any merger review, potential-competition theories often prove too much. If one firm with a similar but fundamentally different product poses a potential threat to a purchaser, there may be many other firms with similar, but fundamentally different, products that do, too.

If Instagram, with its photo feed and social features, posed a potential or nascent competitive threat to Facebook when Facebook acquired it, then so must other services with products that

---

[22] This section is adapted, in part, from Bowman & Dumitriu, *supra* note 12.

[23] Jason Furman, *et al.*, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (Mar. 2019), 98, *available at* https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf ("Furman Review").

[24] *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report*, STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE (2019), 75, 88, *available at* https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf ("Stigler Report").

[25] Yves-Alexandre de Motjoye, Heike Schweitzer, & Jacques Crémer, *Competition Policy for the Digital Era*, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION (2019), 110-112, https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en.

[26] *See* Sections 3.2., 6.2.2. of the Digital Services Platform Inquiry of September 2022, which finds a "high risk of anticompetitive acquisitions by digital platforms," *available at* https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

are clearly distinct from Facebook but have social features. In that case, Facebook faces potential competition from other services like TikTok, Twitch, YouTube, Twitter (X), and Snapchat, all of which have services that are at least as similar to Facebook's as Instagram's. In this case, the loss of a single, relatively small potential competitor out of many cannot be counted as a significant loss for competition, since so many other potential and actual competitors remain.

The most compelling version of the potential and nascent competition argument is that offered by Steven Salop, who argues that since a monopolist's profits will tend to exceed duopolists' combined profits, a monopolist will normally be willing and able to buy a would-be competitor for more than the competitor would be able to earn if it entered the market and competed directly, earning only duopoly profits.[27]

While theoretically elegant, this model has limited use in understanding real-world scenarios. First, it assumes that entry is only possible once—*i.e.*, that after a monopolist purchases a would-be competitor, it can breathe easy. But if repeat entry is possible, such that another firm can enter the market at some point after an acquisition has taken place, the monopolist will be engaged in a potentially endless series of acquisitions, sharing its monopoly profits with a succession of would-be duopolists until there is no monopoly profit left.

Second, the model does not predict what share of monopoly profits would go to the entrant, as compared to the monopolist. The entrant could hold out for nearly all of the monopolist's profit share, adjusted for the entrant's expected success in becoming a duopolist.

Third, apart from being a poor strategy for preserving monopoly profits—since these may largely accrue to the entrants, under this model—this could lead to stronger incentives for entry than in a scenario where the duopolists were left to compete with one another, leading to more startup formation and entry overall.

Finally, acquisitions of potential competitors, far from harming competition, often benefit consumers. The acquisition of Instagram by Facebook, for example, brought the photo-editing technology that Instagram had developed to a much larger market of Facebook users, and provided those services with a powerful monetization mechanism that was otherwise unavailable to Instagram.[28] As Ben Sperry has written:

> Facebook has helped to build Instagram into the product it is today, a position that was far from guaranteed, and that most of the commentators who mocked the merger did not even imagine was possible. Instagram's integration into the Facebook platform in fact did benefit users, as evidenced by the rise of Instagram and other third-party photo apps on Facebook's platform.[29]

[27] Steven Salop, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits*, GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS 2380 (Apr. 2021), *available at* https://scholarship.law.georgetown.edu/facpub/2380.

[28] Geoffrey A. Manne, *et al.*, *Comments of the International Center for Law & Economics on the FTC & DOJ Draft Merger Guidelines*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (18 Sep. 2023), 38, *available at* https://laweconcenter.org/wp-content/uploads/2023/09/ICLE-Draft-Merger-Guidelines-Comments-1.pdf.

[29] Ben Sperry, *Killer Acquisition of Successful Integration: The Case of the Facebook/Instagram Merger*, THE HILL (8 Oct. 2020), https://thehill.com/blogs/congress-blog/politics/520211-killer-acquisition-or-successful-integration-the-case-of-the.

