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Broader Public Benefits in Mergers: An Australian Case Study

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THE COMPETITION LAW WORLD IS pivoting to focus on public interest considerations in a way it never has before. The Federal Trade Commission's Policy[1] on unfair methods of competition is one example. The Organisation for Economic Co-operation and Development's (OECD) work on gender-inclusive competition policy is another.[2] Most recently, the American Bar Association (ABA) included a panel on "Incorporating Equity: A Global Perspective" in its flagship Antitrust Spring Meeting.[3]

This public interest focus reflects how competition agencies globally are undergoing a recalibration of their objectives and the tools at their disposal to achieve them. One such tool that is of particular importance in all competition agency toolboxes is the review of mergers.

The extent to which competition agencies can incorporate public interest considerations in their merger reviews varies. According to FTC Chair Lina M. Khan, her agency's scope to incorporate these considerations in merger reviews is limited. At the ABA's 2023 Antitrust Spring Meeting, Khan confirmed this position, saying, "the FTC's tools are not going to be appropriate to solve all sorts of problems that other policymakers may want to fix . . . . [W]e look at these deals through a competition prism and any types of ESG commitments or other types of sustainability commitments are really not key to our inquiry."[4]

The Australian Competition and Consumer Commission (ACCC) has a different approach. When announcing sweeping reforms to Australia's merger control regime in April 2023, ACCC Chair Gina Cass-Gottlieb reaffirmed the ability in Australia's competition law framework to consider broader public benefits. She noted the valuable flexibility that considering broader public benefits enabled, "where a merger may have the effect of substantially lessening competition but would nonetheless provide real, verifiable and significant public benefits."[5]

Australia's broader approach to assessing public benefits in mergers provides the world with a rare example of how merger review can incorporate public interest concerns. To better understand how these types of public benefits can be considered in merger review, in this paper I summarize what can be and has been considered a broader public benefit in Australian merger analyses.

There have been various types of broader public benefits cited in Australian merger reviews, as seen in the table at the end of this paper. My analysis focuses on the three broader public benefits that the Australian Competition Tribunal (Tribunal), rather than the ACCC, has accepted. The Tribunal is the quasi-judicial review body to the ACCC. Therefore exploring the Tribunal's approach may provide greater insight into how these broader public benefits would be treated on appeal.

Even for jurisdictions with merger review frameworks that are not so explicitly open to these types of public benefits, understanding Australia's approach can provide insight into different ways of effectively considering broader benefits. There may be no better time to reflect on these possibilities than in this global period of recalibration.

Australia's merger process

Australia has two processes for approving mergers: a merger clearance process that focuses on whether a merger would be likely to have the effect of substantially lessening competition; and a merger authorization process that focuses on a merger's public benefits.

Under this authorization process' "net public benefit test," the ACCC or the Tribunal can approve a merger if it is satisfied in all the circumstances that the likely public benefit resulting from the proposed acquisition outweighs the likely resulting public detriment.[6]

Various authorities confirm that the purpose of the merger authorization process is to recognise broader public

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benefits. Re Queensland Co–operative Milling Association Ltd, Defiance Holdings Ltd (1976) ATPR 40–012 9 (*QCMA*) is often cited when reflecting on the breadth of the public benefit concept in Australian mergers:

> [W]e would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.[7]

The Swanson Committee's 1976 review of the process reaffirmed the importance of putting "as little limitation as possible" on the categories of public benefits available in these merger reviews.[8] Australia's highest judicial authority to have considered this merger process, the Full Federal Court of Australia, similarly held that public benefits could be "broader merely than [competitive benefits and detriments] and also includes other benefits and detriments not necessarily related to competition."[9]

If the concept of public benefits is not limited to competitive or efficiency benefits, what *is* it limited by? The *Competition and Consumer Act 2010* (Cth) (Australian Act) does not define public benefit. However, case law and legislative history highlight certain criteria that a public benefit must have, in relation to the members of the public that benefit, how the public benefit is measured, and the amount of time a public benefit lasts.

