Submission to House of Representatives Standing Committee on Economics

Inquiry into promoting economic dynamism, competition and business formation

Professor Deborah Healey UNSW Sydney

Dr. Rhonda Smith University of Melbourne

31 March 2023

Introduction

The Standing Committee is examining 'the promotion of economic dynamism, competition and business formation, with reference to:

- The effect of a diverse and dynamic business environment on:
    - productivity, prices and better-paid jobs
    - our supply chain resilience to disruption
- The extent to which anti-competitive behaviour and changes in industry structures have contributed to rising market concentration in Australia
- The extent to which economic barriers—such as regulatory costs and barriers to finance, infrastructure, suppliers, customers and workers—contribute to rising market concentration and slowing business formation rates in Australia
- The extent to which businesses consolidating their market power has undermined productivity, stifled wages, made markets more fragile and led to higher mark-ups
- Drawing on international examples, how Australia could lower economic barriers to competition and business formation, further limit anti-competitive behaviour, and better manage changes in industry structure that would entrench, increase or extend market power.'

This submission does not comprehensively respond to the very broad Terms of Reference. Rather it focuses on two main areas which substantially impact competition and arise from concentration of markets: erosion of buyer power in the digital environment, and the crucial importance of appropriate and effective merger regulation in the Competition and Consumer Act 2010.

1 Attacking concentration: buyer power in the digital space

1.1 Introduction

1.1.1 During the past decade, concerns have grown in the US, Europe, and other regions regarding the increasing concentration of markets and the implications it has for market power. The Chicago

School of Economics is often blamed for this, as it promotes the idea of market self-correction, resulting in a lack of enforcement of competition laws. In 2017, Lina Khan criticized this approach, which assumes that market outcomes, such as firm size, industry structure, and concentration levels, are determined by the interplay of market forces and production requirements.[1] This paradigm shifts the focus of analysis away from the necessary conditions for competition and towards an overarching outcome of consumer welfare.[2] In our view the conditions for competition are of at least equal analytical importance.

1.1.2 Although Chicagoan philosophy as described may appear inadequate for analyzing recent competition phenomena, other regions that do not adhere to this approach have still experienced increases in market concentration. Additionally, the growth of firms has not solely been due to mergers, but also through organic means such as technological advancements and network effects.[3] These examples suggest that the reasons for the increasing market concentration may be attributed to various factors beyond the influence of the Chicago School. Unger, for example, suggests that: '…over the past forty years, large firms have particularly benefited from large investments in IT capital, investments that often only make sense at scale and in informationally intensive business models (e.g., simultaneously involving many different customers, suppliers, and product lines). These investments have in turn made these large firms even more productive.'[4] As a result of these changes, smaller firms have been unable to reap the benefits and have consequently lost significance, while market concentration has risen, particularly in the realm of digital platform markets. There have clearly been advantages and disadvantages arising from this.

However, these alternative explanations for increasing market concentration are not mutually exclusive: 'Digitisation, automation and stronger international division of labour, and market integration might have favoured larger firms to spread fixed costs and reap the benefits of new technologies….On the other hand, some observers are of the view that decreased competition, less stringent competition enforcement (the debate of which is particularly prominent in the US) and consequently anti- competitive large firm conduct pushed markets towards concentration and monopolization. Both these types of developments can be at play at the same time.'[5]

1.1.3 The aim of this submission is first to outline how digital platform businesses may increase

1 Lina M. Khan, Amazon's Antitrust Paradox, Yale Law Journal, 126 (3), 2017, p.4.
2 Ibid, p.11.
3 *See generally* Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 Bell J. Econ. & Mgmt. Sci. 16 (1974);
4 Gabriel Unger, The Limits of Antitrust in the New Economy, Competition Policy International, 25 October 2020. https://www.competitionpolicyinternational.com/the-limits-of-antitrust-in-the-new-economy/.
5 EU Competition Policy Brief Issue 2021/02 November 2021.

market concentration which may facilitate anti-competitive conduct in the market/s in which the platforms supply services and/or in the upstream markets in which they acquire inputs. The second aim is to consider two specific ways in which the buyer power of a dominant digital platform (or any other firm with buyer power for that matter) can be constrained in the Australian environment. The first of these is by allowing sellers to collectively bargain with the buyer. This has the advantage of redressing the imbalance in bargaining power to some extent and thus making the market work more effectively. A second way in which a dominant buyer can be constrained is by introducing a mandatory code of. This has the advantage of setting some parameters for the behaviour of the powerful party and the conditions contained in the agreements reached. Finally the submission will make brief comments on the current state of merger regulation in Australia, and attaches recent research by the authors on this issue.

