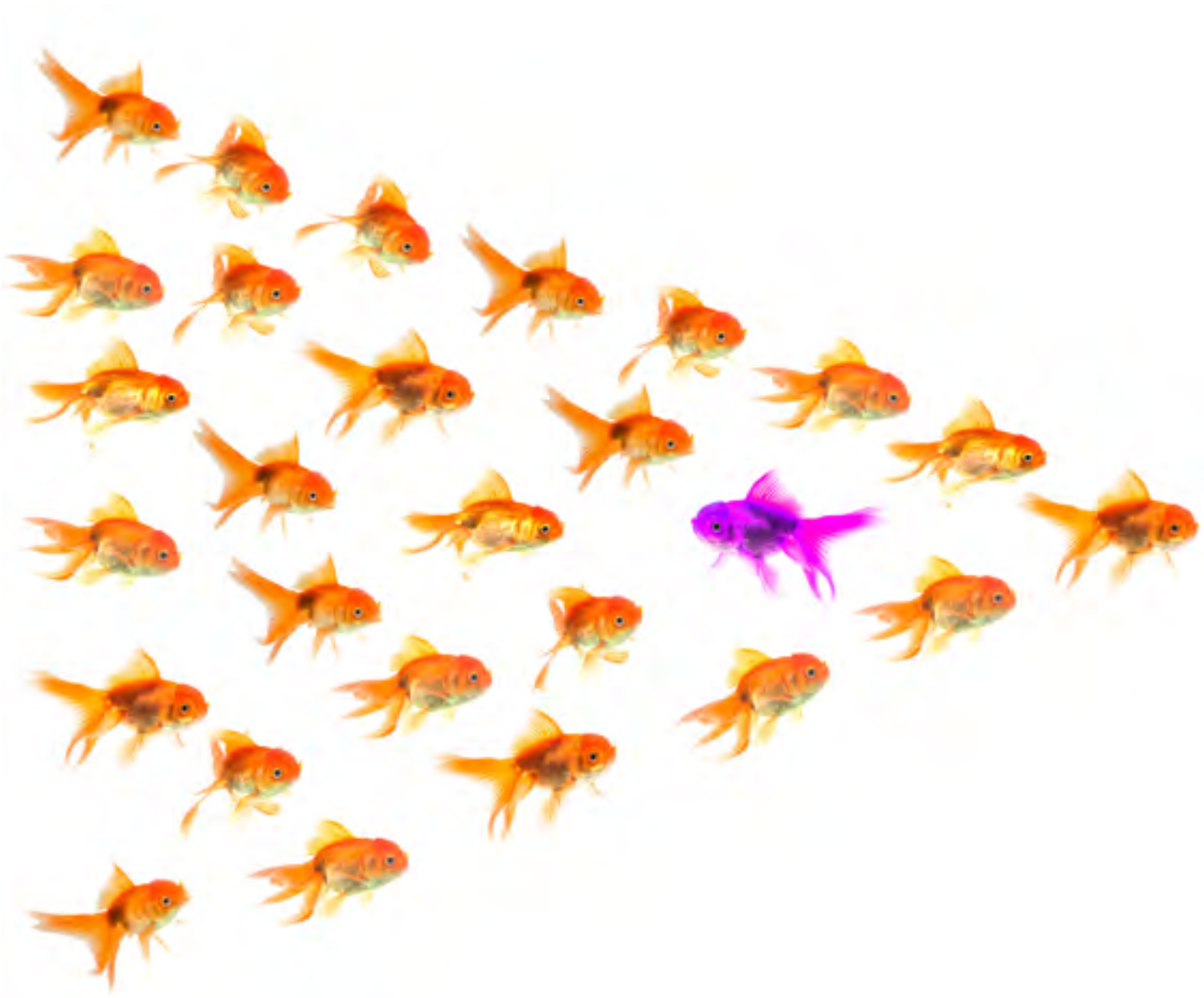
AUSTRALIA'S MERGER CONTROL REGIME: *EX POST* MERGER REVIEWS, CONTINUED PUSH FOR RADICAL CHANGES TO MERGER CLEARANCE PROCESS, PROPOSED SECTOR SPECIFIC RULES



