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The Chinese Anti-Monopoly Law: Lessons for Australian Banks and Chinese Regulators

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Zhang Chenying **

Table of Contents

Executive summary 5
Lessons for Australian banks 6
Lessons for Chinese regulators 7
Analysis of law, regulation and practice 8
  Application of other laws and regulations 8
  Approach to merger analysis of competition regulators 9
  Impact of merger notification thresholds in China 10
  Market definition 11
  Application of merger factors to bank mergers 11
  Conditional mergers 12
  Need for robust competition policy in addition to law 12

PART 1 14
  1.1 Introduction to the project 14

PART 2 16
  2.1 Methodology 16

PART 3 17
  3.1 Shifting frameworks 17
  3.2 The Third Plenum October 2013 17
  3.3 Competition law and financial system reviews in Australia 17
  3.4 Free Trade Agreement between Australia and China 19

PART 4 20
  4.1 Competition law: The role of the market 20
PART 5
5.1 Political economy and regulatory context of China: a socialist market economy
5.2 Implications from the form of the AML
5.3 Australia: a market economy

PART 6
6. The Banking Environment
6.1 Introduction
6.2 Banking Landscape in China
6.3 Banking regulation in China
6.4 Regulation of foreign banks
6.5 Shadow banking
6.6 Shanghai Free Trade Zone
6.7 Further reform of the Chinese financial system
6.8 Conclusions on Chinese Banking System
6.9 Australian financial organisations in China

PART 7
7. The Banking Environment in Australia
7.1 The banking landscape
7.2 Banking regulation
7.3 Foreign banks: regulation
7.4 Further reform of the financial system: competition policy going forward

8. The competition laws in brief
8.1 Introduction
8.2 Merger regulation and comparisons
8.3 The AML and mergers: issues arising
8.3.1 Notification requirements 58
8.3.2 Application to joint ventures 59
8.3.3 Extraterritorial reach 60
8.3.4 Conclusion 60
8.4 Market definition 61
8.5 Merger test: the factors 62
8.6 Indications from merger determinations: China 65
  8.6.1 Overall results 65
  8.6.2 Impact on foreign parties 65
  8.6.3 Refusal to allow a merger 66
  8.6.4 Different outcomes in conditional mergers 67
  8.6.5 Categories of conditions 67
  8.6.6 Conclusions on MOFCOM determinations 73
  8.6.7 Implications for banking markets in China 74
8.7 Australian bank mergers 76
  8.7.1 The merger test 76
  8.7.2 Competition in the Australian Banking Environment 76
  8.7.3 Notable Australian bank merger decisions 80
  8.7.4 Trends in ACCC determinations 85
8.8 Conclusions: the jurisdictional distinctions in focus 86

APPENDIX A 88

REFUSALS 88
  Coca Cola/Huiyuan Juice 2009 88
  Maersk/Mediterranean Shipping/CMA CGM 2014 88

CONDITIONAL APPROVAL 89
  Google/Motorola Mobility 2012: Maintenance of status quo 89
Seagate/Samsung 2011: Maintenance of status quo  90
Marubeni/Gavilon 2013: Hold separate conditions  91
Walmart/Newheight 2013: Limitations on integration  91
Uralkali/Silvinit 2011: Certainty of supply  92
Glencore/Xstrata 2013: Structural and behavioural conditions  92
Thermo Fisher Scientific/Life Technologies: Pricing conditions  93

APPENDIX B  94
Westpac/Bank of Melbourne (1997)  94
Commonwealth/Colonial (2000)  95
Bendigo Bank / Adelaide Bank (2007)  95
Westpac Banking Corporation/ RAMS Home Loans Pty Limited (2007)  95
Westpac/ St George (2008)  96
Commonwealth/BankWest (2008)  97
Aussie Home Loans/Wizard Home Loans (2009)  98
Commonwealth Banking Corporation/Aussie Home Loans (2013)  100
Westpac Banking Corporation/Lloyds International Pty Ltd (CFAL and BOSI) (2013)  101

Bibliography  102

Appendix C  118

Sample interview /questionnaire for China and Australia  118
Executive summary

This research project compares the application of the competition laws of China and Australia to bank mergers, against financial regulatory frameworks and the dual objectives of competition and economic stability. As the title indicates, it seeks to identify lessons for Australian banks and Chinese regulators. A number of features dictate that the two jurisdictions will differ on many issues: ideological approach to the role of the market and the degree of appropriate government intervention; stage of economic development; nature of banking markets, particularly the extent of regulation. All of these features mean that many comparisons which could be made were not really of like with like. The research found a number of differences between approaches to merger analysis, particularly in relation to the role of competition itself.

Financial stability is important in both jurisdictions. The Ministry of Commerce (MOFCOM) has the responsibility for reviewing mergers under the Anti-Monopoly Law of China (AML). There are no MOFCOM bank merger determinations under the AML at this point, but China places particular emphasis on financial stability as part of its national development agenda. This is unsurprising as despite its size and economic power China is still a developing nation. The research found that there are a number of examples where MOFCOM merger determinations in other areas of industry diverge from a pure competition-based analysis, but the divergences are generally within the terms of the AML. MOFCOM’s approach is founded in the political economy of the People’s Republic of China (PRC), which influences a number of features of the AML, meaning that the outcomes are uniquely Chinese. The AML is enforced by MOFCOM but questions remain about the nature of its application to mergers in sensitive industries. Despite the size of the country, market definition tends to be geographically very broad, which may also affect outcomes in all industries including banking.

A number of implications for bank mergers arise from these conclusions, both in relation to Chinese domestic and to international bank mergers. Banking markets are the context of any MOFCOM bank merger determination. China continues to slowly open up its heavily regulated financial markets, but there are still very rigidly defined categories of banks and permitted activities. Significant regulatory

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barriers to investment by foreign banks remain. While there has been some loosening of entry, many regulatory features significantly affect both market entry and bank competition.

In the Australian context, the Australian Competition and Consumer Commission (ACCC) considers mergers under the *Competition and Consumer Act 2010* (Cth) (CCA), mainly under its informal clearance process. The research found that the ACCC determines mergers, including bank mergers, on competition grounds alone. Despite the active consideration of competition by the regulator, the market is concentrated and a relatively narrow range of bank competition exists following a number of bank mergers and other international developments. Prudential regulators and ultimately the Treasurer may override an ACCC bank merger determination. Recent government reviews have made competition policy recommendations to support existing competition law, with the object of increasing competition in all markets and particularly banking and finance markets.

There are, however, a number of lessons to be drawn from this investigation.

**Lessons for Australian banks**

- The barriers to entry for foreign banks in China are very high. Foreign market entrants are unable to secure a dominant stake in most categories of bank because of complex and prescriptive regulation, some of which applies solely to them and not to their Chinese domestic competitors. Most categories of banking are very heavily regulated for all market participants. Flexibility to offer new products and services is low and growth difficult. Policy directives from central government often influence lending decisions.

- Based on examples of merger determinations from other industries and given the importance of banking stability to the Chinese economy, competition is unlikely to play a large part in any assessment of a bank merger by MOFCOM. Issues linked to “national economic development” are likely to play the most important role, which makes outcomes less predictable.

- Given the low thresholds for notification which MOFCOM has set, a greater number of merger transactions are notifiable to MOFCOM than would be expected to be the case elsewhere. Once notified MOFCOM has jurisdiction to determine whether the transaction lessens competition without recourse to any set threshold of lessening. This includes international mergers where the parties have relatively small operations in China.
• Once seized with jurisdiction in this way, MOFCOM may determine the issue on grounds linked to national economic development and impose conditions.

• Conditions imposed by MOFCOM are often sweeping and in many cases do not appear to be linked to competition concerns. This is a significant imposition on merging parties, both domestic and international.

Lessons for Chinese regulators

• Market definition is a tool to assist in determining outcomes in merger transactions. Australian jurisprudence around market definition generally, and particularly in relation to banking, may prove useful in consideration of mergers and bank mergers in China. Australian market definition tends to focus on smaller geographic areas than appears to be the case in China. Consideration of bank mergers in China in appropriate situations by way of more limited geographic markets may be a better tool for determining their competitive impact. Consideration of a more precise range of substitutable products and services may also be more useful. Of course market definition always depends upon the facts of the particular situation.

• Australian jurisprudence around “substantial lessening of competition” under s50 CCA is relevant to interpreting what constitutes “eliminating or restricting competition” under Article 28 AML, although the AML does not contain a stated threshold on the prohibited level of lessening. Australian law has already been applied in the only MOFCOM determination discussing a foreign regulatory determination to date, when the Coca Cola/ Huiyuan Juice\(^2\) case referred to the ACCC decision in the Coca Cola/Berri Juice case.\(^3\) The Australian approach which has been applied to bank mergers on a number of occasions may also prove useful in a banking context in China.

• Australia has recognised the importance of competition by its incorporation into the mandates of regulators throughout the Australian regulatory system. This is designed to foster a more competitive environment generally in conjunction with the competition law. This has recently been reinforced in Australia in legislative reviews. Although the AML has specific provisions on

\(^2\) [2009], MOFCOM No 22 of 2009, 18 March 2009.

administrative monopoly, which deal with anti-competitive impact of regulations and actions of regulators, regulators generally appear to lack a more general competition mandate in China. Where there is mention of competition in banking regulation it appears to have little impact. The administrative monopoly provisions are not heavily policed and enforced, although this is a very difficult task in such a large jurisdiction with so many rules and regulations. There are also difficulties with the enforcement system for administrative monopoly. A clearer focus on the overall impact on competition of individual regulations may assist in developing more competitive markets in China.

More detailed findings on aspects of the research are set out below.

Analysis of law, regulation and practice

Application of other laws and regulations

- Mergers between banks are subject to similar competition merger rules by competition regulators in both jurisdictions, although the AML contains some unusual factors for consideration. Notification to MOFCOM is mandated over set turnover thresholds. Parties in Australia generally approach the ACCC based on a risk analysis for informal clearance, although more formal procedures such as authorisation (administrative consideration) and the courts may determine merger scenarios.

- Other regulators are involved in bank merger approvals in both jurisdictions. In China it is unclear whether other laws or regulations, or other regulators such as the China Banking Regulatory Commission (CBRC) or the State-owned Assets Supervision and Administration Commission (SASAC), have priority in decision making over MOFCOM. On the wording of the AML, and given the place of competition in the political agenda and MOFCOM in the political hierarchy, it is likely that this will be the case. In Australia, the ACCC generally decides bank mergers under the CCA transparently on competition grounds. Other regulators and the Treasurer review bank mergers on separate and different criteria. Ultimately the Treasurer may refuse permission for a merger despite ACCC approval.

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4 There are, however, special rules on calculating bank turnover for the purposes of notification under the Anti-Monopoly Law of the People’s Republic of China (People’s Republic of China), National People’s Congress, 1 August 2008, discussed later. There has been a tendency for State Owned Enterprises not to notify under the AML.

5 Ibid, art 7, and 51 may be relevant here.
Both countries have specific rules relating to the acquisition of domestic assets by foreign entities generally. The treatment of mergers involving foreign entities and the related issue of protection of ‘national champions’ under domestic industrial policy arises in both markets, whether it be through the Treasurer’s oversight of the ‘national interest’ in Australia or China’s formal national industrial policy. It is worth noting however, that the practical threshold for what constitutes a ‘national champion’ appears to be a higher in Australia than in China.

Approach to merger analysis of competition regulators

No applications have been made to MOFCOM to consider bank mergers in China to date, so the conclusions in this Report are based on the wording of the AML, merger case studies in other industries and the interviews conducted. Given the importance of banking to stability and national economic development, assessment of a bank merger by MOFCOM is very likely to be heavily influenced by factors other than the anti-competitive impact of the merger. Prominent among these factors are the impact of the merger on national economic development, the objectives of the AML itself and other non-competition factors listed in the merger provisions. This means that competition assessment alone is unlikely to determine the outcome of a bank merger notification to MOFCOM in China. In short, due to factors such as the historical mix, the inherent nature of banking and the wording of the AML, stability and national economic development will likely trump competition where bank mergers are involved. There is a distinct tendency in the merger decisions available under the AML in other industries to look at the impact of the merger “on China”.

As a practical matter, other regulators in China also consult with MOFCOM during its consideration of mergers. Most interview respondents from China who were competition lawyers stated that the usual practices of MOFCOM would apply to a bank merger. Participants from the banking side indicated that nothing would be done without CBRC approval, and that the CBRC would be the pre-eminent regulator in a bank merger situation, particularly in circumstances of financial crisis.

Merger notification in Australia is not compulsory and the most common approach to the ACCC is informal, with consideration based on the likelihood of an anti-competitive outcome, not a turnover threshold. Analysis of mergers generally and decided bank mergers indicates that the
ACCC focus is most likely to be solely on competition outcomes arising from the merger. While the ACCC consults with other regulators and interested parties, interview participants were generally confident that competition issues alone directed ACCC outcomes, although some participants suggested that there may be other intervention in times of economic crisis.

**Impact of merger notification thresholds in China**

- MOFCOM has set low turnover thresholds for the notification of mergers under the AML. This means that many mergers for which notification is required do not affect market competition in practical terms. They are, however, within the scope of MOFCOM’s consideration and may be considered under the non-competition factors of the AML, such as impact on national economic development. This feature potentially impacts the three categories of mergers: mergers between domestic banks, acquisitions of Chinese domestic banks by foreign banks, and international bank mergers.

- In the context of domestic mergers, the low notification thresholds mean that mergers and acquisitions between state-owned enterprises (SOEs) which are banks should be notified. It is unclear whether mergers are occurring and not being notified, or whether they are not occurring.

- Despite the constraints on acquisition by foreign banks in China, which generally limit them to minority shareholdings, the low notification thresholds mean that mergers between a domestic bank and a foreign bank may require notification even in circumstances where it is unlikely to result in anti-competitive impact. Once MOFCOM is seized with jurisdiction in these circumstances, competition issues alone are not likely to determine the outcome for reasons noted above. Based on analysis of previous examples of conditional MOFCOM determinations in sensitive industry mergers, even where shareholdings are low and changes in ownership small, MOFCOM may impose conditions on the merger. This is of concern to international banks contemplating a merger in China.

- These notable features of AML merger determination by MOFCOM also have important implications for international mergers between two foreign banks which have a presence in
China. The low notification thresholds mean that these may be subject to notification under the AML even in circumstances where the level of business in China is relatively low. This again means that conditions may be imposed by MOFCOM, on international transactions looking at issues such as national economic development despite small operations (as a proportion of market share) in China.

- The different notification process of the merger test in Australia and its focus solely on competition mean that none of these issues are relevant to the ACCC’s determinations.

**Market definition**

- While the approach to market definition is similar in each jurisdiction, MOFCOM defines geographic market more broadly. In the context of previous mergers the market is generally the market “in China”, despite the size of the country and the diversity of industry and consumers.

- Across all industries, ACCC determinations of geographic market are more likely to investigate a narrower geographic market, although this will certainly depend upon the facts. In relation to bank mergers, earlier ACCC determinations focussed more on state based markets, but this has changed. With the growth of technology and the decrease in importance of branch networks, more recent ACCC bank merger determinations have tended to define more markets as national markets. This has also been due to the increasing concentration in banking markets. However, some areas such as small and medium enterprise (SME) banking and agribusiness, where branches are critical to relationships, are still examined at a more local level, for example on the basis of competition within a state. Pricing is generally considered on a national basis in the context of analysis.

**Application of merger factors to bank mergers**

- The legislative tests in both jurisdictions refer, put simply, to a lessening of competition following the merger. However, in Australia that lessening must be “substantial”. The AML does not set a threshold for the degree of lessening of competition which will allow MOFCOM to intervene. Coupled with other non-competition factors mentioned above this gives MOFCOM significant discretion to intervene in a merger.
In practice MOFCOM determinations look at the impact of the merger “on China”, which is subtly different from the impact of competition on a particular market in China, and incorporates non-competition features such as national economic development.

**Conditional mergers**

- Based on previous MOFCOM determinations, conditions imposed on a merger may be detailed and sweeping. This reflects the MOFCOM view that it should be flexible and allow mergers with comprehensive conditions rather than disallow them, particularly in assessing mergers in sensitive industries in a global context.

- Conditions imposed by MOFCOM often include detailed and lengthy on-going behavioural conditions. The ACCC accepts conditions in informal merger clearances in Australia and formalises that process under the CCA; however, the ACCC would be unlikely to accept the detailed conditions dealt with by MOFCOM to allow a merger to proceed in any industry including banking.

**Need for robust competition policy in addition to law**

- Each jurisdiction illustrates the necessity for a competition policy which supports its competition law. The impact on bank competition of other laws and regulations in both jurisdictions is very significant.

- Australia has had a National Competition Policy since 1995, but recent government initiated reviews recommend a sharper focus on other laws, regulations and policies which impact competition, particularly in financial markets.

- China’s banking laws and regulations mention competition but it is unclear whether any real priority is given to competition in decision-making by banking regulators. China has administrative monopoly provisions aimed at competition policy issues in the AML. These have to

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6 *Competition and Consumer Act 2010* (Cth), s 87B.
date been used sparingly and in a less comprehensive way than would be required to thoroughly address competition in relation to regulatory issues in banking.
PART 1

1.1 Introduction to the project

China is a major global economy with a very significant impact on world markets. The size of its domestic markets makes them very attractive to foreign businesses, as even a very small market share is substantial in an overall context. Australia is much smaller by population, but despite this, the two are engaged in substantial economic dealings. China is Australia’s biggest trading partner, and Australia is China’s fifth trading partner, the two countries being linked particularly by the resources trade which is significant to both countries. Australia was the second biggest destination for Chinese foreign investment in 2013.

The *Australia in the Asian Century* White Paper \(^7\) emphasised the importance of the finance and insurance industries to the Australian economy. It recognised the expertise of Australian financial organisations, and concluded that those with a presence in Asia were well-positioned to capitalise on increasing investment and interregional trade flows, and new financial markets emerging through the benefits of technology. \(^8\) Growth by way of local acquisition was suggested as an expansion option for the Australian financial services industry into China. In this context an understanding for Australian banks of Chinese merger regulation, and its likely impact on transactions involving financial institutions, is important.

This project explores the regulation of bank mergers in China, comparing Chinese competition law and practice to that of Australia against the background of banking regulation in each jurisdiction. At the outset it is important to note that no bank mergers have been considered by MOFCOM in China to date. However, research based on MOFCOM decision-making in other industries, informed by the views of the interviewees in the context of this research, provides a window into an area of market and regulatory performance which is directly relevant to Australian banks. \(^9\) This research project uses case studies and interviews from both jurisdictions to examine how bank mergers might be assessed in China, whether current Chinese laws have the capacity to achieve the general aims of a competitive but stable financial environment, and whether special merger standards are necessary for banking in China in addition to the competition law of China, the AML. Australian competition law, the CCA, and the methodology of the competition regulator assessing mergers in the banking and financial industries are well-established, and supporting laws and regulations are also well developed. While clearly many features of the banking and

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\(^7\) *Australia in the Asian Century Task Force, Australia in the Asian Century, White Paper, (2012), 158.*

\(^8\) Ibid, 181.

\(^9\) Ibid.
finance industries in the two jurisdictions are quite different, the research references Australian competition and banking regulation and practice to provide a counterpoint to the approach of the AML and its interpretation by regulators.

The project thus casts light on merger regulation, and particularly bank merger regulation, in China. It contrasts Chinese and Australian merger competition regulation and analysis against the background of banking regulation and other laws, including regulation on foreign investment. It reaches practical conclusions based on analysis of the regulations, practice and existing merger determinations. It focuses on the implications of merger and other regulation in China for three categories of bank mergers:

- the merger of two Chinese banks (China/China);
- the merger of a domestic bank with a foreign bank or the acquisition of shares in a domestic bank by a foreign bank (foreign/China);
- The merger of two foreign banks or the acquisition of a stake in a foreign bank by a foreign bank (foreign/foreign).

The AML and MOFCOM’s methods mean that this categorisation is important in the context of China. These categories are of less importance in considering the Australian position because notification for the purposes of informal clearance in Australia is based on risk analysis by the parties and not on turnover thresholds which apply regardless of the level of risk of an anti-competitive outcome. As a result, and also due to both the wording of the CCA and the holistic Australian approach to merger review, there is less opportunity in Australia for the broad ranging consequences for each nominated category which may arise in China.
PART 2

2.1 Methodology

The project commenced in August 2013 with funding from the Centre for International Finance and Regulation (CIFR).\(^\text{10}\) Individual interviews were conducted in China and Australia.\(^\text{11}\) Contributors drawn from the ranks of academics, lawyers and regulators with expertise in banking and finance, and competition regulation, provided answers anonymously to the questions posed by the study.\(^\text{12}\) This purposive sample informed the conclusions reached in this report.\(^\text{13}\)

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\(^{10}\) Ethics approval was obtained in October 2013 from the University of New South Wales Ethics Committee. A copy of the draft questionnaire is attached as Appendix C.

\(^{11}\) Beijing and Shanghai in November 2013, March and November 2014; Sydney and Melbourne in November and December 2013 and April and May 2014.

\(^{12}\) The authors thank contributors for their time and enthusiasm, seminar participants for their input, and independent reviewers for their insightful comments. Any errors of interpretation are, of course, those of the authors. The authors are indebted to CIFR for the funding which enabled this research to take place. A draft report was presented to invited participants at a twilight seminar at King Wood Mallesons in Sydney in September 2014 and the authors thank the firm for their kind assistance.
PART 3

3.1 Shifting frameworks

After the project commenced there were a number of notable developments in the regulatory environments of the two jurisdictions.

3.2 The Third Plenum October 2013

The Third Plenum in Beijing in October 2013 heralded a very significant ideological change in economic approach from the National Communist Party (NCP). In summary, the NCP expressly acknowledged the decisive impact of the market in achieving efficient resource allocation and growth, when previously it had merely recognised its usefulness. The increased emphasis on resource allocation by markets will inevitably change the political and economic impact of SOEs, and in fact foreshadows their further substantial reform.14

While SOEs have traditionally been a stabilising economic feature, their inefficiency has markedly increased. The reform of SOEs and the diversification of their ownership should increase their efficiency. These developments alone will invariably change the banking environment in China significantly due to the prominence of large SOE banks. Combined with detailed proposals on changes to banking regulation which were also foreshadowed at the Third Plenum,15 and have started to occur,16 they create opportunities for foreign banks to play a more meaningful role in the financial system. Steps towards internationalisation of the currency have been taken and should also assist development of the Chinese economy, which is clearly of the upmost importance to the government of the PRC.

3.3 Competition law and financial system reviews in Australia

Meanwhile, in Australia in late 2013 the incoming Abbott government instituted a number of important reviews, two of which impact Australia’s long standing competition law and banking regulatory frameworks. Firstly, the government instituted a “Root and Branch Review” of competition law and policy in Australia, chaired by Professor Ian Harper. The Review focussed on identifying impediments to

15 Such as allowing private capital to set up small and medium sized banks, and accelerating interest-rate liberalisation and capital account convertibility.
competition and productivity across the economy which cannot be justified in the broader public interest. It examined the Australian competition law, the CCA, to ensure that it is “driving efficiency, competition and durable outcomes” against economic changes and increased globalisation.\(^\text{17}\) It examined the effectiveness of the existing merger provisions and their practical operation.\(^\text{18}\) While there was little support for substantive legislative change to the merger provisions themselves, procedural questions about the appropriate arbiter of first instance in authorisation, and the nature of the administrative test on appeal were raised. Some procedural amendments were recommended in the Final Report in March 2015.\(^\text{19}\)

Secondly, a Financial System Inquiry (FSI) examined the financial system and particularly its capacity to support economic growth against the background of the Global Financial Crisis (GFC).\(^\text{20}\) It specifically explored “...the extent to which stability objectives might hinder competition, or promote competition, and reduce systemic risk.”\(^\text{21}\) Domestic competition and international competitiveness of the financial system were specifically considered. The Final Report recognised competition as the primary support to financial system efficiency, while noting that competitive markets must be placed within a strong and effective legal and policy framework and that “...competition alone does not always deliver the best balance between efficiency, resilience and fair treatment.”\(^\text{22}\) Despite this finding, the Report emphasises that policy interventions in the financial system should only occur where benefits to the community outweigh the costs and that in the ordinary course policy makers “should give competitive markets the opportunity to adjust to markets signals and allow established legal remedies to be enforced.”\(^\text{23}\) While the Report found that competition in the banking industry was “generally adequate”, it strongly encouraged the removal of impediments to competition and cautioned financial regulators to be “...more sensitive to the effects of their decisions on competition, international competitiveness and the free flow of capital.”\(^\text{24}\)

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20 The purpose of the FSI was to make recommendations to foster an efficient, innovative, competitive, and flexible financial system, consistent with financial stability, prudence, public confidence and capacity to meet the needs of users; Financial System Inquiry Committee, *Financial System Inquiry*, Final Report, (November 2014). It specifically examined the system in the context of “…balancing competition, innovation, efficiency, stability and consumer protection.”; Financial System Inquiry Committee, *Financial System Inquiry*, Terms of Reference, (20 December 2013).
23 Ibid 12.
24 Ibid 21.
Both Reports of the FSI and the Harper Review thus confirmed the essential significance of competitive markets, and recommended that steps should be taken to identify and address current and future impediments to competition in markets generally and particularly by way of inappropriate regulation.