2. The effects of increased concentration

2.1.1 Market Concentration

2.1.1 Schumpeter's theory of creative destruction posits that innovation and technological progress are the driving forces of economic growth, and the catalyst for shifts in market structure. In the current economy, the rise of what has been described as 'superstar' firms such as Facebook, Google, Amazon, Apple and Microsoft can be explained through this theory.[6] The growth of these platform based firms resulted from their superior performance, with firms harnessing technological advances and globalisation to accelerate productivity growth.[7] As a result, favourable network effects and the advantages of scale and scope were generated, which, depending on their potency, led to markets tipping in their favour.[8] The dominance of these firms is a result of creative destruction, as they have replaced less productive and outdated firms through innovation and efficiency gains. This, it is claimed, has enabled '…highly productive firms to dominate more than before, not least by expanding into new markets.'[9]

2.1.2 While Schumpeter did recognize the potential for monopolies and oligopolies to emerge as a

---

[6] For example, see Matej Bajgar, Sara Calligaris, Chiara Criscuolo, Luca Marcolin, and Jonathan Timmis, Superstar Firms Are Running Away with the Global Economy, Harvard Business Review 14/11/2019.

[7] David Autor, David Dorn, Lawrence F Katz, Christina Patterson, John Van Reenen, The Fall of the Labor Share and the Rise of Superstar Firms, *The Quarterly Journal of Economics*, Volume 135, Issue 2, May 2020, Pages 645–709, https://doi.org/10.1093/qje/qjaa004

[8] See, for example, Unlocking Digital Competition Expert Panel, Unlocking digital competition, March 2019 ('Furman Report') at 4, 64, 84, 102

[9] Ryan Borne, Does Rising Industry Concentration Signify Monopoly Power? Cato Institute, Economic Policy Brief No. 2, 13 February 2020. https://www.cato.org/economic-policy-brief/does-rising-industry-concentration-signifymonopoly-power#rising-national-concentration. More recently, see Report of the Digital Competition Expert Panel, Unlocking Digital Competition, March 2019, paragraphs 1.95 ff.

result of successful innovation and market leadership, he believed that these dominant firms are eventually displaced by new entrants who introduce even more innovative products and business models, thereby promoting competition and economic growth.[10] However, today some scholars and policymakers argue that the digital platform is unique in its ability to sustain market power not least through its incumbency advantage, but also through the platforms role as both an intermediary and a competitor, creating conflicts of interest and opportunities for anticompetitive behavior. Thus, the issue for competition law is whether digital technology has at the same time created a situation where the incentive and ability of the platforms to engage in conduct to preserve their dominant position is likely to result in unchecked anti-competitive harm. Opinions about this are strongly divergent – some claim the benefits of dominant digital platforms far outweigh the costs, others take the opposite stand. From the latter have come calls for change – more effective enforcement of antitrust laws, especially in relation to mergers, as well as for regulation of some of the activities of the dominant platforms.

2.1.3 Market concentration and the benefits that come from it provide the incentive for incumbents to engage in strategic conduct which has the purpose and/or effect of deterring entry and thus of substantially lessening competition. Market concentration, albeit in combination with other factors, also may affect the ability to engage in such conduct. Where entry and hence the potential for competition emerges in the form of a start-up business with an innovative product or new/improved technology, a dominant firm in a concentrated market has not only the incentive to acquire it but is better placed to do so than any other incumbent.[8] The DG Comp found in 2021 that the proportion of industries where the largest four firms accounted for at least 50% of the industry had doubled in the last two decades and that the most concentrated industry groups in the 5 largest European countries were in communication, energy, transport and finance companies. It concluded:[11]

'…one sees an increasing share of high concentration industries and increasing aggregate profit, with some industries-communication, finance and transportation, as well as digitally sensitive industries-particularly affected. This suggests that competition enforcement is operating in an increasingly complex environment, where difficult mergers are likely to become more frequent.'[12]

2.1.4 Of course, competition authorities have traditionally tended to treat information about market concentration as a 'stepping stone' to a competition analysis - a signal as to whether

10 Joseph Schmupeter, *Capitalism, Socialism and Democracy* (Harper & Brothers 1942) 74.
11 EU Competition Policy Brief, surpra note 5.
12 Ibid.

there may be a competition issue – rather than as part of that analysis.[13] Even if market concentration is high, as long as barriers to entry are low, it is generally accepted that market concentration is unlikely to give rise to competition issues, even when a merger reduces the number of market participants from three to two or even from two to one.[14]

2.1.5 More recently, competition law concerns about concentration have tended to focus on digital markets which have tipped due to first (or early mover) advantages and strong network effects which create high barriers to entry.