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By Kirsten Webb

This paper comments on the results of the first ex post review of merger cases undertaken by the Australian Competition and Consumer Commission ("ACCC"), which feeds into the ACCC's call for reform to Australia's merger control laws; and reviews some of the key elements of the ACCC's proposed merger law reforms. The ACCC says that its proposed merger law reforms will bring Australia's merger clearance regime and rules for digital platforms into alignment with international models. However, those reforms will add more complexity and cost to clearance processes in Australia and potentially, if all of the ACCC's changes were adopted, could lead to more deals being blocked. There have been a number of mergers in recent years that were originally opposed by the ACCC but ultimately cleared by the Federal Court of Australia or the Australian Competition Tribunal. Part of the ACCC's petition for reform is that the current test is too high of a bar for the ACCC to effectively prevent anti-competitive deals in court proceedings. An ex post review of these cases could test this argument.

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I. INTRODUCTION

In his eleventh and final speech to the Committee for Economic Development Australia ("CEDA") on March 3, 2022,[2] outgoing ACCC Chairman Rod Sims outlined the ACCC's areas of particular focus for the year ahead.

Mr. Sims noted the surge in M&A activity in Australia and globally, reporting:

- In 2021, 472 mergers were notified to the ACCC, up 41 percent on the previous year and 63 percent higher than the average over the last five years, including global mergers with significant transaction value; and

- The ACCC is seeing an increase in the number and complexity of public reviews in sectors such as ports, container handling equipment and services, rail transport, aviation, health, and pharmaceuticals.

In that context, Mr. Sims used his speech to continue to advocate for merger law reform in Australia. Over the past few years, Mr. Sims has argued that Australia's informal merger review model is out of step internationally, and the current legal test restricts the ACCC's ability to prevent anti-competitive mergers.

In August 2021[3] the ACCC announced a range of radical proposals designed to re-engineer the merger clearance process which, if implemented, would include replacing the existing voluntary and informal clearance process with a mandatory and suspensory notification regime. This is an agenda that the ACCC will continue to push over the next year.

If the ACCC is successful in agitating for merger law reform, it would fundamentally alter merger clearance in Australia with the ACCC's legislative reform wish list including a mandatory filing regime and a ban on the parties closing the deal until the ACCC has granted clearance. Ultimately, the ACCC's passion alone will not be enough to force legislative change with the debate likely to continue and the final say coming down to the Commonwealth Government.

II. *EX POST* MERGER REVIEW

This continued push for merger law reform followed the publication of the ACCC's first *ex post* review of merger cases.[4] That review focused on identifying lessons that can be learned from past cases to inform and improve the ACCC's current investigative and decision-making processes.

However, while the *ex post* review work was conducted independently of the law reform proposals, the ACCC has used it as another opportunity to advocate for reform. In particular, the report raises concerns about the factual accuracy and completeness of information provided by parties in past cases, arguing that this is a weakness of the current informal regime.

2 Rod Sims, Chair, Australian Competition and Consumer Commission, ACCC's enforcement and compliance policy update 2022-23, Committee for Economic Development of Australia (CEDA) (March 3, 2022) https://www.accc.gov.au/speech/acccs-enforcement-and-compliance-policy-update-2022-23.

3 Rod Sims, Chair, Australian Competition and Consumer Commission, Protecting and promoting competition in Australia, Speech at the Competition and Consumer Workshop 2021 - Law Council of Australia (August 27, 2021) https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia.

4 Australian Competition and Consumer Commission, *Ex-post Review of Merger Decisions* (February 25, 2022) https://www.accc.gov.au/publications/ex-post-review-of-accc-merger-decisions.

