

**HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS**

**REVIEW OF THE ACCC ANNUAL REPORT 2019**

**ACCC09QON:**

**Mr FALINSKI:** If you had participants any other sector all coming together to have common ownership of a single supplier—in this instance, proxy advice—wouldn't that give you cause for concern?

**Mr Sims:** It does give us cause for concern, but you've still got to meet the threshold in the act of proving that it amounts to a substantial lessening of competition, and you've got to make sure that it's in trade or commerce.

**Mr FALINSKI:** I understand that, so I'll leave it at this: how does any other proxy adviser compete in that market when 28 industry super funds all own one supplier of that particular service? I might just leave that as a rhetorical question. You may want to take it on notice.

**Mr Sims:** We'll certainly take it on notice and we'll look further into it. I understand and share your concern.

**Answer:**

The question raises two issues:

- (i) competition concerns arising from common ownership by institutional investors (through a proxy adviser firm) of particular Australian corporations, and
- (ii) whether 28 industry superannuation funds having common ownership of, or being members of, one proxy adviser firm raises competition concerns.

Common ownership may give rise to competition law concerns where institutional investors simultaneously own shares in competing firms. This is because the voting decisions of these common owners have the potential to dampen competition between the firms in which they have invested. Common ownership of shares in firms which do not compete with each other does not by itself raise these concerns because it does not have the potential to limit competition between competitors.

The ACCC notes the report of the Organisation for Economic Co-operation and Development (OECD) [Common Ownership by Institutional Investors and its Impact on Competition](#) in relation to these issues. The report concludes that further analysis is required in order to determine whether substantial institutional investor ownership in firms, which compete with each other (with or without the use of proxy adviser firms), can impact competitive outcomes.

The ACCC understands that members of the Australian Council of Superannuation Investors (ACSI) have, on average, a 10-11 per cent shareholding across ASX200 companies. For a small number of companies, the aggregate shareholding of ACSI members is higher, at times up to 30.2 per cent. The ACCC has not received any complaints relating to ACSI members using their voting decisions to limit competition between firms in which they have common ownership stakes, but would be open to considering such issues should they arise.

The ACCC understands that the question in relation to ACSI is directed at whether the ownership of ACSI by 28 industry superannuation funds could raise competition concerns in relation to the supply of proxy adviser services in Australia.

The ACCC notes that there are four major proxy adviser firms in Australia including ACSI.

The ACCC understands that ACSI has 37 members, 31 of which are Australian superannuation funds. ACSI provides voting advice to members in relation to their shareholdings in ASX-listed companies. The ACCC understands that ACSI members are able to obtain services from other proxy adviser firms. A number of superannuation funds which have appeared before the Committee have confirmed that they seek advice from other sources.

The ACCC has not received any complaints from superannuation funds, competing proxy advisers or ASX-listed companies in relation to the issues presented. The ACCC is open to considering any information that would indicate competition concerns arising from the membership of ACSI.

The ACCC is aware of the potential for issues related to common ownership and proxy advisers to give rise to competition concerns, and will continue to monitor any developments.

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#### ACCC10QON:

**Mr SIMMONDS:** I turn to the changes to the franchising code between car manufacturers and car dealers that came in in June 2020, because I still get feedback from my local car dealers about the disproportionate power imbalance they feel is wielded by car manufacturers. In particular, they mentioned Mercedes and Volkswagen to me. Can I get an update from you about how you're monitoring the implementation of those changes in the Franchising Code of Conduct and what trends you've seen. Have you seen a drop in complaints? Have you seen a rise in car dealers collaborating to negotiate or to resolve disputes, which I know they're allowed to do as a collective now?

**Mr Grimwade:** I'll try to take this question. The changes to the franchising code in June really reflected, I think, two things. One was to enable a 12-month period before termination of a franchise could be implemented, and the other provision related to commitments to make a significant investment in a particular franchise. I'm not aware of receiving any particular complaints in relation to the implementation of those provisions.

I also note that, just looking back our figures over the last six months—and the commission will be releasing a report this week, Small business in focus, which will have the statistics laid out the last six months—there has been a drop in franchising complaints generally but an increase in the number of inquiries made of the commission. But, in relation to the car dealer or auto manufacturer franchise complaints you're referring to in particular, I think I might have to take that on notice.

