



Australian Government  
The Treasury



# Competition Review

## An overview

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# The Review

- The Treasurer and Assistant Minister Leigh announced on 23 August 2023 that the government would undertake a review of competition policy settings to help build a more dynamic and productive economy.
- The review will address new and emerging issues including some not addressed through existing laws, regulations and structures.
- The review will advise on how competition can lift productivity and deal with cost-of-living concerns.
- The 1993 Hilmer Review illustrates the opportunities offered by reform; the Productivity Commission calculated the reforms boosted Australia's GDP by 2.5%. – worth \$50b or around \$5000 per household today.



# The Taskforce

The Competition Taskforce within Treasury will harness broad expertise, engage in public consultation, and provide ongoing advice to Government to deliver on the aims of the Competition Review over 2 years.



## Scope

- The review will look at competition laws, policies and institutions to ensure they remain fit for purpose, with a focus on reforms that would increase productivity, reduce the cost of living and boost wages.
- Examine market dynamics in key sectors and priority reform areas.
- Provide recommendations to Government about updates to laws, policy and institutions.

## Structure

- Taskforce established within Treasury, harnessing experience and expertise from across government.
- Further expertise and perspectives to be offered by a Taskforce expert advisory panel.
- Taskforce to engage in targeted consultation and deliver ongoing advice to Government throughout the Review period.

# The Expert Advisory Panel

An Expert Advisory Panel featuring leading experts from business, government, law and economics has been appointed to support the Competition Review. The Panel will bring decades of Australian and international experience and offer insights and perspectives from their deep experience with competition related issues.



## **Dr Kerry Schott AO** (Panel Chair)

A highly regarded leader across business and government. Her experience spans several sectors, including public infrastructure and finance.

## **Dr John Asker**

A leading competition economist and Professor of Economics at the University of California. His research includes firm level productivity, aggregate impact of market power and antitrust policy.

## **John Fingleton CBE**

An experienced advisor with expertise across business, regulation and government. Served as Chief Executive of the UK Office of Fair Trading.

## **David Gonski AC**

An experienced leader who has worked in policy, business, commerce and philanthropy.

## **Sharon Henrick**

A leading competition lawyer. She has significant experience providing strategic advice on competition deals, competition and consumer litigation.

## **Rod Sims AO**

A Professor in public policy and antitrust at the Australian National University. He has been recognised for his distinguished service to economic policy and regulation. Served as Chair of the Australian Competition and Consumer Commission.

## **Danielle Wood**

The incoming Chair of the Productivity Commission. As Chief Executive Officer of the Grattan Institute she has led Grattan's Budgets and Government Program.

# Declining productivity and competition

- Australia's productivity growth has slowed over the past decade.
- Reduced competition has contributed to this decline.
- Evidence of increased market concentration and a reduction in dynamism across many parts of the economy.

# Declining productivity and competition

Figure 1: Average market share of top four firms in each industry

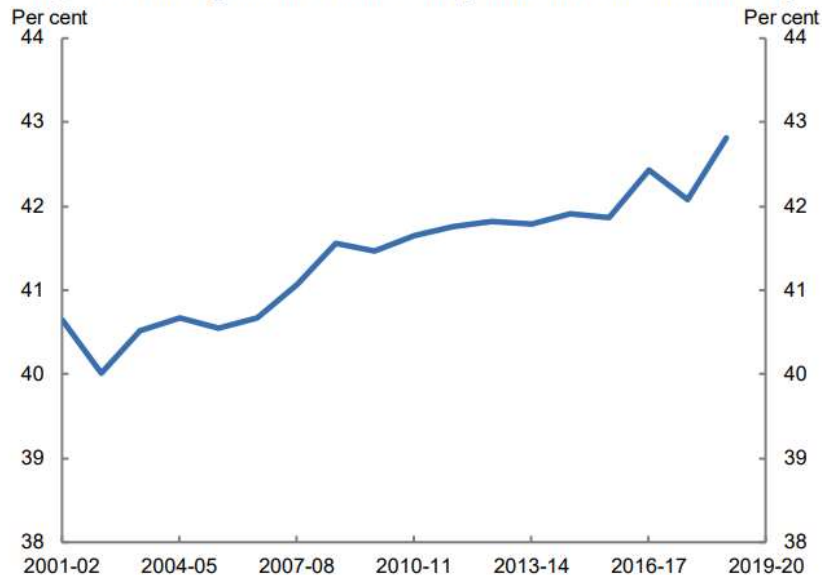
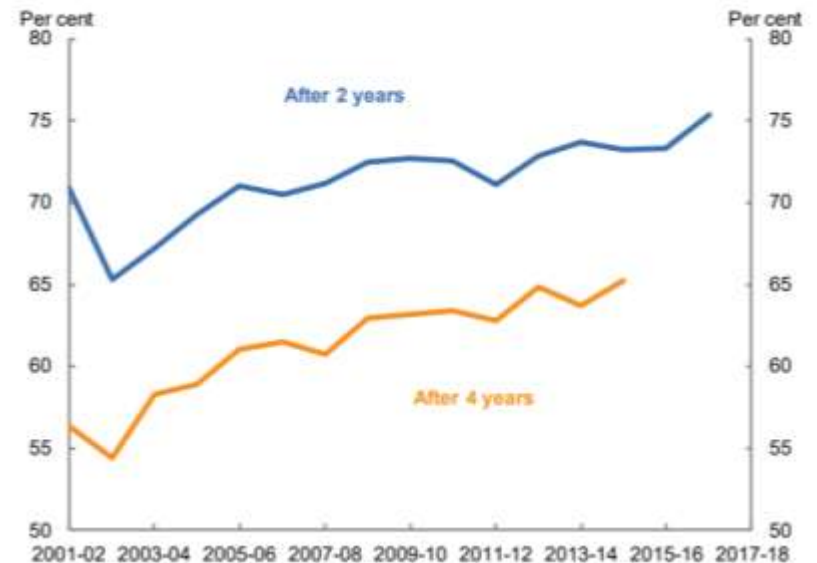