2.1.6 Market concentration may itself represent a barrier to entry. A market entrant must build sales by winning customers away from incumbents. In a market with many participants the effect on the sales of any one incumbent will likely be minimal, almost unnoticeable. However, the more concentrated the market the more sales the entrant must win from each incumbent for it to achieve minimum efficient scale. The entrant's small market share means that at this stage its average cost is likely to be higher than that of the incumbent.[15] In response to entry, the incumbent can lower its price to its average or marginal cost, causing the entrant to incur losses. If the entrant is unable to build its market share relatively quickly to achieve minimum efficient scale and eliminate its losses, something which other strategic conduct by the incumbent may influence, this may cause it to exit. Indeed, the prospect of such losses may actually deter entry or require that potential entrants are more efficient than the incumbent/s. This effect is not simply the outcome of economies of scale: it is market concentration that provides the incumbent with access to those economies.

2.2 Digital Platforms and Buyer power

2.2.1 Businesses, including platform businesses, in highly concentrated markets, are likely to possess substantial seller market power and/or they may also possess buyer market power. The effects of the former are well documented. In this respect, digital platform businesses challenge the traditional approach to analysing market power given that services are often free for consumers

[13] 'However, such crude aggregate proxies are not intended and are indeed unable to determine whether there is increasing market power in specific antitrust markets. That is a task for case-by-case assessments of competition investigations. Supra note 5.

[14] However, Sims and Woodbridge point out that even where barriers to entry are significant, competition may be effective despite high concentration levels.' They illustrate this by reference to markets where a maverick is present or where there is a strong competitive fringe. [Rod Sims & Graeme Woodbridge, The ACCC's Perspective on Part IV, Current Issues In Competition Law, Vol 1, Michael Gvozdenovic & Stephen Puttick (eds), 2021, p.34.]

[15] It is assumed that once established, the entrant's average cost would be no higher than that of the incumbent.

and platform operators compete through innovation. What has received less attention is the effect of concentration in the upstream market in which inputs are purchased, that is, of buyer power.

2.2.2 The degree of buyer power in an input market depends on three factors. The first is the market share of the buyer. This is because a significant reduction in purchases by the particular buyer may substantially reduce the supplier's profits. This will occur if: (i) there are inadequate alternative buyers to compensate for the loss of the particular buyer; and/or (ii) if there are significant switching costs in redirecting supply to other buyers. Second, buyer power is likely to be greater if supply is relatively price inelastic. This is because a relatively small reduction in the amount of the input acquired by the buyer will cause a significant reduction in the price of the input. Thirdly, buyer power requires barriers to entry into the downstream market to be significant and for the price elasticity of fringe demand to be relatively low. If this were not the case, the firm with buyer power could force down the input price but entrants and/or fringe acquirers would increase their purchases of the input and so force the price up again. These conditions are likely to be satisfied in concentrated digital platform markets.

2.2.3 The adverse effects of buyer power are well documented.[16] First, like seller power, buyer power results in reduced efficiency if purchases of inputs are restricted to depress the price paid for them and with less inputs production is reduced in the downstream market as well.[17] Second, buyer power may result in lower returns to suppliers and so investment, including in innovation, may be discouraged. Third, the exercise of buyer power causes a redistribution from sellers to buyers and this may have adverse effects in other related markets as well. Consumers in those markets may face higher prices and/or reduced quality or variety. In addition, the response of sellers to the exercise of buyer power may have anti- competitive consequences for their own suppliers or, by encouraging price discrimination, may disadvantage those competing with the firm(s) that possess buyer power.[18] Buyer power may be part of the reason why returns to labour have fallen relative to those to capital**.**

---

16 Many of the same features of market power are exhibited in relation to seller power in concentrated markets.

17 An exercise of buyer power does not always reduce input purchases – For example see Rhonda L Smith and Alexandra Merrett, To buy or not to buy: Economic and legal reflections on buyer power, *Competition & Consumer Law Journal*, 14 (2), 100-126 at 116-118.

18 The low price to the buyer(s) with market power may not translate into an average price for the seller that fails to yield normal profits if prices to buyers without market power can be raised. This is most likely where the seller supplies into several markets and possesses seller power in the market in which the firm with buyer power does not participate. For a more detailed discussion see Office of Fair Trading, The Welfare Consequences of the Exercise of Buyer Power (Research Paper No. 16, September 1998). See P.C. Carstensen (2017), Competition Policy and the Control of Buyer Power, Chapter 4.

2.3 Buyer power and Data Commodification

2.3.1 Where buyer power comes into play is through the acquisition of behavioral data for accurate forecasting of advertising purposes. Traditionally the business model of digital platforms is often perceived in the context of a two-sided market, where the platform acts as an intermediary between two groups of users, such as buyers and sellers, or advertisers and consumers. The platform provides a service or technology that enables these two groups. Internationally, the law on seller-side monopolization is considerably more developed than that on buyer power abuses.[19] This two-sided market model has become increasingly common in the digital economy, as platforms like Facebook, Uber, and Airbnb have emerged as dominant players in their respective markets.