**Answer:**

The ACCC typically receives a low number of franchise-related reports from individual dealers. It is more usual for dealer associations to raise franchise-related concerns with the ACCC on behalf of a number of dealers, rather than individual dealers making individual reports themselves. These issues arise when there is a major change in operations being proposed by the vehicle manufacturer or distributor.

In either case, there is no discernible trend in the number of franchise-related reports we have received from individual dealers or dealer associations before or following the amendments to the Franchising Code of Conduct, which took effect on 1 June 2020 for new vehicle dealership agreements.

In general, we received 137 franchise-related reports (which included 2 dealer-related reports) from 1 July to 31 December 2020. This compared to 166 franchise-related reports (which included one dealer-related report) in the 6 month period from 1 January 2020 to 30 June 2020.

There is no requirement for the ACCC to be notified of multi-party disputes under the Franchising Code of Conduct. A key feature of the Code is to provide mechanisms for smaller franchisees to resolve issues through mediation without regulatory oversight from the ACCC.

Dealers may seek the ACCC's authorisation if certain conduct they engage in, such as collective bargaining risks breaching the competition provisions of the *Competition and Consumer Act 2010*. The ACCC has not received a rise in applications for authorisation from dealers to collaborate to negotiate or resolve disputes collectively. Since 1 June 2020, we have received one application for authorisation from a dealer association on behalf of itself and a group of dealers.

The ACCC has made a class exemption to allow small businesses, franchisees and fuel retailers to collectively negotiate with their suppliers and processors, franchisor or fuel wholesaler respectively, without first having to seek approval using the ACCC's existing authorisation or notification processes. The collective bargaining class exemption is intended to be a beneficial deregulatory measure for small businesses, reducing compliance costs and providing legal certainty for them to be able to collectively bargain. The class exemption is not yet available for businesses to use.

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**ACCC11QON:**

**Ms MURPHY:** What is the breakdown in gender in the ACCC's briefing practices?

**Ms Court:** I have a strong interest in that also, as does our general counsel, Wendy Peter. The legal committee that I chair—which is an internal legal committee consisting of me, Ms Peter and a range of other senior executives within the ACCC—has those figures in relation to gender diversity reported to it on a monthly basis. I don't have the figures—Mr Gregson may have them—but our rates of briefing female junior counsel may be upwards of 40 per cent now. Senior counsel is more difficult, because there are very few female senior counsel, unfortunately, that do our work. Those that do do the work—again, unfortunately from our perspective—very quickly get elevated to the bench. So we just get a senior counsel engaged in our work and then, as I say, she is often appointed to the bench. Mr Gregson may have the precise figures, but I can assure you it's something that we as an agency look at very closely on a monthly basis.

**Ms MURPHY:** I'm glad to hear that. I would be interested—I don't want you to trawl back over years and years—in some of the more recent figures.

Answer:

***Counsel gender equity breakdown***

<b>Breakdown of no. of briefs to counsel</b>	<b>2018-19</b>	<b>2019-20</b>
<b>Male counsel - Proportion of briefs (out of total no. of briefs in FY)</b>		
Senior counsel – direct briefs	2.4%	1.3%
Junior counsel – direct briefs	3.2%	2.6%
<b>Total direct briefs to male counsel</b>	<b>5.6%</b>	<b>3.9%</b>
Senior counsel – indirect briefs	25.6%	27.0%
Junior counsel – indirect briefs	24.4%	22.5%
<b>Total indirect briefs to male counsel</b>	<b>50.0%</b>	<b>49.5%</b>
<b>Overall proportion of briefs to male counsel (direct &amp; indirect)</b>	<b>55.6%</b>	<b>53.4%</b>
<b>Female counsel - Proportion of briefs (out of total no. of briefs in FY)</b>		
Senior counsel - direct briefs	2.0%	0.3%
Junior counsel - direct briefs	2.0%	2.0%
<b>Total no. direct briefs to female counsel</b>	<b>4.0%</b>	<b>2.3%</b>
Senior counsel - indirect briefs	12.4%	12.7%
Junior counsel - indirect briefs	28.0%	31.6%
<b>Total no. indirect briefs to female counsel</b>	<b>40.4%</b>	<b>44.3%</b>
<b>Overall proportion of briefs to female counsel (direct &amp; indirect)</b>	<b>44.4%</b>	<b>46.6%</b>