In other words, many supposedly anticompetitive acquisitions appear that way only because of improvements made to the acquired business by the acquiring platform.[30]

As for "killer acquisitions," this refers to scenarios in which incumbents acquire a firm just to shut down pipelines of products that compete closely with their own. By eliminating these products and research lines, it is feared that "killer acquisitions" could harm consumers by eliminating would-be competitors and their products from the market, and thereby eliminating an innovative rival. A recent study by Marc Ivaldi, Nicolas Petit, and Selçukhan Ünekbas, however, recommends caution surrounding the killer acquisition "hype." First, despite the disproportionate attention they have been paid in policy circles, "killer acquisitions" are an exceedingly rare phenomenon. In pharmaceuticals, where the risk is arguably the highest, it is they account for between 5.3% and 7.4% of all acquisitions, while in digital markets, the rate is closer to 1 in 175.[31] The authors ultimately find that:

> Examining acquisitions by large technology firms in ICT industries screened by the European Commission, [we find] that acquired products are often not killed but scaled, post-merger industry output demonstrably increases, and the relevant markets remain dynamic post-transaction. These findings cast doubt on contemporary calls for tightening of merger control policies.[32]

Thus, acquisitions of potential competitors and smaller rivals more often than not lead to valuable synergies, efficiencies, and the successful scaling of products and integration of technologies.

But there is an arguably even more important reason why the ACCC should not preventively restrict companies' ability to acquire smaller rivals (or potential rivals). To safeguard incentives to invest and innovate, it is essential that buyouts remain a viable "way out" for startups and small players. As ICLE has argued previously:

> Venture capitalists invest on the understanding that many of the businesses in their portfolio will likely fail, but that the returns from a single successful exit could be large enough to offset any failures. *Unsurprisingly, this means that exit considerations are the most important factor for VCs when valuing a company*. A US survey of VCs found 89% considered exits important and 48% considered it the most important factor. This is particularly important for later-stage VCs."[33] (emphasis added)

Indeed, the "killer" label obfuscates the fact that acquisitions are frequently a desired exit strategy for founders, especially founders of startups and small companies. Investors and entrepreneurs hope to make money from the products into which they are putting their time and money. While

---

[30] Sam Bowman & Geoffrey A. Manne, *Killer Acquisitions: An Exit Strategy for Founders*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (Jul. 2020), *available at* https://laweconcenter.org/wp-content/uploads/2020/07/ICLE-tldr-Killer-acquisitions_-an-exit-strategy-for-founders-FINAL.pdf.

[31] *See* Colleen Cunningham, Florida Ederer, & Song Ma, *Killer Acquisitions*, 129(3) JOURNAL OF POLITICAL ECONOMY 649-702 (Mar. 2021); *see also* Axel Gautier & Joe Lamesch, *Mergers in the Digital Economy* 54 INFORMATION ECONOMICS AND POLICY 100890 (2 Sep. 2020).

[32] Marc Ivaldi, Nicolas Petit, & Selçukhan Ünekbas, *Killer Acquisitions in Digital Markets May be More Hype than Reality*, VOXEU (15 Sep. 2023), https://cepr.org/voxeu/columns/killer-acquisitions-digital-markets-may-be-more-hype-reality ("The majority of transactions triggered increasing levels of competition in their respective markets.")

[33] Bowman & Dumitriu, *supra* note 12.

that may come from the product becoming wildly successful and potentially displacing an incumbent, this outcome can be exceedingly difficult to achieve. The prospect of acquisition increases the possibility that these entrepreneurs can earn a return, and thus magnifies their incentives to build and innovate.[34]

In sum, while potential competition and so-called killer acquisitions are important theories for the ACCC to consider when engaging in merger review, neither theory suggests that the burden of proof needed to reject a merger should be changed, much less warranting an overhaul of the existing merger regime. Furthermore, given the paucity of "killer acquisitions" in the real world, it is highly unlikely that any economic woes that Australia currently faces are due to an epidemic of killer acquisitions or acquisitions of potential/nascent competitors. Indeed, a recent paper by Jonathan Barnett finds the concerns around startup acquisitions to have been vastly exaggerated, while their benefits have been underappreciated:

> A review of the relevant body of evidence finds that these widely-held views concerning incumbent/startup acquisitions rest on meager support, confined to ambiguous evidence drawn from a small portion of the total universe of acquisitions in the pharmaceutical market and theoretical models of acquisition transactions in information technology markets. Moreover, the emergent regulatory and scholarly consensus fails to take into account the rich body of evidence showing the critical function played by incumbent/startup acquisitions in supplying a monetization mechanism that induces venture-capital investment and promotes startup entry in technology markets.

