Bumps and breakthroughs: The journey of Australia's merger reforms

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We examine the evolution of Australia's merger laws over the past six decades, detailing significant legislative and policy developments. Our analysis begins with Garfield Barwick's early proposals and the establishment of the Trade Practices Act 1974 (Cth), which introduced the prohibition on anti-competitive mergers. We discuss the shift to the dominance test in 1977, the reversion to the substantial lessening of competition test in 1993, and the impact of the Hilmer Reforms. The analysis covers key periods, including the era of voluntary and non-suspensory merger processes, the challenges posed by creeping acquisitions, and the responses to market concentration issues. The merger reforms enacted in 2024 are discussed in detail, highlighting the introduction of mandatory notification, streamlined review processes, and enhanced transparency measures aimed at improving the efficiency and effectiveness of Australia's merger control framework. Applying a historical lens, and looking to the future, the article underscores the importance of robust merger laws in promoting competitive markets and protecting consumer welfare.

Introduction

Alongside cartels, concerted practices and misuse of market power, merger control is one of the main pillars of competition policy. Merger control plays a critical gatekeeper function, preserving the integrity of markets by preventing mergers that substantially lessen competition. Merger control is unique because it acts as 'the "preventive medicine" of competition law'.[1] It is the first line of defence against potentially harmful anti-competitive behaviour, focusing on anticipated future effects rather than past conduct.[2] An effective merger control system also has effects beyond those which are observable, in that it will deter anti-competitive mergers.[3]

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1 J Walker, 'An Economic Perspective on Part IV' in M Gvozdenovic and S Puttick (Eds), *Current Issues in Competition Law* (Federation Press, 2021) vol 1, pp 59, 87.

2 J Walker, *Economic Analysis in Merger Investigations* (Discussion Paper, Organisation for Economic Co-operation and Development, Global Forum on Competition, 2020) p 7.

3 Note, eg, the US Department of Justice: 'We have not attempted to value the deterrence effects [...] of our successful [merger] enforcement efforts. While we believe that these effects in most matters are very large, we are unable to approach measuring them'. See Department of Justice, *Congressional Submission for the Year 2001*.

Mergers allow capital to go where it is most needed. Most mergers do not raise competition concerns and are a healthy way for firms to achieve economies of scale and scope, and access new resources, technology and expertise. However, mergers can cause serious economic harm when firms are focused on squeezing out competitors to capture a larger percentage of the market. The small number of proposed mergers that raise competition concerns warrant close scrutiny.

For business, a less competitive market can increase the cost of doing business, and reduce the incentives and opportunities to invest, grow and innovate. For consumers, a less competitive market leads to higher prices, less choice, and lower wage growth.[4]

The strength and effectiveness of merger law says a lot about a nation's competitive industry structure. In the case of Australia, understanding the history of merger reform provides valuable insights into past competition reforms to inform future reforms. Yet most previous analysis of Australian competition history focuses only on a single episode.

We aim to fill this gap by outlining the pivotal merger reform breakthroughs — and the bumps along the way — in Australia over the past six decades. We conclude by outlining reforms proposed by the Australian Government in 2024 to strengthen and modernise merger law.

1962: Barwick's bid

Attorney-General in the Menzies Government, Garfield Barwick, was the first minister to extensively canvass the issue of merger regulation in Australia. In 1962, Barwick 'operated virtually as a commission of one'[5] to prepare 'proposals for legislation on restrictive trade practices and monopolies'.[6]

Barwick's nearly 8000-word statement was delivered in Parliament by Acting Attorney-General Gordon Freeth, since Barwick himself was overseas. In the statement, Barwick linked restrictive practices to the public interest. In Barwick's words, the public interest was in 'the maintenance of free enterprise' and 'ensuring competitive conditions'.[7] Barwick argued that competitive conditions 'tend to initiative, resourcefulness, productive efficiency, high output and fair and reasonable prices to the consumer'.[8]

As part of his statement, Barwick proposed requiring registration of certain restrictive trade practices. He also proposed a merger system where a Commission with a registrar would have an opportunity to intervene before an anti-competitive merger took place.

Barwick's vision for merger regulation was one where the Commission 'would have the right within a limited period to approach the tribunal for a

4 A Leigh, 'Game changer: harnessing microdata for a fairer competition landscape', speech delivered at the Chifley Research Centre (Melbourne, 30 January 2024) (Game changer).

5 Commonwealth, *Parliamentary Debates* (House of Representatives, 6 December 1962, p 3102, G Freeth).

6 Above.

7 Above p 3103.

8 Above.

finding'.[9] He argued that it would be unmanageable to examine every merger and said a monetary threshold would be appropriate.

Barwick also noted companies go 'a considerable distance' to furnish shareholders with a 'great deal of information' about merger proposals.[10] And companies should provide the same information to the Commission — together with information on the purpose and effect of the merger.[11]

Barwick was following a global trend. Enacted in 1947, Japan's *Dokusen Kinshi Hō* (*Antimonopoly Act*) required the mandatory notification of mergers. Around the same time as Barwick was writing, the United Kingdom was considering a merger clearance process.[12] However, Barwick was ahead of his time in proposing mandatory and suspensory notification. Such requirements were not introduced in other jurisdictions until much later: the United States in 1976,[13] Canada in 1986,[14] and the European Union in 1989.[15]

Barwick was satisfied he had put forward 'a sensible and workable scheme of control of harmful restrictive practices in Australia'.[16] He hoped his statement would 'excite'. And excite it did. It 'exploded in the press'[17] and many industry groups were 'incensed'.[18]

Barwick duly defended his statement until his appointment as Chief Justice of the Australian High Court in 1964. Then it was over to Billy Snedden to finalise the *Trade Practices Act 1965*.

