

AS THE CLOCK STRIKES MIDNIGHT: THE COMPETITIVE IMPACT OF STEALTH M&A IN AUSTRALIA

Are we letting anti-competitive deals go unnoticed?

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Australia's mergers and acquisitions (M&A) regime is coming under scrutiny against a backdrop of rising industry concentration. While the competitive consequences of individual deals are complex, it is difficult to assess their aggregate impact due to incomplete data. With Australia's voluntary disclosure regime, smaller transactions are potentially leaving blind spots in our understanding of the competitive landscape in Australia.

Small transactions may appear benign, but their cumulative effect can be material. In the US, it is estimated that 28-47% of the increase in industry concentration reflects undisclosed merger activity.¹ Unlike in the US, where large deals must be reported directly to regulators, in Australia there is currently no mandatory reporting of a transaction to the Australian Competition and Consumer Commission (ACCC). The ACCC may be notified through other instances:

- 1 Where the target firm is listed on the stock exchange (ASX), as it will have to notify the ASX and its shareholders.
- 2 Where the buyer is listed on the ASX and the transaction is large enough that it must be publicly announced to satisfy listing requirements (defined as more than 5% of the buyer's net assets).²
- 3 Where there are foreign parties involved in the transaction, requiring the Foreign Investment Review Board to be notified.
- 4 If a third-party - such as customers, suppliers, or other international regulators - notifies the ACCC.

Transactions can also be voluntarily reported by merging parties to the ACCC, through an informal notification channel, which ACCC guidelines encourage. In 2008, the recommended thresholds for notification were relaxed such that the only reasons to notify the ACCC were:

- 1 If the merging parties operated in the same market or markets that were closely intertwined...
- 2 ... **and** the deal would result in the new company being more than 20% of the relevant market.

What was the impact of this new threshold?

Our analysis highlights that the relaxed guidelines appear to have decreased the frequency of ACCC reviews. In 2004, the ACCC reviewed a total of 79 mergers, compared to just 35 in 2022 (Figure 1). This fall in the number of mergers reviewed is driven by a decrease in the number of 'private' mergers (Figure 2) – that is, mergers that are not captured by the public notification channels listed above.

The total number of public mergers occurring remained stable over this period, and we would expect trends in the number of private mergers to follow these. Therefore, the decrease in Figure 2 is a plausible indicative estimate of the impact of the change in merger guidelines.

Figure 1: Public M&A Deals and ACCC Merger Reviews*

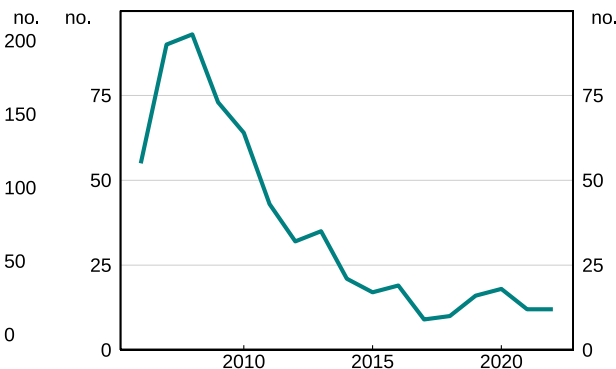
2002-2022, number of transactions



* Reviews separate to the formal merger process
Sources: ACCC; e61; Refinitiv

Figure 2: Private* Mergers Reviewed by the ACCC

2006-2022, number of transactions

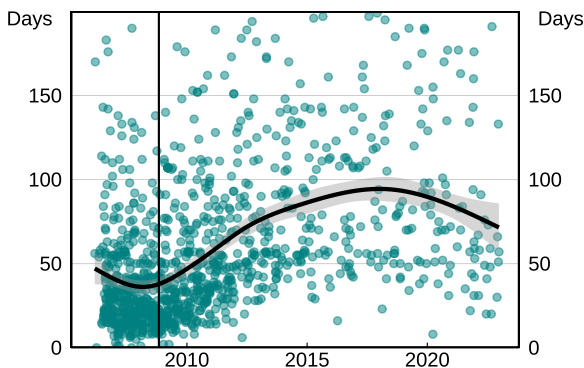


* No record exists in Refinitiv M&A Database
Sources: ACCC; e61; Refinitiv

As additional evidence, we show that the average time the ACCC spent reviewing an M&A deal has doubled since 2008 (Figure 3). We would expect to see this if the ACCC was focusing its resources on larger, high-profile transactions. It is unclear whether these larger transactions are considered more contentious from a competition perspective in the eyes of the ACCC, as the opposition rate to these mergers did not materially increase over this timeframe (Figure 4).

Figure 3: Average Length of ACCC Informal Merger Reviews*

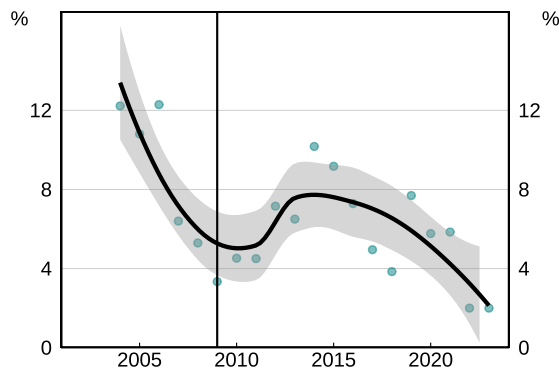
2006-2022



* Reviews separate to the formal merger process
Sources: ACCC; e61; Refinitiv

Figure 4: Opposition Rate* of ACCC Informal Merger Reviews**

2002-2022



* Three year moving average of mergers that are reviewed and opposed by ACCC
** Reviews separate to the formal merger process
Sources: ACCC; e61

Given the ACCC has recently discussed increasing requirements to a mandatory notification regime with size-based thresholds, we note that:

- 1 Since the guidelines changed in 2008, the ACCC has been reviewing fewer 'private' transactions that were voluntarily disclosed, which tend to be smaller and would likely go unobserved otherwise due to the reasons listed above.
- 2 If the ACCC required notification of smaller mergers, we would have a much clearer picture of merger activity. However, size thresholds also need to be designed with the knowledge that merger parties will likely manipulate the value of a transaction to avoid ACCC attention.
- 3 A common argument against the mandatory reporting of smaller mergers is that the compliance costs would be excessive. However, international experience shows that the regulatory burden on firms can be lessened with a fast-track option for straightforward transactions.³ Furthermore, some anti-trust research argues that the cost of complying with a stricter merger regime will be more costly for mergers that are more likely to be deemed anti-competitive in the first place.⁴

1. Barrios and Wollman (2022).

2. It is unclear whether Australian companies manipulate the transaction value to be lower to avoid disclosure, however this behaviour has been documented in the US (Barrios and Wollman (2022)).

3. See speech made by Gina Cass-Gottlieb (2023) for further details.

4. Asker and Nocke (2021).

References

ACCC (2008). Merger Guidelines. Canberra. <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>

Asker, J. and V. Nocke (2021). Chapter 12 - Collusion, mergers, and related antitrust issues, Handbook of Industrial Organization, Elsevier, Volume 5, Issue 1.

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Cass-Gottlieb, G. (2023). The role of the ACCC and competition in a transitioning economy address to the National Press Club 2023. Canberra, National Press Club.

Productivity Commission (1995). Pre-merger notification and the Trade Practices Act 1974 Submission to the Treasury. Canberra, Productivity Commission.

ACCC Data

The ACCC public register of merger reviews was compiled into machine-readable format. To view the register, see: <https://www.accc.gov.au/public-registers/mergers-registers>