A. Outline of Current Merger Control Regime

Section 50 of the Competition and Consumer Act 2010 (Cth) ("CCA") prohibits a corporation from directly or indirectly acquiring shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Currently, there is an informal merger clearance process that enables merger parties to seek the ACCC's view on whether the ACCC considers a proposed acquisition is likely to have the effect of substantially lessening competition. This is an informal process that is not underpinned by legislation that has developed over time, to provide an avenue for merger parties to seek the ACCC's view prior to completing a merger.

While there is no mandatory ACCC notification requirement, the ACCC has the power to commence proceedings in the Federal Court of Australia seeking an injunction to restrain a proposed merger, as well as penalties and other orders if the Court determines that the merger is likely to have the effect of substantially lessening competition in breach of Section 50.[5] Merger parties also have the ability to seek a declaration from the Federal Court of Australia that a merger is not likely to substantially lessen competition and until recently could also commence proceedings in the Australian Competition Tribunal seeking authorization of a proposed merger.

B. Mergers Reviewed by ACCC in Ex Post Review Report

The ACCC conducted detailed ex post reviews of six mergers[6] which it originally reviewed, and did not oppose, between 2017 and 2019. This compares to 78 public merger reviews appearing on the ACCC's register in the same period (this number excludes numerous others that would have been confidentially cleared (or "pre-assessed") in the same period) and the increased numbers of mergers notified to the ACCC in 2021 outlined in Section I above.

The cases were selected based on a range of criteria including the nature of the issues raised and relevance to future reviews, availability of information and data, and the time that had elapsed since the merger.

There have been a number of mergers that were originally opposed by the ACCC but approved by the Federal Court of Australia or Australian Competition Tribunal, none of which were the subject of the ex post review.[7] The ACCC has flagged the possibility of conducting an *ex post* review of such mergers. Specifically, the report noted that the ACCC has received complaints from industry about some of those mergers.[8]

Part of the ACCC's petition for reform is a proposal to lower the threshold for deals to be blocked, on the basis that current forward looking test – and the requirement to satisfy the civil standard of proof – is too high of a bar for the ACCC to effectively prevent anti-competitive deals in court proceedings. In recent contested merger cases determined by the Federal Court of Australia, examination of witnesses has produced compelling evidence as to why a merger should be permitted. An *ex post* review of cases the ACCC opposed but were approved by the Federal Court of Australia or Australian Competition Tribunal, could test the ACCC's argument.

C. Core Findings from the Ex Post Review

Despite the very small sample size, the ACCC seeks to draw some broad conclusions. Its core findings include that:

- There is a need to look beyond market shares (which may underplay competitive effects) and closely examine other market conditions. In particular, the ACCC found that the removal of a vigorous and effective competitor can have a significant impact on competition, even where market shares are low and other vigorous and effective competitors remain. The ACCC based this finding on a merger where the parties' combined share post-merger was only 11 percent and a number of other competitors remained in the market. However, a detailed ex post review of pricing data revealed a quantifiable reduction in price competition post-merger attributable to the removal of the target.

5 *Ibid.* p.2

6 Caltex Australia's acquisition of assets from Milemaker Petroleum (Caltex/Milemaker); Platinum Equity's (Winc) acquisition of OfficeMax Australia; Complete Office Supplies' acquisition of Lyreco; Emergent Cold's acquisition of AB Oxford Cold Storage Company; Propel Funeral Partners' acquisition of Gregson & Weight Funeral Directors; and the remedy package in Landmark's acquisition of Ruralco.

7 In the past 10 years: *AGL/ Macquarie Generation* (2014); *Sea Swift/ Toll Marine* (2016); *Tabcorp/Tattersalls* (2016-2018); *Pacific National/Aurizon* (2018-2020); *TPG/ Vodafone* (2020).

8 *TPG/ Vodafone* (2020), *AGL/ Macquarie Generation* (2014) and *Sea Swift/ Toll Marine* (2016).