2.3.2 However, underneath this, digital platforms operate fundamentally as retailers of users' personal information.[20] In the upstream market, digital platforms purchase personal information from large retailers and final consumers. This is done in exchange for search services or upon payment of money.[21] In doing so it extracts value from the raw data acquired through predictive algorithms, in order to sell to advertisers.[22] It is in this realm of the vertical market structure that competition analysis in extant literature has been limited, but ultimately will provide new insights into competition enforcement.

2.3.3 Data has an important influence on the competition of digital based platforms by virtue of the fact that the economics of digital data favours concentration and dominance.[23] The data that digital platforms are able to amass – which has been described as a form of vertical concentration - may assist them to entrench their market dominance. The more concentrated the market, the more information is potentially available to the dominant firm. Thus, 'the more data are available to platforms, the better the services that platforms will offer to both users and advertisers and, in turn, the more users and advertisers will use the platforms and bring more data and more money, respectively.'[24] This information enables the platform to respond to its customers in ways that are not open to an entrant/rival – feedback loops. It creates an asymmetry of information to the

[19] Thomas K. Cheng, 'Buyer Power in the Digital Economy: The Case of Uber and Amazon' (2022) 19(1) *New York University Journal of Law and Business* 1, 2.
[20] Giacomo Luchetta, 'Is the Google Platform a Two Sided Market?', (2014) 10(1) *Journal of Competition Law & Economics* 185, 1.
[21] Giacomo Luchetta, 'Is the Google Platform a Two Sided Market?', (2014) 10(1) *Journal of Competition Law & Economics* 185, 1.
[22] Ibid.
[23] (OECD, 2014, para. 13).
[24] Colangelo & Mariateresa Maggiolino (2017) Big data as misleading facilities, *European Competition Journal*, 13:2-3, 249-281, at 262.

disadvantage of rivals and makes the market position of platforms less contestable. This is more than just market efficiency. Multi-sided markets and network effects may act to entrench the incumbent in ways which entrants find very difficult to surmount.

2.3.4 In this model, the digital platform is a particular kind of retailer, buying users' personal information—which is used to profile users much more accurately than most other media—and processing it to match users and advertisers willing to deliver targeted messages.[25] A portion of personal information supply is obtained through end-users themselves and is reciprocated through the provision of search services. The remaining portion of the supply is procured from "wholesalers," such as major websites, other search engines, software developers - particularly browsers - and Original Equipment Manufacturers (OEMs) and is compensated through monetary means like any other input in production.[26]

2.3.5 The allegations against Amazon, for instance, for abusing buyer power are too numerous to be fully listed here. These allegations can be classified into six categories: (1) excessively low purchase prices, (2) unduly severe contractual terms, (3) Most Favoured Nation (MFN) clauses, which are often the platform's response to suppliers' reactions to its demands for low prices, (4) tying, (5) unfair competition with its own suppliers, and (6) coerced investment. The first two categories of abuse are clearly exploitative, as they result in Amazon's suppliers and third-party sellers being exploited. MFN clauses and tying are exclusionary practices. MFN clauses make it impossible for Amazon's competitors and potential new entrants to compete with Amazon by offering lower prices.[27]

3. Collective Bargaining to Constrain Buyer Power

3.1 The aim of competition law is to protect and foster competition so that markets operate efficiently. As noted, buyer power has adverse effects on the operation of markets not only in the market in which the buyer power is exercised but also in the downstream market and possibly in related markets. Given this, options for constraining buyer power include allowing collective action by sellers and/or by imposing a mandatory code of conduct relating to negotiation of prices. Each of these has historically been used to address buyer power in Australia, and more recently, to address issues arising from the acquisition of content from news media by Google and Facebook.

[25] Giacomo Luchetta, 'Is the Google Platform a Two Sided Market?', (2014) 10(1) *Journal of Competition Law & Economics* 185, 1.
[26] Ibid.
[27] Thomas K. Cheng, 'Buyer Power in the Digital Economy: The Case of Uber and Amazon' (2022) 19(1) *New York University Journal of Law and Business* 1, 2.

These approaches are discussed below.

3.2 How does collective bargaining reduce the effect of buyer power?

3.2.1 How does collective bargaining alter the outcome of negotiations? One of the key factors determining bargaining power is the options available to the parties if negotiations are unsuccessful. Consequently, if the buyer possesses substantial market power there will be few, if any, other options available to a seller, and so the buyer will likely possess substantial bargaining power, other things being equal. This has traditionally been highlighted in Australia in relation to negotiations in relation to perishable primary food products and areas like franchising.

Another relevant factor is the number and significance of the sellers. With numerous suppliers, especially if they are small, the buyer can afford to bargain more aggressively because the probability that negotiations will fail is low and if they do, the loss will not be significant as they will simply turn to another supplier – suppliers can be played off against each other.