In addition:

> Proposed changes to merger review standards would disrupt these efficient transactional mechanisms and are likely to have counterproductive effects on competitive conditions in innovation markets.[35]

Accordingly, if the Treasury is going to adopt any rules to address these theories of harm, it should do so in a way consistent with the error-cost framework (see reply to Question 6); that does not undercut the benefits and incentives that derive from the prospect of acquisition by a larger player; and that accurately reflects the real (modest) anticompetitive threat posed by killer acquisitions, rather than one animated by dystopic hyperbole.[36]

C. Question 9

> **Should Australia's merger regime focus more on acquisitions by firms with market power, and/or the effect of the acquisitions on the overall structure of the market?**

---

[34] Bowman & Manne, *supra* note 30.

[35] Jonathan Barnett, *"Killer Acquisitions" Reexamined: Economic Hyperbole in the Age of Populist Antitrust*, USC Class Research Paper 23-1 (28 Aug. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408546.

[36] On the current wave of dystopian thinking in antitrust law, especially surrounding anything "digital," *see* Dirk Auer & Geoffrey A. Manne, *Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and their Origins*, 28(4) George Mason Law Review 1281 (9 Sep. 2021).

Merger control should remain tethered to analysis of competitive effects within the framework of the SLC test, rather than on fostering any particular market structure. Market structure is, at best, an imperfect proxy for competitive effects and, at worst, a misleading one. As such, it should be considered just one tool among many for scrutinizing mergers, not an end in itself.

To start, the assumption that "too much" concentration is harmful presumes both that the structure of a market is what determines economic outcomes, and that anyone knows what the "right" amount of concentration is.[37] But as economists have understood since at least the 1970s, (despite an extremely vigorous, but ultimately futile, effort to show otherwise), market structure is not outcome determinative.[38] As Harold Demsetz has written:

> Once perfect knowledge of technology and price is abandoned, [competitive intensity] may increase, decrease, or remain unchanged as the number of firms in the market is increased.... [I]t is presumptuous to conclude... that markets populated by fewer firms perform less well or offer competition that is less intense.[39]

This view is well-supported, and held by scholars across the political spectrum.[40] To take one prominent recent example, professors Fiona Scott Morton (deputy assistant attorney general for economics in the U.S. Justice Department Antitrust Division under President Barack Obama), Martin Gaynor (former director of the Federal Trade Commission Bureau of Economics under President Obama), and Steven Berry surveyed the industrial-organization literature and found that presumptions based on measures of concentration are unlikely to provide sound guidance for public policy:

> In short, there is no well-defined "causal effect of concentration on price," but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration.... Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that regressions of market outcomes on measures of industry structure like the Herfindahl Hirschman Index should be given little weight in policy debates.[41]

The absence of correlation between increased concentration and both anticompetitive causes and deleterious economic effects is also demonstrated by a recent, influential empirical paper by Shanat Ganapati. Ganapati finds that the increase in industry concentration in U.S. non-manufacturing sectors between 1972 and 2012 was "related to an offsetting and positive force—these oligopolies are likely due to technical innovation or scale economies. [The] data suggests

[37] The response to this question is adapted from Manne, *et al.*, *supra* note 28.

[38] *See*, *e.g.*, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16(1) JOURNAL OF LAW & ECONOMICS 1-9 (Apr. 1973).

[39] *See* Harold Demsetz, *The Intensity and Dimensionality of Competition*, *in* HAROLD DEMSETZ, THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 140-41 (1995).

[40] Nathan Miller, *et al.*, *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10(2) JOURNAL OF ANTITRUST ENFORCEMENT 248-259 (28 May 2022).