Figure 2: Share of top four firms that were still in the top four after 2 and 4 years



Source: [Hartigan and Hambur 2022](#) based on ABS BLADE Treasury analysis.

# What does this mean?

- **Less competition** – rising share of top 4 firms, indicates falling competition which leads to poorer outcomes for consumers.
- **Reduced investment and innovation** – less competition and more concentration of buying power can place pressure on business, reducing profits and the incentive to invest and innovate.

# International context (1/2)

Some examples of competition reforms and debates playing out internationally ...

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## United States

- The Federal Trade Commission and the Anti-trust Division of the Department of Justice have been consulting on **draft updated merger guidelines**
- July 2021: **President Biden issued the Executive Order on Promoting Competition in the American Economy** – 72 initiatives

## United Kingdom

- In April 2022, the UK government announced proposed wide-reaching changes to the UK competition and consumer protection regimes. The package of measures includes:
  - Strengthening the **evidence-gathering powers** of the UK competition regulator;
  - **Increasing penalties** for non-compliance; and
  - Addressing **'killer acquisitions'** while retaining a voluntary mergers framework.

## Canada

- Review of the Competition Act has instigated amendments including to **strengthen merger control**.
- June 2023: Canada introduced:
  - A **criminal prohibition for 'wage fixing' and no-poaching' agreements** between employees; and
  - **The Online News Act**, which requires digital platforms to bargain with Canadian media companies to use news content on their platforms.

## European Union – example debates

- November 2021: the EU commenced a **review of its competition policy instruments**
  - Aim:** to ensure they are fit for purpose and for new challenges regarding the economic recovery from covid, resilience of European industries, and the green and digital transitions.
  - Scope:** The review lists 27 initiatives, including mergers, rules applicable to digital platforms acting as gatekeepers and distortionary effects of foreign subsidies



# International context (2/2)

## Some examples of competition reforms and debates playing out internationally ...

### Japan

- Addressed issues in **digital markets** through enforcement of the Antimonopoly Act establishment and amendment of guidelines, review of mergers and acquisitions, and fact-finding surveys.
- **February 2021:** Japan introduced the Act on Improving Transparency and Fairness of Digital Platforms (Transparency Act).
  - Initially only applied to **online market-places** and app stores, then expanded in July 2022 to the digital advertising sector

### South Korea

- In recent years, the Korean Government has introduced reforms targeting digital platforms as well as changes to merger reviews
- **August 2021:** South Korea amended the Telecommunications Business Act
- **January 2022:** the Korea Fair Trade Commission (KFTC) announced industry-specific review Guidelines for Review of Abuse of Dominance and Unfair Trade Practices by Online Platform Operators
- **February 2023:** KFTC announced proposed amendments to the Monopoly Regulation and Fair Trade Act

### OECD

#### Competition Committee

Example areas of interest:

- Bid rigging in public procurement
- Intellectual property rights.
- Serial acquisitions (creeping acquisitions) and industry roll ups;
- Optimal design of competition institutions;
- Globalisation and regionalisation and the impact on competition policy
- Ex post assessment of merger remedies; and
- Alternatives to cartel leniency programs.