1965: Snedden stumbles

Snedden's Bill retained aspects of Barwick's proposal but with noticeable differences and omissions. A register of trade agreements would be introduced but applicable to fewer restrictive practices than had been envisaged by Barwick. The Bill did not prohibit resale price maintenance and exclusive dealing. The control of mergers was not included at all.[19]

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9 Above p 3112.
10 Above.
11 Above.
12 Commonwealth, *Parliamentary Debates* (House of Representatives, 25 November 1965, p 3232, G Whitlam).
13 *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 USC § 18a (1976); D A Valentine, 'The Evolution of U.S. Merger Law', speech delivered at the *INDECOPI Conference* (Federal Trade Commission, 13 August 1996).
14 *Competition Act*, RSC 1985, c C-34; M Smith, 'Mergers and abuse of dominant position: Legal aspects' (Current Issue Review No 91-3E, Parliamentary Library, Parliament of Canada, 1998).
15 *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings* [1989] OJ L 395/1; European Commission, 'Community merger control — Green Paper on the review of the merger regulation' (Green Paper, 31 January 1996) p 5.
16 Commonwealth, *Parliamentary Debates* (House of Representatives, 6 December 1962, p 3113, G Freeth).
17 K Round and M P Shanahan, 'From Protection to Competition: The Politics of Trade Practices Reform in Australia and the Trade Practices Act 1965' (2012) 58(4) *Australian Journal of Politics and History*, p 497, 506.
18 Above.
19 Above p 509.

Gough Whitlam told Parliament that Snedden's Bill was a clear case where the sights had been lowered.[20] He argued Barwick's proposal had been diluted and the public interest had been betrayed.

In hindsight, the legislation was a 'toe in the water'.[21] But the trade practices register exposed 'the kind and extent of anti-competitive conduct which was commonplace in Australia at the time'.[22] Annual reports to the Parliament under this law by Trade Practices Commissioner Ron Bannerman showed 'how the web of anti-competitive restriction spread across industry and hampered the efficiency that the economic climate was demanding'.[23]

Allan Fels, who served as chair of the Australian Competition and Consumer Commission, argues that the period from 1965 to 1974 saw a number of cartels broken up, but the absence of merger controls meant that in many cases, the parties simply responded by merging.[24]

1974: Murphy's law

In 1974, the Whitlam Government through Lionel Murphy as Attorney-General enacted the *Trade Practices Act 1974* (Cth). The legislation, now known as the *Competition and Consumer Act 2010* (Cth), has stood the test of time.

Murphy's Act was significant for many reasons including the ban on anti-competitive mergers and creation of the Trade Practices Commission.[25] Murphy introduced a prohibition on acquisitions which are likely to substantially lessen competition in a market — a test also used in other parts of the Act.[26]

However, the scope of the substantial lessening of competition test would become a great source of debate over the next three decades, including the scope to take account of efficiency considerations, competition as a process or state of affairs within the structure of a market, and the need for a forward-looking counterfactual analysis.[27]

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20 Commonwealth, *Parliamentary Debates* (House of Representatives, 2 December 1965, p 3551, G Whitlam).

21 J Jagot, 'The Common Law and Competition Law', speech delivered at the *Bannerman Competition Lecture* (22 February 2018) pp 15–16; R Bannerman, 'Development of Trade Practices Law and Administration' (1985) 18(3) *Australian Economic Review*, p 83, 85.

22 Jagot (n 21) p 16.

23 R Bannerman, 'Address to the Commercial Law Association', speech delivered at the Commercial Law Association (October 1984). See also Bannerman, 'Development of Trade Practices Law and Administration' (n 21) p 85.

24 A Fels, 'The Change from a Dominance to a Substantial Lessening of Competition Test in Australia's Merger Law' in B E Hawk (Ed), *International Antitrust Law & Policy, Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing, 2003) vol 29, pt 2002, pp 163, 169. See also Commissioner of Trade Practices, *Seventh Annual Report for Year 1973–74* (Parliamentary Paper No 101, 16 July 1974) p 8 [1.22].

25 *Trade Practices Act 1974* (Cth) s 50, as enacted. See also Commonwealth, *Parliamentary Debates* (Senate, 30 July 1974, pp 540–548, L Murphy).

26 P L Williams and G Woodbridge, 'Antitrust Merger Policy: Lessons from the Australian Experience' in T Ito and A O Krueger (Eds), *Governance, Regulation, and Privatization in the Asia-Pacific Region, NBER East Asia Seminar on Economics* (University of Chicago Press, 2004) vol 12, pp 35, 40.

27 Above pp 38, 46–49.

Murphy introduced voluntary and non-suspensory merger clearance and authorisation processes. Companies could choose whether or not to apply for immunity from legal action for their merger, and they did not have to wait for approval before merging.

Judicial enforcement through the Federal Court was established with the Trade Practices Commission and Attorney-General having the power to take merger cases to court. Only 4 cases would go on to be litigated to judgment in the first 25 years of the Act, with parties possibly deterred by the time, uncertainty and cost associated with litigation.[28]

1977: Howard hesitates

A few years later, the very existence of Australia's merger laws was again on the line when the Minister for Business and Consumer Affairs, John Howard, established the Swanson Committee to consider the operation and effect of the new Act. Some submissions called for merger laws to be abolished, but most said the laws should be retained with changes.[29]

The Swanson Committee handed down its report in August 1976 stating that merger law was needed. In fact, it said it was 'proper to have legislation dealing with merger activity as part of a competition policy law'.[30]

But the Committee did raise concerns about the possible application of the merger laws to smaller businesses and favoured the introduction of a monetary threshold test based on turnover of the target.[31]

Despite the findings, the Fraser Government repealed the merger clearance process and weakened the merger test as part of the *Trade Practices Amendment Act 1977* (Cth).