The public that must benefit

Similar to how there are many kinds of benefits that may be a public benefit, many types of entities may receive a cognizable public benefit. The Tribunal in *QCMA* reflected on how the Australian Act was broader than its British counterpart on this point:

> [T]he British Restrictive Trade Practices Act 1956 . . . asks whether withholding approval would 'deny to the public as purchasers, consumers or users . . . specific and substantial benefits or advantages.' However, this is not what the Australian Act says; and we cannot but think that the choice of a wider expression was deliberate, as pointing to some wider conception of the public interest, though no doubt the interests of the public as purchasers, consumers or users must fall within it and bulk large . . . it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.[10]

In 2017 the Tribunal again reflected on how "public" a merger's public benefit had to be. It implied that, as long as the Australian public *indirectly* receives a benefit, that benefit may still be recognised as a cognizable public benefit of the merger, even if the merging parties may be the only ones to *directly* receive it. One example of a scenario involving an accepted indirect benefit is if the merging parties have Australian shareholders that would benefit from cost savings, leading to broader economic benefits through redeployed resources:

> [S]ome of the benefits will accrue to the 'public,' being parties other than [the merging parties], but the direct merger benefits nevertheless also contribute public benefits . . . . Cost reductions free resources for use elsewhere in the economy and increased profitability generates benefits for Australian shareholders. Even if it created no benefits other than cost savings, a merger without detriments would still generate public benefits as long as those savings pass to Australian shareholders.[11]

Interestingly, a recent ACCC merger determination in December 2022 does not emphasize that cost savings need to be passed onto shareholders to qualify as a public benefit:

> Generally, the ACCC considers that cost savings accruing to one or more businesses that result from increases in productive efficiency can constitute a public benefit, and it is not necessary for the savings to be passed on to consumers in the form of lower prices. However, the ACCC may give more weight to benefits which flow through to consumers or the broader community than if they are retained by the parties.[12]

This 2022 determination also highlights that not all public benefits are equal. The Tribunal has stated that it must assess a merger's public benefits "slightly differently" than in the standard economic interpretation, where an economic total welfare standard would weigh benefits incurred by firms and consumers equally.[13] A public benefit's distribution between the merging parties and wider public must be considered: "[B]enefits that are not widely shared may nevertheless be benefits to the public, but the extent to which the benefits extend to ultimate consumers is a matter to be put into the scales."[14] This raises the question of how to measure a broader public benefit.

How must a public benefit be measured

Australian courts have confirmed that any claimed public benefit must be assessed and weighed, though not necessarily through an arithmetical or accounting process. It "may involve an instinctive synthesis of otherwise incommensurable factors," and it does not have to happen through a particular measurement method.[15]

The Federal Court of Australia has recognised that a "modified total welfare standard" can (although does not have to) be used to weigh a public benefit. The Tribunal has often found it appropriate to use this standard to "weigh certain of the benefits and detriments differently, both to reflect the uncertainty of their realisation as well as their distribution between the merging parties and the wider public."[16]

It is reasonable, and in fact necessary, to acknowledge that broader public benefits will not have a common

measurement standard, given how varied they can be. Reflecting this, the Tribunal has recognised that a public benefit must be defined "with some precision" so that there is a "factual basis" for concluding that the benefit is likely to result from the merger. The Tribunal has noted it prefers detailed quantification of a public benefit where possible. If quantification is possible, it must be "robust and commercially realistic." However, benefits should be quantified only to the extent that quantification helps the Tribunal more than a "qualitative explanation." Where benefits cannot be monetarily quantified, they can still be claimed in qualitative terms. The Tribunal has acknowledged that the test is, "after all, a balancing exercise that requires judgment over a wide range of tangible and intangible factors."[17]

How long must a public benefit last

Although a public benefit does not need to be quantified, it must be substantive. Previously, the Australian Act expressly required public benefits to be "substantial."[18] The word "substantial" was removed in 1977, though the Full Federal Court of Australia confirmed that a public benefit must still be "of substance rather than ephemeral . . . non-trivial, not transitory or, using appropriate care, of substance or substantive." The Court noted, "we would glean the need for a benefit to be non-ephemeral from the word 'benefit' itself. Parliament is unlikely to have intended the Tribunal to concern itself with trifles."[19]

The Court's use of "non-ephemeral" implies that public benefits must last. The Tribunal has noted this requirement, stating, "benefits must have durability in order to be taken into account." Consequently, the Tribunal has written that short-term integration costs should be given less weight than "durable costs savings that adhere to the merged business in the long-term."[20]

The Tribunal has also emphasized that "care must be taken to distinguish between one-off benefits and those of a more lasting nature."[21] Similarly, a recent determination stated the ACCC "may give less weight to public benefits that may not to endure in the longer term."[22]

The three merger authorizations below illustrate how Australia's Tribunal has evaluated whether the requirements of the "public benefit" concept are met.