#### OECD Economic Survey of Australia 2023

Finding:

- *"Some indicators of competitive intensity in product markets have weakened. Unlike in most OECD countries, pre-merger notification is not required. A competition policy review has commenced."*

Recommended

- *"Consider requiring companies to give pre-merger notification to the competition authority for transactions above a defined threshold"*

# What will the Review look at?

Announcing the Competition Review on 23 August 2023, the Treasurer outlined some initial priority issues to be considered.



## Current priority issues

### **Mergers and Competition**

Proposals put forward by the Australian Competition and Consumer Commission around merger reform, and other competition law issues.

### **Coordinated National Reform**

Options for coordinated reform with states and territories, through the Council on Federal Financial Relations.

### **Labour Market Opportunities**

Non-compete and related clauses that restrict workers from shifting to a better-paying job or starting a competing business.

### **The Changing Economy**

Advice on competition issues raised by new technologies, the net zero transformation and growth in the care economy.

### **Aviation**

Working with the Department of Infrastructure, Transport, Regional Development, Communications and the Arts to consider competition issues as part of the development of the Aviation White Paper.

# A case for evidence-based policy

Building an evidence base to support policy will be crucial. It will help inform government and to engage the public in a healthy and informed discussion. While creating evidence to support policy is complex, it is vital to good policy development.



- Not only do we need to create evidence, we need to embed processes within and across the APS, so Australia can continue to generate evidence on the drivers, patterns and effects of competition.
- To do this, our Data and Evaluation team will work on 3 key pillars:
  - Building skills and human capital
  - Building data assets
  - Creating evidence

# Evidence and insights –Taskforce data role

## Building data assets

We will be creating data assets and methodologies. Key among them will be microdata to track and study mergers and a domestic aviation dataset.

## Building skills and human capital

- Working with data, especially microdata, is complex.
- We will be collaborating with other key APS agencies, and where possible states and territories to build ongoing capability.
- This result will be an ongoing source of insights and evidence to inform policy making into the future.

## Building an evidence base for policy

We will undertake analysis to:

- a) Create a landscape to track how competition has changed in Australia overtime;
- b) Understand the trends and patterns of mergers and acquisition activity in Australia; and
- c) How competition can benefit consumers in the Aviation Industry.

# Merger reform

Mergers are a key focus of Australia's competition law. Effective merger control prevents firms accumulating market power simply by buying their competitors.



The ACCC has raised concerns that the Australia's merger control regime are allowing anti-competitive mergers to proceed.

## Emerging concerns

The ACCC has raised a range of concerns about Australia's merger control regime, including:

- that it is 'skewed towards clearance';
- the existing voluntary system of merger notification and assessment is not as effective as it needs to be; and
- it does not adequately address issues such as creeping acquisitions, historically a concern in the supermarkets sector.

The ACCC has proposed major changes, including mandatory notification and prohibiting mergers that entrench a position of substantial market power.

## Next steps

Public consultation on merger reform is expected as part of the Review. This will be supplemented by in-person and online roundtable discussions and meetings.

Consultation will seek stakeholder views on:

- concerns that the current system is not working effectively;
- Improvements to the current system; and
- possible reforms to address concerns and improve the system, including those proposed by the ACCC.

# The current merger control system?

## 1. Informal merger review – most common

- Non-binding view from the ACCC
- Assessment asks whether merger is **likely to substantially lessen competition** (SLC)

## 2. Merger authorisation

- Formal process that gives legal immunity
- ACCC must not grant authorisation unless it is satisfied that the merger is **not likely to substantially lessen competition** or there is a **net public benefit**
- Review by the Australian Competition Tribunal

## 3. Federal Court proceedings

- Two options:
  - ACCC commences action; or
  - Merger parties seek declaratory relief that a merger does not breach the law

# Merger reform questions

## What if any improvements should be made to merger assessment processes?

- Can we improve certainty on timing?
- Can we improve clarity on when to notify a merger?
- Can merger and foreign investment assessments be streamlined?
- Should transparency and review processes be improved?
- Merger clearance process or enforcement model?

## What is the right test to be applied in assessing a merger?

- Positive or negative?
  - Should the test focus on whether the merger **is** likely to SLC; or on whether the merger **is not** likely to SLC?
- Should the 'merger factors' be updated or simplified or removed?
- Should a 'structural' element be included?
- Should 'related agreements' be considered?