<b>Breakdown of value of briefs to counsel</b>	<b>2018-19</b>	<b>2019-20</b>
<b>Male counsel - Value of briefs (out of total counsel expenditure in FY)</b>		
Senior counsel – direct briefs	1.2%	1.0%
Junior counsel – direct briefs	1.2%	0.6%
<b>Total value of direct briefs to male counsel</b>	<b>2.4%</b>	<b>1.6%</b>
Senior counsel – indirect briefs	44.1%	37.3%
Junior counsel – indirect briefs	16.2%	17.1%
<b>Total value of indirect briefs to male counsel</b>	<b>60.3%</b>	<b>54.4%</b>
<b>Overall value of briefs to male counsel (direct &amp; indirect)</b>	<b>62.7%</b>	<b>56.0%</b>
<b>Female counsel - Value of briefs (out of total counsel expenditure in FY)</b>		
Senior counsel – direct briefs	0.5%	0.3%
Junior counsel – direct briefs	0.7%	0.8%

<b>Breakdown of value of briefs to counsel</b>	<b>2018-19</b>	<b>2019-20</b>
<b>Total value of direct briefs to female counsel</b>	<b>1.2%</b>	<b>1.1%</b>
Senior counsel – indirect briefs	14.6%	20.2%
Junior counsel – indirect briefs	21.5%	22.7%
<b>Total value of indirect briefs to female counsel</b>	<b>36.1%</b>	<b>42.9%</b>
<b>Overall value of briefs to female counsel (direct &amp; indirect)</b>	<b>37.3%</b>	<b>44.0%</b>

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**ACCC12QON:**

**Ms MURPHY:** I'm not accusing the ACCC of doing this, but many organisations and firms meet their gender targets by briefing a lot of women at the low-value cases and not giving them the opportunity to get not just higher-value cases but higher-profile cases which would allow them to then become senior counsel. If you have some figures, I'd be happy to have them, but I'm also happy for you to take actual figures on notice.

**Mr Gregson:** We will take that on notice. The only thing I would add to Ms Court's answer is that we also try to be quite proactive in the way that we support and develop those counsel. As Ms Court mentioned, it often means that they move on, but we endeavour to be quite proactive in that exercise.

**Ms MURPHY:** Terrific. I know the ACCC has women very high up in the litigation and investigation sections, but I would also be interested in the figures in the in-house legal team and what the breakdown is.



**Answer:**

***ACCC/AER In-house lawyer breakdown***

Six out of the seven most senior in-house ACCC lawyers (General Counsel and five Deputy General Counsel) are female.

Legal Group staff Classification and title	Headcount			FTE		
	Female	Male	Total	Female	Male	Total
SES band 2 (Special or General Counsel)	1	1	2	1	1	2
SES band 1 (Deputy General Counsel)	5	0	5	4.6	0	4.6
L2 – Principal Lawyer	21	14	35	19.3	13.8	33.1
L1 – Senior Lawyer	5	5	10	5	5	10

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**ACCC13QW:**

The Committee has previously provided evidence of superannuation funds limiting a customer's ability to use their superannuation funds to pay for financial advice from a third-party adviser.

In the ACCC's response to this evidence ([ACCC02QON](#)), it advised that it would continue to consider potential competition issues in the superannuation industry as part of its broader remit into assessing anti-competitive conduct across the financial services sector.

Can you please advise how these investigations are progressing?

**Answer:**

The ACCC has not received any consumer complaints in relation to the superannuation fund issue previously presented.

The ACCC has a number of active investigations into anti-competitive conduct in the financial services sector. The ACCC's investigations are confidential. The ACCC continues to consider competition issues across the financial services sector, including in the superannuation industry, through its engagement with other financial regulators and as part of its advocacy role.