Proceeds that fund certain public sector projects in *AGL Energy*

In Application for Authorization of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1 (*AGL Energy*), the Tribunal found that the sale of a public good, and the proceeds that it created for use in a particular public sector project, was a public benefit, and authorized the merger.

AGL Energy involved energy company AGL's acquisition of Macquarie Generation's electricity plants from the State of New South Wales (NSW). The Tribunal distinguished one of the benefits of the acquisition "said to flow direct to the State, and so to the public of NSW," from two "benefits to the public said to flow from increased efficiencies."[23]

The Tribunal tied the broader public benefit to the fact that the State of NSW was legislatively required to pay the $1 billion net proceeds from the electricity plants' sale into the Government's Restart NSW Fund. The Government was then legislatively required to apply those Fund moneys to major infrastructure projects that would improve public utilities.[24]

The proceeding's independent economic experts differed on whether the sale was the best way to raise $1 billion for the NSW Government. However, both agreed that, even if not necessarily the best way, it was nevertheless a proper method to obtain funds for that infrastructure development.[25]

In relation to quantifying the benefit, the Tribunal noted that general statements about possible or likely benefits were not helpful if they could not be backed up by some factual material. However, the Tribunal determined that it was not practicable to identify and quantify the benefit that might come from the particular projects likely to be funded by the $1 billion sale proceeds.

The Tribunal accepted that the proceeds were a significant benefit to the public from the fact that the policy behind the Restart NSW Fund (into which the proceeds had to go) was "clearly a carefully considered strategy following as it does from a series of Inquiries going back at least to the Owen Report in 2007." The Infrastructure Strategy behind the Fund was independent and legislatively mandated. The Strategy had clearly beneficial (even if aspirational) public goals of supporting economic activity, improving public infrastructure, enabling the movement of people, goods, and information, servicing household needs, supporting quality of life and community resilience, and connecting individuals, businesses, and communities with each other and the world. Therefore, the Tribunal did not need to precisely quantify the eventual infrastructure projects, for the proceeds that would fund those projects to constitute a public benefit.[26]

Protecting vulnerable, disadvantaged communities through minimum frequency conditions and price limitations in *Sea Swift*

In Application by Sea Swift Pty Limited [2016] ACompT 9 (*Sea Swift*) the Tribunal found that the proposed conditions placed on the merger constituted public benefits, and authorized the merger.

Sea Swift involved freight operator Sea Swift's acquisition of the remote coastal freight business Toll Marine Logistics. These freight operators serviced two main types of communities: communities built around mining projects, and communities predominantly comprised of Aboriginal and

Torres Strait Island people, Australia's First Nations people. The freight services were essential to these communities because road access to them was either impossible since they were on islands, or limited since the roads' state was often impassable. The Tribunal also noted that the First Nations communities had high unemployment and welfare dependence rates.

The Tribunal found that three conditions that the parties agreed to impose on the merger were public benefits. These conditions aimed to minimize disruption to these remote, vulnerable, and disadvantaged First Nations communities.

One of the conditions prohibited Sea Swift from imposing exclusivity or a right of first refusal on its contracts with larger commercial customers. The condition aimed to increase the contracts' contestability by encouraging these larger customers to continue servicing the First Nations communities with regular and timely supply of essential commodities, even while considering other freight providers to Sea Swift. The Tribunal rejected the argument that the condition's seven-year length was too short a timeframe for a competitor to Sea Swift to emerge.