3.2.2 Collective bargaining by sellers reduces the options available to a buyer with market power. The success of this depends in part on the completeness of the seller group that is collectively bargaining. Assuming no other relevant factors, if all sellers collectively bargain this will equalise the bargaining power of the sellers and the buyer resulting in an equal split of the gains from trade. Collective bargaining may reverse the balance of power if the product is an essential input into the buyer's business.

3.3 Collective bargaining and competition law

3.3.1 Collective bargaining is cartel conduct: in some jurisdictions it is prohibited absolutely as hard core cartel conduct. It removes the competitive constraint arising from competition between sellers to supply potential buyers. Nevertheless, markets fail in any event if there is a lack of competition on the buyer side of the market. Whether the conduct in fact has an anti- competitive effect will depend upon the actual circumstances.

3.3.2 But collective bargaining may result in markets working better – more efficiently – and not only because it balances bargaining power. Collective bargaining may result in more efficient negotiations thereby reducing transaction costs compared to one-on-one negotiations.

However, the efficiency of contracts negotiated between parties also depends on the extent to which relevant information is available to the parties. Asymmetry of information is not unusual especially, but not only, when the buyers are small businesses. Collective bargaining enables the

pooling of information and may improve the use of information. Potentially it may enable more complete and efficient contracts to be negotiated that better reflect the needs of members of the bargaining group. This in turn improves the efficiency of the market and the competitive process within it.

3.3.3 Thus, the welfare effect of the collective bargaining depends on the balance between the adverse effects of creating a seller cartel and the adverse effects of the buyer's market power, together with any other benefits that might result from collective negotiation.

3.4.1 Exempting collective bargaining - public v private benefit

3.4.1 EU competition law permits collective bargaining by employees in relation to working conditions and during 2021-2022 the EC consulted on collective bargaining. However, this was confined to clarifying the applicability of EU competition to collective bargaining by self-employed persons. Similarly in the US, any consideration of collective bargaining appears to be confined to labour relations, including in relation to sports and the gig economy. In neither the EU nor the US is there any provision currently for an exemption for collective bargaining in relation to matters that do not relate to labour relations.

3.4.2 Under Australian competition law, conduct that would otherwise contravene the prohibition against anti-competitive conduct, including cartel conduct, can be exempted if the conduct is likely to result in public benefits which exceed any associated public detriments. The process is referred to as authorisation and provides immunity for the specified conduct by specified applicants in the future (but not retrospectively). It is an extremely long-standing and well-established process with very many examples of collective bargaining granted exemption over the years after full consideration of the circumstances and the formal opportunity for input into the process of other interested parties.[28] When applying for authorisation, the applicant must explain why the conduct will result in a net public benefit and must provide evidence to support the claim

[28] Recent examples include: The Australian Directors' Guild in respect of collective negotiation of model terms of engagement with Screen Producers Australia Authorisation number: AA1000556, 29 September 2021; Honeysuckle Health Pty Ltd and nib health funds limited in respect of the Honeysuckle Health Buying Group, Authorisation number: AA1000542 21 September, 2021; Clubs Australia in relation to Application for authorisation AA1000444 June 2019; National Honda Dealer Council Limited in respect of collective negotiations with Honda Australia regarding new dealer agreements Authorisation number: AA1000528, 2 December 2020. Details are available at https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/collective- bargaining-notifications-register

3.4.3 Alternatively, in some circumstances the onus for establishing the net public benefit may be reversed, that is, it lies with the Australian Competition and Consumer Commission (ACCC) and this is referred to as notification.[29]

3.4.4 As part of an inquiry into the competition law in 2003, submissions suggested that in addition to the existing processes, small businesses should be allowed to notify proposed collective bargaining conduct and proceed with the conduct unless the ACCC objected. This new process which was more easily and cheaply accessed by small business became available in January 2007 for individual businesses with a transaction value in relation to the other party of less than $3 million per annum. Then in 2015, the Harper Review recommended, and the government accepted, the introduction of changes to the notification for collective bargaining by small business to provide greater flexibility[30] and also adding a class exemption provision.[31] The class exemption provision allows the ACCC to exempt defined conduct from the reach of the Competition and Consumer Act (CCA) and removes the need for businesses to lodge individual applications in respect of particular types of collective bargaining conduct. Thus, since 3 June 2021, small business, franchisees and fuel retailers have been able to use a 'class exemption' to collectively bargain without the need to justify the proposed conduct.[32] Within 12 months of the introduction of class exemptions , 47 class exemption notices had been lodged with the ACCC.[33] Businesses that do not qualify for this exemption may still apply for an exemption via the authorisation process. The ACCC, for example, authorised collective bargaining by each of Country Press Australia and by Radio Australia (neither is covered by the Code) with Google and Facebook, as to which see below.[34]

3.5 **Collective boycotts**

3.5.1 A buyer with sufficient market power may refuse to negotiate, instead making a take-it-or-leave-it offer. Collective bargaining is only an effective constraint to the extent that the counterparty is prepared to engage with the process. Thus, to be effective in certain circumstances collective bargaining needs to be facilitated by the additional right to collectively boycott (as is the

---

29 It is a less formal process not available for all conduct.

30 Competition Policy Review – Final Report, March 2015, Section 22.2 and Recommendation 54. https://treasury.gov.au/publication/p2015-cpr-final-report

31 Ibid Section 22.3 and Recommendation 39.

32 ACCC, Collective Bargaining Class Exemption, 3 June, 2021. https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption-0.