As a result, merger control was limited to voluntary and non-suspensory applications for merger authorisations. In other words, the Trade Practices Commission could investigate potentially anti-competitive mergers but it was up to companies to choose whether to apply for formal protection from legal action for proposed mergers and they were not required to wait before merging.

The 'substantial lessening of competition' test was replaced with a 'dominance' test. This meant that the only acquisitions prohibited were those which likely resulted in, or substantially strengthened, a position to control or dominate a market.

Howard argued that 'there should be no unnecessary impediment, legislative or administrative, to the attainment of rationalisation of Australian

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28 Above pp 50–53. The four cases are: *Trade Practices Commission v Ansett Transport Industries (Operations)* (1978) 32 FLR 305; (1978) 20 ALR 31; *Trade Practices Commission v Australian Meat Holdings* (1988) 83 ALR 299; *Trade Practices Commission v Arnotts Ltd* (1990) 24 FCR 313; (1990) 97 ALR 555; *Davids Holdings v A-G (Cth)* (1994) 49 FCR 211; (1994) 121 ALR 241.

29 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Parliament of Australia, Canberra, 1976) p 47 [8.5] (*Swanson Review*).

30 Above p 48 [8.8].

31 Above p 51.

industry'.[32] His logic was that '[i]t is in Australia's best interest to achieve economies of scale and improved international competitiveness'.[33]

It was in this period following 1977 that the informal merger review process emerged. A 'voluntary informal review was considered to be more simple and less onerous than merger authorisation',[34] enabling merger parties to seek the Trade Practices Commission's view on whether a proposal would be likely to breach the mergers test.[35]

1980s: Decade of the dealmakers

In his book *The Eighties,* historian Frank Bongiorno dedicated an entire chapter to 'the deal-makers'.[36] According to Bongiorno, it was an era where corporate tall poppies were admired for their beauty and the media reported on business deals like they were sporting contests.

The merger laws were considered to be 'still in the development stage'.[37] But Attorney-General Lionel Bowen made improvements in 1986 following the Hawke Government's Green Paper on proposals for change.[38]

Lionel Bowen's amendments closed loopholes around joint ventures and inserted a new clause to deal with offshore mergers.[39] It also clarified that 'bare transfers of monopoly power' were not prohibited, if as a result of the acquisition, the dominant firm was not (and was not likely to be) in a stronger position to dominate the market.[40] This ensured dominant firms were not 'takeover-proof'.[41]

The words 'control or' were omitted from the test of 'control or dominance' following judgment in the Trade Practices Commission's case *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd*.[42] Towards the end of the 1980s, a series of major takeovers were starting to change the public mindset. And there were calls for greater consideration of the public interest in merger regulation.[43]

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32 Commonwealth, *Parliamentary Debates* (House of Representatives, 3 May 1977, p 1478, J Howard).

33 Above.

34 A Fels, A Heger and G Cunningham, 'A Mandatory and Suspensory Merger Notification System for Australia', in M Gvozdenovic and S Puttick (Eds), *Current Issues in Competition Law*: *Vol II Practice and Perspectives* (Federation Press, 2021) pp 186, 193.

35 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Mergers, Takeovers and Monopolies: Profiting from competition?* (Parliament of Australia, Canberra, 1989) p 71 [6.1.4] (*Griffiths Report*).

36 F Bongiorno, *The Eighties: The Decade that Transformed Australia* (Black Inc, 2015) ch 5.

37 *Griffiths Report* (n 35) p 106 [8.1.6].

38 G Evans, B Cohen and R Willis, 'The Trade Practices Act: Proposals for Change' (Discussion Paper, February 1984) (Green Paper).

39 Commonwealth, *Parliamentary Debates* (House of Representatives, 19 March 1986, p 1627, L Bowen).

40 Above p 1623; *Trade Practices (Transfer of Market Dominance) Amendment Act 1986* (Cth) s 3.

41 Commonwealth, *Parliamentary Debates* (House of Representatives, 19 March 1986, pp 1623, 1624, L Bowen).

42 *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 20 ALR 31; (1978) 32 FLR 305.

43 *Griffiths Report* (n 35) pp 2–3.

Alan Griffiths chaired a House of Representatives committee inquiry into mergers, takeovers and monopolies, handing down a report in 1989 recommending retaining the dominance test. The committee noted the 'significant support'[44] and 'belief that the [dominance] test facilitates and promotes desirable industry rationalisation and increased international competitiveness'.[45] The Committee was also not convinced about the need for a pre-notification scheme after New Zealand experienced a 'great paper war'[46] when introducing a similar requirement.[47]

1992: Keating restores the substantial lessening of competition test

Barney Cooney's Senate Committee inquiry was next. It had a brief to delve deeper into the adequacy of merger laws including the test and compulsory pre-merger notification.[48]

The Cooney Committee published its report in 1991 recommending the repeal of the 'dominance' test and a return to the 'substantial lessening of competition' test, which would bring Australia into line with similar countries such as the United States of America.[49] It also recommended a non-exhaustive list of matters a Court had to consider in applying the test.[50] The Committee also backed mandatory notification 'where mergers or acquisitions of a substantial nature are proposed'.[51]

As part of a wider response to the Griffiths and Cooney reports, in 1992, the Keating Government replaced the 'dominance' test with a 'substantial lessening of competition' test and added a list of merger factors to be taken into account through the *Trade Practices Legislation Amendment Act 1992* (Cth). This pivot back to the 'substantial lessening of competition' test took place in January 1993.