- The benefit of competitive constraints on a particular segment or class of customers will not necessarily carry over to other segments. The ACCC found that some mergers have resulted in significant price increases for particular segments of customers, and this can be a particular issue where some classes of customers have less available alternative suppliers and/or are unable to self-supply. The ACCC appears to base this finding on one merger where the ACCC found that, following the merger, large customers were able to prevent price rises due to effective countervailing buyer power, but mid-sized customers faced more significant price increases.

- Claims about the likelihood of new entry and expansion, and the ability of third parties to exercise countervailing power, need to be scrutinized closely as these are routinely exaggerated by both merger parties and third parties. While numerous claims about new entry were made by both merger parties and industry participants in original review processes, the ACCC found that in almost none of these cases had any entry actually transpired since the merger. Similarly, the ex post review identified several instances where market participants were overly confident about their ability to prevent the merged entity from raising prices and may have underestimated the capital and labor commitment required.

- Both merger parties and third parties have distorted or omitted critical information relevant to the ACCC's analysis. Examples included the ACCC receiving directly contradictory information about the viability of a competitor in separate review processes, weeks apart; sanitized internal documents downplaying forecasted post-merger price increases; definitive submissions on post-merger expansion plans that never eventuated; and the failure to disclose a subsequent and imminent transaction which impacted the ACCC's assessment of market dynamics.

D. Continued Petition for Reform of Informal Merger Clearance Regime

The findings of the report have already been leveraged in support of the introduction of a new mandatory and suspensory regime. In announcing the report, outgoing ACCC Chair Rod Sims expressed concerns about the current informal and non-suspensory regime, highlighting that the ACCC often has to negotiate with parties over the information they will provide, frequently under time constraints and, in some cases, threats to complete.[9]

III. PROPOSED CHANGES TO AUSTRALIA'S MERGER REGIME

The ACCC has been vocal in pushing for reform of Australia's merger regime on the basis that Australia's merger control is out of step internationally and not "fit for purpose." Concerned about increased market power and concentration in industry in Australia, the ACCC is proposing a radical overhaul to enhance the ACCC's ability to prevent consolidation.

The ACCC acknowledges it has not been successful in preventing mergers that it deems problematic – and so is pressing for radical change that it says will bring the Australian regime closer to that seen in other jurisdictions. While the ACCC has said that it is, by proposing a regime, intending to start a debate in Australia about change, it is clear that the ACCC proposal has been meticulously thought through – right down to particular wording.

Specifically, the ACCC is looking to have three key changes implemented in Australia:

1. A new formal merger review process, with a mandatory filing regime and a ban on the parties closing the deal until the ACCC has granted clearance which would be the only means by which clearance could be granted;

2. Changes to the mergers test in Section 50 of the current law to lower the threshold for deals that can be blocked to cover cases where there is a possibility of competition being reduced; and

3. Reforms to deal with acquisitions by large digital platforms.

9 Press Release: Australian Competition and Consumer Commission, ACCC examines competition impact of past mergers (February 25, 2022) https://www.accc.gov.au/media-release/accc-examines-competition-impact-of-past-mergers.

A. Change #1: A new Mandatory Merger Notification Process

Currently, there is an informal merger clearance process outlined in Section II.A above. There is no mandatory merger notification requirement.

The new formal merger review process proposed would introduce mandatory notification of all deals above a defined threshold. A suspensory regime would also be implemented, preventing closing without ACCC clearance as well as a set time period for review.

To complement the thresholds, which the ACCC acknowledges would need to be carefully set, the ACCC is also proposing a "call in" power for those transactions that are "potentially problematic" but which fall below the thresholds. This power would bring these transactions under the formal process and, in the ACCC's view, discourage transactions being structured in ways to avoid notification. The ACCC has not unveiled its preferred time period for the "call in" power to be operative – but has said that the period should be a matter for debate.