The second condition established minimum frequency requirements. It aimed to guarantee that commercial providers would continue servicing the First Nations communities at a minimum frequency level. The Tribunal said that this minimum frequency level could not be assured without the proposed acquisition.

The final condition that the Tribunal found could protect the First Nations communities set a cap on the price increases that Sea Swift could impose on the most common items carried for these communities. It was not a "tight cap" because Sea Swift could increase prices if the Consumer Price Index increased or for the independent reason of covering fuel expenses. The Tribunal also acknowledged that there were no commitments ensuring delivery days and times, freight waiting time, or the delivered goods' condition. However, the Tribunal found that, as part of a "package" with the other conditions, this condition should also be considered a public benefit. The Tribunal found that the condition's five-year timeframe was "sufficiently durable and substantive."[27]

The Tribunal noted certain aspects that were key to the conditions being public benefits. First, there were no affordable substitute freight services for these First Nations communities, yet the services' reliability and frequency were important due to the freighted cargo's essential and perishable nature. Further, Australia's Department of Prime Minister and Cabinet made a submission on the disadvantage that a significant proportion of these communities faced, and that actions likely to cause them further disadvantage should be avoided. Finally, the Tribunal noted there was limited demand for freight services to these communities, however the services had high fixed costs. Consequently the freight services to these communities risked being discontinued or diminished, since, absent the merger, neither Sea Swift nor any other company may have had a commercial incentive to continue servicing the communities.[28]

Flow-through benefits to the wider community such as the racing industry in *Tabcorp*

In Applications by Tabcorp Holdings Limited [2017] ACompT 5 (*Tabcorp*), the Tribunal authorized the merger and found a public benefit in the $50 million of "flow-through of benefits to the wider community," represented in cost and revenue benefits from the merger that would be shared with the racing industry.[29] This public benefit stemmed from how closely the merging parties were linked to the racing industry.

Tabcorp concerned wagering and gaming company Tabcorp's merger with lottery, wagering, and gaming company Tatts. The Tribunal accepted there was a co-dependent relationship between the racing industry (represented in its regulatory authorities) and the merging parties. This interdependency came from how the merging parties were the only privately licensed operators for pari-mutuel wagering in each Australian jurisdiction. Because they were licensed bookmakers, the merging parties had commercial profit-sharing agreements with Victoria's and NSW's racing industries. This meant that the merging parties had to return part of their profit to the racing industry's regulatory authorities, as a consequence of being granted their exclusive retail and pari-mutuel licences.[30]

Post-merger, the parties were expected to be able to make higher bids for wagering licences. Without the merger, the parties would not be able to make such high bids, meaning they would provide less funding to the racing industry. The Tribunal noted that this shortfall would potentially have to be met by public funding, as happened in other Australian states. Therefore the Tribunal accepted that the merger was likely to result in the public benefit of the racing industry, and the regulatory authorities, receiving increased profit fees.

The Tribunal noted that Tabcorp did not express these flow-through benefits as succinctly as it could have, given it reported only the top-line total costs savings and revenue increases it would achieve through the merger, and then apportioned parts of those savings and increases to flow-through without noting its remaining residual benefits. However, the Tribunal found the residuals were still clear enough.

In relation to the benefiting public, the Tribunal disagreed with the argument that the racing industry should not be considered a "relevant part of the public" simply because the industry was the merging parties' "joint production partner." The Tribunal instead found that benefits retained by the merger party could be considered public benefits.[31]

The Tribunal did "pause … to mention the issue of problem gambling." It did not find that any public detriment caused by gambling would outweigh the merger's public benefit. The Tribunal noted that the merger was not an attempt to target vulnerable community members, or problem gamblers, with services that would be harmful if not used in a controlled manner, and the merger did not alleviate the merging parties of their responsible gambling obligations.

The Tribunal also said the ACCC may not be best placed to assess whether problem gambling would increase as a result of the merged entity having a larger customer database. On this point, the Tribunal said it saw no evidence that profiling and promotional activity would increase from this larger customer database. Further, the Tribunal noted that both the merging parties and the ACCC's economic experts concluded that the increased consumer welfare outweighed the detriment from problem gambling.[32]

The ACCC's new emphasis of broader public benefits

The above merger authorizations highlight that the public benefit concept in Australia's merger regime is expansive enough to capture not only societal or equity-related benefits but also benefits to the merging parties.