3.4 Free Trade Agreement between Australia and China

Finally and very importantly, at a relatively late stage of the Project, Australia and China signed a Free Trade Agreement (FTA), under which it was expected that Australian financial services “... will benefit from being able to do business in China more easily.” The FTA sends a strong message by both countries about deeper engagement, with the expectation that “Australia’s banks, insurers and financial service providers [will] take advantage of concessions to access China’s emerging services industries before they are offered to competitor nations.” The expectation is not that Australian banks and financial service providers will compete head to head with their Chinese counterparts, but that they will be able to take advantage of less restrictive licensing requirements to provide products and services in China’s financial markets.

PART 4

4.1 Competition law: The role of the market

The basic economic rationale for competition law is that competition is the best tool for creating the market efficiencies which lead to economic and consumer benefits. The aim of competition law is the creation of a level playing field for competition so that the most efficient competitors win market share by lowering prices and supplying better products and services to consumers.

Translation of these ideas into the competition laws of jurisdictions around the world has been neither simple nor uniform. This is reflected in the different ways the goals of competition laws are enunciated, the emphasis placed in the laws and policies of jurisdictions on other economic and community goals, and the justifications given for exemption of particular entities and conduct from the ambit of competition laws in different jurisdictions.

The important role of government in the market in developing jurisdictions in Asia has substantial impact on competition, both within individual jurisdictions, in the region, and globally. Governments have the capacity to substantially affect markets and affect competition in a number of ways, including by the laws that they make. The extent to which competition laws apply to the conduct of government, its SOEs and other entities are important threshold questions about the capacity of individual competition laws to create a level playing field for competition within a jurisdiction. As previously noted, most banks in China are SOEs, or are owned or controlled at some level of government. The extent to which they are caught by the AML is not entirely clear. The CCA in Australia generally applies to SOEs and to other government bodies at various levels to the extent that they are “carrying on business.”

4.2 Relationship between competition and stability in the financial sector

The extent to which factors other than competitive impact should be considered in competition law is the subject of continuing debate. In a similar vein, the relationship between competition and stability and the priority which should be granted to one or the other in the financial sector is the subject of divergent views. One school of thought is that “...competition lowers bank margins and encourages adverse risk taking” (the “competition fragility view”). The alternative view (“competition- stability view”) asserts that

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29 The Harper Review (Recommendation 24) recommended further broadening of this application; see Competition and Consumer Act 2010 (Cth), ss 2A-2C.
“...market power in the provision of loans exacerbates moral hazard and adverse selection problems.” 30

Other views suggest another relevant comparison: the “more credit” view, which is that “bank competition leads to more credit availability, more firm entry and more growth”, to be contrasted with the “less credit view” which suggests that “credit availability may be higher in less competitive environments”. 31 The OECD has found that a “clear causal link between either competition or concentration and stability in the financial sector can be found neither in theory nor in the data.”32 On the other hand, it is suggested that there is a growing body of scholarship on banking which suggests that “…the widely accepted trade-off between competition and stability does not generally hold”.33

While a clear causal link between either competition or concentration and stability in a financial system is yet to be shown, it has been shown that banking systems in countries with less competition between financial institutions due to, amongst other factors, public policies that limit competition and high government ownership of banks, are more prone to fragility.34

While clearly there is no general consensus on these issues, further detailed analysis is clearly beyond the scope of this research. Important questions thus remain about the issue of this balance, the approach which should be taken in different jurisdictions, and whether the approach should be different in times of financial crisis.

Both jurisdictions recognise, however, that other public benefit factors may trump competition in appropriate circumstances, although they certainly approach this issue in different ways. As is stated subsequently, the Australian view on markets and competition generally recognises that competition is very important but that there are areas of market discontinuity where competition assessment alone does not foster the best outcomes for consumers. 35 The political economy of China also mandates that the AML provisions and the approach of regulators should be broader than consideration of competitive

30 See generally Carolyn M. Evans, Deborah Healey, Marina Nehme, Rob Nicholls and Charlotte Penel, Competition in Financial Services, Centre for International Finance and Regulation Research Report August 2015, 133 and sources there cited, available at http://www.cifr.edu.au/site/Latest_news/Competition_in_Financial_Services.aspx. The Report considered the optimal competition law and policy settings which should apply to the financial services sector in Australia. Some of the issues raised would also be relevant to China, although the context is quite different and may require a different approach and outcome.
31 Ibid and sources there cited.
32 Ibid 134.
33 Ibid 134 and sources there cited.
34 Anginer, Demirgüç-Kunt and Zhu, cited in Carolyn M. Evans, above n 30, 134, found that ‘greater competition encourages banks to take on more diversified risks, making the banking system less fragile to shocks.’ Examining the impact of the institutional and regulatory environment on systemic stability shows that banking systems are more fragile in countries with weak supervision and private monitoring, high government ownership of banks, and in countries with public policies that restrict competition.
impact alone, although this is in a much broader range of circumstances than would be countenanced in Australia under the terms of the CCA or as a matter or policy.\textsuperscript{36}

Whether issues of stability should be addressed by competition law or decision-making or whether it should or can be left to the domain of prudential regulation is part of the background to these questions and to this research.

In particular in relation to financial services, factors such as ongoing community confidence in the efficient functioning of financial markets, the complex nature of products and services in the financial services industry, institutional interdependence both domestically and internationally, and the perceived need for prudential regulation based on factors such as all of these complicate regulatory decision-making. Issues such as these raise for legitimate consideration the extent to which consideration should be given to factors beyond competition law in merger assessment. Both jurisdictions have detailed prudential regulation, with the regulation being more proscriptive in China.

A second important consideration relating to the interplay between competition and stability is whether the conclusions and the resulting approach should be different in circumstances of financial crisis, particularly in relation to state aids and subsidies. Much has been written on this question following the Global Financial Crisis (GFC), and questions such as the relevance of a failing firm defence and the role of efficiency in concluding mergers are often discussed. These are very relevant in financial markets which are seminal to the operation of the financial systems which were so affected by the GFC.\textsuperscript{37}

This research seeks to document the extent to which each of the jurisdictions employs factors other than competition analysis in its merger review. It does not draw substantive conclusions on the theoretical correctness of these approaches but rather analyses how the approach impacts on decision-making and the predictability of outcomes.

\textsuperscript{36} See subsequent commentary.

\textsuperscript{37} See generally, for example, Ioannis Kokkoris and Rodrigo Olivares-Caminal, \textit{Antitrust Law amidst Financial Crisis}, (Cambridge University Press, 2010).
PART 5

5.1 Political economy and regulatory context of China: a socialist market economy

The enactment of the AML as the first comprehensive competition law in China in 2008, in the context of its socialist market economy, and the prominence of SOEs generally, and particularly in banking, are an essential platform for the questions raised in this study.

Competition law can only be considered in the context of the political economy of a jurisdiction. China is a unique competition law environment. The concept of the “socialist market economy” is enshrined in its Constitution.\(^\text{38}\) This means that competition law does not operate in a market environment, and it appears that it will not do so for the foreseeable future.

It is important to understand the subtleties of the meaning of “socialist market economy” in China because this assists with understanding when and how government market intervention might occur, and how the AML may be applied. The leading Chinese competition law academic, Professor Wang Xiaoye, has cited the following comments from the report of the 14\(^\text{th}\) Central Committee of the Communist Party of China in explaining what the socialist market economy is in China:

“The socialist market economy that we want to establish is a market economy where the allocation of resources is under macroeconomic control by the socialist state, where economic activity follows the demands of price regulations, and adapts to changes in supply and demand. Through price leverage and the function of competition, resources are allocated to more optimal locations, both pressuring and motivating companies to respond, and achieving a system of survival of the fittest. By activating this quality of the market in sensitively responding to economic signals, supply and demand can quickly find equilibrium.”\(^\text{39}\)

Professor Wang describes the relationship between competition and government intervention very simply in the following quote:

\(^{38}\) In November 1993, the Decision on Some Issues Concerning the Establishing of the Socialist Market Economy was made at the Third Session of the Fourteenth Central Committee of the CPC, the first CPC document to expressly and clearly indicate the establishment of a modern enterprise system. The prime characteristics of a modern enterprise system were clearly established: an ownership structure, well-defined power and responsibilities, a separation of operation rights from ownership rights and management practices in line with market rules.” See Xu Shiying, ‘Competitive Neutrality of SOEs in China’ in Deborah Healey (ed), Competitive Neutrality and its Application in Selected Developing Countries, (UNCTAD, 2014), 44.

“This fully confirms that the basic elements of the market economy— the market system, price system, and competition system—are also the basic elements of the socialist market economy, and confirms that price adjustments and market competition are a basic part of the socialist market process. It also therefore confirms the importance of competition in furthering China’s economic reforms and the establishment of a socialist market economy.”

Central to the concept of socialist market economy in China is thus acceptance of a major movement to markets but an on-going recognition of the very substantial role of the State as a policy maker, regulator, price setter and market participant. It is the latter two elements which distinguish the socialist market economy from a market economy, and which impact particularly on regulatory determinations under the AML. Industrial policy is a crucial element in the functioning of the socialist market economy. It is: 

“...measures taken to promote the industrial development of a given sector ... The principle role of this kind of policy is to adjust market mechanisms by restructuring and influencing demand and supply.”

In the context of this report, references to industrial policy include both systematic big picture initiatives as part of some overall industrial plan, such as a general plan for an industry or type of entity, and also one-off regulatory decisions in relation to a particular merger, for example, based on policy reasons other than competition analysis. Given the wording of the AML, it is appropriate to use a definition encompassing both these categories. The appropriateness of industrial policy as an effective economic tool is the subject of on-going international debate, but it has some relevance in most countries. In developing countries it is often employed to improve the efficiency of resource allocation to assist social and economic stability. It has played that crucial role in China. Industrial policy and competition policy both have the aims of improving the functioning of the market and providing economic benefits to consumers, but the two are at odds because industrial policy relies on policy makers to adjust the market rather than relying on the market to adjust itself.

40 Xiaoye Wang, ibid.
43 In the EU, for example, policy objectives of merger regulation were reaffirmed as not favouring the creation of national champions in 2011. See Joaquin Almunia, ‘Policy Objectives in Merger Control’, (paper presented at Fordham Competition Conference, New York, 8 September 2011).
China’s size and economic clout mean that it is easy to forget that it is still a developing economy. Economic stability is of critical importance to China, as is continued economic growth. The Chinese government has a high degree of economic control and has managed consistent economic growth along with social development, although the economy has slowed slightly of late. Economic growth and social development flow through to enhance political stability – the three go hand in hand. The banking system is designed and implemented to support these important objectives. In practice this means that stability is very important and competition generally has a low priority, which is particularly relevant to this research.

In particular, the government continues to play a dominant role in industries identified by the government as key to the country’s national security and economic development, including banking and financial services. Some of these industries are categorised as “sensitive” or “lifeline” industries. As previously noted, it is intended that this will continue despite the increasing trend to marketisation foreshadowed by developments such as the Third Plenum in Beijing in mid-November 2013. Thus, in the context of merger regulation in China the relationship between competition law and industrial policy is still key to determining the MOFCOM’s approach generally and in any given merger or in relation to an industry.

The history of the growth and development of the Chinese economy has led to a large number of sub-scale SOEs, meaning that there is very considerable scope for consolidation in many industries. In addition, high levels of administrative monopoly, concerns about foreign incursion into the economy and accepted views about “excessive competition” all influence the administration and enforcement of the AML.

5.2 Implications from the form of the AML

Against the background of the socialist market economy, the AML itself clearly indicates that industrial policy considerations are important factors for consideration in analysis. While express goals of the AML include the “standard” competition law objectives such as fostering efficient competitive markets which

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44 One participant noted that in those industries which had opened up noted that there were very few Chinese companies in the top ten companies for those industries.
46 China Daily, above n 14.
48 Administrative monopoly is ‘the misuse by government, at all levels, of administrative powers, both legal and extralegal, to promote, manipulate, impede or prevent economic activities’. It is widespread in China and is seen as a real barrier to effective competition: see Mark Williams, Competition Policy and Law in China, Hong Kong and Taiwan (Cambridge University Press, 2005), 138.
will benefit consumers and the economy generally, the objects also espouse active industrial policy considerations and clearly recognise the on-going role of the state in the market and its relevance to competition law.\footnote{See, for example, the \textit{Anti-Monopoly Law of the People’s Republic of China}, (People’s Republic of China), National People’s Congress, 1 August 2008, art 1, 4, 11.} Article 7, for example, emphasises the role of industrial policy, noting that “the State shall protect the legitimate business activities of the undertakings” in industries dominated by the state-owned economy and that have “a direct bearing on national economic wellbeing and national security.” The same provision also foreshadows “supervision, adjustment and control of the business operations and the prices of products and services of these undertakings in accordance with the law, safeguard [ing] the legitimate interests of consumers and promote[ing] technological progress.” The provision clearly recognises an on-going role for the state in price setting.\footnote{It has been suggested that this provision reconciles antitrust law and industrial policy for the purposes of the AML. The same author also suggests that the administrative monopoly provisions of the AML keep industrial policy in check. Meng Yanbei, above n 41, 259, 265.} Sector specific laws expressly take precedence over the AML,\footnote{\textit{Anti-Monopoly Law of the People’s Republic of China}, (People’s Republic of China), National People’s Congress, 1 August 2008, art 51.} and they may not themselves contain industry specific competition provisions, which means that those industries may not be subject to competition laws at all.

Industrial policy issues are specifically mandated as factors for consideration under a number of the specific AML provisions. The provisions in relation to merger review are discussed below.

It is thus obvious from the drafting of the law that industrial policy is expected to play a legitimate role in the decisions made under the AML. Industrial policy issues arise in the competition law context in many jurisdictions,\footnote{See, for example, the way this is dealt with in the EU by art 107 of the \textit{Treaty on the Functioning of the European Union}, which strictly controls the area of state aids. In Australia, for example, s 95AZH(2) of the \textit{Competition and Consumer Act 2010} (Cth) which directs the Australian Competition Tribunal to have regard to “a significant increase in the real value of exports”, “a significant substitution of domestic products for imported products” and “all other relevant matters relating to the international competitiveness of Australian industry” when assessing merger authorisations. The authorisation process is, however, rarely used.} and there is recognition in many competition laws that there are areas of discontinuity where the market may not produce the best outcome for consumers.\footnote{The National Competition Policy Review Committee, above n 35.} The AML’s approach to industrial policy overall and in relation to the application of many of its provisions, however, is far broader than in most other jurisdictions and lends uncertainty to MOFCOM’s likely approach in a given situation. Given the prominence of SOEs in China, consideration of industrial policy clearly takes on a special significance.

Assessing the likelihood of MOFCOM’s reliance on industrial policy factors in the exercise of its merger jurisdiction is key to understanding the impact that industrial policy will have on the practical application
of the AML in all industries, and particularly in banking. In fact industrial policy as a competition goal is likely to include the active promotion of the formation of national champions. Importantly in the current context:

“...in light of alleged anticompetitive behaviour of multinationals, Chinese policymakers may be unwilling to consent to foreign takeovers of Chinese well-known enterprises.”

Protection of national brands and creation of national champions are important examples of factors which may be part of considerations linked to “national economic development”, which is listed as a merger factor in the AML.

5.3 Australia: a market economy

By way of comparison to China, Australia is a market economy ranked highly for competitiveness, with a demonstrated commitment to markets and competition, and limited government intervention to correct market failure. While government traditionally played a large part in its economy, market reforms in the 1980s transformed it into an “open, flexible and dynamic economy”. By way of contrast to China, Australia’s CCA has simpler objects in line with the background of its traditional market economy. Its objects are to “... enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”

Marketisation continues to expand, with the current Harper Review of Competition Policy (noted earlier) recommending the extension of marketisation into the supply of human services by deepening and extending competition policy into these areas.

It is important to note, however, that the Australian commitment to competition is not absolute. Indeed the Hilmer Report of 1993 recognised that in limited areas of market discontinuity where the market did not deliver optimal outcomes market intervention may be required. It endorsed the process of

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55 The ACCC signed a memorandum of understanding with MOFCOM on 20 May 2014 to enhance communication on merger review cases; see Memorandum of Understanding on Anti-Monopoly Cooperation, Australian Competition and Consumer Commission and Ministry of Commerce of the People’s Republic of China, signed and entered into force on 20 May 2014.
56 Tingting Weinrich-Zhao, Chinese Merger Law: An Assessment of its Competition Policy Orientation after the First Years of Application, (Springer-Verlag Berlin Heidelberg, 2015), 64.
57 See generally The National Competition Policy Review Committee, National Competition Policy Review (the Hilmer Report), above n 35.
59 Competition and Consumer Act 2010 (Cth) s 2. The CCA also contains detailed provisions on consumer protection in the Australian Consumer Law; for example, see Competition and Consumer Act 2010 (Cth), sch 2.
61 Ibid.
individual authorisation to address such situations. Finally, in the recent FSI there was also recognition that “competition alone does not always deliver the best balance between efficiency, resilience and fair treatment.” The conclusion there was that in the context of the finance industry, unless there is clear public interest, policy makers should give competitive markets the opportunity to adjust to market signals and allow legal remedies to be enforced, rather than regulate pre-emptively.

62 Under the process individual applicants seek administrative permission to engage in conduct which might otherwise be prohibited based on the public benefit arising from the conduct. In particular, in relation to merger authorisation (which is rarely sought because it can be both time consuming and costly), the Australian Competition Tribunal is specifically directed to consider the following factors in the context of “public benefit”:

- a significant increase in the real value of exports;
- a significant substitution of domestic products for imported products; and
- all other relevant matters relating to international competitiveness of Australian industry.

This means that in the context of an Australian merger (in the very limited range of circumstances in which it is applied) industrial policy issues may come into play. However, absent a failing firm argument being advanced, it is difficult to see how a bank merger can result in a public benefit.


64 Ibid, 12.
PART 6

6. The Banking Environment

6.1 Introduction

Essential considerations for the purposes of this research are the nature of banking and finance markets, banking regulation in each jurisdiction, and the relationships of both markets and regulation with the relevant competition laws. Important issues in relation to the competitive workings of the market include the nature of the players; how they are regulated; whether there is a level playing field; how competitors are able to enter and exit the market; likely changes to the environment and the nature of government influence over decision-making on competition issues.

6.2 Banking Landscape in China

China’s banking system has changed dramatically over the last 20 years during the transition from a centrally planned economy to a socialist market economy. Before China’s economic reforms, banks were fully government-owned, isolated from the global economy, and a key plank in the centrally planned economy. Interest rates were set directly by the Central Government, the stock market and bond market did not exist, the Renminbi (RMB) was largely unconvertible for current and capital account transactions, and foreign investment was negligible.

After the 16th NCP Meeting in 2002 private ownership in the banking sector was actively promoted and foreign banks were allowed to take minority stakes in Chinese banks in preparation for the obligations and international competition of World Trade Organisation (WTO) membership. This has not, however, translated into “free rein” or even easy entry for foreign banks, which in most cases are allowed limited avenues of business or are consigned to minority shareholdings in Chinese banks. The continuing importance of banking as a strategic sector in the developing economy, and stability concerns, mean that the state has retained substantial control of banks, and of money supply which finances state development priorities.

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66 Ibid.
68 Many of the laws and regulations governing banking were passed by the Standing Committee of the National People’s Congress, signifying their importance; see Roselyn Hseuh, China’s Regulatory State: A New Strategy for Globalization, (New York Cornell University Press, 2011), 198.
Key regulators in banking are the People’s Bank of China (PBOC); the China Banking and Regulatory Commission (CBRC); the Ministry of Finance (MOF), the major executive body for government financial policies, which manages the financial industry at a macro level and guides entry and operation in Chinese markets; the National Development and Reform Commission (NDRC), which regulates pricing of banking products and services; and the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) which oversees the operation of SOEs generally, including SOE banks.

These regulators operate in a very complex and proscriptive regulatory environment, under regulations and directives which set out the way banks are established, controlled and conducted, and the way in which foreign banks are allowed to operate. A number of more general laws are relevant to the area of banking and aspects of mergers generally and will not be discussed here.

Banks in China operate in a three tier system:

- The big four SOE banks, which are the Industrial and Commercial Bank of China, the China Construction Bank, the Bank of China, and the Agricultural Bank of China;
- The joint stock commercial banks; and
- The city commercial banks, rural commercial banks, rural co-operative banks, postal savings banks, and foreign banks.

There are also three policy banks which deploy government funds to advance government policy in specified areas: China Development Bank, Export-Import Bank and Agricultural Development Bank.

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69 He Wei Ping, above n 45, 369.

70 The regulatory approach flows in part from the different meaning of regulation in China, which covers not only regulation but has connotations of supervision and management, see He Wei Ping, ibid, 3.

71 Most laws and regulations governing corporate mergers apply to banks: See, eg, Companies Law of the People’s Republic of China, (People’s Republic of China), National People’s Congress, 27 October 2005; Securities Law of the People’s Republic of China, (People’s Republic of China), National People’s Congress, 28 November 2004; General Principles of the Civil Law of the People’s Republic of China, (People’s Republic of China), National People’s Congress, 12 April 1986; Contract Law of the People’s Republic of China, (People’s Republic of China), National People’s Congress, 15 March 1999. Additionally, a draft Foreign Investment Law was issued for public comment in January 2015. This Law will have a substantial impact on foreign investment in China as it unifies the current tripartite legal arrangements. It replaces the existing guidance on investment in particular industries with a negative list setting out the sectors where foreign investment is restricted or prohibited with a unified national security review system.


74 The Postal Savings Bank, which will reportedly soon be listed, is probably placed fifth; see Michael N. Tan, Corporate Governance and Banking in China, (Routledge Contemporary China Series, 2013), Appendix 1.

75 Ibid. For a very detailed commentary on individual banks, see Shen Wei, The Anatomy of China’s Banking Sector and Regulation, (Wolters Kluwer, 2014), 65ff.
Traditionally the large SOE banks performed poorly, but their performance has greatly improved following bailouts, bad loan carve outs, capital injections and IPOs. When equitised they were given different categories of shareholders. But even with the injection of private funds the majority of their shares are held by the PBOC, MOF or other government entities, and tradeable shares typically represent only a fraction of their total equity. These banks have internationalised to divest themselves of non-performing loans, and improved their corporate governance by listing on overseas stock exchanges and taking foreign investment. They have, however, focussed their business strategies in the main on large SOE corporations as their clients and paid less attention to other market participants, such as private firms, SMEs and consumers.

In tier two, the joint stock commercial banks are private commercial banks, such as the China Minsheng Bank, where the majority of shares are owned by non-government entities. The city commercial banks have been encouraged to seek foreign partners to improve corporate governance, and to attain higher standards of management expertise and service. They struggle to compete with the larger banks but often benefit from local government opportunities given their strong ties to local government.

Tier three banks include foreign banks, discussed below, and local banks. The latter are also closely linked to local government and in some cases the interests of the CBRC and these organisations diverge, particularly in relation to the area of local development policy.