[41] Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33(3) JOURNAL OF ECONOMIC PERSPECTIVES 44-68, 48 (2019).

that national oligopolies are strongly correlated with innovations in productivity."[42] In the end, Ganapati found, increased concentration resulted from a beneficial growth in firm size in productive industries that "expand[s] real output and hold[s] down prices, raising consumer welfare, while maintaining or reducing [these firms'] workforces."[43] Sam Peltzman's research on increasing concentration in manufacturing finds that it has, on average, been associated with both increased productivity growth and widening margins of price over input costs. These two effects offset each other, leading to "trivial" net price effects.[44]

Further, the presence of harmful effects in industries with increased concentration cannot readily be extrapolated to other industries. Thus, while some studies have plausibly shown that an increase in concentration in a particular case led to higher prices (although this is true in only a minority of the relevant literature), assuming the same result from an increase in concentration in other industries or other contexts is simply not justified:

> The most plausible competitive or efficiency theory of any particular industry's structure and business practices is as likely to be idiosyncratic to that industry as the most plausible strategic theory with market power.[45]

As Chad Syverson recently summarized:

> Perhaps the deepest conceptual problem with concentration as a measure of market power is that it is an outcome, not an immutable core determinant of how competitive an industry or market is… As a result, concentration is worse than just a noisy barometer of market power. Instead, we cannot even generally know which way the barometer is oriented.[46]

In other words, depending on the nature and dynamics of the market, competition may well be protected under conditions that preserve a certain number of competitors in the relevant market. But competition may also be protected under conditions in which a single winner takes all on the merits of their business.[47] It is reductive, and bad policy, to presume that a certain number of competitors is always and everywhere conducive to better economic outcomes, or indicative of anticompetitive harm.

This does not mean that concentration measures have no use in merger enforcement. Instead, it demonstrates that market concentration is often unrelated to antitrust enforcement because it is driven by factors that are endogenous to each industry. In revamping its merger-control rules, Australia should be careful not to rely too heavily on structural presumptions based on

---

[42] Shanat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13(3) AMERICAN ECONOMIC JOURNAL: MICROECONOMICS 309-327, 324 (Aug. 2021).

[43] *Id.*, 309.

[44] Sam Peltzman, *Productivity, Prices and Productivity in Manufacturing: a Demsetzian Perspective*, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECONOMICS 917, (19 Jul. 2021).

[45] Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, *in* RICHARD SCHMALENSEE & ROBERT WILLIG (eds.), HANDBOOK OF INDUSTRIAL ORGANIZATION, 1011, 1053-54 (1989).

[46] Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33(3) JOURNAL OF ECONOMIC PERSPECTIVES 23-43, 26 (2019).

[47] Nicolas Petit & Lazar Radic, *The Necessity of the Consumer Welfare Standard in Antitrust Analysis*, PROMARKET (18 Dec. 2023), https://www.promarket.org/2023/12/18/the-necessity-of-a-consumer-welfare-standard-in-antitrust-analysis.

concentration measures, as these may be poor indicators of those cases where antitrust enforcement would be most beneficial to consumers.

In sum, market structure should remain only a proxy for determining whether a transaction significantly lessens competition. It should not be at the forefront of merger review. And it should certainly not be the determining factor in deciding whether to block a merger.

D. Question 13

> **Should Australia introduce a mandatory notification regime, and what would be the key considerations for designing notification thresholds?**

The ACCC has argued that Australia is an "international outlier" in not requiring mandatory notification of mergers.[48] While it is true that most countries with merger-control rules also require mandatory notification of mergers when these exceed a certain threshold, there are also notable examples where this is not the case. For example, the United Kingdom, one of the leading competition jurisdictions in the world, does not require mandatory notification of mergers.

In deciding whether to impose a mandatory-notification regime and accompanying notification thresholds, Australia should not—as a matter of principle—be guided by international trends. International trends may be a useful indicator, but they can also be misleading. Instead, Australia's decision should be informed by close analysis of error costs. In particular, Australia should seek to understand how a notification regime would affect the balance between Type I and Type II errors in this context. A notification regime would presumably reduce false negatives without necessarily increasing false positives, which is a good outcome.

In its calculation, however, the Treasury cannot ignore the costs of filing mergers and of reviewing them. If designed poorly, mandatory notifications can be a burden for the merging firms, for third parties, and for the reviewing authorities, siphoning resources that could be better deployed elsewhere. It is here where a voluntary-notification regime could have an edge over the alternative. For instance, a study by Chongwoo Choe comparing systems of compulsory pre-merger notification with the Australian system of voluntary pre-merger notification found that:

> Thanks to the signaling opportunity that arises when notification is voluntary, voluntary notification leads to lower enforcement costs for the regulator and lower notification costs for the merging parties. Some of the theoretical predictions are supported by exploratory empirical tests using merger data from Australia. *Overall, our results suggest that voluntary merger notification may achieve objectives similar to those achieved by compulsory systems at lower costs to the merging parties as well as to the regulator.*[49] (emphasis added).