Allan Fels has pointed to several mergers that went through under the dominance test which in his view would not have been allowed under Murphy's 'substantial lessening of competition' test.[52] These included the mergers between Coles and Myer, News Ltd and The Herald and Weekly Times, and Ansett Airlines and East West Airlines.

Interlude: The Hilmer reforms

At around the same time, the *Hilmer Review* and subsequent National Competition Policy were shaping up as one of the most significant economic reforms in Australia's history. The Hilmer reforms were built on principles for

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44 Above p 63 [5.4.61].
45 Above.
46 Above p 51 [5.3.11].
47 Above p 51 [5.3.15].
48 Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies, and acquisitions: Adequacy of existing legislative controls* (Parliament of Australia, Canberra, 1991) p 1 (*Cooney Report*).
49 Above p 52.
50 Above pp 50 [3.120], 52–53.
51 Above p 67 [4.40].
52 Fels (n 24) vol 29, pt 2002, p 163.

competition reform, such as structural reform of public monopolies, allowing third parties access to significant infrastructure, reviewing and removing anticompetitive regulation, and requiring competitive neutrality between government and private business.

They were driven by the reforming energy of then Prime Minister Paul Keating, who was keen to work with state and territory governments to open up markets and scrap unnecessary regulations. Around 1800 laws and regulations that restricted competition were reviewed and, where appropriate, reformed or repealed. For the first time, retail energy markets were opened to competition, enabling consumers to shop around.

Government businesses were restructured to operate more efficiently and the playing field was levelled with the *Trade Practices Act* extended to previously excluded businesses — such as professionals. In its 2005 review of the impact of the National Competition Policy reforms, the Productivity Commission analysed the impact on the economy. That analysis estimated a permanent increase of 2.5% in Australia's GDP from those competition reforms.[53] Today, that lift equates to around $50 billion a year, or around $5000 per household.[54]

In an article marking their 30th anniversary, Leigh argued that there are seven lessons from the Hilmer reforms for modern competition reformers.[55] First, tell a big story, engaging the public and the press on the value of competition and the need for change. Second, use payments to states and territories to make it easier for jurisdictions to persist with challenging reforms. Third, focus on the most pressing problems impairing economic growth, recognising that each reform effort will tackle a different set of impediments. Fourth, protect vulnerable people and communities, using data to identify the individuals and neighbourhoods likely to be adversely affected. Fifth, promote changes that improve both economic dynamism and environmental sustainability, recognising that Australians want cheaper, cleaner energy — not one or the other. Sixth, beware of privatised monopolies, recognising that selling a government monopoly into private hands can impose a multi-decade 'tax' on consumers. Seventh, use federalism to drive reform, recognising that constitutional realities and economic practicalities mean that competition reform will always be a shared effort across different tiers of government.

In terms of mergers, the *Hilmer Review* acknowledged the Keating Government's recent changes to the mergers test. The Review focused on the Keating Government's plans to adopt an administratively simple pre-merger notification scheme for substantial mergers.[56] The *Hilmer Review* said such a scheme could help ensure the competition authority is always given sufficient notice about mergers to examine them and take appropriate action prior to completion. However, it noted that pre-merger notification needed to be balanced against imposing a burden on businesses through information

53 Productivity Commission, *Review of National Competition Policy Reforms* (2005).

54 A Leigh, 'A Zippier Economy: Lessons from the 1992 Hilmer Competition Reforms' (2023) 42(3) *Economic Papers*, p 229, 232 (A Zippier Economy).

55 Above pp 232–234.

56 F G Hilmer, M R Rayner and G Q Taperell, *National Competition Policy* (1993) (*Hilmer Review*).

requirements and delay. The *Hilmer Review* noted that an 'essential criterion' in the evaluation of the pre-merger notification system would be administrative simplicity.[57]

The Keating Government issued a consultation paper on possible options for the notification scheme.[58] Alas, the idea of a simple pre-merger notification scheme was dropped when the Howard Government won office in 1996.

In 1999, the Howard Government missed another opportunity — passing up the chance to act on the Baird Committee's recommendation for mandatory notification of mergers in the grocery sector.[59] The Baird Committee's recommendation would have enabled the Australian Competition and Consumer Commission 'to make an informed assessment of the likely impact of [acquisitions by major supermarkets Woolworths, Coles and Franklins] on local businesses'.[60] The Baird Committee argued that giving the Australian Competition and Consumer Commission greater visibility over the acquisition of small stores through mandatory notification 'may expose more clearly whether a major chain is implementing a deliberate strategy of creeping acquisitions'.[61]

2008–2011: Controlling creeping acquisitions

After the *Hilmer Review* had expanded competition and extended the reach of the *Trade Practices Act*, the Howard Government appointed Daryl Dawson to examine the competition provisions of the Act. The *Dawson Review* made 43 recommendations.[62] This included recommendations on the introduction of criminal sanctions for cartel conduct[63] — which Labor Minister Chris Bowen later actioned in 2008.

On the mergers front, the *Dawson Review* focused on the merger assessment process, recommending the introduction of an additional formal clearance process. It also considered proposals to deal with serial or creeping acquisitions but dismissed these as supporting the preservation of the number of competitors rather than the promotion of competition.[64] In 2006, the Howard Government enacted reforms to create the additional voluntary formal merger clearance system and change the merger authorisation process.[65]

After Labor won office in 2007, the Rudd and Gillard Governments brought about changes to clarify merger laws and address growing concerns. One of those concerns was creeping acquisitions — a series of smaller acquisitions by