In summary, at the end of 2013:

“...China’s banking sector consisted of two policy banks and China Development Bank (CDB), five large commercial banks, 12 joint-stock commercial banks, 145 city commercial banks, 468 rural commercial banks, 122 rural cooperative banks, 1,803 rural credit cooperatives (RCCs), one postal savings bank, 4 banking assets management companies, 42 locally incorporated foreign banking institutions, one Sino-German Bausparkasse, 68 trust companies, 176 finance companies of corporate groups, 23 financial leasing companies, 5 money brokerage firms, 17 auto financing

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76 Shen Wei, above n 75, 67.
77 Tan, above n 74, 4.
78 Shen Wei, above n 75.
79 Tan, above n 73, 4.
81 See He Wei Ping, above n 45, 138.
companies, 4 consumer finance companies, 987 village or township banks, 14 lending companies and 49 rural mutual cooperatives.\textsuperscript{82}

The stratification of the banks by law and regulation creates a fragmented market as background to competition consideration in the context of mergers. Different target customers, the availability of different products and services in different contexts, and differing geographic locations suggests a number of distinct markets for the purposes of assessing competition and the impact of mergers. Competition in these individual markets is heavily affected by law and regulation but also by more informal government directives about bank lending practices, for example, to favour certain groups of borrowers.

6.3 Banking regulation in China

The main banking institutions, laws and regulations are discussed below.\textsuperscript{83} However, it is important to state at the outset that these place little real emphasis in practical terms on fostering competition, although there is some recognition in principle that it has a significant role to play in financial market development.

There are four main levels of regulation potentially impacting banks: laws enacted by the National People’s Congress; regulatory policies set by regulators such as the CBRC. These include CBRC guidance, notices and rules; and Window Guidance Measures, the latter mainly emanating from the PBOC.\textsuperscript{84}

The PBOC is the central bank. It supervises monetary policy, including interbank markets, the payment and settlement system, and the credit information system.\textsuperscript{85}

The CBRC is the key regulator, established under the Law of the PRC on Regulation of and Supervision Over the Banking Industry (the Banking Supervision Law). The Banking Supervision Law was the first law to systematically regulate and supervise the banking sector, including both domestic and foreign banks. The CBRC replaced the PBOC in this supervisory and regulatory role, and is now expressly

\textsuperscript{83} These are described in some detail as some may be difficult to locate easily.
\textsuperscript{84} He Wei Ping, above n 45, chapter 3 generally.
\textsuperscript{85} The functions and operation of the PBOC are set out in the \textit{Law of the People’s Republic of China on the People’s Bank of China}, (People’s Republic of China), President of the People’s Republic of China, Order No. 46, 18 March 1995.
\textsuperscript{86} \textit{Law of the People’s Republic of China on Regulation of and Supervision over the Banking Industry}, (People’s Republic of China), National People’s Congress, 1 January 2007.
responsible for all prudential regulation.\(^{87}\) It is subject to State Council control but expressly operates free from intervention by local government.\(^{88}\)

Under the Banking Supervision Law, the CBRC approves the establishment of all commercial banks and their branches in China, and the operation of Chinese banks overseas.\(^{89}\) The Banking Supervision Law has objectives of improving regulation and supervision in the industry; protecting the rights of depositors and customers; promoting the sound development of the industry and preserving public trust.\(^{90}\) The Law sets out a procedural role for the CBRC in bank mergers.\(^{91}\) Article 3 states that the industry “... shall be regulated and supervised in such a way as to protect fair competition in the industry and increase the competitiveness of the industry.”\(^{92}\) But while fair competition and competitiveness are mentioned, they do not appear elsewhere in the Law and it is unclear where they sit in the CBRC decision-making hierarchy.\(^{93}\) It has been suggested, however, that the CBRC’s overall objective of improving competitiveness “... obscures a well-defined objective: to improve what is perceived to be the lagging competitiveness of both Chinese banks and the Chinese banking sector generally.”\(^{94}\)

The Law on Commercial Banks\(^{95}\) applies to banks which take deposits from the general public, grant loans, handle settlements, etc.\(^{96}\) It has multiple objectives ranging from protecting the rights of commercial banks, depositors and other clients, to standardising their behaviour; raising the quality of credit assets; strengthening supervision and control; ensuring stable and sound operation of commercial banks; maintaining financial order and promoting the development of the socialist market economy.”\(^{97}\) It applies to domestic and foreign banks,\(^{98}\) and sets out detailed requirements for establishing and conducting a commercial bank. Commercial bank operations are very closely controlled. All banks must seek CBRC approval for alteration of their name, registered capital, locations of the parent bank or the


\(^{88}\) Ibid, art 5.


\(^{90}\) Ibid, art 1 approves for the establishment and operations, both domestically and overseas, of financial institutions in China.

\(^{91}\) Ibid, art 16, 17.

\(^{92}\) Other laws and administrative regulations in relation to the regulation of and supervision over policy banks and asset management companies, wholly foreign funded financial institutions, Chinese-foreign joint venture financial institutions and branches of foreign financial institutions established in China prevail over the Law of the People's Republic of China on Regulation of and Supervision over the Banking Industry, (People's Republic of China), National People's Congress, 1 January 2007, art 50-51.

\(^{93}\) These criteria are, however, mentioned in other documentation: see China Banking and Regulatory Commission, Annual Report, (2013), XVI. The same document states that its objectives are “To protect fair competition in the banking sector and enhance the industry’s competitiveness, and thereby promote the safety and soundness of the banking sector and maintaining public confidence in the banking sector.” (at XV).

\(^{94}\) He Wei Ping, above n 67, 12.


\(^{96}\) Ibid art 16, 17.

\(^{97}\) Ibid art 1.

\(^{98}\) Ibid art 2.
branches; adjustment of business scope; and alteration of shareholders who hold more than 5% of the total amount of capital or shares. In addition to a board, solely state-owned commercial banks must have a board of supervisors responsible for issues such as the quality of the loan assets of the solely state-owned commercial bank, asset to liability ratios, and present and added values of the state-owned assets. The board of supervisors also oversees and is responsible for the conduct of senior management. Different capital requirements are imposed on different types of banks. For example, the minimum amount of registered paid-in capital required to establish a national commercial bank is RMB one billion, the minimum amount of registered paid-in capital for establishing a city commercial bank is RMB one hundred million ($16M USD), and for a rural commercial bank the minimum amount of registered paid-in capital is RMB 50 million ($8M USD).99

Under the Law on Commercial Banks, banks must determine their interest rates on deposits and loans in accordance with prescribed upper and lower rates set by the PBOC.100 They must abide by fair competition and not engage in illegitimate competition,101 but they must conduct business in accordance with the needs of national economic and social development and under the guidance of the industrial policies of the State.102 These provisions do not, therefore, accord priority to either competition or industrial policy in their implementation, and they contain little discussion of how competition might work or the extent to which it should be applied or fostered. Given the importance of banking to the economy and the emphasis on stability it is likely that other issues noted above will be viewed in most situations as being of greater importance.

As to bank mergers, the Law on Commercial Banks provides that “Division and Merger” of commercial banks are governed by the Company Law and subject to approval by CBRC.103 The dissolution of commercial banks (including when a merger has occurred) is also regulated.104 There are few specific administrative regulations specifically relating to bank mergers, but most regulations governing corporate mergers generally apply.

In summary, whilst competition is noted in a number of the general laws applicable to banks, there is little specific indication of the way in which competition issues will be approached under laws such as the Banking Supervision Law and the Law on Commercial Banks in day to day regulation of banks or banking

100 Ibid, art 31, 38.
102 Ibid, art 34. To some extent this mirrors the hierarchy of decision making under the merger provisions of the AML, as discussed in Chapter 8.
103 Ibid, art 25.
104 Ibid, art 69.
markets or what priority will be afforded them in relation to their interactions with stability issues. The ethos of the socialist market economy discussed previously, however, suggests that competition will not be accorded the same level of priority as stability.

6.4 Regulation of foreign banks

Foreign banks are allowed to enter China in a number of ways. They may use representative offices, branches, local incorporation, equity participation or enter via county banks. The CBRC generally encourages local incorporation to prioritise the safety of depositors’ funds. There are also a limited number of Chinese-foreign joint venture banks. Some of these categories are only allowed to conduct more limited activities. As noted above, the Banking Supervision Law and the Law on Commercial Banks apply.

To have some idea of the scope of foreign entry, by the end of 2013, foreign banks in China consisted of the following:

...banks from 51 countries and regions established 42 locally incorporated entities, 92 foreign bank branches and 187 representative offices in China ... 36 locally incorporated foreign banks and 57 foreign bank branches were approved to conduct RMB business, 30 locally incorporated foreign banks and 27 foreign bank branches were authorized to operate financial derivatives business, 6 locally incorporated foreign banks were approved to issue RMB financial bonds and 3 locally incorporated foreign banks were authorized to issue credit cards.

It has been suggested by at least one commentator that the approach of Chinese regulators to the entry of foreign banks has been underscored by two conflicting ideas. On the one hand, regulators believe that foreign participation and competition will assist the development of the Chinese banking system and improve areas of managerial capacity, risk management and corporate governance. On the other hand, they believe that China’s banks are still vulnerable to competition from foreign banks. The outcome of this is that there is no level playing field for foreign banks: they are not allowed to compete in areas where it is difficult for domestic banks to compete in the short term or where it is feared that foreign banks may obtain a competitive edge in the long run.

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105 He Wei Ping, above n 45, 80.
106 China Banking and Regulatory Commission, above n 82, 20.
107 Participants in the survey commented on the difficulties for foreign banks in China, including governance problems, government involvement in decisionmaking and absence of power to make decisions as minority shareholders. See also He Wei Ping, above n 45, 58.
Additional regulation applies to foreign banks. While the Law on Commercial Banks applies generally to foreign invested commercial banks (i.e. those with some foreign ownership), Sino-foreign joint venture commercial banks, and branches of foreign commercial banks, the provisions of other laws and administrative regulations made specifically in respect of foreign banks expressly prevail over the Law on Commercial Banks.108 This means that the Regulation on the Administration of Foreign-Funded Banks (Regulation on Foreign Funded Banks) is particularly important for foreign banks. Different capital requirements existed for foreign banks until quite recently. However, in November 2014, the Regulation on Foreign-Funded Banks was amended to delete the foreign-funded minimum working capital requirements. Other changes included shortening or cancellation of time limits in relation to business openings and requirements to show profitability. The requirement for an incoming bank to have a representative office for two years before expansion was also cancelled. These changes reduced distinctions and inconsistencies in Chinese banking law between domestic and foreign owned entities.

Another important regulation affecting foreign banks is the Measures for the Administration of Equity Investment by Overseas Financial Institutions in Chinese Funded Financial Institutions (Equity Investment Measures).109 CBRC supervises and approves all equity investment in Chinese funded financial institutions.110 These Equity Investment Measures contain strict limits on foreign shareholdings. The shareholding of a single foreign financial institution may not exceed 20%,111 and when the aggregate of foreign investment reaches or exceeds 25% in a non-listed Chinese funded financial institution it is regarded as a foreign-funded financial institution.112

However, different and less strict rules apply in respect of county banks and particularly those in less developed rural areas where foreign banks may set up or acquire local banks. The purpose of the different rules is to provide financial support for farmers and to promote economic development in rural areas. Foreign firms are well represented in county banks. The CBRC has traditionally had a pegging policy which made it easier and quicker for foreign banks to establish county banks in more developed areas if they had previously established a county bank in a key impoverished county.113

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109 Ibid.
110 Ibid art 3, 4. Chinese Funded Financial Institutions include commercial banks, urban and rural credit co-operatives, trust and investment companies of enterprise groups and financial leasing companies within China as well as other Chinese Funded Institutions established with CBRC approval under art 2 of the Law of the People’s Republic of China on Commercial Banks, (People’s Republic of China), National People’s Congress, 27 December 2003.
111 Ibid art. 8.
112 Ibid art. 9.
113 See He Wei Ping, above n 45, 87 ff.
A more recent rule affecting foreign banks is the *Implementation Measures for the Administrative Licensing Items Concerning Foreign-Funded Banks* of 11 September 2014 (Implementation Measures). According to these Implementation Measures, the formation, modification, and termination of an institution, the scope of its business, the qualifications of directors and senior executives, and other administrative licensing items prescribed by laws and administrative regulations or decided by the State Council are subject to administrative licensing by the CBRC and its local offices. The Implementation Measure of September 2014 has expired and was replaced by the *Implementing Measures on Administrative Licensing of Foreign-funded Banks*, effective 5 June 2015. Generally, this Measure has further reduced the requirements for establishment of a Chinese subsidiary by foreign funded financial institutions. Specific features of the Implementing Measures include delegating some CBRC regulatory responsibilities to local banking regulatory authorities and removing the 100 million yuan (approximately $16M USD at June 2015) branch operations fund.

Revisions in 2014 and 2015 discussed below mean that licensing conditions for foreign funded banks have become far more like those which apply to Chinese funded banks. The main changes following amendments to the Equity Investment Measures and the Implementation Measures include reductions in the scope of administrative licensing, and the unification of market entry criteria for different types of banks. Nine areas traditionally subject to strict administrative licensing, including e-banking business, debit card business, changes to working capital and business addresses for operating branches, and the establishment of automatic teller machines, have been relaxed. The Measures, however, have some added requirements for establishment of information technology structures, refinement of managerial tasks and prudential requirements.

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All of the aforementioned developments mean that establishing a foreign banking presence in China is now less onerous than it was previously, but significant distinctions between domestic and foreign bank ownership still apply.

### 6.5 Shadow banking

The phenomenon of shadow banking is an important feature of banking and finance markets in China and thus must be factored into any consideration of banking and banking markets. Shadow banking is credit intermediation outside the official banking system which is free from the general laws and regulations which govern bank loans. It is an extremely large and important sector of the Chinese financial economy, where it operates quite differently to the way it operates in the West. There are estimates that it currently finances “almost half of all new credit.”\(^{118}\) It exists for a number of reasons, primarily the tendency of traditional banks to favour SOEs rather than small businesses in the allocation of their loans; and the low interest rates available to bank depositors which encourage them to invest in more risky ventures to maximise returns on invested funds.\(^{119}\)

Shadow banking creates risks for the finance industry and the economy generally because it is not subject to prudential or other regulation. On the positive side, it offers innovative products and services unavailable to its users elsewhere due to the strict banking regulation and the practices of the major banks, and thus it generally stimulates innovation in financial products from more traditional lenders. As a consequence it provides substantial competition to the traditional banking sector, which is more constrained by regulation and may be subject to political directives on lending.

China’s large commercial banks are central players in the banking system but participate in shadow banking by circumventing strict regulations on bank lending, along with other players in the shadow banking system. Lenders in the shadow system include a wide range of players, legitimate and otherwise. The diversity of players is staggering. Shadow banking includes the off-balance sheet vehicles (commercial bills and entrusted loans between corporates which are off the administering bank’s balance sheet) of legitimate banks; loans structured as interbank assets to dodge lending caps; investment products backed by murky pools of loans;\(^ {120}\) high risk business projects such as property developers, steelmaking, mining and shipping companies;\(^ {121}\) and funds borrowed by local government financing

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\(^{118}\) Shen Wei, above note 75, 596

\(^{119}\) Ibid.

\(^{120}\) Ibid, 578.

vehicles (LGFV) to finance investment in municipal infrastructure projects. Another aspect is person to person platform banking (P2P), which involves individuals using online platforms without a financial institution as an intermediary. Participants noted that internet companies like Baidu China and Alibaba collect deposits and give interest, so they are in some ways like banks. Wealth management products have grown exponentially and most of these are off-balance sheet products and hence part of the shadow banking sector. 122 Finally and also part of shadow banking, difficulties in obtaining bank loans force many SMEs and consumers to seek working capital from loan sharks. 123

Shadow banks are not subject to rules on capital and liquidity, and:

“It has been reported that 90% of shadow lenders are State-Owned enterprises which are cash rich and are more capable than private enterprises in terms of their capability to sneak around rigid regulatory requirements... These SOEs usually have financial arms in the form of financing or trust companies.” 124

These SOEs can make great profits out of shadow banking, with their position enabling them to borrow from the formal banking sector at lower interest rates and lend at higher rates. 125

Real concerns exist particularly about the flow of bank money into loans in this market. The involvement of local and central government and SOEs in the shadow banking system suggests implicit guarantees and may encourage investors to take part in the shadow banking system and overlook the material risks.

Regulation of shadow banking would encourage financial stability and sustainable growth, and protect investors. The CBRC has taken steps to control and regulate the area, but no one regulation can control all aspects of it, as it involves multiple authorities in the financial sector. 126 Participants noted that the CBRC recognises the tension between prudential regulation of shadow banking for stability and the competition which shadow banking generates. The existence and significant role of shadow banking in China must be factored into market definition and any competition analysis of bank mergers in China.

6.6 Shanghai Free Trade Zone

The approach to banking in areas such as the Shanghai Free Trade Zone (SFTZ) will have a growing influence on banking markets over the coming years. It was announced in 2013 as part of the continued

122 Shen Wei, above note 75, 599.
123 Ibid.
124 Ibid, 592.
125 Ibid.
126 See, for example, China Banking Regulatory Commission, above n 82, IX, 5, 57, 58, 98.
opening up of the Chinese economy. The State Council passed the Framework Plan for China (Shanghai) Pilot Free Trade Zone in July 2013. The Framework Plan outlined the expansion of the SFTZ to many areas of trade and professional services, and these include investment and financial services.

First bank entrants into the SFTZ were the Industrial and Commercial Bank of China, the Agricultural Bank of China, the China Construction Bank, the Bank of Communications, China Merchants Bank, Shanghai Pudong Development Bank, Bank of Shanghai and Citibank, and the Development Bank of Singapore. By the end of 2013, 22 banking institutions had been approved:

“… to establish 25 outlets in SFTZ, including nine branches and three sub-branches of Chinese banks, 12 sub-branches of foreign banks and a financial leasing subsidiary. Foreign banks’ sub-branches in SFTZ accounted for 11% of their total sub-branches in Shanghai.”

The Notice of the CBRC on Issues Concerning Banking Supervision in China (Shanghai) Free Trade Zone set innovative rules for the SFTZ, including:

- Supporting the entry of banks, particularly private banks, foreign banks and non-bank financial institutions. The rules allow for new banks or branches of both Chinese private and foreign-funded commercial banks, policy banks and local banks, as well as finance companies, auto financing companies and consumer finance companies.
- Encouraging the provision of cross-border investment and financing services. Banks in the SFTZ are assisted with the development of cross-border investment services (including cross-border acquisition and merger loans, project loans, onshore warranty for offshore loans, cross-border asset management and wealth management businesses, and real estate investment trusts).
- Supporting the development of offshore banking business from the SFTZ by approved Chinese-funded banks.
- Simplifying access to banking markets for banks, senior executives, and certain services below branch level by mandating ex post reporting instead of ex ante approval. A fast-track green channel for the access issues in the banking sector in the SFTZ will be established, and rules on time limits for handling access issues will be developed.

127 The Overall Plan for China (Shanghai) Pilot Free Trade Zone, (People’s Republic of China), State Council, Announcement No 38, 18 September 2013.
128 China Banking and Regulatory Commission, above n 82, 47.
129 Notice of the China Banking Regulatory Commission on Issues concerning Banking Supervision in China (Shanghai) Pilot Free Trade Zone, (People’s Republic of China), China Banking Regulatory Commission, Order No 40, 28 September 2013.
Making the regulatory service system independent and supportive of banking, while still controlling risk. The calculation standards and regulatory requirements for the loan-to-deposit ratio, liquidity, and other indicators will be adjusted.

There are three main regulatory innovations in SFTZ. The first is the establishment of a “negative list” administrative mode for foreign investment: fields outside an 18 industry negative list, under the principle of consistency in policies for both foreign-funded and domestic enterprises, will be subject to a filing system administered by the Shanghai Municipal People’s Government and not an approval system (unless the State Council reserves the approval requirement for domestic investment projects). This means that approval of contracts and by-laws of foreign-funded enterprises is replaced with filings to the Shanghai Municipal People’s Government, and relevant formalities after filing are the same as the requirements for local businesses. Special Management Measures for the Market Entry of Foreign Investment in the Shanghai FTZ set out the areas excluded from these provisions, such as national security and public safety, or areas detrimental to social and public interests. Mergers and acquisitions by foreign investors, strategic investment by foreign investors in listed companies, and capital contribution by offshore investors with their holdings of equities in enterprises in Mainland China are still allowed only subject to the usual national security and anti-monopoly review.

The remainder of the SFTZ initiatives should make business dealings in the SFTZ easier for all businesses. Quarantine, and entry and export inspections, are relaxed and made more efficient. There will be better co-operation between government departments, such as customs, quality inspection, industry and commerce, taxation, and foreign exchange, and the Shanghai Municipal People’s Government. Other important changes include further simplification of administrative procedures and various laws.\footnote{Such as the Law of the People’s Republic of China on Foreign-funded Enterprises, (People’s Republic of China), President of the People’s Republic of China, Order No 41, 31 October 2000; Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures, (People’s Republic of China), National People’s Congress, Order No 7, 8 July 1979; and, Law of the People’s Republic of China on Chinese-Foreign Contractual Joint Ventures, (People’s Republic of China), National People’s Congress, 13 April 1988.}

6.7 Further reform of the Chinese financial system

Financial system reform in China is on-going, but despite a commitment to increased marketisation, full details of the way forward and the timing of change are still unclear. It is expected that stability will still form the cornerstone of the system, followed by industrial policy, with competition a way behind. Despite this, the government continues to implement important reforms. The exposure draft for a new deposit insurance scheme, Regulations of Deposit Insurance, was released by the PBOC on 30 November 2015.
2014. 131 It was a further step towards financial marketization, since it reduces the impact of the implied guarantee of SOE banks. This regulation commenced quickly on 1 May 2015, with no material change from the draft regulation.132 Arguably this regulation assists moves towards interest rate liberalisation, a crucial step in further financial reform such as the internationalisation of the RMB.

Banking industry reform has been described in the following way:

“...the process is slow and BOC continues to enjoy state support and operate in an oligopolistic banking sector dominated by it and its three competitors...”133

Despite the continued “...tight internal financial regulation, strong controls on portfolio capital flows and a steadily appreciating currency”, 134 regulatory changes over the past few years have strengthened the system, particularly by establishment of the CBRC and its strong regulatory framework. Interest rates and exchange rates are more flexible and the emphasis of monetary policy has shifted. The PBOC still gives “window guidance”- guiding individual banks’ extension of credit to priority sectors, but has phased out mandatory credit ceilings. Restrictions on capital flows have been removed. In summary, “While the control of portfolio flows has remained tight, since the late 2000s efforts by the authorities to promote the internationalisation of China’s currency have seen growth in offshore RMB deposits and an increase in avenues for cross-border flows.”135

It is expected that recent changes such as those to the Regulation on Foreign-Funded Banks will narrow the competitive gap between foreign and domestic banks, providing better opportunities for foreign banks to enter and expand.

A comprehensive report entitled “China 2030” was issued by the World Bank and the Development Research Centre of the State Council of the PRC in 2013. It charted principles for China’s on-going growth and development and concluded that redefinition of the role of government in the market was essential to China’s progress. It recommended: reforming and restructuring state enterprises and banks; developing the private sector; and promoting competition and deepening reforms in markets including financial markets. Unsurprisingly the banking sector was identified as crucial to China’s development,136 with the Report recommending commercialisation of the banking sector, interest rates set by the market,

131 Deposit Insurance Regulation, (People’s Republic of China), State Council, 1 May 2015.
133 Liew, above n 71, 220.
135 Ibid, 30.
136 World Bank, above n 47, 111.
deepening of capital markets and improving the legal and supervisory infrastructure to ensure financial stability and internationalisation of the financial sector.\textsuperscript{137}

Structural reforms recommended for the economy generally included support for private sector firms by lowering barriers to entry and exit, breaking up state monopolies or oligopolies in key industries (petroleum, chemicals, electricity distribution, and telecommunications), promoting the growth of SMEs and increasing their access to finance, stimulating regional and local specialisation, and encouraging state enterprise reforms through competition.\textsuperscript{138}

Of particular importance for this research, the Report noted that despite substantial progress in China’s reform and deepening of the financial sector over the last 30 years, key structural imbalances such as the dominance of state-owned banks, strong state intervention and controls on interest rates still exist. The Report foreshadowed that benefits of the existing system were likely to be outweighed in the future by costs,\textsuperscript{139} that the system posed significant financial risks, and that going forward it would prevent the financial system from serving an economy driven by the private sector. It noted that global Chinese enterprises would benefit from a domestic financial sector seamlessly integrated with foreign financial institutions and global capital markets.\textsuperscript{140} The Report proposed comprehensive financial sector reforms, but strongly emphasised the need for:

“Careful monitoring of the progress of liberalization ... to ensure that banks do not indulge in destabilizing competition that erodes margins or in reckless lending that harms the quality of the loan portfolio, and that any emerging risk of distress is dealt with swiftly.”\textsuperscript{141}

The reforms proposed by the World Bank Report would impact both the nature of lending and the role of SOE banks in Chinese financial markets.