If the Treasury nonetheless decides to mandate merger notification, the next step would be to establish a notification threshold, as it is evident that not all mergers can, or should, be notified to the Australian authorities. Indeed, many mergers may be patently uninteresting from a

---

[48] ACCC, 2023: 5.

[49] Chongwoo Choe, *Compulsory or Voluntary Pre-Merger Notification? Theory and Some Evidence*, 28(1) INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 10-20 (Jan. 2010).

competition perspective (*e.g.*, one small supermarket in Perth buying another), while others might not have a significant nexus with Australia (*e.g.*, where an international company that does modest business in Australia buys a shop in Spain).[50] Too many merger notifications strain the public's limited resources and disproportionately affect smaller companies, as these companies are less capable of covering administrative costs and filing fees. To mitigate such unnecessary costs, the Treasury should establish reasonable thresholds that help filter out transactions where the merging parties are unlikely to have significant market power post-merger.

But what constitutes a reasonable threshold? Our view is that there is no need to reinvent the wheel here. Turnover has typically been used as a proxy for a merger's competitive impact because it offers a first indicator of the parties' relative position on the market. Despite the Consultation's claim that "mergers of all sizes are potentially capable of raising competition concerns,"[51] where the parties (and especially the target company) have either no or only negligible turnover in Australia, it is highly unlikely that the merger will significantly lessen competition. If the Treasury decides to impose mandatory notification for mergers, it should therefore consider using a turnover-based threshold.

E. Question 17

Should Australia's merger control regime require the decision-maker to be satisfied that a proposed merger:

- **would be likely to substantially lessen competition before blocking it; or**
- **would not be likely to substantially lessen competition before clearing it?**

The second option would essentially reverse the burden of proof in merger control. Instead of requiring the authority to prove that a merger would substantially lessen competition, it would fall on the merging parties to prove a negative—*i.e.*, that the merger would *not* be likely to substantially lessen competition.

The ACCC has made this proposal because it:

> Means that the risk of error is borne by the merger parties rather than the public. In the cases where this difference matters (for example where there is uncertainty or a number of possible future outcomes), the default position should be to leave the risk with the merger parties, not to put at risk the public interest in maintaining the state of competition into the future.[52]

The Consultation sympathizes. It recognizes that "there are trade-offs between the risks of false positives and false negatives in designing a merger test," but contends that, while both lead to

[50] For an overview of the impact of unnecessary transaction costs in merger notification in the context of Ireland, *see* Paul K. Gorecki, *Merger Control in Ireland: Too Many Unnecessary Notifications?*, ESRI WORKING PAPER NO. 383 (2011), https://www.econstor.eu/handle/10419/50090.

[51] Consultation, 24.

[52] ACCC, 2023, 9.

lower output, higher prices, lower quality, and less innovation, "allowing anti-competitive mergers means that merging parties benefit at the expense of consumers."[53]

But this argument is based on a flawed premise. The risk of error—whether Type I or Type II error—is *always* borne by the public. The public is harmed by false positives in at least two ways. First, and most directly, it suffers harm through the foregone benefits that could have accrued from a procompetitive merger. As we have shown in our responses to Questions 6, 8, and 9, these benefits are common and can be economically substantial. Second, but no less important, false positives chill merger activity and discourage future mergers. This also negatively affects the public.

The extent to which chilling merger activity harms the public has, however, been obfuscated by a contrived dichotomy between "the public" and the merging parties, which taints the ACCC's argumentation and skews the Conclusion. The merging parties are also part of society and, therefore, also part of "the public." An unduly restrictive merger regime that prioritizes avoiding false negatives over false positives harms consumers. But it also harms the "public" more broadly, insofar as anyone could, potentially, have a direct interest in a merger, either as a stakeholder or a party to that merger.