Reflective of the prevalence of merger party-related benefits, the ACCC's current Authorization Guidelines, last updated in 2018, focus on efficiency-related (rather than societal or equity-related) benefits, saying that many public benefits can be expressed as allocative, productive, or dynamic efficiency.[33] Similarly, parties applying for merger review in Australia have generally not cited broader public benefits. Broader public benefits have constituted approximately 25 percent of the benefits cited by merging parties, as summarised in this paper's final table. Merging parties instead cite efficiency-related benefits frequently, approximately 60 percent of the time.[34]

However, since its 2018 Guidelines, the ACCC's approach seems to have shifted. The ACCC's latest three merger determinations in August 2023, June 2023 and December 2022 re-emphasize broader public benefits in a way that neither its 2018 Guidelines, nor its past merger determinations, do. These latest determinations highlight broader, "offsetting public benefits, such that the achievement of economic efficiency and the other benefits of competitive market conduct may come at the cost of other valued objectives." In these 2023 and 2022 determinations, the ACCC also says that the agency must take a "broad approach" and assess all a merger's benefits, "not just those related to effects on competition."[35]

Further, as noted above, the ACCC's April 2023 proposed merger regime reforms re-emphasize the importance of broader public benefits in Australia's framework. The ACCC has said that the acknowledgement of broader public benefits in Australia's regime makes it particularly well placed to consider the environmental sustainability benefits a merger may have, a topic receiving significant attention from competition agencies worldwide.[36]

The ACCC's recent focus on broader public benefits beyond competition and efficiency suggests a regulatory shift in what the ACCC may consider, and accept, as public benefits in mergers.

Conclusion

Australia's legislation enables a broad consideration of public benefits in merger review, irrespective of whether the potential public benefits are also benefits to competition. This approach can be contrasted to the US context, where some analyses of legislative history suggest that broader benefits in fact are a type of competition benefit, and that the potential benefit to the public was a key reason for the US antitrust laws.[37]

Australia's expansive approach to public benefits in mergers reflects the Australian Act's stated objective to prioritise welfare over competition, in aiming "to enhance the welfare of Australians through the promotion of competition."[38] As the parliamentary speech introducing this objective into the Australian Act said:

> It is important to understand that this Government is not interested in reform or competition for its own sake. The package recognises that economic efficiency is one element of a broader public policy context which also includes social considerations . . . which governments must balance in making policy decisions, such as ecologically sustainable development, social welfare and equity considerations, community service obligations, and the interests of consumers . . . [G]overnments should give full and proper consideration to these matters when they make decisions about economic reform.[39]

Other jurisdictions may not have such a statutorily clear mandate to incorporate public interest considerations in their competition analyses. However, evaluating to what extent other competition agencies can consider broader, equity-related concepts is important in the current context. It is potentially especially important in relation to approving mergers, as compared to other conduct. As stated by leading Australian competition economist Professor Maureen Brunt, who the ACCC often cites,[40] "most mergers and takeovers are beneficial, or at least harmless."[41] It is therefore especially important to consider the possibility of acknowledging general, broader public benefits when attempting to authorize this kind of business conduct.

As antitrust regulators increasingly explore public interest considerations in their work, Australia provides a timely example of how broader public benefits can be incorporated in merger review. There may be insights both for agencies wanting to incorporate these considerations, and for merging parties with transactions that feature these broader benefits. ■

Table summarizing broader public benefits cited in Australian merger authorization determinations