The ACCC would like to retain some aspects of the current voluntary merger clearance regime – i.e. for acquisitions that fall below the thresholds, merger parties would continue to be able to request ACCC clearance based on the current pre-assessment process. The ACCC is also proposing a "notification waiver" for acquisitions which are above the thresholds, but which are unlikely to raise serious competition concerns.

Of significance, while the ACCC would be obligated to provide substantive reasons for its decision to clear, or decline to clear, proposed acquisitions, its decisions would be subject to limited merits review by the Australian Competition Tribunal. That is, the Federal Court would no longer be directly involved in any aspect of the merger clearance process.

The ACCC also proposes that on review of ACCC decisions to block a transaction the Tribunal would only be able to have regard to the material which was before the ACCC when it made its decision. This would ramp up the filing obligations and costs for the merger parties to make sure they provide the ACCC with a fulsome analysis of the competition issues affected by the transaction, because they will be limited on appeal to that material.

This limited review process would eliminate what has been a fruitful underpinning of Federal Court decisions to permit mergers, namely cross examination of both the merging parties' witnesses and those that give evidence for the ACCC. In all recent contested merger cases determined by the Federal Court of Australia, examination of witnesses has produced compelling evidence as to why a merger should be permitted. The ACCC no longer wants this avenue to be available – although it will retain its own right to undertake examination of witnesses as part of its merger clearance process.

B. Change #2: Changes to the Merger Test

The ACCC argues that the current regime (outlined in Section II.A above) overly favors merger parties by placing too much of an evidentiary burden onto the ACCC to convince the Federal Court to uphold ACCC decisions and block questionable transactions.[10]

The ACCC says that the requirement to prove the likely future state of competition "with and without" the merger to the civil standard of proof presents unacceptable challenges. Third parties likely to be adversely affected by the transaction are often reluctant to provide evidence; executives from merger parties are self-interested and internal documents carefully curated.

Under the proposed formal regime, the applicable test would be whether the ACCC is satisfied the proposed acquisition is not likely to have the effect of substantially lessening of competition. The word "likely" appears in the current test in s50. It is not defined but has been interpreted in case law to mean, at time of writing, "a real commercial likelihood."

The ACCC proposes that a definition be included in statute and that the threshold be reduced; "likely" should be defined as "a possibility that is not remote." This would, in the ACCC's view, make it clear that, for a breach of the merger law to be established it is not necessary for the ACCC or Tribunal on review to be persuaded on the balance of probabilities that there is a real commercial likelihood of a substantial lessening of competition. All that would be required is a possibility that is not remote. This would firmly move the burden to the parties to show no significant possibility of a loss of competition. That is a substantive change to the existing law and has potential ramifications for other prohibitions of conduct that is likely to substantially lessen competition, such as concerted practices.

10 Rod Sims, Chair, Australian Competition and Consumer Commission, Protecting and promoting competition in Australia, Speech at the Competition and Consumer Workshop 2021 - Law Council of Australia (August 27, 2021) https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia.

Currently, Section 50 of the CCA sets out a number of factors that must be taken into account in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market (known as the merger factors) as follows:

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- the nature and extent of vertical integration in the market.

The ACCC is also proposing that:

- the existing merger factors in Section 50 be revised to focus on the structural conditions for competition that are changed by the acquisition to the detriment of competition. The precise changes sought have not been notified;
- an acquisition by an acquirer which has a position of substantial market power be deemed to be problematic if, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased, or materially extended. The precise language of "entrenched, materially increased or materially extended" has been proposed by the ACCC and has no precedent in any other provisions of the existing law; and
- to the extent that merger parties enter into ancillary agreements as part of their transaction, the competitive effects of such agreements be considered together with the merger as part of the assessment. This amendment is intended to prevent "parties taking steps to change the counterfactual or take advantage of the anti-overlap provisions in order to get anti-competitive mergers cleared."[11]

C. Change #3: Digital Platforms

The ACCC is not convinced that the proposals outlined above "go far enough to enable us to scrutinise and, if necessary, block certain critical acquisitions by large digital platforms."[12]

Accordingly, the proposal is that special rules would be introduced to regulate acquisitions digital platforms propose including acquisitions of nascent firms.

