HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS

INQUIRY INTO THE IMPLICATIONS OF COMMON OWNERSHIP AND CAPITAL CONCENTRATION IN AUSTRALIA

Question 1:

Ms HAMMOND: If we were to commission or get extra research done in this area, taking from what you've just said it would be wise for us to perhaps look at those industries or those sectors where there are, say, less than four active competitors. Would that be your advice?

Answer:

As noted by ACCC representatives in their evidence at the hearing, the ACCC agrees that if the Committee were to commission research, it may be useful for this research to focus on industries or sectors where there are a small number of active competitors.

In the ACCC's submission to this inquiry, we noted that in Australia, a number of sectors are dominated by a small number of suppliers including in banking, supermarkets, mobile telecommunications, internet service provision, energy retailing, gas supply and transport, insurance, pathology services and domestic air travel. These sectors may be useful for the Committee to focus on when considering the effect of common ownership on competition.

Research into the effect of common ownership on competition, including the mechanisms by which common ownership may influence competition, was undertaken in the European context in 2019, at the request of the European Parliament. A link to this research was published in May 2020 and is available here: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652708/IPOL_STU(2020)652708_EN.pdf >.

Question 2:

Dr Mulino: … In terms of the kinds of things we should be looking at *[in the context of meetings between fund managers of commonly owned companies and those companies]*, we had a very preliminary discussion about this yesterday with the banks, and one of the issues that came up was: how often do you meet with major shareholders, and what do you discuss? We're going to need to test this across a number of industries, and we're going to need to test it, in a sense, from both sides of that transaction. I'm sure we're going to be calling on some of the index funds and some of the super funds. But their initial reaction was that we tend to meet with major shareholders a couple of times a year after results. I don't know whether you've had a chance to review any of that discussion from the banks and what your reaction to that was—

Mr Sims: I think it varies. I'm certainly aware of wealth managers that would meet more regularly than that, but it does take a particular event for them to do that. So certainly the results events will do it. There's not much else to say, but we might give a bit of thought as to what else would be helpful to know. If we can take it on notice, we'll give it some thought. Whether we can send back anything helpful or not I don't know, but we'd like to be as helpful as we can.

Answer:

As noted by ACCC representatives in their evidence at the hearing, we consider the Committee's approach to obtain information from major institutional investors and listed companies to understand the timing, frequency, nature and content of meetings between institutional investors, and the management of commonly owned companies, is a useful starting point.

The Committee may also find it useful to consider seeking information on:

- Who the Board and Senior Management of listed companies consider to be 'major' (or 'strategically important') shareholders and if these shareholders differ from those who are 'substantial shareholders' under the Corporations Act.
- Whether the Board and Senior Management meet with major institutional investors before undertaking projects or investments of a material threshold, and the discussions involved in these investor meetings.
- Whether the analysis frameworks and financial models used by institutional investors differ for companies in which they have common ownership interests compared to other companies (in which they do not hold shares in other competing companies), and if so, how they differ.

Question 3:

Dr LEIGH: I have a final question on the common-ownership issue. Mr Sims, do you need any legal change in order to take account of common ownership in merger decisions? I assume the answer is no, but I'm curious as to whether there are legal impediments to you taking account of common ownership.

Mr Sims: I might take that one on notice if I could, Dr Leigh. There have certainly been issues that ring a bell, but I'm having trouble bringing them from the back of my mind to the front of my mind. We might take that one on notice, if we could, unless Mr Bezzi has a view, because he's had some role in these things. We'll take that on notice, thanks.

Answer:

The ACCC is not seeking any legal change to take into account common ownership in merger decisions.

Section 50 of the *Competition and Consumer Act 2010* can apply directly to the acquisition of partial shareholdings and minority interests. The test under section 50 focuses on the effect of an acquisition on competition and therefore there is no shareholding threshold limiting which acquisitions are subject to it. This means the ACCC can give consideration to an acquisition which gives rise to common shareholdings across rival firms, whether or not the interest delivers control. To establish a breach of section 50, it would be necessary to prove that the acquisition would have the effect, or likely effect, of substantially lessening competition in a market.

The ACCC Merger Guidelines[1] refer to the factors the ACCC would take into account to assess acquisitions involving partial and minority interests. These factors go to issues relating to levels of control, influence and changes in incentives arising from the acquisition.

Corporate veil considerations may be relevant for example where it involves the acquisition of an interest by a foreign acquirer which is not incorporated in Australia or it is asserted it is not carrying on a business within Australia pursuant to s5(1)(g). This will impact on whether the acquisition is subject to the *Competition and Consumer Act.*

[1] ACCC Merger Guidelines 2008 p. 55-56

Question 4:

CHAIR: We're also seeing that in desalination plants, but that's in a slightly different context. Thinking about the cartel provisions—because cartel provisions in the Competition and Consumer Act could, in part, be a relevant factor in this space, depending on the nature of the suppression of competition—are you aware of cartel action ever being taken? When you read it, it seems to me that it's largely focused on cartel behaviour on output of goods. Have there been any examples of cartel behaviour in the output of services, or action taken in the context of services?

Mr Sims: I'm going to pass to my colleagues here, who will have a faster answer.

Mr Bezzi: Ms Won might want to talk about this in a bit more detail. We've got quite a large case at the moment where that's at the heart of the case, and it involves the financial sector.

CHAIR: Which case is that?

Ms Won: You would be aware of the criminal prosecution in relation to the ANZ share placement. It involves shares, which are a service, basically, not goods.

CHAIR: Is that the only example that you have?

Ms Won: I don't think that's right, no. It is the only example I can bring to mind now, but I am certain that there are other cases.

CHAIR: I don't want you to go off and do a six-month exposition, but, if you have any other examples that you could provide us on notice that would not be hard to find if you think about it for a few minutes, I'd appreciate that.

Answer:

Recent ACCC cartel litigation involving the supply of services include:

- Air cargo cartel: https://www.accc.gov.au/media-release/high-court-rules-in-acccs-favour-in-air-cargo-cartel-case
- Container shipping cartel: https://www.accc.gov.au/media-release/wallenius-wilhelmsen-pleads-guilty-to-criminal-cartel-conduct