# When should mergers be notified?

*Current system:* Voluntary notification and judicial enforcement



## Voluntary

- + Less 'formal' regulatory burden on non-contentious mergers, can be quick
- Risk of non-notified mergers, uncertain timing, high costs in contentious mergers



## Mandatory

- + Visibility over mergers that may be anti-competitive, upfront information
- Potential burden on non-problematic mergers

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*Current system:* Indicative timelines (informal review); 90 calendar days (merger authorisation)



## Non-suspensory

- + Flexibility, minimise delay
- Challenging and costly to obtain injunction or 'unscramble' an anti-competitive merger



## Suspensory period

- + Gives ACCC time to review a merger and hear from third parties, gives timing clarity for merger parties
- Regulatory delay for merger parties

Other considerations: Thresholds, filing fees, minority shareholdings, clock-stoppers, duration



# Which merger control model?

## *Merger clearance process or enforcement?*



### Federal Court

- + More permissive
- Very expensive in contentious cases, uncertain timing, adversarial, less economic expertise, less focus on economic risks



### ACCC (reviewable by Tribunal)

- + Less costly, predictable timing, non-adversarial, focus on economic risks, clarity about notification obligations
- No cross examination



### Independent panel

- + Speed, low cost, focus on economic risks, predictable timing.
- Depends on constitution of the panel

## Should the test focus on whether the merger...



### ...is likely to SLC?

- + Requires the ACCC or a third party to prove its case
- Substantial evidentiary burden, risk of not stopping an anti-competitive merger that could impact consumers and businesses



### ...is not likely to SLC?

- + Where there is uncertainty or risk of competitive harm, default towards protecting competition
- Risk of blocking mergers that aren't anti-competitive, potential for chilling innovation

Other considerations: Effect of decision e.g. legal immunity

# Should there be changes to how mergers are assessed?



## Should the 'merger factors' be updated, simplified or removed?

- + Increase focus on change resulting from a merger, data, potential competition, serial or creeping acquisitions, entrenching market power
- Change might not be needed as list is currently non-exhaustive



## Should a 'structural' element (e.g. substantial market power) be included?

- + Greater focus on impact on market structure and competitive dynamics
- Increased complexity



## Should 'related agreements' be considered?

- + Take competitive effects of related agreements into account
- Potential for over-capture, risk of increase in information to be assessed

# Non-compete clauses and related restraints of trade

Recent evidence suggests at least **one in five workers** in Australia are bound by a non-compete clauses – including many low wage workers such as clerical workers and labourers.

International research finds that non-compete clauses create a barrier to labour mobility and the creation of new firms, with adverse consequences for wage growth, innovation and productivity.



## Scope

Initial focus will be restraints on workers which include the use of non-compete, no-poach and non-solicit clauses in employment contracts.

We are also interested in information on broader restraints of trade e.g., restraints in partnership situations; restraints on the vendor/purchaser following the sale of a business; independent contractors.

## Key questions for industry and lawyers:

How common are non-compete clauses?

Why do employers use non-compete clauses? Are they used for specific jobs or broadly across all workers in a business?

Have you enforced a non-compete clause or been unable to hire someone due to the terms of an existing non-compete clause?

# Working alongside other Government processes

- E.g., Aviation White Paper – due mid-2024
  - Process being driven by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA)
  - Competition Review working alongside DITRDCA to consider competition issues in aviation
    - Attending stakeholder meetings
    - Providing input into consultation documents and briefings where competition involved
    - Secondment of Competition Taskforce staff member to DITRDCA

# Competition and the changing economy

The Government has also tasked the Competition Policy Review with looking at how competition policy can help meet three other aspects of our changing economy:

- the care economy
- data and digital
- the transition to net zero



## The care economy

- The Harper Review (2015) recommended expanding choice, competition and contestability in human services, transforming the way that many human services are delivered in Australia.
- For competition to work well, governments need to have a steady hand at the wheel in managing these markets for quality and desired outcomes.
- Many of these markets are funded largely by government to the benefit of our most vulnerable i.e. NDIS
- Many carer support markets are thin, and users often can't access services where they live.
- To achieve economies of scale, these thin markets need additional mechanisms to coordinate and match users and providers.

## The data and digital economy

- Data is a pure public good, and allowing consumers and businesses to deploy it is critical to modern competition.
- We need to maintain incentives for businesses to collect, curate and trade data.
- Those same characteristics also mean data can be used to facilitate price discrimination and even entrench market power.
- Ensuring digital and data services are competitive is essential to ensuring dynamism and productivity growth in the Australian economy

# Competition and the changing economy

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- the transition to net zero



## Transition to net zero

- Competition is critical for ensuring the path we choose is least cost, which means high innovation and opportunity for Australian businesses and workers
- Barriers to competition can impede businesses adopting and deploying the latest technologies, such as where there are different regulatory standards across jurisdictions
- Competitive processes for reducing emissions are essential to ensuring resource flow to more innovative businesses that can thrive in the new, clean economy
- Businesses need confidence that they won't fall foul of competition rules when cooperating to address climate change

# QUESTIONS

If you have any questions following this presentation, please contact

[competitiontaskforce@treasury.gov.au](mailto:competitiontaskforce@treasury.gov.au)