In a discussion paper released on February 24, 2022,[13] the ACCC outlined 6 options for special merger rules for digital platforms (in addition to the ACCC's proposed economy wide reforms) as follows:

1. **Pre-defined criteria linked to market power or strategic position**: any new tailored merger rules for digital platforms would only apply to digital platform firms that meet pre-defined criteria linked to their market power and/or strategic position (including, potentially, their role as gatekeepers) in one or more digital platform markets. The ACCC intends that only a few of the largest digital platforms that benefit from entrenched and substantial market power would be subject to the bespoke merger regime.[14]

2. **Bespoke notification regime**: The ACCC is considering whether a bespoke notification regime is required for acquisitions by digital platforms that meet the relevant criteria, noting that it may be appropriate for a specific notification threshold to apply to acquisitions by the largest digital platforms.[15]

11 *Ibid.*

12 *Ibid.*

13 Australian Competition and Consumer Commission, *Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services* (February 24, 2022) https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

14 *Ibid.* at 8.6.1.

15 *Ibid.* at 8.6.2.

3. **Lower probability threshold**: The ACCC says that applying a lower probability of competitive harm threshold to acquisitions by those digital platforms that meet the relevant criteria would enable the ACCC to intervene in circumstances where there may be a low probability that the acquisition would substantially lessen competition, but where the impact of any substantial lessening of competition is likely to be very substantial and long-lasting (i.e. to account for low probability but high impact competition effects).[16]

4. **Reversal of onus of proof**: If the broader economy-wide merger reform outlined above is not implemented, the ACCC says it may be appropriate to consider an option to reverse the onus on proof specifically in relation to acquisitions by large digital platforms that meet the relevant criteria, or to introduce a rebuttable presumption that certain acquisitions by large digital platforms that meet the relevant criteria would result in competitive harm.[17]

5. **Enhanced deeming provision**: in addition to focusing on those situations that entrench, materially increase, or materially extend a position of market power, a digital platform-specific deeming provision could also focus on acquisitions by such digital platforms that raise barriers to entry for rivals; or that remove or weaken a source of future competitive constraint or partial competitive constraint.[18]

6. **Prohibition**: The ACCC notes a suggestion that it may be appropriate to prohibit digital platforms that meet the relevant criteria from acquiring any business in certain categories, such as those businesses operating in the same or adjacent markets, or businesses that may allow a digital platform firm to extend, expand or entrench its market power. However, the ACCC recognizes that this particular option could severely restrict the ability of digital platforms to acquire other businesses and seeks stakeholder feedback on whether such an approach is warranted and any potentially adverse impacts of such an approach on competition and efficiencies in the long term.[19]

The ACCC states that "*alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for affected digital platforms. Regulatory coherence will also assist Australian consumers and businesses to benefit from law reform implemented globally to improve competition and consumer protection.*"[20] However, different jurisdictions have different models and the form of regulation in one jurisdiction may not readily be transplanted to a different jurisdiction. Australia has a long-standing prosecutorial model, which separates investigation from adjudication. The ACCC's proposed changes would result in a shift to an administrative model, with the ACCC as decision-maker as well as investigator with limited review rights. These two models have been hotly debated in other jurisdictions and a similar debate should take place in Australia, as these proposed reforms are considered and developed.

The ACCC is seeking stakeholder views on these proposals as well as a range of other potential competition and consumer law reforms relating to digital platforms outlined in the Discussion Paper. The ACCC's Digital Platform Services Inquiry Interim Report No. 5 is due to be provided to the Treasurer by September 30, 2022.

The debate is therefore likely to continue throughout the coming year, with the final say coming down to the Commonwealth Government.

16 *Ibid.* at 8.6.3.

17 *Ibid.* at 8.6.4.

18 *Ibid.* at 8.6.5.

19 *Ibid.* at 8.6.6.