33 Ibid.

34 ACCC, Media Release, 5 August 2021 at https://www.accc.gov.au/media-release/country-press-australia-can-collectively-bargain-with-google-and-facebook; ACCC, Media Release, 29 October at https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations- register/commercial-radio-australia

case in the labour market). While there may be legitimate reasons for refusing to collectively bargain, one reason may be that it would result in more balanced bargaining power between the parties to the disadvantage of the counterparty. Such a refusal would be unlikely in a competitive market. [35] Seen simply as a reallocation of the value from trade it would be unlikely to substantially lessen competition.

3.5.2 However, Kemp[36] and Williams[37] argue that increased efficiency – productive, allocative and dynamic – fuels competition. Consequently, if absent the refusal the market would operate more efficiently, the refusal may constitute a lessening of competition. Whether it would be determined to be a *substantial* lessening would depend on the extent of the efficiency increase resulting from collective bargaining. Especially in markets where this imbalance is structural and likely to persist, it might be concluded that something more than the right to collectively bargain is needed to enable successful collective bargaining to occur, that is, the ability under certain circumstances to threaten or to engage in a collective boycott. This would impose a cost on the counterparty if it refused to collectively negotiate.[38]

3.5.3 Having authorised a group of chicken growers to collectively boycott subject to various conditions in 2005[39] and then had the Australian Competition Tribunal overturn its decision,[40] thereafter the ACCC was unwilling to authorize such conduct. However, its position seems to be shifting. Addressing small business, the ACCC stated:

'In certain circumstances, a collective boycott may help the group achieve some of the benefits of collective bargaining. For example, attempts by small businesses to collectively bargain with a large customer or supplier without the ability to threaten and/or engage in a collective boycott can be ineffective where the target business refuses to negotiate with the group.'[41]

3.5.4 Published in 2018, the ACCC's Collective Bargaining Guideline states: ''[a] collective boycott

---

35 In *Port of Newcastle*, although it operated a bottleneck facility, PNO argued that it did not possess 'unfettered market power' [Tribunal paragraph 71] and the Tribunal accepted 'that PNO's market power is significantly constrained by its dependence on export coal and the threat of regulation' [Tribunal, paragraph 252]. It is clear that PNO and the coal producers are co-dependent but this does not necessarily mean that their market power and bargaining power were equal.

36 Katherine Kemp, Misuse of Market Power: Rationale and Reform, 2018, p. 176-179.

37 Philip Williams, Fact-Value Complexes in the Old and New Versions of Section 46, Current Issues In Competition Law, Michael Gvozdenovic & Stephen Puttick (eds), Vol II Practice and Perspectives, 2021, 139-147

38 Similar to a strike in the context of negotiations by workers over wages and conditions.

39 Applications for Authorisation lodged by the Victorian Farmers Federation on behalf of its member chicken meat growers in relation to collective bargaining by chicken meat grower groups with their nominated processors in Victoria, Authorisation nos. A40093, A90931, 2 March 2005, iv - v. https://www.accc.gov.au/system/files/public-registers/documents/D05%2B9999.pdf

40 Re VFF Chicken Meat Growers' Boycott Authorisation [2006] ACompT 2. http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ACompT/2006/2.html

41 ACCC Small Business Education Program: What are collective boycotts?, undated. https://www.accc.gov.au/business/anti-competitive-behaviour/collective-bargaining-boycotts#collective-boycott

can be a useful negotiating tool to bring the target business to the table or restart stalled negotiations.'[42] It identifies factors relevant to the assessment of proposed boycott conduct as including the size of the target business, the strength of competition in downstream markets, the potential and likely duration of harm to third parties, outcomes of previous collective bargaining, and limitations on boycott activity.[43] Despite this, the class exemption for collective bargaining by small businesses which came into effect in mid-2021 does not include a right to collectively boycott. The Commission's Guideline concerning class exemptions specifically states that: 'in some cases collective boycotts can be costly and damage a wide range of market participants, including the group that is engaging in the boycott. The class exemption does not provide protection from competition laws for collective boycotts.'[44] A separate application for authorisation would need to be made and would only be granted if contrary to the view of the Tribunal in the poultry meat matter,[45] the ACCC was convinced that possession of a boycott authorisation would not distort market outcomes compared with those expected in efficient markets.