	Broader public benefits cited by merging parties
***Accepted* by the ACCC/Tribunal**	
1	Avoiding dislocation costs, uncertainty and customer impacts associated with one of the parties' disorderly exit, and maintaining confidence in cash as a payment system, *Linfox Armaguard and Prosegur Australia Holdings merger (Armaguard), 2023*
2	Enhanced ownership interests and voting rights of smaller participants, *Amalgamation of BPAY, eftpos and NPPA (BPAY), 2021*
3	Increased engagement with small businesses and other participants, *BPAY, 2021*
4	Flow-through benefits to racing industry, *Tabcorp Holdings and Tatts Group merger, 2017*
5	Protection of vulnerable communities in minimum frequency and price limitations, *Sea Swift acquisition of Toll Marine Logistics, 2015*
6	Proceeds to fund Restart NSW Fund projects, *AGL Energy acquisition of Macquarie Generation assets, 2014*
7	Technology to improve environmental standards, *DuPont (Australia) joint venture with Ticor, 1996*
8	Environmental benefits, *Comalco and Comalco Aluminium acquisition of Gladstone Power Station, 1994*
9	Increased employment in efficient industries, *Pasminco Australian Mining and Australian Mining & Smelting merger, 1988*
10	Expanded employment, *Fletcher Challenge acquisition of Australian Newsprint Mills and ANM Investments (Fletcher), 1988*
11	Responsible management of environment, *Fletcher, 1988*
12	Closer economic relations with NZ through rationalisation, *Fletcher, 1988*
***Rejected* by the ACCC/Tribunal**	
13	Avoiding transition costs and uncertainty associated with a new regulatory model, *Armaguard, 2023*
14	Maintaining industry safety and security standards, *Armaguard, 2023*
15	Preserving the parties' complementary expertise, *Armaguard, 2023*
16	Community health services *Australian Pharmaceutical Industries acquisition of Sigma Company (API), 2002*
17	Regional and rural support, *API, 2002*
18	Small business support, *API, 2002*
19	Constraining effect on fare increases, *Silver Top Taxi Service and North Suburban merger (Silver Top), 1996*
20	Improved passenger and driver safety, *Silver Top, 1996*
21	Environmental benefits and health and safety, *Wattyl (Australia) acquisition of Taubmans Industries, 1996*
22	Preventing a failing company from exiting the market, *Queensland Co-operative Milling Association and Defiance Holdings Barnes Milling merger (QCMA), 1975*
23	Increase liquidity for shareholders, *QCMA, 1975*
24	Increasing investment in independent bakeries, *QCMA, 1975*
25	Preventing a failing company from exiting the market, *QCMA, 1975*
***Not definitively concluded on as material* by the ACCC/Tribunal**	
26	Increase in contributions to Major Bank Levy, *Australian and New Zealand Banking Group proposed acquisition of Suncorp Bank (ANZ Suncorp), 2023*
27	Benefits to Queensland from ANZ Suncorp implementation agreements, *ANZ Suncorp, 2023*
28	Reducing the parties' carbon footprint, *Armaguard, 2023*
29	Environmental benefits, *Telstra Corporation and TPG Telecom proposed spectrum sharing, 2022*
30	Lower search costs for consumers, *Gumtree AU acquisition of Cox Australia Media Solutions, 2020*
31	Increased community access to pharmaceuticals, *API, 2002*
32	Reductions in Government expenditure, *API, 2002*

[1] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[2] Organisation for Economic Co-Operation and Development, *Gender inclusive competition policy, Competition* (2018), https://www.oecd.org/competition/gender-inclusive-competition-policy.htm.

[3] *American Bar Association, Antitrust Law Spring Meeting 2023 Agenda* (Mar. 29, 2023), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at-spring-meeting/2023-agenda.pdf.

[4] Lina M. Khan, Remarks in the Enforcer's Roundtable panel of the American Bar Association Section of Antitrust Law Spring Meeting 2023 (Mar. 31, 2023), as cited in "Enforcers' Roundtable," ANTITRUST, June 2023, at 24.

[5] Gina Cass-Gottlieb, *The role of the ACCC and competition in a transitioning economy address to the National Press Club 2023*, (Apr. 12, 2023), https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023; see also Elizabeth Avery et al., ACCC advances on sweeping reforms to Australia's merger regime, GILBERT + TOBIN (Apr. 13, 2023),https://www.gtlaw.com.au/knowledge/accc-advances-sweeping-reforms-australias-merger-regime

[6] *Competition and Consumer Act* (Cth), § 90(7) (2010).

[7] Re Queensland Co–operative Milling Association Ltd, Defiance Holdings Ltd. (QCMA), (1976) ATPR 40–012 9, [507].