20 *Ibid.* at pp 6-7.

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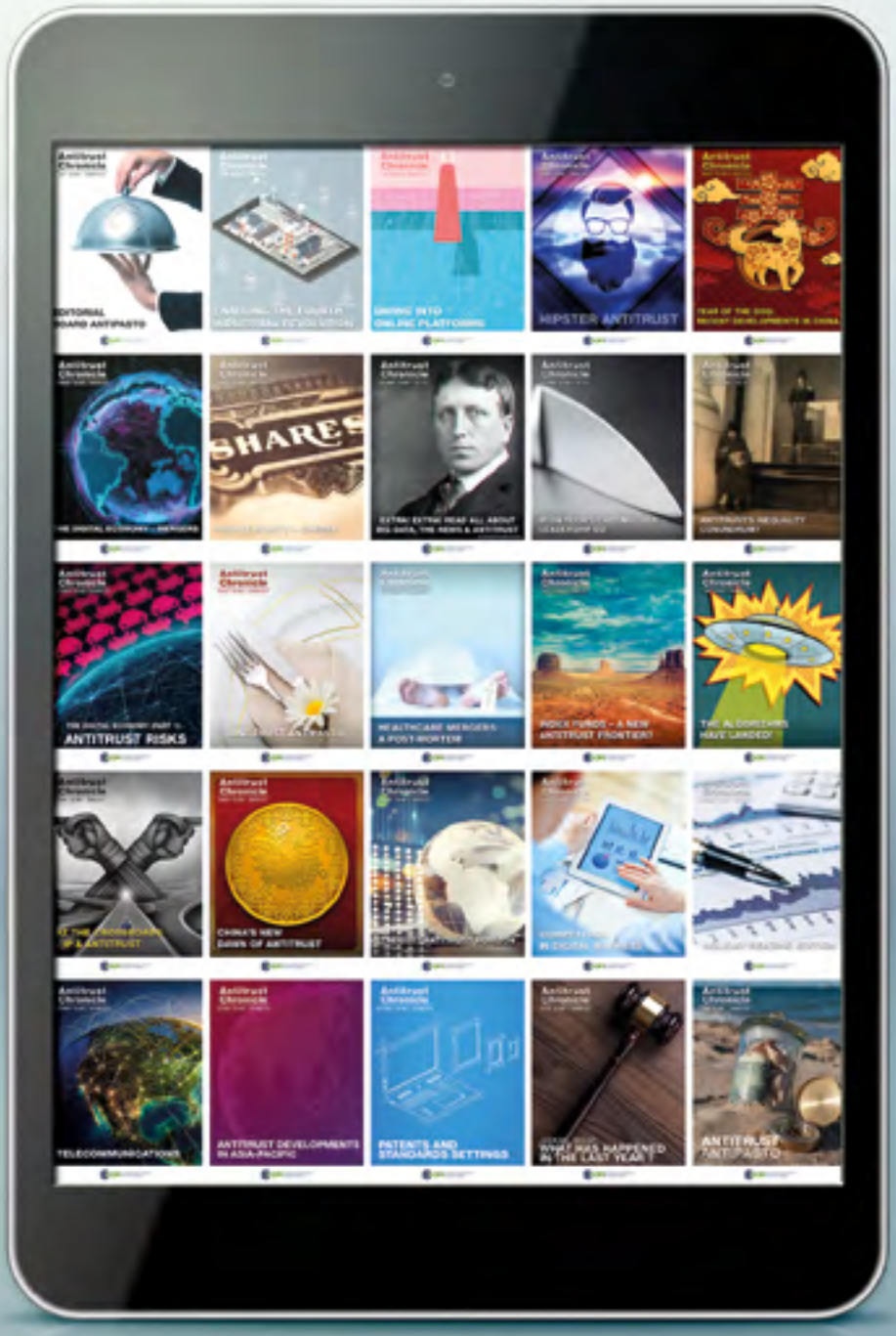


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