57 Above p 83.
58 G Gear, *Pre-merger Notification* (Media Release, 22 November 1994).
59 Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure? A review of Australia's retailing sector* (Parliament of Australia, Canberra, 1999) pp xxii, 58.
60 Commonwealth, *Parliamentary Debates* (House of Representatives, 30 August 1999, p 9328, B Baird).
61 Joint Select Committee on the Retailing Sector (n 59) p 58.
62 D Dawson, J Segal and C Rendall, *Review of the Competition Provisions of the Trade Practices Act* (2003) (*Dawson Review*).
63 Above pp 161–162, 164.
64 Above pp 67–68.
65 P Costello, *Commencement of Trade Practices Act Reforms* (Media Release, 22 December 2006).

large firms which collectively amount to a substantial lessening of competition. The Australian Competition and Consumer Commission's 2008 grocery inquiry supported the introduction of a general creeping acquisition law.[66]

The Rudd Government issued discussion papers in 2008 and 2009 to canvas possible options on creeping acquisitions.[67] This included aggregating multiple transactions over time to assess whether in combination they would substantially lessen competition; prohibiting mergers by businesses with substantial market power if the merger would increase that market power; and an ability for a Minister to 'declare' businesses where there were concerns about potential competitive harm from creeping acquisitions. Acquisitions by declared businesses would be subject to a more stringent test, being blocked 'if the acquisition would have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market'.[68] However, no legislative changes based on the proposals in the Treasury discussion papers were made.

David Bradbury, Parliamentary Secretary to the Treasurer, then brought to Parliament a Bill to amend the merger laws to make it clear that a court or the Australian Competition and Consumer Commission can consider the effects of a merger or acquisition on multiple markets in conducting its assessment.[69]

These amendments also deleted the requirement for a market to be 'substantial' from s 50. This allowed 'the Australian Competition and Consumer Commission or a court to continue to examine acquisitions in all markets, including in relatively small, local markets'.[70]

2015: Harper's hope

Prior to the 2013 election, the Coalition's signature competition policy was a wide-ranging review. Upon winning office, Prime Minister Tony Abbott and Treasurer Joe Hockey commissioned Ian Harper to produce the report. The *Harper Review* was handed to the government in 2015 with the goal of 'reinvigorating Australia's competition landscape'.[71]

66 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008) p 430.

67 Commonwealth, *Parliamentary Debates* (House of Representatives, 15 June 2011, p 6053, D Bradbury); Treasury, 'Creeping Acquisitions' (Discussion Paper, 1 September 2008); Treasury, 'Creeping Acquisitions — The Way Forward' (Discussion Paper, 11 June 2009).

68 Treasury, 'Creeping Acquisitions — The Way Forward' (n 67) pp 3–4.

69 Commonwealth, *Parliamentary Debates* (House of Representatives, 15 June 2011, p 6053, D Bradbury).

70 Above.

71 I Harper et al, *Competition Policy Review Final Report* (2015) p 7 (*Harper Review*).

The *Harper Review* was comprehensive, with 56 recommendations on reforms to competition policy, laws and institutions. While the *Harper Review* resulted in some significant changes, core recommendations that would have reinvigorated National Competition Policy were never really implemented.[72]

It was the misuse of market power provisions that dominated debate. In relation to the mergers test, which had been debated in reviews in the previous 30 years, 'submissions offered near-universal support for the substantial lessening of competition test'.[73] On creeping acquisitions, the *Harper Review* did not consider that 'a sufficiently strong case for change' had been made for further amendments.[74]

At the time, merger parties had three main avenues for review: the informal merger review process, formal clearance by the Australian Competition and Consumer Commission, and authorisation by the Australian Competition Tribunal.

The *Harper Review* recommended retaining the informal process, and combining the formal clearance and authorisation processes.[75] The *Harper Review* recommended that the Australian Competition and Consumer Commission be the first instance decision-maker in the combined formal process. The Australian Competition Tribunal was viewed as better suited to an appellate or review role. The *Harper Review* also recommended that any review that was undertaken by the Tribunal should be based on the material that was before the Australian Competition and Consumer Commission. The Review considered that an unfettered ability to introduce new material at this stage would dampen the incentives to engage with the Australian Competition and Consumer Commission and lead to delays.[76]

The Turnbull Government accepted the *Harper Review* recommendations and enacted legislation to give effect to the changes in 2017.[77]

2024: Merger reforms

As Labor's competition spokesperson during the party's time in opposition (2013–2022), Leigh coauthored a series of articles analysing various aspects of competition economics in Australia. A study with Adam Triggs used data from IBIS World to analyse the degree of market concentration across the Australian economy.[78] Another analysed how 'Chicago School' thinking on competition policy had shaped Australian jurisprudence.[79] The researchers

72 J Chalmers, 'Merger reform for a more competitive economy', speech delivered at the *Bannerman Competition Lecture* (10 April 2024).

73 *Harper Review* (n 71) p 314.

74 Above pp 66, 323.

75 Above pp 66, 329, 332.

76 Above; Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) at p 137.

77 S Morrison, *Strengthened competition law — Harper reforms passed* (Media Release, 18 October 2017); *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

78 A Leigh and A Triggs, 'Markets, monopolies and moguls: The relationship between inequality and competition' (2016) 49(4) *Australian Economic Review*, p 389.

79 A Triggs and A Leigh, 'A Giant Problem: The Influence of the Chicago School on

carried out the first Australian analysis of common ownership.[80] They showed that monopoly power worsens inequality by transferring resources from consumers to shareholders.[81] And they recounted multiple instances of monopolies behaving badly in the marketplace.[82]

After Labor took office in 2022, Leigh worked with Treasury experts to analyse industry-level microdata. A series of journal articles showed evidence that market concentration had worsened,[83] markups had risen,[84] monopsony hiring power was a problem in many labour markets,[85] and monopoly power was a risk in new sectors, such as artificial intelligence.[86] Other research looked at lessons from competition reformers internationally,[87] as well as from the Hilmer reforms.[88] Heger, together with Allan Fels, considered the future of merger law in Australia, discussing possible options for merger reform given the importance of effective merger control to the Australian economy.[89]

In 2023, Treasurer Jim Chalmers and Assistant Minister for Competition Andrew Leigh established a Competition Taskforce in Treasury, focused on providing advice to government about actionable reforms to create a more dynamic and productive economy. This approach differed from past reform efforts, which had typically tasked prominent experts to produce a report.