More recent reform initiatives appear to parallel some of the Report’s ideas, although participants stated that there was not universal acceptance of its approach within Chinese decision-makers. The CBRC Chairman in the 2013 Annual Report flagged reforms to improve “..coverage, differentiation and efficiency” of banking institutions emphasising “differentiated competition and specialised services”.

\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid 27.
\textsuperscript{139} Ibid 28.
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid 27–30. See also Wing Thye Woo, ‘Increasing the Resilience of China’s Financial Sector and the Global Monetary System’ in Ligang Song, Ross Garnault and Cai Fang (eds), Deepening Reform for China’s long-term growth and development (ANU Press, 2014), 315.
talking of the “risks brought by homogenous competition.” This suggests a real recognition of the value of competition to the banking sector and the objective of assisting its development. On the other hand, the Chairman also talked of the “...momentum of robust growth and orderly competition” and criticised “blind expansion and disorderly competition.” These latter descriptions of competition accord with the socialist market competition view of managed competition, rather than true market led competition.

6.8 Conclusions on Chinese Banking System

In summary, while there has been significant reform of the Chinese financial system, interest rates are still set by the PBOC, and the state continues to influence the allocation of capital, with the majority of legitimate funds still going to SOEs. The PBC frequently adjusts the required rate of return for commercial banks, with the ratio exceeding 20 per cent in mid-2011. The authorities maintain strict capital account controls, especially over portfolio investment, debt financing and foreign direct investment. While there is some competition between banks, detailed regulation on the functions of particular categories of bank means that competition tends to be competition between those performing similar functions. The rigid nature of banking regulation creates a very stable system but drives more conduct into the shadow banking system. Shadow banking clearly provides competitive tension for some categories of borrowers and lenders, but there is little discussion of its impact in formal documents about banking. Most participants recognised its importance in the market, both in terms of competitive benefit but also increased systemic risk.

Existing regulation has limited the ability of foreign banks to innovate and fully leverage the inherent advantages which they have operating in complex financial markets. More recent developments have been described as indicating a “tangible commitment to change”. The CBRC continues to address problems relating to provision of financial support for rural and agriculture industries by adopting different regulatory policies and initiatives in relation to them. It also encourages large and medium

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142 Ibid, above n 82, 89.
143 Ibid, 88.
144 Ibid, 89.
145 "Orderly competition" is often mentioned in China and is actually mentioned in the AML; see Anti-monopoly Law of the People’s Republic of China, (People's Republic of China), National People’s Congress, 1 August 2008, art 4. Where SOEs compete and loss does not necessarily lead to market exit because they have government support, prices can continue to fall requiring “industry self regulation”, which involves floor pricing and a return to so-called “orderly competition”.
148 Ibid, 10.
149 China Banking and Regulatory Commission, above n 82, IX.
sized banks to set up special SME units to serve SMEs at grassroots level and expand institutional coverage, and allows private banks to diversify and assist SMEs.\textsuperscript{150}

In summary, Chinese banking regulation is primarily driven by the key interests of the government. This involves pursuing economic and political stability, concurrently protecting banks and using them to serve its interests. Government will not allow banks to fail given the likely disruptive social and economic consequences. The government allows foreign competition to serve those ends. When necessary, banks are directed against their own commercial interests to serve government policy. All of this may undermine aspects of banking reform. China’s banking laws and regulations themselves emphasise stability and national economic development. While they contain provisions recognising the role of competition, it is clearly less relevant to policy makers than stability and national economic development. Despite some modifications, laws and regulations continue to make market entry for new and foreign banks difficult, and impede innovation and competition between banks at all levels. This is to a great extent by design as part of the socialist market economy matrix, but as the World Bank has noted, it may not assist in the long run to provide China’s citizens with the economic and social development they will require in the longer term. While some initiatives are aimed at opening up parts of the financial economy there is still a very long way to go. At the same time, stability is threatened by the unregulated shadow banking system which has some advantages in competitive terms but encourages risky financial activities including by SOEs, local and central governments.

6.9 Australian financial organisations in China

All of the major Australian banks have a presence in China, while some Chinese banks have a direct presence in Australia.\textsuperscript{151} Insurance and funds management companies are also represented.

The Australian and New Zealand Banking Group Limited (ANZ) Bank has two associates and one wholly owned banking enterprise. It owns 20% of the Shanghai Rural Commercial Bank, China’s largest commercial rural bank, in an investment of $252M USD. It owns 14% of the Bank of Tianjin, which is the fourth largest city commercial bank based on assets.\textsuperscript{152} It also fully owns a rural bank in Liangping County,

\textsuperscript{150} PWC, above n 147, 38.
\textsuperscript{151} At June 2015, Bank of China (Australia) Limited was the only Chinese-owned foreign subsidiary bank operating in Australia, however the following Chinese banks also had APRA ADI approved branches operating in Australia: Agricultural Bank of China Limited, Bank of Communications Co Ltd, China Construction Bank Corporation, Industrial and Commercial Bank of China Limited and the Oversea-Chinese Banking Corporation Limited; see Australian Prudential Regulation Authority, ‘List of Authorised Deposit-taking Institutions’, (3 June 2016), <http://www.apra.gov.au/adi/pages/adilist.aspx>.
\textsuperscript{152} Australia and New Zealand Banking Group Limited, Annual Report, 2014.
Chongqing.\textsuperscript{153} ANZ has a network of six branches and sub-branches s in Beijing, Shanghai, Chongqing, Chengdu, Hangzhou and Guangzhou, in addition to a branch in the Shanghai Free Trade Zone.\textsuperscript{154} The Bank has an RMB licence for retail banking.\textsuperscript{155}

The Commonwealth Bank of Australia (CBA) has two main joint ventures: 20% of Qilu Bank Co Limited in Shandong Province, the 10\textsuperscript{th} largest city commercial bank by assets; and 19.9% of Bank of Hangzhou, an investment of $100M (approximately $77M USD at June 2015). CBA expansion in China has a regional focus. It currently owns or controls 15 county banks and four sub-branches in Henan and Hebei province since opening the first county bank in 2011 in a joint venture with Bank of Hangzhou.\textsuperscript{156} It also has branch offices in Shanghai and Beijing and a representative office in Beijing. CBA earlier purchased a Shanghai-based mortgage broking business, which it rebranded as CommFinance in 2005. In addition, CBA currently has interests in a funds management joint venture, and in a joint venture in insurance with the Bank of Communications.

The National Australia Bank (NAB) has a branch in Pudong, Shanghai where it provides a range of services including selected personal banking services, while the Bank’s representative office in Beijing is to be upgraded to a branch office following regulatory approval in May 2015.\textsuperscript{157} It has partnerships with a range of banks and the national bankcard association, as well as links to wealth management institutions. This more limited penetration of the China market has been a strategic decision, with its operations focused on supporting Australian clients entering the Chinese market.\textsuperscript{158}

Similarly to NAB’s strategy, Westpac Banking Corporation (Westpac) has focused on organic growth supporting its existing clients’ expansion into China. Westpac has offices in Hong Kong, Beijing, Shanghai and a sub-branch in the SFTZ. It has licences to trade currency pairs and derivatives in China.\textsuperscript{159}


\textsuperscript{158} For example, see the comments of Spiro Pappas, CEO, NAB Asia: “Our approach focuses on that investment and trade flow with our corporate and business customers, which means we don’t need to have a vast footprint in the region, We have a deliberate policy of targeting their Asian agenda.”; Peter Cai, “NAB deals in China in its own way”, (11 March 2013), The Sydney Morning Herald (online), <http://www.smh.com.au/business/nab-deals-in-china-in-its-own-way-20130310-fu1v9.html>.

The banking environment in China is difficult for foreign banks. Most seek to maintain their presence in the country but expansion will depend on the easing of regulations, and the ability to access new markets and provide a wider range of products and services in a flexible manner.

7. The Banking Environment in Australia

7.1 The banking landscape

Australia has a well-regulated banking and financial system which emerged strongly from the GFC. Its ranking on the Financial Development Index is good—it is ranked fifth after Hong Kong, the United States, United Kingdom and Singapore for financial access, stability, institutional environment and financial markets.\textsuperscript{160}

The Australian financial system was traditionally highly regulated but in 1983 the Australian dollar was floated, foreign exchange controls and capital rationing through quantitative lending controls were removed in the early 1980s and foreign banks were allowed to compete, initially for corporate customers and then in the 1990s, as deposit taking institutions.\textsuperscript{161}

Banking in Australia is highly concentrated and is currently dominated by four major banks: ANZ, CBA, NAB and Westpac. A second tier of six banks includes local and internationally owned banks and holds about 10% of the market.\textsuperscript{162}

The banking market has become more concentrated following various mergers over the last ten years or so, which are discussed later in the report, although mergers appear to be a worldwide trend.\textsuperscript{163} Other banking businesses in Australia include significant foreign banks, investment banks, regional banks and non-bank financial institutions carrying on banking business such as credit unions, building societies and friendly societies. Bodies approved to carry on banking\textsuperscript{164} in Australia are known as “authorised deposit taking institutions” (ADIs).\textsuperscript{165} Additional approval is required to describe a business as a “bank”.

7.2 Banking regulation

\textsuperscript{163} Senate Economics Reference Committee, Parliament of Australia, \textit{Competition within the Australian Banking Sector}, (May 2011), 43.
\textsuperscript{164} Banking business involves specified activities around taking money on deposit and making advances; see \textit{Banking Act 1959 (Cth)} s 5.
\textsuperscript{165} \textit{Australian Prudential Regulation Authority Act 1998 (Cth)} s 12(3).
The banking and finance system is regulated by the Reserve Bank of Australia (RBA), the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC). The RBA is the central bank.\textsuperscript{166} It is responsible for the overall stability of the financial system and monetary policy by way of its Payments Systems Board and Reserve Bank Board. APRA\textsuperscript{167} is responsible for licensing and prudential supervision of all ADIs and prudential supervision of life and general insurance companies and superannuation funds.\textsuperscript{168} It is worth noting that these regulators, with the exception of the Reserve Bank Board, either currently have references to competition in their mandates or have competition proposed to be included in their mandates.\textsuperscript{169} This reflects the systemic importance of competition as a means of providing stability and resilience to the Australian financial system, whilst also ensuring that regulators consider competition issues in the banking system when acting independently of the ACCC. For example, the mandate of APRA under the Banking Act 1959 requires it to:

"...balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality...to promote financial system stability in Australia."\textsuperscript{170}

The Treasurer assesses merger applications under s63 (3A) of the \textit{Banking Act 1959} (Cth), consulting ASIC and APRA. The Treasurer must take the national interest into account before giving consent to a bank merger.

APRA has operational independence from government but is subject to government direction on its policies and priorities. The Minister is expressly prohibited, however, from giving a direction in relation to a particular situation.\textsuperscript{171} Banks themselves are responsible for implementation and monitoring of the prudential standards and must report generally on compliance and in particular on any significant breach or likely breach. Failure to notify a significant breach or likely breach of a standard is itself a breach of the Banking Act.\textsuperscript{172} APRA may give ADIs a direction to comply with a standard and failure to do so is an offence.\textsuperscript{173} It has broad powers to investigate ADIs likely to be unable to meet their obligations to

\begin{footnotesize}
\begin{enumerate}
\item[166] Established under the \textit{Reserve Bank Act 1959} (Cth).
\item[167] Established under the \textit{Australian Prudential Regulation Authority Act 1998} (Cth).
\item[168] Prudential standards relate to matters such as "capital adequacy, funds management and securitisation, liquidity management, large exposures, equity associations, credit quality, corporate governance and outsourcing matters"; see Louise McCoach and David Landry, ‘\textit{Australia}’ in Jan Putnis (ed) \textit{The Banking Regulation Review} (Law Business Research London, 2010), 32. The banks and financial institutions are themselves responsible for implementation and monitoring of the prudential standards. APRAs prudential standards are set out at www.apra.gov.au
\item[169] \textit{Australian Prudential Regulation Authority Act 1998} (Cth) s 8(2); \textit{Payment Systems (Regulation) Act 1998} (Cth), s 8(a)(iii); Financial System Inquiry Committee, Financial System Inquiry Final Report (November 2014), Recommendation 30.
\item[170] \textit{Australian Prudential Regulatory Authority Act 1998} (Cth) s8(2).
\item[171] Louise McCoach and David Landry, see above n 168, Ch 3.
\item[172] \textit{Banking Act 1959} (Cth), s 62A(1B).
\item[173] \textit{Banking Ac 1959} (Cth) s 11CG(1).
\end{enumerate}
\end{footnotesize}
depositors. Ultimately, APRA may apply to the court to have an ADI wound up.\textsuperscript{174} Where an ADI is unable to meet its obligations to depositors, the RBA has the discretion to act as lender of last resort if the financial system would be seriously affected by a failure.\textsuperscript{175}

ASIC monitors and promotes market integrity and consumer protection and is responsible for licensing in relation to financial products and services.\textsuperscript{176}

Public companies incorporated in Australia (companies which can access markets generally for funds), non-operating holdings companies of a group which holds an ADI, and foreign banks registered as such under the Corporations Act can apply for ADI authorisation.\textsuperscript{177} In such cases the bank must provide further information about supervisory arrangements in its home jurisdiction. Foreign ADIs are not permitted to accept deposits from Australian residents of less than $250,000.\textsuperscript{178}

Transfers of banking businesses between Australian ADIs are also governed by the Financial Sector (Business Transfer and Group Restructure) Act 1999. APRA must grant approval and issue a certificate of transfer before legally recognised succession can occur. In granting approval APRA has regard to the interests of the depositors of both bodies, and to the interests of the financial sector generally, and consults with the ACCC and the Commissioner of Taxation.\textsuperscript{179}

The government’s so-called “four pillars” policy is of particular importance to the Australian banking landscape and to individual bank mergers because it places limits on acquisition by the four largest banks. It is a competition policy designed to prevent undue concentration by mergers between them. The policy evolved from the “six pillars” policy in 1990, when the government announced that no mergers would be allowed between any of the four major banks and the two major life insurance companies. This became the four pillars policy in 1997, when the government stated that mergers amongst the four major banks would not be permitted until it was satisfied that there was improved competition from new and established financial industry participants, particularly with regard to small business lending. The policy was implemented at that time to:

“The...prevent a situation where conceivably the four banks would go down to two in a short period of time, before [the government] put in place measures which would allow new deposit taking

\textsuperscript{174} Banking Act 1959 (Cth), s 14F.
\textsuperscript{175} Australian Securities and Investments Act 2001 (Cth).
\textsuperscript{176} Established under the Australian Securities and Investments Act 2001 (Cth).
\textsuperscript{177} Established under the Corporations Act 2001 (Cth).
\textsuperscript{178} They must also disclose to depositors that the depositor protection provisions of the Banking Act do not apply. For these reasons foreign banks usually incorporate local subsidiaries.
\textsuperscript{179} APRA also has oversight of both voluntary and compulsory (as may be required in a crisis event) acquisitions of assets in the financial system under the Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth). APRA’s oversight of asset acquisitions extends to those which occur in the insurance sector under the Insurance Acquisitions and Takeovers Act 1991 (Cth).
institutions to form, new foreign entrants to come into the market, and to facilitate the enhanced competition that the Government at the time believed was necessary.\footnote{180}

The recent FSI recommended that the four pillars policy be retained to prevent further concentration.\footnote{181}

Other laws which apply to banks are the \textit{Corporations Act 2001} (Cth) which applies to all corporations, setting out the requirements for their management and containing the actual mechanics of mergers including bank mergers. There are also consumer protection laws specific to the financial system, these include the \textit{National Consumer Credit Protection Act 2009} (Cth) which unified regulation of consumer credit activities previously governed by state regulation and provides the regulatory framework under which Australian Credit Licences are issued and introduced the National Credit Code; and, the \textit{Australian Securities and Investment Commission Act 2001} (Cth) (ASIC Act), which empowers ASIC with consumer protection powers in relation to financial products under Part 2 of the ASIC Act.\footnote{182} Rules on regulatory capital are set out in prudential standards and are based on the Basel II framework to ensure ADIs maintain adequate capital. Australian ADIs source their funds from investor deposits and domestic and international wholesale markets.

During the GFC the government implemented measures such as guarantees for bank deposits and provided some wholesale bank funding.\footnote{183} It also provided liquidity funding and purchase of mortgage-backed securities.\footnote{184}

\section*{7.3 Foreign banks: regulation}

\footnote{180} Professor Allan Fels (then ACCC Chairman), "The Wallis Report - Implications for the Insurance Industry", (speech delivered at The Association for Women in Insurance Victorian Chapter, Deloitte Touche Tohmatsu Melbourne, 14 July 1997), 9. While there is general support for the policy and it has recently been reconfirmed by the Financial System Inquiry (see Final Report, above n 19, 34), others have suggested that it stifles competition by entrenching the position of the big four banks and implies a government guarantee for them but not others.\footnote{181} Financial System Inquiry Committee, above n 20, Final Report, 34. There have been recommendations to abolish the policy on the ground that it is ultimately anticompetitive as encouraging the idea that there is an implied government guarantee for those four banks. See [add in Nicholls etc report]\footnote{182} \textit{Corporations Act 2001} (Cth), Ch 5 and Ch 6.

\footnote{183} Currently, the Government’s Financial Claims Scheme protects deposits in ADIs valued up to $250,000 on a per account holder, per ADI basis if an insolvency event were to occur. The Scheme replaced the Commonwealth Government’s Guarantee Scheme for Large Deposits and Wholesale Funding, which was a key component of the Government’s response to the GFC. The preceding provisions of the Commonwealth Government’s Guarantee Scheme for Large Deposits and Wholesale Funding were introduced in October 2008 and provided greater protection of banks deposits, with deposits up to $1 million in eligible ADIs guaranteed; see Guarantee Scheme for Large Deposits and Wholesale Funding, ‘Questions & Answers about the Guarantee on Deposits’, (2012), <http://www.guaranteescheme.gov.au/qa/deposits.html>.\footnote{184} Leela Cejnar, ‘The Impact of the Global Financial Crisis on Competition Policy in the Australian Banking Sector’ (2009) 3(5) \textit{Law and Financial Markets Review} 449, 454.
In addition to specific banking regulation, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) requires notification to the Australian government of acquisitions by foreign companies of a substantial interest in an Australian company. This applies to ADIs. The following acquisitions are notifiable:\(^{185}\)

- Acquisition by a foreign person of a substantial interest\(^ {186}\) in an Australian corporation with total assets exceeding A$252m (approximately $195M USD in June 2015). A higher threshold of $1.1BN (approximately $850M AUD in June 2015) applies to Chilean, New Zealand, US, Japanese and Korean non-government investors, although certain prescribed sensitive sectors have lower thresholds.

- Takeovers of offshore companies where the assets of Australian subsidiaries exceed $252m (approximately $195M USD in June 2015). A higher threshold of $1.1BN (approximately $850M AUD in June 2015) applies to Chilean, New Zealand, US, Japanese and Korean non-government investors, although certain prescribed sensitive sectors have lower thresholds.

- Direct investments by foreign governments and their agencies irrespective of size, including new businesses.

It should also be noted that foreign investment in the banking sector must also comply with the *Banking Act 1959* (Cth) and the *Financial Sector (Shareholdings ) Act 1998* (Cth).

Nonetheless, even when a merger in Australia involving a foreign and domestic merger party has all the relevant regulatory approvals, the Treasurer may refuse permission if the acquisition is against the “national interest” under the *Foreign Acquisitions and Takeovers Act 1975* (Cth). This reflects a form of implicit national industrial policy. There are two recent examples of acquisitions which have been blocked under this ‘national interest’ protection which illustrates how the Treasurer can exercise his authority in assessing these mergers.

\(^{185}\) These thresholds are provided for under Australia’s *Foreign Investment Policy* (2015).

\(^{186}\) A “substantial interest” under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) is control alone or with associates of 15% or more of the voting power or interests in 15% or more of the issued shares.
Firstly, the proposed Archers Daniel Midland (ADM)/Graincorp Limited (GNC) merger was blocked by the Treasurer in 2013 on grounds that it was contrary to the ‘national interest’. This particular merger involved a proposal by ADM, a diversified publicly owned US agricultural entity, purchasing 100% of the shareholding of Graincorp Limited, a publicly listed company principally operating facilities for the receipt and storage of grain and other agricultural products. In this particular decision, the Treasurer blocked the merger proposal on the basis of outstanding competition concerns. This was despite the merger having been approved by the ACCC. There was a high level of concern from stakeholders and the broader community about the proposed merger, which suggests that popular concerns will be taken into account when a transaction is subject to review. The Treasurer intervened prior to the release of the decision of the Foreign Investment Review Board (FIRB) (which reviewed the decision under the Foreign Acquisitions and Takeovers Act 1975 (Cth)), despite ADM offering conditions to address such concerns as part of the FIRB approval process. In this particular transaction it is worth noting that in making the decision to block the proposed merger, the Treasurer was bound by a side letter commitment to the US-Australia Free Trade Agreement to discuss the proposed transaction with his US counterpart. Such consultation commitments offer foreign bidders for domestic assets an alternative means of influencing the approval of the transaction. Despite such consultation, the decision was blocked. This decision illustrates that even in the event that competition approval is granted to a transaction involving a foreign entity and there is consultation with a foreign counterpart, the merger proposal can be blocked on the grounds it is contrary to the ‘national interest’, a measure designed to ensure stability within the Australian economy. This is done, however, in a transparent manner.

Another example of the way in which the Treasurer can intervene in a proposed merger is seen in the blocking of the ASX Limited (ASX)/Singapore Exchange Limited (SGX) merger in April 2011. This particular transaction involved the proposed merger of the national stock exchanges of Australia and Singapore. Whilst similarly to the ADM/Graincorp transaction, the Treasurer blocked the merger, despite the proposed transaction also having ACCC approval. However, the blocking of this merger can be distinguished in some respects from the blocking of the ADM/Graincorp transaction, as while the Treasurer intervened prior to FIRB determination in the ADM/Graincorp transaction, here FIRB had

188 Australian Competition and Consumer Commission, “Archer Daniels Midland Company - possible takeover of GrainCorp Limited”, (Merger Register, R50620, date completed 27 June 2013).
publicly announced that the proposed transaction was ‘contrary to the national interest’. The reasons provided by the Treasurer in blocking this particular merger included that the merger would dilute capital flows to Australian listed companies (as the SGX was a smaller exchange by capital flows) while also placing Australian jobs at risk. Again, this decision illustrates how mergers in the Australian financial sector remain subject to other regulators, who consider issues other than competition concerns in maintaining systemic stability.

This is clearly a simpler and more open financial regulatory environment than that existing in China. The competition regulator is not the final arbiter on bank mergers, although the power of the Treasurer to refuse a merger regarding “national interest” grounds is not specifically linked to competition issues but requires a broader inquiry. There are current proposals to strengthen and simplify the foreign investment framework. Refusals by the Treasurer in this context are, however, relatively uncommon.

7.4 Further reform of the financial system: competition policy going forward

The FSI reported in late 2014 and a number of its recommendations are aimed at increasing competition in financial markets. The Report recognised that stability of the banking system, as the core of the Australian financial system, is of paramount importance. It noted that the banking sector is concentrated “with the four major banks being the largest players in virtually all respects” and recommended the retention of the “four pillars” policy. The Report characterised competition in the finance industry as “generally adequate”, a far from ringing endorsement of the competitive environment. It noted that the high concentration and increasing vertical integration in the industry had the potential to limit the benefits of competition and recommended that the position should be monitored proactively. The Report also emphasised that its approach to encouraging competition was the removal of impediments to competition, including by ensuring that regulators “are more sensitive to the effects of their decisions on competition, international competitiveness and the free flow of capital.” The Report recommended review of the competitive environment every three years, which would guarantee the “right” level of competition and would address the natural tendency of conduct and prudential regulators to “prioritise

190 See Foreign Investment Review Board Minute, (F2011/01924, 2 April 2011).
192 See, for example, joint media release of the Prime Minister and The Treasurer, ‘Government strengthens the foreign investment framework’, (Media Release, 34/2015, 2 May 2015).
193 Financial System Inquiry Committee, above n 20, Final Report, xvi.
194 Ibid, xvi, 18.
fairness or stability over competition and long-term efficiency.”