In addition, a regime that requires companies to prove that a deal is not harmful (with the usual caveats about the difficulty of proving a negative) before being allowed to proceed unduly restricts economic freedom and the rights of defense—both of which are very "public" benefits, as everyone, in principle, benefits from them. These elements should also be taken into consideration when weighing the costs and benefits of Type I and Type II errors. That balancing test should, in our view, generally favor false negatives, as argued in our response to Question 6.

Finally, there is no objective, material justification for "[shifting] the default position from allowing mergers to proceed where there is uncertainty [which is, by definition, always in a merger review process that is forward-looking] to a position where, if there is sufficient uncertainty about the effects of a merger, it would not be cleared." As discussed in our answer to Question 6, the vast majority of mergers are procompetitive, including mergers in the digital sector, or mergers that involve digital platforms. This presumption is reflected in the requirement, common across antitrust jurisdictions, that enforcers must make a *prima facie* case that a merger will be anticompetitive before the merging parties have a duty to respond. There has been no major empirical finding or theoretical revelation in recent years that would justify reversing this burden of proof. Indeed, any change along these lines would be guided by ephemeral political and industrial-policy exigencies, rather than by robust principles of law and economics. In our view, these are not sound reasons for flipping merger review on its head.

In sum, Australian merger control should require that a decisionmaker be satisfied that a merger would be likely to substantially lessen competition before blocking it.

[53] Consultation, 29.

F. Question 18

Should Australia's substantial lessening of competition test be amended to include acquisitions that 'entrench, materially increase or materially extend a position of substantial market power'?

According to the ACCC:

> Under the current substantial lessening of competition test, it may be difficult to stop acquisitions that lead to a dominant firm extending their market power into related or adjacent markets.[54]

The ACCC imagines this is a problem, particularly in digital markets. Preventing dominant firms from leveraging their market power in one market to restrict competition in an adjacent one is a legitimate concern. We should, however, be clear about what is meant by "materially increase or materially extend a position of substantial market power."

Merger control should not, as a matter of principle, seek to prevent incumbents from entering adjacent markets. Large firms moving into the core business of competitors from adjacent markets often represents the biggest source of competition for incumbents, as it is often precisely these firms who have the capacity to contest competitors' dominance in their core businesses effectively. This scenario is prevalent in digital markets, where incumbents must enter multiple adjacent markets, most often by supplying highly differentiated products, complements, or "new combinations" of existing offerings.[55]

Moreover, it is unclear why the SLC test in its current state is insufficient to curb the misuse of market power. The SLC test is a standard used by regulatory authorities to assess the legality of proposed mergers and acquisitions. Simply put, it examines whether a prospective merger is likely to substantially lessen competition in a given market, with the purpose of preventing mergers that increase prices, reduce output, limit consumer choice, or stifle innovation as a result of a decrease in competition.

The SLC test is one of the two major tests deployed by competition authorities to determine whether a merger is anticompetitive, the other being the dominance test. Most merger-control regimes today use the SLC test, and for two good reasons. The first is that, under the dominance test, it is difficult to assess coordinated effects and non-horizontal mergers.[56] The other, mentioned in the Consultation, is that the SLC test allows for more robust effects-based economic analysis.[57]

---

[54] Consultation, 19; ACCC, 2023: 6-7.

[55] NICOLAS PETIT, BIG TECH AND THE DIGITAL ECONOMY: THE MOLIGOPOLY SCENARIO (2020); *see also* Walid Chaiehoudj, *On "Big Tech and the Digital Economy": Interview with Professor Nicolas Petit*, COMPETITION FORUM (11 Jan. 2021), https://competition-forum.com/on-big-tech-and-the-digital-economy-interview-with-professor-nicolas-petit.

[56] *Standard for Merger Review*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (11 May 2010), 6, *available at* https://www.oecd.org/daf/competition/45247537.pdf.

[57] *Id.*; *see also* Consultation, 31, indicating that "[SLC test] would enable mergers to be assessed on competition criteria but not prescriptively identify which competition criteria should be taken into account. It may permit more flexible application of the law and *a greater degree of economic analysis in merger decision-making*" (emphasis added).