An advantage of the taskforce approach is that it allows for progress to be made over time and builds up expertise within the public service. The Competition Taskforce's approach to reform was also more data-intensive, relying heavily on the Business Longitudinal Analysis Data Environment (BLADE) dataset.[90] In parallel to this, the House Economics Committee, chaired by Daniel Mulino, carried out an inquiry into boosting economic dynamism.[91]

Australian Competition Law, Economic Dynamism and Inequality' (2019) 47(4) *Federal Law Review*, p 696.

80 A Leigh and A Triggs, 'Common Ownership of Competing Firms: Evidence from Australia' (2021) 97(318) *Economic Record*, p 333.

81 J Gans et al, 'Inequality and market concentration, when shareholding is more skewed than consumption' (2019) 35(3) *Oxford Review of Economic Policy*, p 550.

82 A Leigh and A Triggs, 'A Few Big Firms' (17 May 2017) *The Monthly*.

83 A Leigh, 'A More Dynamic Economy' (2022) 55(4) *Australian Economic Review*, p 431.

84 A Leigh, 'Market power and markups: Malign markers for the Australian macroeconomy' (2023) 62(3) *Australian Economic Papers*, p 567.

85 A Leigh, 'How uncompetitive markets hurt workers' (2023) 26(1) *Australian Journal of Labour Economics*, p 1.

86 A Leigh, 'Competition and Artificial Intelligence: An Australian Policy Perspective' (2023) 2 (December) *CPI TechREG Chronicle: Regulating Generative Artificial Intelligence* (Competition and Artificial Intelligence).

87 A Leigh, 'Economic Dynamism: A Global Perspective' (2022) 29(3) *Competition and Consumer Law Journal*, p 193.

88 Leigh, 'A Zippier Economy' (n 54) p 229.

89 A Heger and A Fels, 'The future of merger law in Australia' (2023) 30(1) *Competition and Consumer Law Journal*, p 1.

90 For an insightful history of this dataset, see D Gruen, 'Data linkage and integration to improve the evidence base for public policy: lessons from Australia', speech delivered at the Health Economics Research Centre (Oxford University, 26 June 2024).

91 House of Representatives Standing Committee on Economics, *Better Competition, Better Prices*: *Report on the inquiry into promoting economic dynamism, competition and business formation* (Parliament of Australia, Canberra, 2024).

The top priority of Treasury's Competition Taskforce was to consider reforms to Australia's merger laws.[92] In this, the Australian Government stated that it was guided by the principle that any change must deliver benefits to the economy and to consumers while providing certainty to businesses.[93]

The Competition Taskforce carried out consultations over summer 2023–2024.[94] Stakeholder feedback to the Competition Taskforce suggested that Australia's 'ad hoc' merger process was unfit for a modern economy and the nation lags best practice in other countries.[95] The Competition Taskforce found that Australia is out of step with most of its international peers, being one of only three OECD jurisdictions with a voluntary merger notification system.[96] Businesses told the Competition Taskforce that uncontentious mergers were subject to frustrating delays, uncertainty, and added costs.

The Australian Competition and Consumer Commission also raised concerns with the approach to merger control in Australia. The Australian Competition and Consumer Commission noted that it was dealing with inadequate merger notifications, insufficient information, and a reactive, adversarial approach from some businesses, with limited capacity to present economic evidence in court.[97] And for the wider community, engaging with the Australian Competition and Consumer Commission's merger reviews is often difficult.

In April 2024, Treasurer Chalmers and Assistant Minister Leigh announced the government's reforms, arguing that they were the most significant reforms to merger settings in almost 50 years.[98] In his speech,[99] the Treasurer argued that the proposed reforms will make Australia's merger approval system faster, stronger, simpler, targeted and more transparent. Following stakeholder feedback, the government opted not to proceed with the Australian Competition and Consumer Commission's proposal to 'reverse the onus of proof' in merger reviews.[100]

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92 J Chalmers and A Leigh, *A more dynamic and competitive economy* (Media Release, 23 August 2023).

93 J Chalmers, 'Nation's productivity demands fairness in merger process', *The Australian*, 20 November 2023.

94 Treasury, 'Merger Reform' (Consultation Paper, 20 November 2023).

95 Australian Government, 'Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy' (Government Response, Treasury, 10 April 2024).

96 Organisation for Economic Co-operation and Development (OECD), *OECD Competition Trends 2021 Volume 2 Global Merger Control* (2021) pp 11–12. In 2024, Australia, New Zealand and the United Kingdom were the only OECD countries with voluntary merger notification systems.

97 Australian Competition and Consumer Commission, Submission to Treasury, *Competition Review Merger Reform — Consultation Paper* (2024); Australian Competition and Consumer Commission, Submission to Treasury, *Competition Review Merger Reform — Consultation Paper* (2023).

98 J Chalmers and A Leigh, 'Merger reform for a more competitive economy' (Joint Media Release, 10 April 2024); Australian Government, 'Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy' (Government Response, Treasury, 10 April 2024).