Removal of rules and procedures creating barriers to competition should be a priority. Finally the Report noted that while the ACCC is primarily responsible for competition policy in the financial sector, the ASIC should take increased account of competition while making regulatory decisions and should be given a competition mandate in this respect.

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196 Ibid, 21, 237.
197 Ibid.
PART 8

8. The competition laws in brief

8.1 Introduction

Both China and Australia have laws aimed at fostering competition and prohibiting certain anticompetitive conduct, including mergers and acquisitions which have a likely anticompetitive impact in the market.

Since the commencement of the AML in 2008, MOFCOM has issued guidelines to indicate its approach to merger regulation and has made determinations on more than nine hundred merger proposals. Most proposals have been cleared but two proposals have been rejected outright and a relatively small number have been cleared with conditions. The AML requires MOFCOM to issue public written determinations only in circumstances where it refuses permission or imposes conditions on a merger. This means that only a small number of written determinations are available. Despite this, trends in MOFCOM’s approach to merger analysis can be discerned.

MOFCOM had not considered any bank mergers in its written determinations at the date of this report. This could be due to a number of factors:

- There may have been no bank mergers at all, or none falling within the merger thresholds, so there was no requirement to notify; and
- The parties may have failed to notify. Many banks are SOEs and there has been a tendency for SOEs not to notify. This is changing, particularly since penalties now apply to failure to notify.

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198 The usual areas are arrangements between competitors, abuse of dominance and merger control. Administrative monopoly is covered in Chapter V.
199 AML, Art. 28; c/f Competition and Consumer Act 2010 (Cth) s. 50. The AML refers to “concentrations of undertakings” rather than mergers or acquisitions, but for simplicity “merger” is used throughout this report.
201 Recent steps by MOFCOM towards increased transparency of decision-making should provide further assistance to analysis of its approach.
202 Some respondents suggested that there had likely been provincial transactions which were not notified. At last inspection of the MOFCOM lists in late 2014, no bank mergers had been notified since the commencement of the AML. Participants noted, however, that the merger between Pin’An Insurance Company and the Shenzin Development Bank to create the Ping’An Bank had been allowed, although there was not written decision as no conditions were imposed.
In Australia the ACCC has power under the CCA to take court action to prohibit mergers which have or are likely to have the effect of substantially lessening competition in a market. Most ACCC decisions on mergers are made, however, under a voluntary clearance procedure developed through custom and practice, and not set out in the law. The practice is a well-established and relatively transparent process, and the ACCC provides guidance on how it works, and releases the results in relation to individual mergers. A number of ACCC bank merger determinations have been controversial and in 2009 the Senate Economics Reference Committee conducted an inquiry into Bank Mergers following concerns about several mergers which occurred around the time of the GFC. A second inquiry into competition in banking was held in 2011. It showed that Australia was not alone in having high aggregate market share in the hands of its top four banks. Despite the controversies, merger review in the banking industry in Australia is well established and well documented.

8.2 Merger regulation and comparisons

Competition law worldwide regulates mergers and acquisitions based on the assumption that the aggregation of businesses may inhibit competition. In practical terms, if structural reorganisation is allowed unchecked it often makes other forms of prohibited anti-competitive conduct unnecessary. The enactment of the AML raised threshold questions about the way it would operate in the context of a socialist market economy and in particular its relationship with China’s well-developed industrial policy. China’s large internal markets and growing foreign investment mean that it is quickly becoming a major player in the competition law world. It now has a significant role as an adjudicator of a growing number of international mergers, and MOFCOM is now the third most influential competition law regulator after the US and European Union (EU). In this capacity it has the ability to significantly impact global merger transactions.

It is important to comment at the outset about comparing merger determinations in different jurisdictions. These are very often different for legitimate reasons such as distinctions in their respective markets related to issues such as number and size of competitors, barriers to entry, surrounding regulation, dynamic characteristics and consumer behaviour. Analysis of the state of competition in a

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203 There are two other routes for merger approval: formal clearance and authorisation, the latter allowing consideration of public benefit by the ACCC. Information on the different methods of merger approval is available on the ACCC website; see Australian Competition and Consumer Commission, ‘Merger Reviews’, <https://www.accc.gov.au/business/mergers/merger-reviews#merger-authorisations>.
205 Senate Economics Reference Committee, above n 163.
206 Ibid, 43. See also generally raolyn M. Evans, above n 30.
market and the impact of a particular merger may therefore vary even aside from other factors such as differences between laws and regulations and the different approaches to industrial policy considerations. In this context, the laws and political and economic backgrounds of the two jurisdictions considered here are vastly different. Nevertheless it is useful to compare the positions of an established competition law regime with a history of decision making in the area of bank mergers, with the likely approach which will be taken in a newer but highly influential jurisdiction.

If there is a “standard approach” to merger adjudication it assesses the likely impact on competition of the merger in relevant markets by virtue of a number of factors set out in the law. The extent to which factors other than the competitive impact of a merger are relevant to merger review, and what remains outside the merger regime, are important in any consideration of how mergers are regulated. Issues such as industrial policy objectives and concerns, the impact of efficiencies, foreign ownership rules and political considerations generally all have the capacity to impact merger analysis. In the context of bank mergers, the extent to which stability is factored into the mix will be critical to outcomes. Of course the extent to which all of these other factors for consideration influences the predictability of outcomes.

8.3 The AML and mergers: issues arising

A number of idiosyncrasies in the Chinese merger control system have the capacity to affect the way MOFCOM considers mergers with implications for the parties and the outcome.

8.3.1 Notification requirements

Under the AML, mergers and acquisitions (called “concentrations”) above designated turnover thresholds are notifiable. Thresholds are:

- worldwide business volume of all business operators exceeds 10 billion yuan (approximately $1.6BN USD as at June 2015) and the business volume in China of at least two operators exceeds 400 million yuan (approximately $64M USD as at June 2015) in the last accounting year;
- business volume in China of all business operators exceeds 2 billion yuan (approximately $320M USD) in the last accounting year and the business volume in China of at least two operators

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Specific guidance on computation of thresholds for mergers involving financial institutions has been provided by MOFCOM in conjunction with other industry regulators.  

While this requires a local nexus of two parties to the transaction, these are relatively low thresholds for notification of international mergers. This has three notable consequences. The first is that filing is necessary for many transactions which are unlikely to significantly affect competition in China. The second is that filing will be necessary for transactions which may have little real relationship with China. The third is that the low thresholds give MOFCOM the opportunity to become involved in a greater number of international mergers than would ordinarily be the case. In some situations MOFCOM has had input into international mergers which would not be amenable to review by regulators in other jurisdictions because those other jurisdictions have higher thresholds or because there is no obligation there to notify based on turnover alone. The issue of notification thresholds is not relevant in Australia, for example, as the issue of risk of anti-competitive outcome, not a turnover threshold, is the signal to notify the ACCC in the non-compulsory notification approach.

8.3.2 Application to joint ventures

The impact of the merger notification requirements on joint ventures in China is not entirely clear but based on past decisions of MOFCOM, the AML appears to apply to joint ventures more broadly than in other jurisdictions.

The AML prohibits mergers and like transactions including “control by contract” which will or may have the effect of eliminating or restricting competition. While there was initial uncertainty as to whether joint ventures were caught at all by the AML, MOFCOM has at this stage taken a very broad view of the

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210 A catch-all provision allows consideration outside these thresholds. Failure to notify in China, particularly by SOEs, has been noticeable, and recognition of this is evidenced by the promulgation of regulations, which allow investigation and punishment for failure to file. These regulations allow MOFCOM to investigate non-filings either of its own volition or on the basis of information presented by a third party.

211 Measures for Computation of Turnover for Notification of Concentrations by Business Operators in the Financial Sector, (People’s Republic of China), Ministry of Commerce, 16 August 2009. The Measures were agreed between MOFCOM, the PBOC, the CBRC, the China Securities Regulatory Commission (CSRC) and the China Insurance Regulatory Commission (CIRC). The Measures list different categories of revenue which should be included in computing turnover in each of four categories of business: banking institutions; securities companies; futures companies; and fund management companies. Categories of revenue such as interest income, commissions, fees, gains of currency exchange, for example, are aggregated, and business costs are deducted to arrive at a net aggregate value. Turnover for the purposes of notification thresholds is 10 per cent of the net aggregate value.

212 Only $65M USD. See Francois Renard and Michael Edwards, ‘China Merger Control Practice: A Comparative Analysis’ in Adrian Emch and David Stallibrass (eds), China’s Anti-Monopoly Law: The First Five Years (Kluwer Law International, 2013) 165, 167. Many jurisdictions do not adjudicate control by contract under their merger provisions. Some would instead consider the relevant contract under other provisions, which would not require notification over a prescribed threshold.
transactions which may be caught under the definition of “concentration” in respect of joint ventures and their likely impact, and appears to believe that minority shareholdings may confer control, particularly where the shareholder is the largest. This is relevant to joint venture banks, although the impact of such a venture will clearly depend upon the approach to market definition. The July 2014 document Guidance on Notification of Concentration of Undertakings discusses the definition of “control” or “decisive influence” when advising on the need to notify a joint venture transaction, stating that the issues will be viewed in a practical context by looking at relevant documentation and other surrounding circumstances. This does not provide real clarification of the issue.

By way of contrast, in Australia the CCA merger provisions deal with acquisition of shares or assets, and the provisions dealing with anti-competitive agreements apply to contract joint ventures. The application depends upon the way the joint venture is established i.e. whether it is by way of an incorporated body or is an unincorporated, contract regulated joint venture. The merger law was changed in 1993 from one which considered the position of the acquirer and its market power to one which focuses on the impact on competition of the merger.

8.3.3 Extraterritorial reach

The extraterritorial application of competition law is particularly important to foreign bank mergers. Article 2 of the AML expressly provides that the law applies to conduct within China and to conduct outside China which has an anti-competitive effect in the domestic market.

While the full extent of the AML provision is not entirely clear at this stage, it has been applied, for example, in a merger of two Russian companies located outside China which would have supplied only 25% of the Chinese market for an essential product in a highly concentrated world market. These examples are pertinent to an international merger of two foreign banks having operations in China, particularly when coupled with the low notification thresholds for mergers.

8.3.4 Conclusion

213 See Savio Macchine Tessili S.P.A. by Penelope Company Limited [2011] MOFCOM No 73, 31 October 2011 where the words “control or decisive influence” were construed broadly. For more recent joint ventures, see Corun/Toyota China/PEVE/Sinogu and Toyota Tsusho [2014] MOFCOM No 49, 2 July 2014; Maersk, MSC and CMA CGM [2014] MOFCOM No 46, 20 June 2014.

214 This document expanded on a 2009 document of the same name; see, Guidance on Notification of Concentration of Undertakings, (People’s Republic of China), Ministry of Commerce, 6 June 2014; and, for the earlier version of the same document, see Guidance Opinion of Notification of Concentration of Undertakings, (People’s Republic of China), Ministry of Commerce, 5 January 2009.

The result of the three identified features is that the outcomes of merger adjudication in China may impact mergers in a greater range of circumstances than would otherwise be expected, and may impact international mergers where there may be no expectation of the application of the law.

Australia has a similar provision on extraterritorial application in CCA s5 but it has not been applied so broadly. There are also provisions in the CCA which specifically apply to foreign mergers which have an impact in Australia and provide for different processes of adjudication. However, because mergers are generally determined by informal clearance in Australia based on risk and not turnover, the implications for merger adjudication in Australia do not have the potential to be so broad.  

8.4 Market definition

Efficient functioning of markets is the primary aim of competition law, so markets are the primary framework for consideration of the nature of competition in a particular context. The value of competition law analysis depends upon the accuracy of market definition. Market definition in a particular industry will vary depending upon the nature of the competition problem at hand and changes with evolution of business developments and consumer habits.

Both jurisdictions adopt the standard approach of considering substitutable products or services when approaching the analysis. Two contrasting features emerge from determinations on market in the two countries: market definition by MOFCOM under the AML focuses on product and geographic market definition, and in comparison with Australia, tends to focus less on the functional level. Earlier determinations of MOFCOM focussed mainly on the overlap between the two parties concerned in the merger but a more sophisticated approach has been taken in more recent determinations. However, the most important feature of MOFCOM market determinations for the purposes of this research is the default position of “China” as the geographic market in all conditional determinations and rejections considered to date. China is a huge country and it seems unrealistic to assume that there will not be mergers of companies in relation to particular products or services which have a more limited impact. In Australia, on the other hand, the ACCC is more inclined to take a realistic view on geographic market

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216 CCA s 50A. It is worth noting that the jurisprudence regarding what constitutes a ‘market in Australia’ is dynamic. Recent enforcement proceedings arising from the global air cargo cartel (Australian Competition and Consumer Commission v Air New Zealand and anor (2014) FCA 1157), determined that while there was cartel conduct which led to a ‘substantial lessening of competition’, the cartel conduct occurred in foreign airports, not constituting a ‘market in Australia’. As June 2015, this matter is currently subject to an appeal to the Full Federal Court of Australia (see NSD1330/2014 and NSD1331/2014, Federal Court of Australia). Although this case is admittedly not in relation to merger approval, any changes in extraterritorial application may have implications for the definition of a territorial market for mergers in Australia.

217 Both jurisdictions have guidelines on the issue: Australian Competition and Consumer Commission, Merger guidelines, (November 2008), 16, 43; for China, see above note 200.

which might be national, a state or a smaller area. As a generalisation, product and functional market is likely to be defined on occasion more narrowly in Australia, although some determinations on these issues have proven particularly difficult.\textsuperscript{219}

The highlighted features of AML market definition hold particular implications for mergers involving banks outside the big four banks. The tendency of MOFCOM to define markets and products broadly\textsuperscript{220} means that it is less likely to find anti-competitive impact in bank mergers outside the big four, given the very large market shares of the big four banks which operate throughout the whole of the country. Unless two of the big four were merging on a broad market definition it is unlikely that there would be a problem with other mergers. Australia has a history of defining markets, and bank markets to some extent, in a narrower way, although as the market has become more concentrated this has changed, since a “national” geographic definition has become more realistic.\textsuperscript{221} However, given the nature of banking in China, it is clear that narrower markets are likely to deliver a more accurate picture of the state of competition for the purpose of merger analysis.

Whether MOFCOM will narrow its market definition to take account of more local lending patterns or define a narrower market for more innovative products when dealing with, say, a commercial city bank merger, is unclear. In any event the outcome may well depend upon national economic development implications. Given that the impact of such a bank merger may be significant to a more local SME or consumer loans market, where the big four do not tend to participate, this is an important issue. Market definition must also recognise the impact of the substantial financial regulation as a barrier to competition. Finally, to be helpful in assessing mergers it must also factor in the important role of shadow banking in the finance landscape, and its role in stimulating competition in financial products and services.

Without considering these significant factors it will be impossible for MOFCOM to create a true picture of the workings of financial markets.

8.5 Merger test: the factors

As noted previously the tests for intervening in a merger are similar in both jurisdictions: Australia prohibits a merger which is “likely to substantially lessen competition”. In this context “substantial”

\textsuperscript{219} Ibid, 298.
\textsuperscript{220} Ibid, 295.
\textsuperscript{221} Ibid, 296.
means “real or of substance” or “meaningful in a relative sense.” China prohibits mergers which eliminate or restrict competition. However, the AML does not require the elimination or restriction to be “substantial” and in fact it sets no threshold for application of the provision to a merger. This in practical terms means that any restriction on competition is relevant and it provides MOFCOM with considerable discretion for intervening in a merger transaction, which casts further light on some of the outcomes, which are discussed below.

In reviewing a merger, MOFCOM considers a range of listed competition factors which reflect features of standard merger clearance practice in established jurisdictions. Additional factors in the AML raise issues not strictly linked to competition, such as the effect of the merger on national economic development. If the merger will or may eliminate or restrict competition, under the AML MOFCOM must prohibit it, and give reasons. But if the parties can prove that the advantages of the merger exceed the disadvantages, or that the concentration is in harmony with the public interest, the merger must be allowed. There is no indication of what will constitute “advantages” and “disadvantages” for the purposes of the weighing process, whether they are tied to competition, or have a wider focus. There is no indication of the size or weighting of relevant advantages or disadvantages – whether they need to be significant or substantial. At the same time in China, Article 5, an overarching provision, provides that “[u]ndertakings may concentrate when such an action is in accordance with the law and adheres to fair competition and is a voluntary union that expands the scale of operation and improves market competition.” This general qualification for concentrations “in accordance with the law” appears to mean law other than the AML. This last issue raises the possibility that industry reorganisations achieved under legislation will be excluded from the AML. The AML also talks of concentrations which improve competition by improving scale. Mergers improving competition by increasing efficiency would be unlikely to offend Article 28, which suggests that Article 5 serves some other purpose. The addition of the

222 The ACCC also states in its merger guidelines: “Generally the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.”; see Australian Competition and Consumer Commission, above n 217, 11.

223 Article 27 of the AML sets out the following factors for consideration: market share of the business operators and controlling power over the market; market concentration; influence of the concentration on market access and technological progress; influence on consumers and other business operators; influence on national economic development; other elements affecting market competition as determined by the AMEA under the State Council; see Anti-Monopoly Law of the People’s Republic of China, (People’s Republic of China), National People’s Congress, 1 August 2008, art 27.

224 Ibid, art 27(4)-(6).

words “adheres to fair competition” introduces the concept of competitive “fairness” which has been a feature of prior Chinese regulation but is not focussed strictly on economic aspects of regulation.

MOFCOM only has an obligation to issue a publicly available written decision when it disallows a merger or allows the merger with conditions, which means that a number of the issues raised above are applied in a non-transparent fashion. By far the majority of mergers to date have been allowed without conditions, which means that there are no publicly available written reasons. There is no indication in the relatively small number of written determinations of MOFCOM to date, for example, about what “advantages” might be, or what might constitute relevant “public benefit” in the weighing process. While it might be argued that a similar position exists in Australia, where most determinations are made by the ACCC under an informal clearance system and the ACCC issues relatively brief (particularly by Australian standards) statements of issues and determinations, there are distinctions between the two approaches. Following business complaints about a lack of transparency in the informal clearance process, the CCA was amended to provide for a more formal clearance process (which has not, however, found favour with merger parties). At the same time the ACCC increased and formalised the level of required documentation in relation to the informal clearance process and details of potentially problematic mergers are now listed on the ACCC website along with supporting information and press releases outlining the outcomes. The process is also more iterative since draft documentation and some submissions of interested parties are put on the website. A draft determination is issued with the opportunity for interested parties to add further submissions in complex cases. In addition, where a matter goes to court (where the ACCC objects to a proposed merger and the parties will not agree to desist) or where the merger goes to the Australian Competition Tribunal for authorisation, the formal administrative permission based on public benefit, full decisions are issued.

A further layer of administrative discretion in mergers in China is the national security review which is required when a domestic business is acquired by a foreign entity. In other jurisdictions this process is often contained in other laws and is separate from, but parallel to, competition law adjudication. Key areas of industry nominated for review under this process are the military sector, key agricultural, energy, infrastructure, transport, and the technology and equipment sectors. Review is by an interagency panel

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226 See, for example, Law of the People’s Republic of China Against Unfair Competition, (People’s Republic of China), National People’s Congress, 2 September 1993. Issues of “fair competition” are also relevant in the competition laws of other Asian jurisdictions, such as Japan and Korea.

227 Ibid art 26. In an attempt to provide more information, MOFCOM has adopted more recently a practice of releasing a list of mergers, which have been approved.

looking at the impact of the transaction on national defence, including relevant products and services; stable operation of the national economy; basic social order; and research and development capacity for key technologies having a bearing on national security.  

8.6 Indications from merger determinations: China

8.6.1 Overall results

By late 2014 MOFCOM had considered more than 900 proposed mergers since the introduction of the AML, giving written reasons for two refusals and more than 20 conditional approvals. 97% of the merger applications were approved without conditions. Given the size of the economy and in comparison with other jurisdictions the number of merger notifications seems relatively small. On the other hand, the number of mergers which have been problematic in competition terms is also relatively low.

The next part focuses on particular determinations of MOFCOM as indicators of its likely approach in bank mergers.

8.6.2 Impact on foreign parties

The concerns of foreign commentators prior to the enactment of the AML that it would be used as a protectionist tool to target foreign companies have not proven to be correct. Most mergers involving foreign companies have been allowed without intervention; however, all of the conditional mergers and the two refusals have involved foreign companies. One reason might be that the state already has a great deal of control over the domestic sectors of the economy, which it regards as a priority, so there is not much need to impose further controls in those areas under the AML merger provisions. Another might be that because scope is an issue in China generally, including for Chinese private companies, there is a lesser need to notify or review wholly Chinese mergers, because there are not a lot of mergers between Chinese private companies which would actually satisfy the merger thresholds. Only one of the

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229 For a more detailed consideration, see Deborah Healey, ‘Strange Bedfellows or Soulmates: Merger Regulation in China and Australia Compared’, (2012) 7(1) Asian Journal of Comparative Law 1, 32, and sources there cited.

230 Elizabeth Xiao-Ru Wang, Joanna Tsai and Sandra Chan, ‘Merger Remedies with Chinese Characteristics’ (2013) 8(2) CPI Antitrust Chronicle 1. Another source quoting the Director General of the Antimonopoly Bureau of MOFCOM, Mr Shang Ming, cites 797 accepted filings, 740 settled cases, 717 approved without conditions, 22 conditional approvals and one rejection since the introduction of the AML. The same source cites 224 filings in 2013, up 8%; see Li Jiabao, ‘Law “Will Level Playing Field”’, (24 February 2014), China Daily USA (China), 14.

231 In Australia, for example, a much smaller jurisdiction without compulsory notification, the ACCC considered 289 mergers in 2012-2013 alone; see Australian Competition and Consumer Commission, Annual Report 2012-2013, (29 October 2013), 41.

232 For example, the OECD’s report identifies competition problems in the Chinese economy, it describes a variety of factors which result in low national concentration, with many markets operating at below minimum efficient scale and significant market distortions; see Organisation for Economic Co-operation and Development, The Challenges of Transition for Competition Law and Policy in China, (DAF/COMP/GF(2008)2/REV1, 27 January 2009) (Note by the Secretariat) 25.
MOFCOM determinations imposing conditions has involved an SOE, even in the context of regulations providing penalties for non-notification. It appears, however, that many transactions involving SOEs are still not notified, which raises two issues: that the relationship internally between regulation of SOEs and the AML itself has not been completely resolved, and the impact of the socialist market economy in the context of AML implementation is unresolved.

A number of issues arise from the conditional decisions and refusals which are likely to be relevant to bank mergers in China and in this part we draw some conclusions from them. In the next section we look at the way bank mergers have been dealt with in Australia.

Reviewing written decisions to date, it is clear that aside from the broad objectives of the AML and some of the unusual factors listed there, MOFCOM uses relatively standard methods and techniques. However, MOFCOM appears to have disallowed or allowed with conditions a number of mergers focussing on the impact of the merger on national economic development, consumers and local competitor firms, particularly protecting market revenues for the latter. Arguably these determinations do not merely assess the impact of the merger on competition in the market, but go further and consider the impact of the merger “on China”. Some appear to look only at the impact on China. Clearly the two considerations are not always the same. A number of participants expressed the view that a merger would not be allowed “if China is worse off”, in these or similar words. This trend can be seen in a number of the refusals and conditional mergers, but it is impossible to know the extent to which this approach has been applied in those mergers which have been allowed. These differences influence outcomes and also inform the nature of conditions imposed to allow mergers to proceed. (Each of the examples noted below is discussed in more detail, along with other examples, in Appendix A)

8.6.3 Refusal to allow a merger

MOFCOM has disallowed only two mergers. The first was Coca Cola and Huiyuan Juice, and was based on the potential to leverage power from one beverage market to the second fruit juice market. MOFCOM referred to the reduction in the chances of survival of mid and small fruit juice enterprises, limitations on the ability of domestic enterprises to compete, and the harm to sustainable and sound development of

236 Although in some circumstances damaging local firms will damage competition, this depends upon the extent to which they are efficient and competitive.
the fruit juice industry in China. The decision was widely criticised as being based on the unpopular portfolio market effect theory and incorporating industrial policy considerations (“development of the national economy”); although the latter is a legitimate consideration under the AML. Arguably, however, the decision was primarily focussed on the potential impact of the merger “on China”, which encompasses national economic development, individual classes of competitors and consumers.