The SLC test examines likely coordinated and non-coordinated effects in all three types of mergers: horizontal, vertical, and conglomerate. Horizontal mergers may substantially lessen competition by eliminating a significant competitive constraint on one or more firms, or by changing the nature of competition such that firms that had not previously coordinating their behavior will be more likely to do so. Vertical and conglomerate mergers tend to pose less of a risk to competition.[58] Still, there are facts and circumstances under which they can substantially lessen competition by, for example, foreclosing rivals from necessary inputs, supplies, or markets. These outcomes will often be associated with an increase in market power. As the OECD has written:

> The focus of the SLC test lies predominantly on the impact of the merger on existing competitive constraints and on measuring market power post-merger.[59]

In other words, the SLC test already accounts for increases in market power that are capable and likely of harming competition. As to whether the "entrenchment" of market power—in line with the 2022 amendments to Canadian competition law—should be added to the SLC test, there is no reason to believe that this is either necessary or appropriate in the Australian context. The 2022 amendments to the Canadian competition law mentioned in the Consultation[60] largely align Canada's merger control with its abuse-of-dominance provision, which prohibits anti-competitive activities that damage or eliminate competitors and that "preserve, entrench or enhance their market power."[61] But in Australia, Section 46 (the equivalent of the Canadian abuse-of-dominance provision) prohibits conduct "that has the purpose, or has or is likely to have the effect, of substantially lessening competition." The proposed amendment would thus create a discrepancy between merger control and Section 46, where the latter would remain tethered to an SLC test, and the former would shift to a new standard. Additionally, since it remains unclear what the results of Canada's 2022 merger-control amendments have been or will be, it would be wiser for Australia to adopt a "wait and see" approach before rushing to replicate them.

Lastly, there is the question of defining "materiality" in the context of an increase or entrenchment of market power. Currently, Section 50 prohibits mergers that "substantially lessen competition," with no mention of materiality.[62] The Merger Guidelines do, however, state that:

> The term "substantial" has been variously interpreted as meaning real or of substance, not merely discernible but *material* in a relative sense and meaningful.[63] (emphasis added)

---

[58] *See*, *e.g.*, European Commission, *Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings* (2008/C 265/07), paras. 11-13.

[59] OECD, *supra* note 56, at 16; *see also* European Commission, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings* (2004/C 31/03).

[60] Consultation, 30-31.

[61] Canadian Competition Act, Sections 78 and 79.

[62] Section 44G, however, does mention a "*material* increase in competition." (emphasis added).

[63] ACCC, Merger Guidelines (2008), *available at* https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF ; see also Australia, Senate 1992, Debates, vol. S157, p. 4776, as cited in the Merger Guidelines (2008).

The proposed amendment follows suit, referring to the concepts of "material increase" and "material extension" of market power. What does this mean? How does a "material increase" in market power differ from a non-material one? In its comments to the American Innovation and Choice Online Act ("AICOA"), the American Bar Association's Antitrust Law Section criticized the bill for using amorphous terms such as "fairness," "preferencing," and "materiality," or the "intrinsic" value of a product. Because these concepts were not defined either in the legislation or in existing case law, the ABA argued that they injected variability and indeterminacy into how the legislation would be administered.[64] The same argument applies here.

Accordingly, the SLC test should not be amended to include acquisitions that "entrench, materially increase or materially extend a position of substantial market power."

G. Question 19

> **Should the merger factors in section 50(3) be amended to increase the focus on changes to market structure as a result of a merger? Or should the merger factors be removed entirely?**

On market structure, see our responses to Question 9 and Question 18.

The merger factors under Section 50(3) already overlap with the factors typically used under the SLC test. These include the structure of related markets; the merger's underlying economic rationale; market accessibility for potential entrants; the market shares of involved undertakings; whether the market is capacity constrained; the presence of competitors (existing and potential); consumer behavior (the willingness and ability of consumers to switch to alternative products); the likely effect on consumers; the financial investment required for market entry; and the market share necessary for a buyer or seller to achieve profitability or economies of scale.

Similarly, Section 50(3) contains a list of the factors to be considered under the SLC test, including barriers to entry, the intensity of competition on the market, the likely effects on price and profit margins, and the extent of vertical integration, among others. Structural questions, such as the degree of concentration on the market, are also one of the listed factors under Section 50(3).