99 Chalmers, 'Merger reform for a more competitive economy' (n 72).

100 Australian Competition and Consumer Commission, *Submission to Treasury on merger reform* (2023) p 9.

Following consultation on the exposure draft legislation from July 2024 to August 2024,[101] the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 to implement the new system was introduced into Parliament on 10 October 2024.[102]

Under the reforms, a mandatory and suspensory administrative system for mergers will be introduced, with the Australian Competition and Consumer Commission as the expert, first instance decision-maker on all mergers that meet the notification thresholds. The reforms reduce three merger review streams to a single, streamlined path to approval that removes duplication, strengthens system integrity and standardises notification requirements for all mergers.

Adopting an administrative, rather than judicial, framework for the assessment of mergers is a substantial reform. Administrative systems better harness the knowledge and expertise of the competition authority to efficiently assess the complex competition effects of mergers. Importantly, transparency and accessibility — for merger parties, stakeholders, consumers and the community — is significantly greater under an administrative model.

Mergers may proceed within 30 business days where no competition concerns are raised by the Australian Competition and Consumer Commission. Where competition concerns are raised, the Australian Competition and Consumer Commission will undertake an in-depth assessment within a four-and-a-half-month period.

Mergers above monetary thresholds will need to be notified to the Australian Competition and Consumer Commission to be approved before proceeding. The Government announced that it would set the thresholds based on international practice and through consultation.[103] In designing targeted, risk-based notification thresholds, the objectives are to capture anti-competitive and economically significant acquisitions for Australians, including serial acquisitions; and enable scrutiny of acquisitions by businesses with substantial market power, including acquisitions of nascent competitors.[104] The proposed notification thresholds adopt monetary metrics to ensure that three categories of merger — large mergers, very large businesses buying small ones, and mergers in sectors where there is consolidation through small acquisitions — can be scrutinised.[105]

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101 Treasury, *Reforming mergers and acquisitions — exposure draft* <https://treasury.gov.au/consultation/c2024-554547> (accessed 16 December 2024).

102 J Chalmers and A Leigh, *Historic reforms for a more competitive economy enter Parliament* (Joint Media Release, 10 October 2024); Australian Government, 'Merger reform for a more competitive economy: Government response to consultation' (Government Response, Treasury, 10 October 2024); Parliament of Australia, *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7257> (accessed 16 December 2024).

103 Chalmers, 'Merger reform for a more competitive economy' (n 72); Treasury, 'Merger Notification Thresholds' (Consultation Paper, 30 August 2024).

104 Treasury, 'Merger Notification Thresholds' (Consultation Paper, 30 August 2024).

105 J Chalmers and A Leigh, *Consultation begins on new merger notification thresholds* (Joint Media Release, 30 August 2024); Australian Government, 'Merger reform for a more competitive economy: Government response to consultation' (n 102) p 2.

The well-understood 'substantial lessening of competition' test has been augmented to reference creating, strengthening or entrenching substantial market power. This emphasises the importance of the competitive structure of the market in the context of the overall assessment of the effects of a merger on competition and ensures more effective review of mergers by businesses with substantial market power.

The Australian Competition and Consumer Commission will also be able to account for the cumulative effect of mergers relating to the same or substitutable product or service within the previous three years. This is a targeted measure to address concerns that some businesses are engaging in anti-competitive roll up strategies that increase prices and reduce quality and choice for consumers. Three years is considered an appropriate reference period to capture strategic business behaviour and take account of dynamic conditions of competition in markets.

Economic analysis heavily underpins merger assessment and law. Moving to administrative decision-making better ensures the necessary economic rigour will be applied to the assessment of mergers, supported by information and evidence. It ensures explicit emphasis is placed on economic methodology and analysis of competitive effects by the Australian Competition and Consumer Commission in assessing whether the merged business will have the incentive and ability to exercise market power in a way that will be harmful to consumer welfare.

The new merger system will also be more transparent, by ensuring the community — consumers, businesses and the public — has better visibility of merger activity. There will be a public register of all mergers and acquisitions notified to the Australian Competition and Consumer Commission to promote transparency and accountability. The Australian Competition and Consumer Commission will also be required to publish reasons for all decisions, setting out the findings on material facts, with reference to the evidence or other material on which those findings were based, commensurate with the substantive review undertaken. This will facilitate transparency and predictability in the administrative system and shape the boundaries of merger control over time as a body of previous decisions, including the economic and legal reasoning, will develop.

Reviews of the Australian Competition and Consumer Commission's decisions will be the responsibility of the Australian Competition Tribunal, made up of a Federal Court judge, an economist and a business leader. The Australian Competition Tribunal, with its independent economic, business and legal expertise, will improve the quality and consistency of merger decisions and promote good decision-making by the Australian Competition and Consumer Commission based on sound economic and legal principles.

The Australian Government contends that these changes — some of which have been debated for decades — will make it easier for the majority of mergers to be approved quickly, providing certainty for businesses and allowing the Australian Competition and Consumer Commission to focus on the minority that give rise to competition concerns.[106] Having passed the

106 J Chalmers, *Next step towards merger reform for a more competitive economy* (Media Release, 24 July 2024).

parliament in November 2024, the merger reforms will take effect from 1 January 2026 (although firms can voluntarily use the new system from 1 July 2025).[107]

Evidence informed policymaking

With the quality of economic evidence improving, it has become possible for microdata analysis to provide insights and shape reform. Adopting a deliberate and rigorous approach with evidence informed policy making enhances the effectiveness, efficiency and equity of public interventions.[108]

An early achievement of the Competition Taskforce was the development of the nation's first whole-of-economy approach to tracking mergers and acquisitions.[109] In simple terms, this approach exploits administrative microdata on labour flows between Australian businesses, adapting a methodology developed in the United States to identify when a merger takes place. Using labour flows makes it possible to define mergers in an economically meaningful way.

There were three significant findings in these initial results.