The second refusal occurred in June 2014 when MOFCOM prohibited the establishment of a network centre between the world’s three largest container shipping companies, Maersk, Mediterranean Shipping and CMA CGM Group on the basis that it was a “close joint operation” which would have the effect of eliminating or restricting competition in the market for international scheduled container shipping services across the Asia-Europe shipping route. MOFCOM did not follow the EU’s practice of limiting the review of joint ventures to those “performing on a lasting basis all of the functions of an autonomous economic entity”. The joint venture was not treated as a merger in other jurisdictions, which cleared it, although authorities in the US and EU stated that they would maintain a watching brief. The decision indicates once again that MOFCOM will take a broad view of its jurisdiction over joint ventures. China is a major exporter and importer, so shipping operations are clearly vital to the Chinese economy, which again raises the issue of national economic development, with the focus of the impact of the merger “on China”.

8.6.4 Different outcomes in conditional mergers

In a number of examples where it considered international mergers with a global product market, MOFCOM has taken a tougher approach from other regulators, imposing more detailed and sweeping conditions.

8.6.5 Categories of conditions

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238 In truth the major concerns were the lack of detailed explanation for the findings and support for the use of the portfolio market effect theory, which might have been better supported. This theory was also applied more recently in Merck KGa and AZ Electronic Materials SA [2014] MOFCOM No 30, 30 April 2014.

239 Maersk, MSC and CMA CGM [2014] MOFCOM No 46, 20 June 2014. Another recent decision on joint ventures in Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho [2014], MOFCOM No 49, 2 July 2014, was also in the sensitive industry of batteries for use in hybrid cars. Detailed conditions were imposed.


Conditions imposed on a merger to alleviate its anti-competitive impact can be characterised as structural or behavioural. The former alter the structure of the market to alleviate the anticompetitive outcome, while the latter impose obligations on the merged entity in relation to its behaviour going forward to the same end. The tendency of most competition regulators is to impose structural conditions which might, for example, require the merged entity to divest part of the combined assets to preserve competition. Based on the conditions imposed to date, MOFCOM favours behavioural conditions, which are less favoured elsewhere as they require on-going supervision. A mix of both structural and behavioural conditions has been imposed in a small number of cases.

A number of unusual conditions have been accepted by MOFCOM as the basis for allowing merger transactions to proceed. One MOFCOM regulator has stated that MOFCOM does not like to disallow mergers, and that MOFCOM is prepared to be flexible in applying conditions to allow mergers to proceed. The same regulator also reportedly said:

"The reason why people see shadows of industrial policies in the remedies imposed by MOFCOM is because remedies which aim to solve competition concerns can ease industrial problems at the same time." This comment confirms what is clear from the determinations, and is mandated by the AML: that industrial policy considerations are sometimes addressed in determinations.

8.6.5.1 Maintenance of status quo

In a number of examples conditions including those mandating on-going licensing arrangements maintain the status quo, particularly in strategically important or sensitive industries. In the well-publicised vertical acquisition by Google of Motorola Mobility, MOFCOM took quite a different view of the competitive impact of the merger from other regulators. In a technology market important to China, Google made

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242 See AML, art 29 and Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings, (People’s Republic of China), Ministry of Commerce, 4 December 2014. In Australia, formal undertakings may be accepted to allow a merger to proceed under s87B of the CCA. If those undertakings are breached it is a breach of the CCA and the usual penalties will apply. The ACCC may also seek other orders from a court.
243 Wang, E. et al, above n 230, 2. MOFCOM has imposed structural remedies without behavioural remedies in only a small number of conditional merger determinations.
244 MOFCOM has fined companies for failure to comply with conditions imposed by it as part of the clearance of mergers, for example in relation to Western Digital [2012] MOFCOM No 9, 2 March 2012. See also Norton Rose Fulbright, above n 235, 5.
245 Reported comments of Mr Shang Ming, Chief Executive of MOFCOM, at ABA Antitrust in Asia Conference in Beijing 21-23 May 2014, set out in Lisa Zhu, ‘PaRR Special Report: ABA Antitrust in Asia’, (12 June 2014), <http://www.parr-global.com/%3Fp%3D13264>, 22. These sentiments were echoed by a number of the research participants, one of whom stated that the “...bottom line for merger review in China is that the interests of society should not be damaged and that businesses should not reap benefits at the cost of others.” Conditional clearance was a compromise approach. Another said that the bottom line of MOFCOM review was that post-merger trading conditions were no worse than before.
246 Ibid.
smart terminal operating systems (Android) and Motorola Mobility made smart mobile terminals. MOFCOM found that the market for smart terminal operating systems was concentrated, with Google’s Android having almost 74% of the market in China and just two other much smaller competitors (Nokia and Apple). MOFCOM concluded that Android had a dominant position in the market because smart mobile terminals were heavily reliant on smart operating systems and Google had a very strong financial position and technical development capabilities. MOFCOM expected that this strong market position, achieved mainly on a free and open source model, would be maintained over a long period of time. Switching costs were high and any change to the model would adversely affect downstream parties. MOFCOM feared that post acquisition Google would have incentive to favour its subsidiary in future product trials, affecting competition. MOFCOM thus required the five year licensing of Android on a free and open source basis to other equipment manufacturers, with all original equipment manufacturers to be treated on a non-discriminatory basis, and compliance with Motorola’s existing obligations to licence its patents on fair, reasonable and non-discriminatory (FRAND) terms. The key distinction between the approaches of MOFCOM and other regulators was the characterisation of Google’s incentive to maintain supply of Android on fair terms to third party equipment manufacturers. US, EU and Australian regulators did not think it likely that there would be anti-competitive impact, because they relied on Google’s representations that it would allow on-going fair reasonable and non-discriminatory use of its standard essential patents by competitors. Technology markets are a sensitive area under industrial policy and China is major player in mobile phones, so it is likely that national economic development and industrial policy played a significant role in the conditions.

Similarly, in the horizontal Seagate/Samsung merger, MOFCOM was the only regulator globally to find anti-competitive impact and impose conditions. MOFCOM found that the merger would negatively impact consumers in China by removing an important competitor from the market, undermining the competitive effect of purchasing patterns and increasing the possibility of co-ordinated effects. MOFCOM imposed behavioural conditions requiring Seagate to keep the Samsung business independent for at least a year. Seagate also agreed to expand Samsung production capacity within six months; to maintain normal research and development investments (at $800 million annually for the following three years);


249 A similar approach was adopted in the more recent Microsoft/Nokia conditional approval; see Microsoft/Nokia [2014] MOFCOM No 24, 8 April 2014.

and not to force any exclusive arrangements upon its customers or suppliers. These substantial conditions significantly impacted on the ability of the merging companies to take advantage of anticipated efficiencies. Once again the merger took place in a sensitive industry with conditions aimed at keeping the market in its current form to improve the position of business and consumers. These mergers were in important technology markets, which again suggest industrial policy issues were at play.

### 8.6.5.2 Hold separate conditions

The merger between Japanese trading house Marubeni and US grain merchant Gavilon is another example of an international merger where other regulators did not intervene and where conditions involved keeping businesses strictly separate post-merger through subsidiaries. MOFCOM found high barriers to entry. China’s soybean crushers were mainly small enterprises with weak bargaining power. Despite the very low market share of the merged entity – less than 20% – MOFCOM imposed conditions which required the merged entity to operate two China soybean import and distribution businesses through subsidiaries of the merging parties, separate and independent in all respects, including keeping assets, information exchanges and business deals at arms’ length, for at least 24 months. The focus of the conditions is on maintaining the status quo for Chinese soybean purchasers again the impact “on China”. MOFCOM intervened despite a relatively small combined market share, in the context of China’s concern for food security in a staple food product, of utmost importance to the national interest.

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251 The US, EU and Australia allowed the Seagate/Samsung merger without conditions on the basis that the transaction was not likely to impact competition, particularly in the context of an increased likelihood of co-ordination, although both the US and the EU imposed conditions on this merger. This was despite those regulators considering similar issues relating to competitive impacts in similarly defined markets; see Federal Trade Commission, ‘FTC Issues Modified Final Order Settling Charges that Western Digital Acquisition of Hitachi Global Storage Technologies was Anticompetitive in Market for Desktop Hard Disk Drives’ (Press Release, May 9 2013); and, Federal Trade Commission, ‘In the Matter of Western Digital Corporation, a corporation’, (FTC Matter/File Number: 1110122, Docket Number: C-4350, 9 May 2013). Other competition regulators tended to break the market down further by the form and end use of the HDDs – see, for example, the EU (separate worldwide markets for hard disk drives based on their end use application such as desktop computers, mobile computers, servers and a separate market for “external hard disk drives in the European Economic Area, which is downstream from hard disk drives”), see European Commission, ‘Mergers: Commission clears Western Digital’s acquisition of Hitachi’s hard disk drive business subject to conditions’ (Press Release, 23 November 2011); Australia (five separate product markets), see Australian Competition & Consumer Commission, 'Seagate Technology PLC – proposed acquisition of the hard disk drive business of Samsung Electronics Co Ltd', (Public Competition Assessment, R46180, 13 December 2011). For MOFCOM’s assessment, see [Western Digital](http://usa.chinadaily.com.cn/china/2013-11/29/content_17139905.htm).

252 Marubeni/Gavilon [2013] MOFCOM No 22, 22 April 2013. This merger was against the background of significant pressure on local soybean suppliers by imports. See also [MediaTek Inc/MStar Semiconductor Inc (Cayman)](http://usa.chinadaily.com.cn/china/2013-11/29/content_17139905.htm) (Cayman) [2013] MOFCOM No 61, 6 August 2013. There the market shares of the parties were large but the conditions required that the LCD Master TV chip business of MStar be conducted by a Taiwanese subsidiary for at least three years, and other onerous conditions relating to separation of that business. The time limit may have been related to the changing nature of the market.


254 Xi Jinping said in November 2013 that food safety is and will always be one of the Government’s top priorities. He said China must be able to guarantee the food supply of its 1.3 billion people because ‘history has shown that even a huge fortune is of no use if a famine hits us’. Zhao Lei, ‘Move on reforms, but not rashly, Xi says’, (29 November 2013), *China Daily* (online), <http://usa.chinadaily.com.cn/china/2013-11/29/content_17139905.htm>.
Conditions imposing substantial limitations on the integration of the acquired entity occurred in the acquisition of majority control of Newheight Holdings, a Chinese company, by Walmart. Newheight Holdings was the owner of Yihaodian, the largest online supermarket in China offering more than 100,000 different goods. Yihaodian was also involved in value added telecommunications services, offering online trading platforms to other online retailers. MOFCOM was concerned that Walmart would leverage its competitive advantages in the bricks and mortar supermarket business into the online retail business, materially strengthening its market power in the online sector. It was also concerned that the merged entity would rapidly expand its business in the value added telecommunications business which would materially strengthen its market power against network platform users there. MOFCOM allowed the merger on condition that the business of Newheight was conducted through the Yihaodian website alone. In addition, Newheight was not to use its network platform to provide internet services to other transaction parties for value added telecommunications services without obtaining approval. Walmart was also prohibited from using a variable interest structure to carry out value added telecommunications business through Yihaodian. These conditions ring-fence the business of Yihaodian from that of Walmart following the merger for an unlimited time. This is another example of circumstances involving key technology industries in a sensitive industry, in this case the internet, which suggests that industrial policy considerations were involved.

8.6.5.3 Certainty of supply

The $1.4 billion USD international transaction between Uralkali and Silvinit, two Russian producers of potash or potassium chloride, used in agricultural fertiliser, a product of significant importance in China, is another example of a merger situation where MOFCOM maintained the status quo for an indeterminate period.\footnote{Uralkali/Silvinit [2011] MOFCOM No. 33, 2 June 2011.} The market was subject to a well-known potash cartel, and as a matter of record, demand worldwide exceeds supply.\footnote{See generally Frederic Jenny, ‘Export Cartels in Primary Products: The Potash Case in Perspective’ in Simon Evenett and Frederic Jenny (eds), *Trade, Competition, and the Pricing of Commodities* (Centre for Economic Policy Research, 2012).} It appears from the decision that ensuring continuing supply of a product on the current reasonable terms for an indeterminate period was crucial. Issues of food safety and security were also relevant to this determination.

In another international merger, Glencore acquired Xstrata\footnote{Glencore/Xstrata [2013] MOFCOM No 20, 16 April 2013.} both were major international organisations in mineral markets. MOFCOM’s assessment focused on markets in China for copper concentrate, zinc concentrate, and lead concentrate, where the parties had overlapping activities and the
market shares were 9.3%, 17.9% and 7.6%, respectively. MOFCOM determined that the global supply of the minerals in question had substantial impact on markets in China as the largest market for Glencore mining products and an important buyer of Xstrata’s products. MOFCOM found that the merger was likely to have the effect of limiting or restricting competition in the markets for copper, zinc and lead concentrate. MOFCOM imposed sweeping structural and behavioural conditions on the transaction. Glencore was required to sell the US$5.7 billion Las Bambas copper project in Peru (expected to produce 400,000 tonnes per annum) within six months from the date of the acquisition. Glencore was required to guarantee supply of specified quantities of copper concentrate to China under an annual contract for the next eight years, with a minimum quantity of 900,000 tonnes in 2013-14 (equivalent to the average sales of the two companies in the past two years). For both zinc concentrate and lead concentrate the merged firm was required to provide long-term contracts to customers in China on fair and reasonable terms. The merger was cleared in Australia and the US without conditions; conditions on zinc were imposed in the EU. The outcome is notable for the finding of anti-competitive impact where market shares were very low and for its imposition of sweeping conditions. It is once again an example of MOFCOM ensuring continuing certainty of supply of an important commodity on reasonable terms to the Chinese market. Clearly industrial policy considerations have been in play.

8.6.5.4 Pricing conditions

Areas involving pharmaceutical products have also proven problematic. In a determination involving the international merger of two US pharmaceutical companies having operations in China, Thermo Fisher Scientific Inc and Life Technologies Corporation. MOFCOM was in general consensus with other regulators but imposed additional conditions relating to on-going supply and pricing. The Federal Trade Commission, EU, China and Australia all approved the merger subject to the divestment of businesses relating to gene modulation (particularly siRNA reagents), cell culture and cell media businesses in fairly similar terms. Most agencies based their decisions on the high concentrations post-merger, which would have provided the merged parties with the ability to raise prices, especially given the high barriers to entry. MOFCOM carefully considered the impact of the merger on a larger number of potential

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markets in China using concentration analysis and price increase forecasts, but in contrast to other regulators imposed additional conditions on markets for SSP kits and SDS-PAGE protein standards. Thermo Fisher agreed to lower the list prices of SSP kits and SDS-PAGE protein standards in the Chinese market by 1% per year for the next 10 years while retaining the same level of discounts offered to distributors in China. Thermo Fisher also committed to either supply SSP kits and SDS-PAGE protein standards to the third party on an original equipment manufacturer basis, or grant the third party a perpetual and non-exclusive licence to use the technology relating to SSP kits and SDS-PAGE protein standards, at the option of the relevant third party.

More recent decisions imposing conditions involving the Merck-AZ acquisition (inputs for flat panel displays), and Corun PEVE joint venture (battery systems in hybrid cars) took place in sensitive industries considered important to the Chinese economy. Many of the conditional determinations involve areas classified as strategic industries under the current five year plan.

8.6.6 Conclusions on MOFCOM determinations

There are a number of conclusions which can be drawn from MOFCOM merger analysis and its refusals and conditional mergers.

MOFCOM uses the standard economic analytical tools. The context and form of the AML, however, result in a practical focus on the impact of the merger on China, rather than its strict impact on competition in a market in China, in a relatively small but significant number of determinations. Most of the conditional approvals were in industries or in relation to products which are considered sensitive in industrial policy terms or involving products essential to significant on-going production or supply in China.

Importantly, in a number of the examples, MOFCOM intervened where market shares were low, or where incremental shareholdings were slight. In some examples findings that competition was lessened by the acquisition were unconvincing in themselves and appeared to provide a platform for market reorganisation or restructuring which appeared to be out of proportion to the impact of the transaction itself.

The objects of the AML and the wording of its provisions provide scope for legitimate recourse to industrial policy in its interpretation and enforcement. SOEs figure prominently in the economy, and the government’s stated policy of promoting mergers which form large internationally competitive

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companies, creating national champions, is inconsistent with generally accepted competition law principles. As a matter of course other government ministries sign off on merger approvals and can influence conditions and concessions of merger parties which have little to do with competitive effects.\footnote{Sokol, above n 208, 102.} Government-mandated industry restructuring plans in China do not mention the AML and while MOFCOM has stated that the usual notification procedures should apply in circumstances involving SOEs, SOEs often do not notify, some arguing that their mergers are already approved by government and do not need MOFCOM approval.

MOFCOM has also taken the opportunity in some cases to maintain the existing market structure post-merger or refashion the market to the benefit of Chinese business or consumers, even as to price. This is particularly pronounced in sensitive markets for natural resources, food products and important technology.\footnote{Marubeni/Gavilon [2013] MOFCOM No 22, 22 April 2013; Glencore/Xstrata [2013] MOFCOM No. 20, 16 April 2013; and, Novartis/Alcon [2010] MOFCOM No 53, 13 August 2010.} These interventions are arguably examples of the exercise of market control by a regulator accustomed to operating in a command economy. Conditions imposed have been quite sweeping and are unlike conditions imposed in most other jurisdictions. They also reflect the ability of MOFCOM to assess the impact of a transaction on the national economy under the merger review factors in the AML. MOFCOM is more ready to accept behavioural conditions to resolve problematic mergers, which may be a result of the socialist market economy context- a greater readiness to control or guide the market following a merger. These behavioural undertakings often maintain the status quo of existing supply or licensing arrangements, and contain “hold separate” obligations, some for indeterminate periods, which arguably dilute the efficiency benefits of the transactions. In other cases, operational parts of the combined businesses were effectively ring-fenced or pricing imposed.

8.6.7 Implications for banking markets in China

The implications of the MOFCOM approach need to be considered against the background of the heavily regulated Chinese banking market with its substantial bias to stability and national economic development, despite some general recognition that competition is an important feature for its progress. In these circumstances the individual determinations of MOFCOM in a small but significant number of examples show a marked propensity to consider national economic development issues and focus on “the impact on China”. Competition issues appear to be secondary in public policy terms, particularly in sensitive industries, although there is some recognition of the importance of the relationship between competition and national economic development. Ultimately this means that competition is unlikely to be
the crucial factor in decision making where bank mergers are concerned, given the importance of banking to stability and national economic development, and competition may in practice play little part in the outcome. There is also potential for the wide scope of the AML to be used as a threshold for the imposition of conditions which refashion markets as required in both domestic and international mergers falling within its scope.
8.7 Australian bank mergers

8.7.1 The merger test

Section 50 of the CCA prohibits mergers or acquisitions which are likely to result in a substantial lessening of competition in a market, a test which is similar to the AML test of “eliminating or restricting competition” in Article 28 but imposes a threshold with an acceptable level of “lessening”. The section lists nine factors for consideration in assessing the impact of conduct, the most significant being barriers to entry. The merger factors relevant to the issue of likely lessening competition in markets in the CCA and the AML are similar but the Australian provisions are all linked to competitive impact of the proposed transaction. The special definition of “market” for the purposes of s50 was amended in 2006 to deal with the issue of creeping acquisitions. Prior to that “market” for the purposes of s50 was a “substantial market for goods or services in Australia, a State, a Territory or a region of Australia”. Market now reads “any market” and “substantial” has been deleted. This means that the ACCC may now assess the impact of a merger on a narrower geographic area, and has begun to do so, for example, in relation to the supermarket industry. Market definition in Australia focuses on substitution and makes use of standard tools such as “small but significant, non-transitory increase in price” (SSNIP) tests. In making the assessment of market impact the ACCC uses a counterfactual test - it compares the “future with” the merger to the state of competition in the market in the “future without” the merger.

8.7.2 Competition in the Australian banking environment

The competitive environment is crucial in any consideration of a proposed merger or acquisition. Between 1985 and 1995, a number of large co-operative building societies were converted to non-mutual corporate banks in Australia. A number of these became regional banks and most went on to merge with existing large banks. Prior to 2000, the ACCC had noted a trend to increased competition and lower interest rates due to the increasing presence of mortgage originators and foreign banks. Market developments subsequently impacted the viability of non-bank lenders and diminished the ability of both groups to compete. This process of consolidation was accelerated following the GFC for a number of reasons. While Australia escaped from the GFC relatively unscathed, there were a number of implications...
for financial markets. Firstly, the cost of funds to compete effectively with the bigger institutions led to the withdrawal or merger of a number of small and previously effective players. The collapse of the securitisation market made it more difficult and costly for regional banks and other financial service providers to secure funding to compete with the major banks. Secondly, international institutions “…adopt[ed] less aggressive strategies or withdr[ew] from the Australian banking industry as a result of developments overseas.” A combination of these features and subsequent consolidation has resulted in a lessening of competition in the Australian market.269

A number of inquiries in Australia have been initiated into banking, competition and stability since the GFC.270 The two most recent major inquiries, the Harper Review and the FSI, into competition law and the financial system respectively, have been discussed in some detail earlier in this report. Both emphasised the importance of competition, of broader initiatives to stimulate market entry, and the importance of deterring laws, regulations, rules and policies which impede or impact competition unnecessarily. The Chair of the ACCC stated that the recommendations of the FSI on these broader competition policy issues were welcome, adding:

“While we have four major banks competing against each other, this sector would be more dynamic and bring more benefits to consumers if there could be more competitive pressure brought on the four major banks.

No matter how many competitors there are, stable oligopolies do not yield the best results. Markets need to be constantly and fully contestable.”271

Of particular relevance, as stated earlier the FSI Report described the current state of competition in the banking market in 2014 as being “generally adequate”, not an overwhelming endorsement of the competitive environment.272 Commentators have noted that the large banks tend to price match and compete on issues such as innovative product and quality of service. Small players tend to price at a margin to majors and differentiate themselves by service.273 There are differing views on whether the big four Australian banks are unduly profitable, which may also indicate a lack of competitive tension.

270 See above notes 17-20 and 163.
271 Rod Sims, Chair, ACCC, Priorities 2015, (speech delivered at the Committee for Economic Development of Australia, Sydney, 19 February 2015).
273 Deloitte Access Economics, above n 269, 7. The same report argues that it is “difficult to assess price competition in individual product markets due to bundling and the two-sided nature of banking products.” (at 8).
This perception has precipitated a number of the inquiries into aspects of the banking industry. Their profits were described in 2011 as being “very high” and in 2014 as “relatively high.” Statistically comparisons of profitability internationally are difficult since the profitability of many banks is still affected by the GFC. More recently, apparent decreases in the profitability and hence the share prices of the big four Australian banks have been blamed in part on the increased competition from global money in institutional banking which has raised the price of obtaining funds. Recent attention has focussed on the high cost of credit card interest and the growing gap between credit card interest rates and the cash rate. All the big four banks charge similar high credit card interest rates.

Interestingly, all participants in the research project thought that the Australian financial market was competitive, although some were of the view that competition exists only in fairly narrow areas.

Other comments may be made about the competitive state of banking markets. If profits are high this should attract new market entrants, depending upon barriers to entry. While there has been entry by HBOS plc, Citibank, ING and HSBC Bank into the Australian retail banking market over the years, they have:

“...not captured significant market share but have maintained leading roles in institutional banking and broking. At the same time Australian banks have made little headway overseas and this perhaps illustrates how entry is always difficult.”