As a result, it is unclear how eliminating the merger factors would transform the SLC test, or why there should be *more* emphasis on market structure (on the proper role of market structure in merger-control analysis, see our answers to Question 9 and Question 18).

In sum, Section 50(3) should not be amended to increase the focus on changes to market structure as a result of a merger. It is also not clear what is gained from removing the factors in Section 50(3). More than a "modernization" (as the Consultation calls it),[65] the change appears redundant. To the extent that these factors place a "straitjacket" on courts (though, in principle,

---

[64] Geoffrey A. Manne & Lazar Radic, *The ABA's Antitrust Law Section Sounds the Alarm on Klobuchar-Grassley*, TRUTH ON THE MARKET (12 May 2022), https://truthonthemarket.com/2022/05/12/the-abas-antitrust-law-section-sounds-the-alarm-on-klobuchar-grassley.

[65] Consultation, 39.

they are broad enough to be sufficiently flexible), however, they could be removed, so long as merger analysis remains tethered to the SLC test.

H. Question 20

Should a public benefit test be retained if a new merger control regime was introduced?

Antitrust law, including merger control, is not a "Swiss Army knife."[66] Public-interest considerations should generally have limited to no weight in merger analysis, except in extremely specific cases proscribed by the law (*e.g.*, public security and defense considerations). Expanding merger analysis to encompass non-competition concerns risks undermining the rule of law, diminishing legal certainty, and harming consumers.

In Australia, the Competition Act currently does not expressly limit the range of public benefits (or detriments) that may be taken into account by the ACCC when deciding whether to block or allow a merger (this includes not limiting them to those that address market failure or improve economic efficiency).[67] Thus, "anything of value to the community generally, any contribution to the aims pursued by the society" could, in theory, be considered a public benefit for the purpose of the public-benefit test.[68] The authorization regime also does not require the ACCC to quantify the level of public benefits and detriments.

Competition authorities are, in principle, ill-suited to rank, weigh, and prioritize complex, incommensurable goals and values against one other. They lack the expertise to meaningfully evaluate political, social, environmental, and other goals. They are independent agencies with a strict, narrow mandate, not political decision makers tasked with redistributing wealth or guiding society forward. Requiring them to consider broad public considerations when deciding on mergers magnifies the risk of discretionary and arbitrary decision making and undercuts legal certainty. This is as true for blocking mergers on the basis of public detriments as it is for allowing them on the basis of public benefits. By contrast, the consumer-welfare standard, which forms the basis of the SLC, is properly understood as:

> Offer[ing] a tractable test that is broad enough to contemplate a variety of evidence related to consumer welfare but also sufficiently objective and clear to cabin discretion and honor the principle of the rule of law. Perhaps most significantly, it is inherently an economic approach to antitrust that benefits from new economic learning and is capable of evaluating an evolving set of commercial practices and business models.[69]

---

[66] Geoffrey A. Manne, *Hearing on "Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America's Food Supply,"* U.S. HOUSE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW (19 Jan. 2021), *available at* https://laweconcenter.org/wp-content/uploads/2022/01/Manne-Supply-Chain-Testimony-2021-01-19.pdf.

[67] *Out-of-Market Efficiencies in Competition Enforcement – Note by Australia*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (6 Dec. 2023), *available at* https://one.oecd.org/document/DAF/COMP/WD(2023)102/en/pdf.

[68] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (QCMA) (1976) ATPR 40-012.

[69] Elyse Dorsey, *et al.*, *Consumer Welfare & The Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPPERDINE LAW REVIEW 861 (1 Jun. 2020).

Consequently, we recommend that the public-interest test be jettisoned from merger analysis, or at least very narrowly circumscribed, if a new merger-control regime is introduced in Australia.

I. Question 24

What is the preferred option or combination of elements outlined above? What implementation considerations would need to be taken into account?

In our opinion, and based on the arguments espoused in this submission, the best options would be as follows:

	CURRENT COMPETITION ASSESSMENT	POSSIBLE CHANGE
Option A	The Federal Court must have regard to the 'merger factors' in section 50(3) of the CCA	No change, or omit the merger factors, simplifying to a substantial lessening of competition test.
Option B	Prohibition against mergers that "would have the effect, or be likely to have the effect of substantially lessening competition."	No change.