



**Australian
Competition &
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Commission**

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Dr Kathleen Dermody
Committee Secretary
Senate Economics Legislation Committee

By email: economics.sen@aph.gov.au

Dear Dr Dermody

Inquiry into the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014 – ACCC Questions on Notice

I refer to your email dated 9 October 2014 regarding the Australian Competition and Consumer Commission's appearance at the above inquiry on 2 October 2014.

Please find at Attachment A the ACCC's responses to the questions it took on notice during the hearing.

If the ACCC can be of further assistance to the Committee regarding its Inquiry, please do not hesitate to contact me

Yours sincerely

Lisa Anne Ayres
Director
Executive Office

Attachment A – ACCC responses to Questions on Notice – Senate Economics Committee Inquiry into the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014 – 2 October 2014

1. **Senator XENOPHON (transcript page 12):** What is the success rate of the ACCC in these (section 46) matters?

ACCC response:

The ACCC has been successful in establishing contraventions of misuse of market power in nine proceedings. The ACCC has been unsuccessful in establishing contraventions of misuse of market power in four proceedings and two proceedings have been discontinued.

2. **Senator CANAVAN (transcript, page 15):** So you do not use HHI measures at all to monitor competition in markets in this country?

Mr Cooper: The ACCC certainly does. It is one relevant factor. It is done through our mergers branch predominantly, but I am not aware of the details.

Senator CANAVAN: Could you take it on notice to let us know if you have updated those figures from that 2008 study?

Mr Cooper: I can do that.

ACCC response:

The ACCC considers market concentration measures, including the Herfindahl-Hirschman Index (HHI), when assessing mergers under section 50 of the *Competition and Consumer Act 2010*.

HHIs are not determinative of themselves in the mergers review context because section 50 requires consideration to be given to a range of 'merger factors' including barriers to entry and concentration. As outlined in the ACCC's Merger Guidelines 2008, HHIs should not be taken to imply a presumption as to whether or not a merger will be likely to result in a substantial lessening of competition but as a guide the ACCC has indicated that it is generally less likely to identify horizontal competition concerns arising from a merger where the post-merger HHI is:

- Less than 2000; or
- Greater than 2000 with a delta less than 100.

There have been no recent merger reviews that have resulted in the ACCC publishing revisions to the national HHI for retailing of packaged groceries since the ACCC Grocery Inquiry Report 2008.

3. **Senator CANAVAN (transcript page 16):** I know the federal trade commission made a submission to the Harper review. Are you aware of that submission?

Mr Cooper: I am.

Senator CANAVAN: I have not read through it all. Did they talk to divest your powers in their submission to the Harper review?

Mr Heys: I do not think so. We could take that on notice.

Senator CANAVAN: Did the ACCC ask them to make a submission?

Mr Cooper: I am not 100 per cent sure. I believe we may have done, informally, at a meeting that we were both attending.

Senator CANAVAN: Okay. If you did do that, could you take that on notice?

Mr Cooper: Yes.

Senator CANAVAN: If you did ask them, can you also take on notice whether you asked them to cover certain topic areas and, if so, which topic areas in competition law?

Mr Cooper: I would need to take that on notice as well.

ACCC response:

The ACCC did not request that the United States Federal Trade Commission (FTC) make a submission to the Competition Policy Review. However, the ACCC's International Unit was advised by FTC staff that the FTC was considering making a submission.

International Unit staff suggested that the FTC submission could usefully cover several issues including the practical operation of the US prohibitions of anticompetitive mergers.

ACCC staff did not suggest whether or not the FTC submission should cover divestiture powers and the ACCC was not given an opportunity to comment on the FTC submission.