First, the database showed that the Australian Competition and Consumer Commission and researchers have only a partial view of merger and acquisition activity in Australia. Under the voluntary notification system, the Australian Competition and Consumer Commission has considered about 330 mergers each year on average over the past decade. Initial results from the database tracking labour flows suggests there are many more than this — somewhere between 1000 and 1500 a year. This means that for every merger that is notified to the Australian Competition and Consumer Commission there are two to three more taking place. The Australian Competition and Consumer Commission may not be aware of these other mergers.

Second, the database showed that acquisitions are disproportionately made by the largest firms. The largest 1% of firms make about half of all acquisitions. The data show that larger firms have increased merger activity since the 2010s and that acquisitions are most common in manufacturing, retail, professional services, and health and social services.

Third, the database indicated that target merger firms are more likely to have a trademark or patent than an average firm. Target firms are more than twice as likely to have a patent and almost twice as likely to have a trademark.[110] This highlighted the purchase of intellectual property as a possible motivating factor behind mergers.

Building on this analysis to incorporate a geographic dimension could support future targeting of the merger control system. The Government has

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107 Australian Government, 'Merger reform for a more competitive economy: Government response to consultation' (n 102) p 1. The Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 passed both Houses on 28 November 2024.

108 S Kennedy, 'Evidence informed policy making', speech delivered to the *South Australian Centre for Economic Studies Corporate Members Luncheon* (University of Adelaide, 30 August 2024).

109 Competition Review Taskforce, *Tracking mergers in Australia using worker flows* (Competition Review Research Note, Treasury, 2024) p 4.

110 Leigh, 'Game changer' (n 4).

announced an intention to explore development of a concentration hotspot tool to identify relatively concentrated industries or sectors of the economy in particular geographic areas. This could be used to determine whether businesses in concentrated local markets need to notify transactions to the Australian Competition and Consumer Commission.[111]

Looking to the future, measuring the impact of merger control by *ex post* review and evaluation of merger assessments — at a merger, industry, region or economy-wide level — will permit testing of the effectiveness of outcomes and allow us to better understand the impact of mergers on our economy.

Conclusion: Merger control in Australia — The next 50 years

Since Barwick's bid in 1962, the story of Australia's merger reforms has been one of bumps and breakthroughs. In earlier decades, vested interests played a heavy role. In 2024, Australia has implemented a fit-for-purpose merger control system to increase competition and economic growth.

The Australian Competition and Consumer Commission will have responsibility for implementing merger reform and the success of the reforms will depend on how it does so. The Government has set expectations that this be done so in a risk-based way, allowing the Australian Competition and Consumer Commission to focus its attention on those mergers with the greatest potential to have adverse economic consequences. The new system will utilise data and economic analysis to enhance merger reviews and provides increased transparency to enhance community understanding and administrative predictability.[112] In doing so, the Australian Competition and Consumer Commission must engage and consult widely with consumers, suppliers and competitors affected by a merger, undertake a rigorous economic and legal analysis of a merger, weigh up the relevant considerations and set out its objective, factual findings and other considerations in its published reasons. This will enhance the accountability, accessibility and transparency of merger review in Australia. Ultimately, the Australian Competition and Consumer Commission must deliver an efficient and effective merger control system, promoting competition, protecting consumers and supporting fair trading in markets to underpin economic growth.

Ultimately, a key test of the new merger system will be whether it leads to a more dynamic and productive economy. Better data has not only shaped the merger reforms; it also provides the opportunity to assess their impact. Tracking the flow of startup businesses, the degree of market concentration and worker mobility across firms will provide evidence as to the effectiveness of merger reforms and other competition policies. As microdata has improved, so too has the capacity of researchers to analyse it, including in universities, think tanks, Treasury and the Australian Competition and Consumer

111 Australian Government, 'Merger reform for a more competitive economy: Government response to consultation' (Government Response, Treasury, 10 October 2024) p 12.

112 Australian Government, *Statement of Expectations: Australian Competition and Consumer Commission* <https://treasury.gov.au/the-department/accountability-reporting/statements-of-expectations> (accessed 26 November 2024).

Commission. This hard-won expertise must be nurtured so that future reforms are informed by the best available evidence.

Future technologies pose new challenges. Algorithmic collusion has been identified as a problem in the Australian petrol market[113] and the US rental market.[114] Doubtless, it is also a problem elsewhere.[115] A series of reports by the Australian Competition and Consumer Commission have identified the potential need for new regulations to address the impact of digital platforms on the economy.[116] And just as internet search has consolidated from a competitive market in the late-1990s to a near-monopoly today, artificial intelligence has a similar risk of consolidation in future decades.[117]

Merger law will never be a case of 'set and forget'. Like other fields of economic policy, it is vital for regulations to keep pace with developments in the economy. Australia's other competition laws — cartels, concerted practices and misuse of market powers — must also be kept in sight to ensure they are also working effectively alongside a reformed merger control system. Directed by evidence and expertise, guided by history and informed by international development, the nation stands the best chance of ensuring that our institutions and laws best serve the interests of all Australians.

113 D P Byrne and N De Roos, 'Learning to coordinate: A study in retail gasoline' (2019) 109(2) *American Economic Review*, p 591.

114 K T White and T W Cowart, 'Behind the Cloaking Device: Is There an Anti-Competitive Agreement Lurking under the Use of Common Pricing Algorithms by Multifamily Landlords?' (2023) 63(3) *Washburn Law Journal*, p 287.

115 A Ezrachi and M E Stucke, 'Algorithmic tacit collusion' in P Whelan (Ed), *Research Handbook on Cartels* (Edward Elgar Publishing, 2023) p 187.

116 Australian Competition and Consumer Commission, *Digital platform services inquiry reports 2020–25*.

117 Leigh, 'Competition and Artificial Intelligence' (n 86).