The likelihood of market entry is still affected to some extent by the aftermath of the GFC and regulatory developments internationally which have been implemented to improve the nature of the banking system. Barriers to entry and exit include licensing, on-going regulatory burdens and compliance costs, increasing prudential standards and other approvals. Some of these may be addressed going forward by the recommendations of the FSI to address the impact on competition of financial regulation going forward. Switching costs of consumers have been identified as a barrier to competition, but these have

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274 Senate Economics Reference Committee, above n 163, 70.
275 Deloitte,above n 269, 20.
277 The “spread” between the Reserve Bank’s official cash rate - currently a record-low 2 per cent - and credit card interest rates is at its widest since records began in 1990”; G Hutchens, “High credit card interest rates need to be investigated, Treasury and RBA officials say”, (1 June 2015), The Sydney Morning Herald (online), <http://www.smh.com.au/federal-politics/political-news/high-credit-card-interest-rates-need-to-be-investigated-treasury-and-rba-officials-say-20150601-ghe5m1.html>.
279 Ibid, 34. The ACCC has noted that the failure of foreign banks in Australia in the 1980s illustrated the barriers to entry which exist. See also Senate Economics References Committee, above n 204, 24.
been reduced by regulatory changes,\textsuperscript{280} although whether consumers routinely consider switching in practice is another issue.\textsuperscript{281} 

In a sign of more flexible barriers to entry and exit, at least for entities already operating within the financial system, at the same time as banks have moved into wealth management, AMP, an insurance company, has added banking to its insurance and wealth businesses.\textsuperscript{282} 

In the future, innovation in financial markets will continue to occur and should markedly increase with the entrenchment of on-line services and new business models with the growth of digital disruption. As the Harper Review notes, new technologies are disrupting the way markets operate and the way business and consumers interact with them:

“The challenge for policymakers and regulators is to capture the benefits... by ensuring that competition policy, laws and institutions do not unduly obstruct its impact yet still preserve expected safeguards for consumers.”\textsuperscript{283} 

The growth of digital disruption will markedly change the nature of markets for financial services.\textsuperscript{284} 

This report asks questions about market stability and notes its primacy in China. Stability in Australia has been addressed by prudential regulation generally and by other limited measures such as guarantees for bank deposits which were introduced around the time of the GFC. Worldwide, various initiatives which are aimed at addressing stability will have implications for the big four banks which will flow on to other financial institutions. In simple terms, however, Australia is highly regarded in terms of its bank stability, although Australian banks are largely dependent on funding from overseas.

\textbf{8.7.3 Notable Australian bank merger decisions} 

Against this background, the report considers the trends in competition analysis emerging from historical Australian bank mergers to provide a counterpoint to the likely approach of MOFCOM under the AML.

\textsuperscript{280}See, for example, \textit{National Consumer Credit Protection Amendment Act 2011} (Cth).
\textsuperscript{281}Rodney Maddock, above n 278, 36. [See generally Nicholls report, which further examines these propositions]
\textsuperscript{282}Ibid, 17.
\textsuperscript{284}For example, Macquarie Bank has estimated that $27BN worth of revenue currently held by large banks in Australia has been put at threat by digital disruption in the Australian financial system; see S Leits, “Digital disruption could cost Australian banks $27 billion a year”. (4 July 2014), ABC (online), <http://www.abc.net.au/news/2014-07-04/digital-disruption-could-cost-australian-banks-27-billion-dollar/5571948>. 

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While there have been a number of bank mergers since 1995 when the current merger test was adopted, this report will focus in detail on several of the most recent ACCC decisions to indicate how bank mergers are approached. All of the bank merger decisions in Australia have been made under the informal merger clearance process. (Each of the examples noted below is discussed in more detail, along with other examples, in Appendix B).

Some earlier mergers involved the acquisition of regional banks by major trading banks, which the ACCC noted that it scrutinised very carefully. In summary, however, despite rigorous competition law review, the main outcome of merger review has been significant consolidation of the Australian banking sector.

A notable example of an Australian bank merger is the acquisition of the Bank of Melbourne by Westpac in 1997, which is instructive as an example of the absorption of a regional bank. It was also unusual in the innovative nature of the conditions imposed by the regulator. Westpac, one of the four major banks, acquired the Bank of Melbourne, a regional bank in the state of Victoria. At the time the ACCC noted that the market was very competitive, with increased competition from mortgage originators forcing banks to cut interest rates sharply and also to unbundle products. This meant that customers no longer necessarily sought home loans from the banks which did their everyday banking. The ACCC noted:

“...although product clustering still occurs there are a large number of consumers who will shop around from different suppliers to get the best deal.”

The ACCC also affirmed the view of the Wallis Committee Financial System Inquiry which also occurred at around that time that “significant elements of the banking market” were regional in character. The ACCC allowed the merger because despite its big four status, Westpac was a relatively weak competitor in Victoria. Westpac provided detailed undertakings to the ACCC under s87B of the CCA to allow the merger to go through. The undertakings meant that regional banks and other smaller financial entities could use Westpac’s automatic teller machines and EFTPOS systems at a reasonable price, giving customers greater choice of teller machines and a larger number of outlets in which to use credit cards. Despite being owned by Westpac, Bank of Melbourne was also given significant autonomy for three years after the acquisition. Lastly, Bank of Melbourne branches would continue to be open on Saturdays and for extended hours on weekdays, unlike Westpac branches. The ACCC stated that the access arrangements for Victorian customers of deposit taking institutions allowed use of ATMs and EFTPOS systems of


Westpac, and thus resulted in a greater choice of institutions that could offer wider electronic access both within Victoria and also when customers went interstate. The ACCC expected that this would greatly increase customer appeal of new and smaller institutions who could market themselves more effectively and competitively against the larger banks.

The ACCC thus took great care to encourage on-going diversity with the detailed undertakings providing new and smaller institutions with a greater ability to compete with the big four.

Another notable acquisition of a regional institution by a larger bank occurred when Westpac acquired St George Bank in 2008. The ACCC did not oppose the merger of the New South Wales (NSW) regional bank St George by Westpac, one of the big four. Both conducted business in personal and business banking, corporate and institutional banking and wealth management, and had branch and ATM networks in each state. St George operated in each of the product and service markets, and had a branch and ATM network Australia-wide (excluding Tasmania). However, in reality St George only had a strong presence in NSW, Australian Capital Territory (ACT) and South Australia (SA) (through the Bank of SA). The ACCC noted developments in banking at the time such as the expansion of regional banks like St George outside their home states, and also the entry of foreign banks into Australia to compete in relation to particular products. Each of these factors indicated that banking markets were competitive. It also noted that the four pillars policy meant that four large banks would remain in the market.

In its analysis the ACCC found national geographic markets for most business areas, but markets for transaction accounts, SME and agribusiness banking were found to be state based because of the importance of bricks and mortar branches to users of those services. The ACCC noted a move away from defining product markets as “cluster markets” in relation to SME banking to include a range of transaction, saving and lending products, stating that evidence suggested that this had changed and that SMEs particularly were unbundling products from the cluster. The ACCC found that a physical banking presence was still important for SME and agribusiness banking; it was also important for some segments of customers who required in-branch transactions and the use of the bank’s own ATM network. Corporate and institutional banking raised no competition concerns regardless of the market adopted.

Ultimately the ACCC found that the acquisition would not substantially lessen competition in any of the markets identified. St George had a relatively small share in retail banking markets and there was insufficient evidence that it was a vigorous and effective competitor against the big four in terms of its

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product pricing or customer service to the extent that its removal would result in a substantial lessening of competition. The ACCC found that competition in the retail banking markets provided by the other big 4 banks, regional banks, credit unions, building societies and other players would constrain the merged firm. It has been suggested that this merger may have been allowed at that particular time because of a desire to promote stability. 288

Thus by the time of the St George determination most product markets were considered in a national geographic context, although the ACCC continued to define transaction accounts, SME and agribusiness banking markets as state-based because of the importance of branches to these particular customers.

A similar approach to markets was adopted in the CBA/Bankwest determination in 2008, although a different financial environment following the GFC played an important role in the outcome. The CBA acquired BankWest, a regional bank which had been aggressively competing while entering east coast markets after originating in West Australia. Product markets considered were retail banking, broken into personal banking and business banking. Geographic markets were based on the importance of physical presence (branch and ATM networks) in consumer choice of a provider and the geographic scope of decision-making in terms of product range, prices and service levels. Personal banking markets were divided into transaction accounts (local but price and service competition national); saving/term products (national); credit cards (national); home loans (national); personal loans (national). Business banking markets were divided into SME banking and agribusiness banking and both of these were local with price and service competition being predominantly national. The ACCC found the acquisition was unlikely to substantially lessen competition. 289 While it was argued by some that BankWest was a vigorous, effective and innovative competitor, the ACCC’s view was that the impact of the GFC on BankWest’s parent company, HBOS plc, a major UK bank facing imminent collapse in 2008, meant that BankWest was unlikely to continue to be a strong competitor absent the merger. Its historical price competition was also underpinned by cheap wholesale funds, which were no longer available. The ACCC view was that no alternative acquirer would be unlikely to invest the capital to continue with the expansion plans.

The ACCC did note, however, that absent the financial crisis this merger may have been challenged. Whether this translates to a potentially different outcome due to the financial crisis itself or because of the circumstances surrounding its parent arising from the financial crisis is unclear. Taking the latter

288 Arlen Duke and Leela Cejnar, see above n 207, 153.
289 Australian Competition and Consumer Commission, Commonwealth Bank of Australia – Proposed Acquisition of BankWest and St Andrews Australia (Public Competition Assessment, R34568, 10 December 2008).
view, it is still a merger decision based purely on the factual matrix of competition analysis against the backdrop of the GFC, rather than an exercise in stability at that particular time.290

More recently the ACCC opposed an acquisition by NAB, one of the four pillar banks, of AXA, a substantial non-bank player in insurance, superannuation and wealth management industries on the basis of its likely anti-competitive impact. Undertakings proposed by the parties to allow the transaction to proceed were rejected by the ACCC. At the same time the ACCC announced that it would not oppose the competing bid of AMP Limited, a large insurer and non-bank financial institution, which ultimately occurred.291 While this is not a bank to bank acquisition it is useful as an example of a merger rejection by the ACCC and of its more recent approach to market definition in financial services.292

AXA’s main business was wealth management products and services. NAB, one of the big four, argued that the acquisition would give it further opportunities for cross selling its retail banking products and wealth management products. It argued that customers tended to seek wealth management products from dedicated financial services outlets. The parties competed in the wealth management sector, and, in particular, in relation to the supply of retail investment platforms for investors with complex investment needs.

The ACCC looked at the impact of the transaction in a number of banking markets relating to retail (personal and business) banking and corporate and institutional banking.293 Personal banking markets were further divided into transaction accounts (local market with national price competition); deposit/term accounts (national market); credit cards (national market); home loans (national market); personal loans (national market); hybrid personal loans/margin loans (national market). Business banking markets were further divided into SME banking (local with national price competition); equipment finance (national); agribusiness (local but national price competition).

The ACCC found that the acquisition was unlikely to have an anti-competitive impact in banking markets. As a conglomerate merger it would be unlikely to give the merged entity the ability or incentive to leverage its retail banking products via its wealth management channels or vice versa, and it would not give either applicant a significant additional market share or power in retail banking.

290 For a discussion of the Lloyds/HBOS takeover in the UK during the GFC when the government intervened to allow the transaction despite competition concerns, see Ioannis Kokkoris and Rodrigo Olivares-Caminal, Antitrust Law Amidst Financial Crisis, (Cambridge University Press, 2010), 406.

291 Australian Competition and Consumer Commission, National Australia Bank-Proposed Acquisition of AXA Asia Pacific Holdings Limited, (Public Competition Assessment, R 39761, 9 September 2010); Australian Competition and Consumer Commission, AMP Ltd-Proposed Acquisition of AXA Asia Holdings Limited, (Public Competition Assessment, R39604, 9 September 2010).

292 A number of participants disagreed with this outcome, some noting that the ACCC took a simple view of very complex markets.

293 See joint Public Competition Assessment for proposed NAB-AXA and AMP-AXA mergers, at n 291, 16.
The ACCC considered, however, that the NAB bid was likely to significantly impact competition in the market for wealth management markets (worth $1,300 billion to the Australian economy in 2009). This was because AXA’s next generation full service wrap platform was likely to compete closely with NAB’s Navigator Platform. The retail investment platforms provided the central link between product providers, financial planners and investors. Retail investors relied on financial planners and financial planners on the retail investment platforms to provide services. Two categories of retail investment platforms offering different services were found to form separate markets: those for investors with complex investment needs; and those for investors with simple needs, such as master trusts and mini-wrap platforms. Platform functionality was a key driver of competition in attracting new funds, as were breadth and quality of investment options. Platform administration fees and volume rebates paid to financial planners. NAB was one of only three large platform providers in a concentrated market and barriers to entry were high. It was a strong competitor in the market for complex investment needs through its Navigator platform. AXA was emerging as a strong competitor through its platform north. AXA was likely to provide vigorous and effective competition in the market, probably more so than other potential competitors, and it would take considerable time and sunk costs for others to replicate these platforms. If NAB acquired AXA, NAB would not have the incentive to continue to invest in and maintain its own platform. The proposed acquisition would therefore impact the vigorous competition of AXA by removing the competitive tension between the two, reducing incentives for other competitors to invest in platform innovation and reducing the prospect of price competition. Proposed undertakings were rejected as insufficient to resolve these difficulties.

The AMP proposal was allowed on the basis that AMP did not have a significant presence in the market for wrap platforms, offering products from other providers badged as AMP products. The ACCC found in its Public Competition Assessment for the AMP-AXA merger proposal that:

“AXA on its own or an AMP-owned AXA would continue to drive innovation, particularly with respect to platform functionality, and deliver the benefits that flow in the form of enhanced services to financial advisers and their clients.”

The ACCC found that without AXA’s competitive pressure, the likelihood of existing platform providers driving wrap platform innovation was limited. This was ultimately the critical factor in the approval being granted to the proposed AMP-AXA merger.

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The trend to looking at banking markets on a national geographic basis thus continued, with markets for transaction accounts, SME banking and agribusiness banking still regarded as state based, but with a new recognition that price competition is now national. Multiple product markets were given individual consideration by the ACCC in reaching its determination.

8.7.4 Trends in ACCC determinations

Market definition has been key to the outcomes of Australian bank merger determinations and a recurrent feature has been recognition of the evolving nature of banking markets. In determining whether geographic markets are national or state markets, the ACCC looks to the hypothetical monopolist or SSNIP test, which considers whether customers would switch to another supplier in the face of a 5-10% increase in price. The broad range of banking products makes this a complex inquiry in relation to product market. The approach of the ACCC has changed over time. In earlier determinations, the approach was to view product markets as ‘cluster markets’, in which products and services were delivered by banks to their customers as a bundle. Changing technology and resultant customer behaviour led to a more recent focus on more particular products and services, and a more national geographic focus. Despite reliance on the importance of physical bricks and mortar branches to some customers, a decreasing number of markets are defined as being state-based. This changing approach to market definition is recognition that on-line banking is virtually replacing the traditional branch structure, a transformation which is set to continue as institutions face burgeoning competition from disruptive technology providers in the financial system. Other digital disruptors in the banking and finance space are likely to accelerate change in current markets and may further act to stimulate very real competition. This scenario has been described as a “technological tsunami” which will likely fundamentally change the competitive environment. In addition the increasing concentration of the market and the growing importance of the national operators reinforce the trend towards national geographic market definition. The current structure, where there are always at least three other large robust competitor banks despite the disappearance of smaller and regional competitors, is both an

295 See, for example, the merger assessment in Westpac Banking Corporation (one of the four pillars) and Challenge Bank (a state based bank) discussed in Garry Goddard and Greg Walker, ‘Competition Analysis of Bank Mergers in Australia’, (2002) 1(1) Journal of Law and Financial Management 6.

296 Westpac Banking Corporation (one of the four pillars) and the Bank of Melbourne (state based); see discussion in Appendix B. For example, a concerted effort is being made to encourage technology start-ups focused on financial services in Sydney, this poses greater competitive threat to existing financial services providers, for example through the establishment of Stone & Chalk, a fintech hub. See James Eyers, ‘Craig Dunn to chair fintech hub Stone and Chalk’, (4 March 2015), The Sydney Morning Herald (online), <http://www.smh.com.au/business/banking-and-finance/craig-dunn-to-chair-fintech-hub-stone-and-chalk-20150303-13tgnk.html>; and, the joint report of the Committee for Sydney and KPMG, “Unlocking the potential: the Fintech opportunity for Sydney”. (October 2014), <https://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Documents/fintech-opportunity-sydney-oct-2014-full-report.pdf>.

outcome and a cause of the increased national approach. Some research participants argued that the ACCC in some of its determinations gave insufficient weight to the true competitive impact of regional players in particular markets, such as St George in the small business loans market. Consolidation itself thus reinforced the trend towards national market, as most market participants were national in operation, meaning that national geographic scope was a more useful tool for measuring competitive impact. Others queried reliance on Herfindahl-Hirschman Index (HHI) generally, over what they described as “a proper qualitative review” (in these or similar terms), arguing that HHI was meant to be an indicator not a determinant.

Areas of importance in assessing competitive impact have been barriers to entry: both regulatory barriers and structural barriers for foreign competitors; availability of funds; barriers to expansion.

Australian banking markets are highly concentrated; however, this is the case in many Australian markets, and issues such as relative isolation and small population create endemic problems in this respect. Contestability, which increases the importance of ease of entry and exit, is thus a more important consideration in this market than many other considerations, and in other larger jurisdictions which do not have the same structural issues. Clearly this is a different scenario to that of Chinese banking markets by their very natures; however, there are lessons from the Australian approach which might assist banking markets in China.

8.8 Conclusions: the jurisdictional distinctions in focus

Despite a fully functioning and relatively effective competition law, and decision-making by the ACCC which relies on competition analysis, the banking market has become substantially more concentrated over the last few years for a number of reasons which have been discussed. The four pillars policy has been important in maintaining the big four as separate competitors to invigorate market competition. It has been argued however that the four pillars policy is in itself a barrier to entry for foreign banks because it implies that they are too big to fail and will be bailed out by government. This implicit government guarantee is said to impact on a number of areas including credit ratings and the cost of funding for their competitors. 299

The implications of the FSI Report are particularly important to this research and they can be summarised thus: the stability of the banking system is of “paramount importance” but competition is also extremely

299 See, for example, Carolyn M. Evans, above n 30.
important to economic growth and development. Competition in the finance industry is “generally adequate” and the four pillars should stay. Competition and competition law, however, should be supported by other policy initiatives such as proactive monitoring and regular review of the competitive market position in banking, removal of impediments to competition including ill-conceived decisions of regulators and rules and procedures, which create unnecessary barriers to competition. In particular, review of competition in the banking system every three years would address the natural tendency of conduct and prudential regulators to prioritise fairness or stability over competition and long-term efficiency. The FSI Report stated that ASIC should also be given an express competition mandate in respect of its decisions.

Various interview participants noted that while it was arguable that there is a clash between the objectives of competition and financial stability, historically in practical terms this was rarely an issue in the Australian banking market.

The important lesson which can be learned from the Australian position is that while an active and effective competition law is important, it needs to be supported by a comprehensive competition policy which ensures that other laws, regulations and policies are considered at the outset and also on a regular basis in the context of their impact on competition.
APPENDIX A

The following merger proposals discussed below only concern mergers between parties, which are both foreign parties with operations in China.

REFUSALS

Coca Cola/Huiyuan Juice 2009

The first refusal by MOFCOM under the AML involved a proposed merger between Coca Cola and Huiyuan Juice.\(^{300}\) In circumstances where Coca Cola wanted to purchase a Chinese juice company, and in a decision which provided an imprecise market definition,\(^{301}\) there was no real discussion of the functional level of the market or of the relationship between the soft drink market and the juice market. This relationship formed the basis of the competition analysis. MOFCOM referred to reducing the chances of survival of mid and small-sized fruit juice enterprises, limitations on the ability of domestic enterprises to compete, and the harm to sustainable and sound development of the fruit juice industry in China. The decision was widely criticised as being based on the unpopular portfolio market effect theory and incorporating industrial policy considerations (“development of the national economy”); however, as noted the latter is a legitimate consideration under the AML.\(^{302}\) Arguably, the decision is primarily focussed on the impact of the merger “on China”, which encompasses national economic development, individual classes of competitors and consumers.

Maersk/Mediterranean Shipping/CMA CGM 2014

The second refusal occurred in June 2014 in an international shipping case, when MOFCOM prohibited the establishment of a network centre between world’s three largest container shipping companies, Maersk, Mediterranean Shipping and CMA CGM on the basis that it was a “close joint operation” which would have the effect of eliminating or restricting competition in the market for international scheduled container shipping services across the Asia- Europe container liner shipping route.\(^{303}\) This close joint operation was found to be different from more usual loose shipping alliances, as the parties were proposing a major consolidation of many activities, with a jointly established network centre carrying out day to day management of all vessels navigating the shipping routes. MOFCOM found that the ability of


\(^{301}\) The impact of the conduct on the “Chinese fruit juice industry” and the “fruit juice beverage market”.

\(^{302}\) In truth the major concerns were the lack of detailed explanation for the findings and support for the use of the portfolio market effect theory, which might have been better supported. This theory was also applied more recently in Merck KGa and AZ Electronic Materials SA [2014] MOFCOM No 30, 30 April 2014.

the shareholders to control the market would be significantly strengthened after the consolidation since the parties had 20.6%, 15.2% and 10.9% of the market respectively; the HHI increased from 890 points to 2,240 points, indicating a change from a relatively fragmented to a highly concentrated market; the capital intensive nature of the industry favoured economies of scale but a certain number of competitors was necessary to safeguard competition. The proposal would eliminate further competition between them and raise entry barriers to new effective competition; the bargaining power of cargo owners was weak, and ports may be forced to accept lower prices, negatively impacting on port development.  

MOFCOM did not follow the EC’s practice of limiting the review of joint ventures to those “performing on a lasting basis all of the functions of an autonomous economic entity”. The joint venture was not treated as a merger in other jurisdictions, which cleared it, although authorities in the US and EU stated that they would maintain a watching brief. The decision indicates once again that MOFCOM will take a broad view of its jurisdiction over joint ventures.  

China is a major exporter and importer, so shipping operations are clearly vital to the Chinese economy, which again raises the issue of national economic development, with the focus of the impact of the merger “on China”.

**CONDITIONAL APPROVAL**

**Google/Motorola Mobility 2012: Maintenance of status quo**

In this well-publicised vertical acquisition by Google of Motorola Mobility, MOFCOM took quite a different view of the competitive impact of the merger from other regulators. In a technology market important to China, Google made smart terminal operating systems (Android) and Motorola Mobility made smart mobile terminals. MOFCOM found that the market for smart terminal operating systems was concentrated, with Google’s Android having almost 74% of the market in China and just two other much smaller competitors (Nokia and Apple). MOFCOM concluded that Android had a dominant position in the market because smart mobile terminals were heavily reliant on smart operating systems and Google had a very strong financial position and technical development capabilities. MOFCOM expected that this strong market position, achieved mainly on a free and open source model, would be maintained over a long period of time. Switching costs were high and any change to the model would adversely affect downstream parties. MOFCOM feared that post acquisition Google would have incentive to favour its subsidiary in future product trials, affecting competition. MOFCOM required the five year licensing of

304 Another recent decision on joint ventures like Samsung/Seagate, Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho [2014] MOFCOM No 49, 2 July 2014, was also in the sensitive industry of batteries for use in hybrid cars. Detailed conditions were imposed.  
305 See Nate Bush, above n 240.  
Android on a free and open source basis to other equipment manufacturers, with all original equipment manufacturers to be treated on a non-discriminatory basis, and compliance with Motorola’s existing obligations to licence its patents on fair, reasonable and non-discriminatory (FRAND) terms. The key distinction between the approaches of MOFCOM and other regulators was the characterisation of Google’s incentive to maintain supply of Android on fair terms to third party equipment manufacturers. US, EU and Australian regulators did not think it likely that there would be anti-competitive impact, because they relied on Google’s representations that it would allow on-going fair reasonable and non-discriminatory use of its standard essential patents by competitors. Technology markets are a sensitive area under industrial policy and China is major player in mobile phones, so it is likely that national economic development and industrial policy played a significant role in the conditions.