3.5.5 It is crucial to the effectiveness of collective bargaining provisions that collective boycotts are available to the weaker parties. Without this possibility, the effectiveness of the collective bargaining conduct is markedly reduced and the provision loses much of its force. More work is needed to identify the conditions under which collective boycotts should be allowed to preserve the utility of these flexible provisions and ensure that collective boycotts are available to collective bargainers in a wider range of cases. Not all situations of low market power are typical enough to warrant Industry codes of conduct.

4. Industry Codes of Conduct

4.1 As noted above, most of the authorisations and other exemptions granted by the ACCC do not allow the collective parties to collectively boycott the acquirer if satisfactory terms are not

42 ACCC, Collective Bargaining Guideline 2018, p.13.

43 Ibid.

44 ACCC, Collective bargaining class exemption Guidelines, June 2021, pp. 2-3.

45 Australian Competition Tribunal, Re VFF Chicken Meat Growers' Boycott Authorisation, supra note 36, paragraph 383.

reached. This additional conduct is still illegal, which is a limitation on the exemption process.[46] This means that other mechanisms can be needed to address buyer power. These include industry codes of conduct which have been employed across a range of industries which experience has shown have proven problematic. Australia has specific provisions in its CCA for voluntary and mandatory codes of conduct.[47] Voluntary Codes of Conduct only apply to those in the subject industry who become code members, while mandatory codes of conduct must be followed by and the entire industry. The Dairy Code of Conduct, for example, regulates the conduct of farmers and those buying raw milk from them. Farmers have little bargaining power due in large part to the perishability of their product and the small number of potential purchasers for the product in any geographic area. The Code provides that all contracts for the supply of raw milk from farmers must comply with the Code. Infringement notices may be issued by the ACCC, which may also seek penalties in court for non-compliance.[48]

4.2 In relation to digital technology in the news industry, while its introduction significantly reduced the cost of producing and distributing newspapers, it also saw a significant loss of advertising revenue because digital platforms offered sellers a more targeted audience. This resulted in a change in business model of the news media to a subscriptions base. The relationship between the news media and the major platforms, Google and Facebook, is ambiguous:

'There is a two-way relationship between news media businesses and Google. Google provides a referral service to news media businesses, offering a channel through which an online audience can be reached. Links to, and snippets of, news media content enhance the attractiveness of the service Google is able to offer consumers. A significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity. The

---

46 In one example, the ACCC did authorise a collective boycott conduct by the collective bargainers. However, this was overturned on appeal by the Competition Tribunal, on the basis that the collective boycott had potential to inflict harm, and the outcome was too uncertain to be able to say whether it could be in the public interest. ACCC Media Release*, Australian Competition Tribunal says no to collective boycott for Victorian Chicken Growers,* 27 April 2006 https://www.accc.gov.au/media-release/australian-competition-tribunal-says-no-to-collective-boycott- for-victorian-chicken.

47 CCA, Part IVB Industry Codes.

48 Other Codes of Conduct include the Electricity Retail Code, the Franchising Code of Conduct and the Wheat Port Code of Conduct. Voluntary Codes include the Food and Grocery Code of Conduct. Codes of Conduct are generally prescribed under the CCA. As to enforcement, see s51ACB, which prohibits corporations from contravening a mandatory code or a voluntary code which the corporation has agreed to join. Injunction, damages and other orders may result from such breaches: s80, s82, s87 CCA.

ACCC therefore considers that Google has significant bargaining power in its dealings with these media businesses.'[49]

4.3 Unlike others republishing material from the news media who paid a copyright fee, neither Google nor Facebook paid for material they reproduced. In response to this and to declining advertising revenue, there was concern about the impact of digital technology on the quality of news reporting. Thus, in December 2017 the ACCC was instructed by the Commonwealth Government to undertake an inquiry into digital platforms, focusing on the impact of digital platforms on the choice and quality of news and journalism. The ACCC's Digital Platforms Inquiry report was released in July 2019. It found that:

'The ubiquity of the Google and Facebook platforms has placed them in a privileged position. They act as gateways to reaching Australian consumers and they are, in many cases, critical and unavoidable partners for many Australian businesses, including news media businesses.'[50]

4.4 The ACCC found that both Google and Facebook possessed substantial market power *inter alia* in their dealings with news media. The most prominent imbalance of bargaining power was found to be the inability of news publishers to individually negotiate terms and conditions around the use of their content by digital platforms. Its recommendation was for '[d]esignated digital platforms to provide codes of conduct governing relationships between digital platforms and media businesses to the ACMA.'[51] Although the recommendation implies a voluntary code, when implemented it was mandatory.[52]