[8] THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA TRADE PRACTICES ACT REVIEW COMMITTEE, Report to the Minister for Business and Consumer Affairs, Parliamentary Paper No. 228/1976 at 53, 99 (Aug. 20, 1976) https://nla.gov.au/nla.obj-1745301127/view?partId=nla.obj-1747327326#page/n0/mode/1up.

[9] Australian Competition and Consumer Commission v Australian Competition Tribunal (2017) FCAFC 150, [6] (Besanko, Perram & Robertson JJ) (Austl.).

[10] *QCMA,* at [507]-[508] (emphasis omitted).

[11] Application by Tabcorp Holdings Ltd (2017) ACompT 5, at 46.

[12] Australian Competition & Consumer Commission, *Reasons for Determination—Application for merger authorisation lodged by Telstra and TPG* (Dec. 21, 2022), at 170 https://www.accc.gov.au/system/files/public-registers/documents/Reasons%20for%20determination%20-%2021.12.12%20-%20PR%20-%20MA1000021%20Telstra%20TPG_0.pdf.

[13] Application by Tabcorp Holdings Ltd., at 45.

[14] Application for Authorization of Acquisition of Macquarie Generation by AGL Energy Ltd (2014) ACompT 1, at 168;

[15] *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150, [67].

[16] Application by Tabcorp Holdings Ltd., at 45, (citing Qantas Airways Ltd, (2004) ACompT 9, at 185).

[17] Qantas Airways Ltd (2004) ACompT 9, at 201,204,206, 208-209.

[18] *Trade Practices Act* (Cth) § 90(5)(1974).

[19] FCAFC 150, [9].

[20] Application by Tabcorp Holdings Ltd, at 440.

[21] Application by Sea Swift Pty Ltd, (2016) ACompT 9, at 46.

[22] Australian Competition & Consumer Commission, *Reasons for Determination—Application for merger authorisation lodged by Telstra and TPG* (Dec. 21, 2022), at 144, https://www.accc.gov.au/system/files/public-registers/documents/Reasons%20for%20determination%20-%2021.12.12%20-%20PR%20-%20MA1000021%20Telstra%20TPG_0.pdf.

[23] Application for Authorization of Acquisition of Macquarie Generation by AGL Energy Ltd, at 199.

[24] *Restart NSW Fund Act 2011* (NSW), § 6(1)(2011).

[25] Application for Authorization of Acquisition of Macquarie Generation by AGL Energy Ltd., at 212.

[26] *Id.* at 229-231.

[27] Application by Sea Swift Pty Ltd., at 120-121, 311, 328, 332, 335, 337, 344, 347.

[28] *Id.* at 101, 311.

[29] Applications by Tabcorp Holdings Ltd., at 490.

[30] *Id.* at 159, 243, 255-256, 490, 500.

[31] *Id.* at 40, 41, 492, 494.

[32] *Id.* at 81-84.

[33] Australian Competition & Consumer Commission, *Merger Authorisation Guidelines*, (Oct. 2018) https://www.accc.gov.au/system/files/Merger%20Authorisation%20Guidelines%20-%20October%202018.pdf.

[34] Research by the author which incorporates broader public benefits in merger authorizations available online from 1974. The research aimed to be comprehensive for merger authorizations between 1990-2023. For 1974-1989, it incorporated all the decisions available from Julie Clarke, *Competition law cases: Merger Authorisation decisions,* (Nov. 4, 2019), https://www.australiancompetitionlaw.info/cases/merger-authorisation; and Wolters Kluwer CCH Intelliconnect, *Commission Decisions—Authorisations* (2023), https://intelliconnect.wkasiapacific.com/scion/secure/ctx_10447348/index.jsp?cpid=WKAP-TAL-IC#page[2]f; see also Maureen Brunt, *The Australian Antitrust Law after 20 Years—a Stocktake,* 9 REVIEW OF INDUSTRIAL ORGANIZATION 483 (1994), https://www.jstor.org/stable/41798531; Note, the remaining 16 percent of cited benefits relate to an Australian industry's international competitiveness, which are required to be considered public benefits: *Competition and Consumer Act* (Cth), § 90(9A)(2010).

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