Seagate/Samsung 2011: Maintenance of status quo

In the horizontal Seagate/Samsung merger, MOFCOM was the only regulator globally to find anti-competitive impact and impose conditions. The merger involved the acquisition of the hard disk drive (“HDD”) business of Samsung Electronics by Seagate Technology. The market was the highly concentrated worldwide HDD market, with submarkets for different end uses such as HDDs for servers, desktop computers, laptops, and consumer electronics. There were five players with homogenous products and a small number of downstream acquirers. MOFCOM found: competition depended upon maintenance of the existing confidential bidding processes and split ordering, which incentivised manufacturers to compete for large orders; buyers of HDDs did not have countervailing market power and generally passed on price increases to consumers; entry barriers were significant, capacity utilisation rates high, and innovation important. MOFCOM found that the merger would negatively impact consumers in China by removing an important competitor from the market, undermining the competitive effect of purchasing patterns and increasing the possibility of co-ordinated effects. MOFCOM imposed behavioural conditions requiring Seagate to keep the Samsung business independent for at least a year. Seagate also agreed to expand Samsung production capacity within six months; to maintain normal research and development investments (at $800 million annually for the following three years); and not to force any exclusive arrangements upon its customers or suppliers. These substantial conditions significantly impacted on the ability of the merging companies to take advantage of anticipated efficiencies. Once again the merger

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307 See above n 248.
308 A similar approach was adopted in the more recent Microsoft/Nokia conditional approval; see Microsoft/Nokia [2014] MOFCOM No 24, 8 April 2014.
took place in a sensitive industry with conditions aimed at keeping the market in its current form to improve the position of business and consumers.310

Marubeni/Gavilon 2013: Hold separate conditions

The merger between Japanese trading house Marubeni and US grain merchant Gavilon is another example of an international merger where other regulators did not intervene and where conditions involved keeping businesses strictly separate post-merger through subsidiaries. 311 MOFCOM defined markets in the transaction as imported soybean, corn soybean and distillers dried grain. 80% of the soybeans consumed in China are imported, and Marubeni was the largest supplier with 18% of imports in 2012. Its competitors had much smaller shares. Gavilon supplied less than 1% of the soybean market in China. In considering the effect of the merger on competition, MOFCOM concluded that Marubeni might further expand by taking advantage of Gavilon’s capability for purchase, storage and logistics in North America, and that Marubeni might enhance its position in China by its comprehensive distribution network and client base. MOFCOM found high barriers to entry. China’s soybean crushers were mainly small enterprises with weak bargaining power. Despite the very low market share of the merged entity – less than 20% – MOFCOM imposed conditions which required the merged entity to operate two China soybean import and distribution businesses through subsidiaries of the merging parties, separate and independent in all respects, including keeping assets, information exchanges and business deals at arms’ length, for at least 24 months. The focus of the conditions is on maintaining the status quo for Chinese soybean purchasers- again the impact “on China”.312 MOFCOM intervened despite a relatively small combined market share, in the context of China’s concern for food security in a staple food product, 313 of utmost importance to the national interest.314

Walmart/Newheight 2013: Limitations on integration

Walmart, a US company, sought to acquire Newheight Holdings, which was the owner of Yihaoedian, the largest online supermarket in China offering more than 100,000 different goods. Yihaoedian was also involved in value added telecommunications services, offering online trading platforms to other online

310 See above n 251.
311 Marubeni/Gavilon [2013] MOFCOM No 22, 22 April 2013. This merger was against the background of significant pressure on local soybean suppliers by imports. See also MediaTek Inc/MStar Semiconductor Inc (Cayman) [2013] MOFCOM No 61, 6 August 2013. There the market shares of the parties were large but the conditions required that the LCD Master TV chip business of MStar be conducted by a Taiwanese subsidiary for at least three years, and other onerous conditions relating to separation of that business. The time limit may have been related to the changing nature of the market.
313 Other jurisdictions did not intervene.
314 See above n 255.
retailers. MOFCOM was concerned that Walmart would leverage its competitive advantages in the bricks and mortar supermarket business into the online retail business, materially strengthening its market power in the online sector. It was also concerned that the merged entity would rapidly expand its business in the value added telecommunications business which would materially strengthen its market power against network platform users there. MOFCOM allowed the merger on condition that the business of Newheight was conducted through the Yihaodian website alone. In addition, Newheight was not to use its network platform to provide internet services to other transaction parties for value added telecommunications services without obtaining approval. Walmart was also prohibited from using a variable interest structure to carry out value added telecommunications business through Yihaodian. These conditions ring-fence the business of Yihaodian from that of Walmart following the merger for an unlimited time. This is another example of circumstances involving companies owning key technologies in a sensitive industry, in this case the internet, which suggests that industrial policy considerations were involved.

Uralkali/Silvinit 2011: Certainty of supply

The US$1.4 billion international transaction between Uralkali and Silvinit, two Russian producers of potash or potassium chloride, used in agricultural fertiliser, a product of significant importance in China, is another example of a merger situation where MOFCOM maintained the status quo for an indeterminate period.\(^\text{315}\) The merger created the second largest potash supplier in the world (with 30% of the global market) with the merged entity accounting for 50% of China’s supply. MOFCOM determined the product and functional market as the market for imports or seaborne trading of all grades of potassium chloride to China. MOFCOM considered market position and unilateral effects, noting the position of competitors, barriers to entry and the impact of the merger on customers and suppliers. The market was subject to a well-known potash cartel, and as a matter of record, demand worldwide exceeds supply.\(^\text{316}\) It appears from the decision that ensuring continuing supply of a product on the current reasonable terms for an indeterminate period was crucial. Issues of food safety and security were also relevant to this determination.

Glencore/Xstrata 2013: Structural and behavioural conditions

\(^{316}\) See above n 247.
In another international merger, Glencore acquired Xstrata \(^{317}\) both parties were major international organisations in minerals markets. MOFCOM’s assessment focused on markets in China for copper concentrate, zinc concentrate, and lead concentrate, where the parties had overlapping activities and the market shares were 9.3%, 17.9% and 7.6%, respectively. MOFCOM determined that the global supply of the minerals in question had substantial impact on markets in China as the largest market for Glencore mining products and an important buyer of Xstrata’s products. MOFCOM emphasised that China imported 68.5%, 28.7% and 27.3% of its consumption of copper concentrate, zinc concentrate and lead concentrate. Xstrata added only 3.1% to the combined market share of copper concentrate and it had no sales of the other two products in China. \(^{318}\) Despite the low market share of copper concentrate in China held by the merged parties, and the low market shares of the other products, MOFCOM found that the merger was likely to have the effect of limiting or restricting competition in the markets for copper, zinc and lead concentrate, for the following reasons: the increase in control by Glencore; its increased share of sales and production; its ability to vertically integrate the production, supply and trade business of the products; the possibility that it would change the terms of Xstrata’s previous supply contracts from long-term contracts to spot contracts; high market entry barriers; and the lack of countervailing market power by downstream Chinese market players. MOFCOM imposed sweeping structural and behavioural conditions on the transaction. Glencore was required to sell the US $5.7 billion Las Bambas copper project in Peru (expected to produce 400,000 tonnes per annum) within six months from the date of the acquisition. Glencore was required to guarantee supply of specified quantities of copper concentrate to China under an annual contract for the next eight years, with a minimum quantity of 900,000 tonnes in 2013-14 (equivalent to the average sales of the two companies in the past two years). For both zinc concentrate and lead concentrate the merged firm was required to provide long-term contracts to customers in China on fair and reasonable terms. The merger was cleared in Australia \(^{319}\) and the US without conditions; conditions on zinc were imposed in the EU. \(^{320}\) The outcome is notable for the finding of anti-competitive impact where market shares were very low and for its imposition of sweeping conditions. It is once again an example of MOFCOM ensuring continuing certainty of supply of an important commodity on reasonable terms to the Chinese market. Clearly industrial policy considerations have been in play.

*Thermo Fisher Scientific/Life Technologies: Pricing conditions*

\(^{317}\) *Glencore/Xstrata [2013] MOFCOM No. 20, 16 April 2013.*


\(^{319}\) See above n 259.

\(^{320}\) European Commission, see above n 260.
In a determination involving the international merger of two US pharmaceutical companies having operations in China, MOFCOM was in general consensus with other regulators but imposed additional conditions relating to on-going supply and pricing. The Federal Trade Commission, EU, China and Australia all approved the merger subject to the divestment of businesses relating to gene modulation (particularly siRNA reagents), cell culture and cell media businesses in fairly similar terms.\(^3\)\(^2\)\(^1\)

Most agencies based their decisions on the high concentrations post-merger, which would have provided the merged parties with the ability to raise prices, especially given the high barriers to entry. MOFCOM carefully considered the impact of the merger on a larger number of potential markets in China using concentration analysis and price increase forecasts, but in contrast to other regulators imposed additional conditions on markets for SSP kits and SDS-PAGE protein standards. Thermo Fisher was to lower its list prices of SSP kits and SDS-PAGE protein standards in the Chinese market by 1% per year for the next 10 years while retaining the same level of discounts offered to distributors in China. Thermo Fisher was also to commit to either, at the option of the relevant third party, supply SSP kits and SDS-PAGE protein standards to the third party on an original equipment manufacturer basis, or grant the third party a perpetual and non-exclusive licence to use the technology relating to SSP kits and SDS-PAGE protein standards.

**APPENDIX B**

The relevant transactions are set out in date order. Some transactions involving banks and other financial institutions have also been included where they have the capacity to affect banking markets.

**Westpac/Bank of Melbourne (1997)**

*Domestic bank acquiring domestic bank*

Westpac, one of the four major banks, acquired the Bank of Melbourne, a Victorian regional bank which operated in Victoria. At the time the ACCC noted that increased competition from mortgage originators had forced banks to cut interest rates sharply and had also led to product unbundling, where customers no longer necessarily sought home loans from the banks which did their everyday banking. They stated:

“...although product clustering still occurs there are a large number of consumers who will shop around from different suppliers to get the best deal.”

\(^3\)\(^2\)\(^1\) See above n 261.
The ACCC also affirmed the view of the Wallis Committee that “significant elements of the banking market” were regional in character.

The ACCC allowed the merger because despite its big four status, Westpac was relatively weak in Victoria. Detailed undertakings provided that regional banks and other smaller financial entities could use Westpac’s automatic teller machines and EFTPOS systems at a reasonable price giving customers greater choice. Bank of Melbourne was also given significant autonomy for three years after the acquisition. Lastly, Bank of Melbourne branches would continue to be open on Saturdays and for extended hours on weekdays. The ACCC stated that the access arrangements for Victorian customers of deposit taking institutions allowing use of ATMs and EFTPOS systems of Westpac resulted in a greater choice of institutions that could offer wider electronic access within Victoria and also when customers were interstate. This was expected to greatly increase customer appeal of new and smaller institutions who could market themselves more effectively and competitively.


*Domestic bank acquiring domestic diversified financial services provider*

This was the acquisition of a state-based bank by one of the big four. The ACCC recognised that not only was the market for home loans national but that the market for credit card issuing was also ‘approaching national’. Deposit and transaction account markets were still regarded as being state-based.\(^{322}\)

**Bendigo Bank / Adelaide Bank (2007)**

*Domestic bank acquiring domestic bank*

This merger was between two regional state based banks. Identified markets were the South Australian markets for personal loans, deposit/term products, transaction accounts, small business banking and issue of credit cards. A national market was considered for hybrid personal lending products (margin loans). This merger was allowed on the basis that the parties had relatively low market shares in each of the identified markets, and much larger competitors remained in each market. Outcomes would have been the same if broader markets were adopted.\(^{323}\)

**Westpac Banking Corporation/ RAMS Home Loans Pty Limited (2007)**


\(^{323}\) Australian Competition and Consumer Commission, Proposed Merger Between Bendigo Bank Limited and Adelaide Bank Limited, (Merger Register, R 29212, date completed 10 September 2007).
Domestic bank acquiring domestic mortgage broker

This was an acquisition by one of the big four banks of the brand and franchise assets of a smaller mortgage organisation. The ACCC looked at the national market for the provision of home loans. It found that the acquisition was unlikely to substantially lessen competition as the target represented only a small proportion of the national market for the supply of home loans and post-acquisition the acquirer would be constrained by the other bid 4 banks. They also stated that “barriers to entry into the home loan market for established non-bank deposit taking institutions and established foreign banks may have been low”. 324

Westpac/ St George (2008)

Domestic bank acquiring domestic bank

The ACCC did not oppose this merger of the NSW regional bank St George by Westpac, one of the big four, which had comprehensive businesses in personal and business banking, corporate and institutional banking and wealth management. 325 Westpac had comprehensive branch and ATM networks in each Australian state. St George operated in each of the product and service markets, and operated a branch and ATM network Australia-wide (excluding Tasmania) but only had a strong presence in NSW, ACT and SA (through the Bank of SA). The ACCC noted the expansion of regional banks such as St George outside their home states in recent times and also the entry of foreign banks into Australia to compete in relation to particular products. It also mentioned the four pillars policy.

The ACCC found national markets for home loans, and the issue of credit cards. However, transaction accounts, SME and agribusiness banking were found to be state based because of the importance of branches to those users. In previous determinations in banking, the ACCC noted that it had identified “cluster markets” in relation to SME banking to include a range of transaction, saving and lending products but evidence suggested that this had changed and that SMEs were unbundling products from the cluster. Equipment finance, for example, was increasingly being sourced separately, but merchant services were still part of the bundle. Geographic dimensions were based on the importance of physical presence in consumer choice of provider and the geographic scope of decision making of financial institutions and the variation across key elements of service offerings- product, price and service levels. Physical presence was important for SME and agribusiness banking; it was also important for some

325 See above n 287.
segments of customers for whom in branch transactions and use of own ATM network was important. Physical presence was not as important in other areas. Corporate and institutional banking raised no competition concerns regardless of the market adopted.

Ultimately the ACCC found that the acquisition would not substantially lessen competition in any of the markets it identified. There was insufficient evidence that St George was a vigorous effective competitor against the big four in terms of its product pricing or customer service in any retail banking market to the extent that its removal would result in a substantial lessening of competition. St George had a relatively small share in retail banking markets. The ACCC found that competition in the retail banking markets provided by the other majors, regional banks, credit unions, building societies and other players would constrain the merged firm. Initially the ACCC identified the aggregation of BT (Westpac) and Asgard (St George) wrap platforms as a potential area of concern. This could involve a platform market or alternatively a broader market including multi-manager investments, industry funds and direct investments. Ultimately on the narrower market definition the ACCC found that there was no substantial lessening of competition given the number of strong competitors, and also the dynamic nature of the market.

Commonwealth/BankWest (2008)

*Domestic bank acquiring subsidiary of foreign bank*

The Commonwealth Bank, the largest retail bank by capitalisation, branch network and ATM network, acquired BankWest, a regional bank which had been aggressively competing while entering east coast markets after originating in West Australia. Markets considered were in retail banking, broken into personal banking and business banking. Geographic markets were based on the importance of physical presence (branch and ATM networks) in consumer choice of a provider and the geographic scope of decision-making in terms of product range, prices and service levels. Personal banking markets were divided into transaction accounts (local markets but price and service competition were national in nature); saving/term products (national); credit cards (national); home loans (national); personal loans (national). Business banking markets were divided into SME banking and agribusiness banking and both of these were local, with price and service competition being predominantly national. The ACCC found the acquisition was unlikely to substantially lessen competition.\(^{326}\) While it was argued that BankWest was a vigorous, effective and innovative competitor, the impact of the GFC on BankWest’s parent company,
HBOS plc, a major UK bank meant that it was facing imminent collapse in 2008. This also meant that BankWest was unlikely to continue to be a strong competitor absent the merger. Its historical price competition was also found to be underpinned by cheap wholesale funds which were no longer available following the GFC. The ACCC stated on this issue:

“With the virtual closure of asset securitisation markets and the increased cost of wholesale funds since late 2007, many non-bank lenders who were reliant on wholesale markets for their funding have had to exit the Australian market.”

APRA and the Reserve Bank also supported the ACCC view. The ACCC also noted that while there was currently no alternative acquirer, any such party would be unlikely to invest the capital to continue with the expansion plans.

The ACCC did note, however, that absent the GFC this merger may have been challenged. Whether this translates to a potentially different outcome due to the GFC itself or that without the GFC the parent would have continued to support BankWest expansion is unclear. Taking the latter view, it is still a merger decision based purely on the factual matrix of competition analysis against the backdrop of the GFC.

**Aussie Home Loans/Wizard Home Loans (2009)**

*Domaestic mortgage broker acquiring domestic mortgage broker*

AHL investments Pty Ltd (Aussie Home Loans) was to acquire the Wizard Mortgage Distribution business, and Commonwealth Bank proposed to acquire the GE loan book. The latter comprised up to $4 billion of Wizard home loan receivables. Both transactions were considered by the ACCC in the context of the national market for the supply of home loans. The first transaction was allowed as there was no significant aggregation of market concentration, and it was unlikely that Aussie Home Loans would acquire any market power, there were sufficient alternative suppliers of home loans and barriers to entry in the mortgage broking sector were sufficiently low to allow for new entrants. The second transaction was allowed on the basis that it would not lead to a significant change in market concentration, nor the opportunity for the acquirer to foreclose markets given the low market share and availability of alternative distribution channels.327

**National Australia Bank/AXA (2010)**

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327 Australian Competition and Consumer Commission, Aussie Home Loans - proposed acquisition of Wizard Home Loans Pty Ltd, (Merger Register, R 36059, date completed: 24 February 2009).
Domestic bank acquiring regional operations of foreign diversified financial services provider

The ACCC opposed this merger between NAB, one of the big four banks, and AXA, a substantial non-bank player in insurance, superannuation and wealth management industries on the basis of its likely anti-competitive impact. Undertakings proposed by the parties were rejected by the ACCC. At the same time the ACCC announced that it would not oppose the competing bid of AMP Limited, which ultimately occurred. 328

AXA’s main business was wealth management products and services. NAB, a major bank, argued that the acquisition would give it further opportunities for cross-selling its retail banking products and wealth management products. It argued that customers tended to seek wealth management products from dedicated financial services outlets. The parties competed in the wealth management sector, and, in particular, in relation to the supply of retail investment platforms for investors with complex investment needs.

The ACCC looked at the impact of the transaction in a number of banking markets relating to retail (personal and business) banking and corporate and institutional banking. 329 The ACCC identified two relevant bank market groupings: retail (personal and business) and corporate and institutional banking. Personal banking markets were further divided into transaction accounts (local market with national price competition); deposit/ term accounts (national market); credit cards (national market); home loans (national market); personal loans (national market); hybrid personal loans/margin loans (national market). Business banking, markets were further divided into SME banking (local with nationals price competition); equipment finance (national); agribusiness (local but national price competition). The ACCC found that the transaction was unlikely to have an anti-competitive impact in banking markets. As a conglomerate merger it would be unlikely to give the merged entity the ability or incentive to leverage its retail banking products via its wealth management channels or vice versa, and it would not give either applicant a significant additional market share or power in retail banking.

The ACCC considered, however, that the NAB bid was likely to impact wealth management markets (worth $1,300 billion to the Australian economy in 2009) as AXA’s next generation full service wrap platform was likely to compete closely with NAB’s Navigator Platform. The retail investment platforms provided the central link between product providers, financial planners and investors. Retail investors relied on financial planners and financial planners on the retail investment platforms to provide services.

328 See above n 291.
329 Ibid, 16.
Two categories of retail investment platforms offering different services were found to form separate markets: those for investors with complex investment needs; and those for investors with simple needs, such as master trusts and mini-wrap platforms. Platform functionality was a key driver of competition in attracting new funds, as were breadth and quality of investment options; platform administration fees and volume rebates paid to financial planners. NAB was one of only three large platform providers in a concentrated market and barriers to entry were high. It was a strong competitor in the market for complex investment needs through its Navigator platform. AXA was emerging as a strong competitor through its platform North. AXA was likely to provide vigorous and effective competition in the market, probably more so than other potential competitors for a variety of reasons. It would take considerable time and sunk costs for others to replicate their platforms. If NAB acquired AXA, NAB would not have the incentive to continue to invest in and maintain its own platform. The proposed acquisition would therefore impact the vigorous competition of AXA by removing the competitive tension between the two, reducing incentives for other competitors to invest in platform innovation and reducing the prospect of price competition. Proposed undertakings were rejected as insufficient to resolve these difficulties.

The ACCC determined that an anticompetitive outcome was unlikely for the alternate acquisition by AMP, as AMP did not have a significant presence in that market, offering products from other providers badged as AMP products.

The tendency to look at markets on a national basis continued with markets for transaction accounts, SME banking and agribusiness banking state based but with a recognition that price competition is national. Product markets were, however, divided into a significant number of markets for individual consideration.

**Commonwealth Banking Corporation/Aussie Home Loans (2013)**

*Domestic bank acquiring domestic mortgage broker*

The Commonwealth Bank sought to acquire the 67% of AHL Pty Limited (Aussie Home Loans) that it did not already own. The Commonwealth Bank, one of the big four banks, provided banking services and supplied home loans directly to consumers and also through indirect lending channels via intermediaries such as mortgage brokers. Aussie Home Loans operated a network of some 750 franchised mortgage brokers which supplied bank and non-bank home loan products, retail banking and insurance products. These included a range of lender mortgage products including products financed by third party lenders such as the Commonwealth Bank but branded as Aussie Home Loans products. Relevant Markets were
found by the ACCC to be the national market for the supply of home loans and the national market for the supply of mortgage distribution services (mortgage aggregators and broker head groups providing lending institutions access to their networks of aligned brokers).\footnote{Australian Competition and Consumer Commission, ‘Commonwealth Bank of Australia-proposed acquisition of remaining issued capital of Aussie Home Loans’, (Media Release, 57/13, 21 March 2013).}

\textbf{Westpac Banking Corporation/Lloyds International Pty Ltd (CFAL and BOSI) (2013)}

\textit{Domestic bank acquiring subsidiary of foreign insurance company}

Westpac, one of the big four banks, sought to acquire the assets of Lloyds International Pty Ltd which included Capital Finance Australia Limited (CFAL) and BOS International (Australia) Limited (BOSI). The two parties competed through subsidiaries in the market for financing motor dealerships and equipment finance. The ACCC identified the markets as those for the provision of bailment (floor plan) and point of sale (POS) finance facilities to motor vehicle dealerships, the provision of POS retail finance to motor vehicle customers, and the provision of equipment finance, having regard to particular industries and asset classes where necessary.\footnote{Australian Competition and Consumer Commission, ‘Westpac Banking Corporation-proposed acquisition of Lloyds International Pty Ltd (CFAL and BOSI)’, (Media Release, 270/13, 4 December 2013).}

In relation to the first market, other forms of commercial finance were not close substitutes for bailment finance. The ACCC considered both national and regional markets for bailment finance and POS finance facilities, noting that while most financiers are national, competition for attracting new motor vehicle dealerships occurs through building relationships with state based representatives.

The ACCC did not consider it necessary to finalise the geographic dimension of the second product market. General equipment finance was considered in a national market.

The ACCC did not consider any of the markets to be problematic. In the first two product markets there were many competitors both aligned to particular manufacturer aligned financiers and non-aligned. Esanda (owned by ANZ) and Macquarie Bank in particular closely competed for non-aligned motor vehicle dealerships and were likely to constrain the merged entity. In relation to the provision of equipment finance a range of competitors would continue to provide alternatives.
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APPENDIX C

Sample interview/ questionnaire for China

- What are the most important laws/ regulations governing banking in practical terms in China?
- What are the most important regulators involved?
- How does the Anti-Monopoly Law (AML) apply to and impact bank mergers in China?
- Have there been any banking mergers determined since the AML came into effect in 2008?
- What were the primary influences in determining their outcome(s)?
- Have outcomes changed as regulators become more comfortable with enforcing the AML?
- Have regulations other than the AML been influential in determining outcomes?
- Have regulations been applied differently in respect of State Owned Enterprises?
- Have outcomes involving SOEs been influenced by other factors that you are able to isolate?
- Have foreign investment rules or policies relating to creation of national champions been important?
- Are there any particular examples which illustrate the way the regulations currently work?
- Do the current processes work well?
- Do they encourage competitive financial markets?
- Do they encourage and assist financial stability?
- Are there undisclosed policies which operate in practice?

Sample interview/ questionnaire for Australia

- What are the most important laws/ regulations governing banking mergers in practical terms?
- What are the most important regulators involved?
- How does the Competition and Consumer Act apply to and impact bank mergers?
- In your view which Australian bank mergers best illustrate the way the laws work?
- What have been the primary influences in determining outcome(s) of bank mergers?
- Have outcomes changed and what was the reason for the changes?
- Have regulations other than the Competition and Consumer Act been influential in determining outcomes?
- Have foreign investment rules been important?
- Are there any particular examples which illustrate the way the regulations currently work?
- Do the current processes work well?
- Do they encourage competitive financial markets?
- Do they encourage and assist financial stability?
- Are there undisclosed policies which operate in practice?