4.5 The aim was to allow 'news media businesses to bargain individually or collectively with designated digital platforms about payment for the inclusion of news on their services.'[53] Under the mandatory code, digital platforms may be designated by the Treasurer as subject to the code. 'In deciding whether to designate a digital platform, the Treasurer must consider whether there is a significant bargaining power imbalance between the platform corporation and Australian news businesses, and also whether the platform corporation has made a significant contribution to the sustainability of the Australian news industry, including through agreements to remunerate those

49 ACCC, Digital Platforms Inquiry Final Report, 2019, p.8.
50 Ibid p.1.
51 Ibid p.14.
52 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 (Cth), effective 3 March 2021.
53 ACCC, News media bargaining code, https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code

businesses for their news content.'[54] Following the introduction of the code, Google and Facebook (now Meta) reached voluntary agreements with a number of news media organisations. A review of the Code by Treasury after its first year of operation found that more than 30 commercial agreements were made between Google and meta and a cross section of news businesses, which were highly unlikely to have been made without the Code.[55]

4.6 The ACCC has also authorised collective bargaining by each of Country Press Australia, an industry body representing some 81 news local publishers in regional communities across the country, and by Radio Australia (neither is covered by the Code) with Google and Facebook.[56] The authorisation also allows the participants for 10 years to discuss and exchange information with each other regarding the negotiations. The public benefits accepted by the ACCC were likely reduced transaction costs to the small businesses, their improved input into negotiations and contributing to the sustainability of Australian news businesses. Participation is voluntary and the authorisation does not allow collective boycott conduct.

5. Merger Reform

The proposals above address the effects of market concentration rather than the cause of it. One reason why market concentration may increase is if it is not possible to prevent anti-competitive mergers. Arguably there are a number of flaws in the current regulation of mergers under the CCA which enhance the ability of firms to merge perhaps even when there are legitimate competition concerns. Issues encountered in assessing the competition effects of platform acquisitions include difficulties establishing that the acquisition of a 'start-up' or nascent competitor will substantially lessen competition, and the complexity of assessing mergers where the acquisition adds to the platform's ecosystem. More broadly, there are concerns that these mergers, and in fact merger in other industries, cannot be successfully prosecuted given existing procedures. This reflects the problems that arise in complying with the Evidence Act when the effects of the merger have yet to occur, and the future is dynamic and consequently uncertain. These difficulties are coupled with uncertainties around the burden of proof in merger review in the courts, and the lengthy judicial process for finalizing merger challenges. The attached paper explores these concerns and puts

[54] ACCC, News media bargaining code, https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code

[55] Treasury, News Media and Digital Platforms Mandatory Bargaining Code. The Code's first year of operation, November 2022, p.9. https://treasury.gov.au/publication/p2022-343549

[56] ACCC, Media Release, 5 August 2021 at https://www.accc.gov.au/media-release/country-press-australia-can- collectively-bargain-with-google-and-facebook; ACCC, Media Release, 29 October at https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/commercial-radio-australia

forward suggestions for change to the process for assessing the competition effects of proposed mergers. The ACCC flagged proposals for merger reform in 2021 and has flagged the release of its further merger reform proposals in the near term following consultations and further consideration. But the basic problems outlined in the paper remain.

6. Some concluding thoughts on collective bargaining, codes and merger reform

Just as substantial seller power can be prosecuted under competition law if it is being used to damage the competitive process, so too can substantial buyer power. A number of significant cases involving the major digital platforms currently are held up in the courts internationally and will likely take a long time to conclude if one includes time for appeals. These cases are expensive and unpredictable. Increasingly the response to technological change seems to have been to look for means to regulate despite the inefficiencies that result. Responding to concerns about concentration, on 9 July 2021 US President Biden issued an executive order concerning antitrust which, together with his appointment of Lina Khan to the chair of the Federal Trade Commission (FTC), signaled a change of direction in US antitrust policy. He stated: '…it is the policy of my Administration to enforce the antitrust laws to combat the *excessive concentration of industry*, the abuses of market power, and the harmful effects of monopoly and monopsony…'[57] Although numerous bills are at various stages of preparation, no laws have been implemented in the US to address these comments. Instead, or as well, perhaps more thought needs to be given to how to make markets work better given technological change. Following its Digital Platforms Inquiry and subsequent inquiries, Australia is implementing a number of responses to competition issues. But formally allowing collective bargaining and industry codes (which might be considered light handed regulation) under the CCA are two existing methods which apply effectively to digital buyer power, and which might be considered by other jurisdictions. Collective bargaining would be enhanced by further consideration and specification of the conditions under which collective boycotts are acceptable.

The current CCA regulation of mergers is not fit for purpose. Major reform to address a number of issues covered by the Terms of Reference is required.

[57] "Executive Order on Promoting Competition in the American Economy," issued on July 9, 2021 (emphasis added). https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on- promoting-competition-in-the-american-economy/