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Mavericks in merger regulation: Approaches and problems
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The maverick in merger regulation is the firm that is a ‘vigorous and effective competitor’, even if it has a small market share. The maverick is thought to have a significant impact on competition — they might be price-cutters, innovative, or disruptive — so the possibility of removing a maverick through a merger is a significant concern for competition regulators. This article considers the role of the maverick in Australian merger regulation, with reference to the experience and approaches in the United States.

In particular, the article examines the problems with maverick firms: How can they be identified? Would their acquisition have any meaningful impact on competition? Should the idea that a merger might create a maverick be discounted entirely? What is the impact if a regulator wrongly identifies a firm as a maverick? The article concludes with the view that a regulator opposing a merger because the target is a maverick must be certain that its maverick classification is correct, and that the loss of that firm will have a real impact on competition. Putting aside the fact that it is unfair from the perspective of the individual firm not to be able to merge — wrongly characterising firms as mavericks has the potential to discourage price-cutting, stifle innovation, and delay other firms from entering the market — all of which is bad for consumers.
A ‘third wave’ of computing is emerging, based on the widespread embedding of processors with data handling and communications capabilities into everyday objects and environments, such as fridges, cars, fitness trackers and hairbrushes. This sociotechnical change brings with it the possibility of a disconnection between current consumer protection law and new marketing activities. The widespread digitisation of commerce has given firms an enhanced ability, not only to compile detailed customer profiles, but also to exploit consumers’ cognitive biases and individual vulnerabilities: a form of ‘digital consumer manipulation’. Opportunities for digital consumer manipulation will be increased by the widespread use of third wave technologies, enabling the availability of a greater amount of intimate and personalised data and creating additional personalised targeting opportunities. Why does this matter? Digital consumer manipulation can erode consumer autonomy, limit choice and competition, violate privacy, compromise personal dignity and subvert reasonable decision-making by consumers. This article examines the key provisions of the Australian Consumer Law to establish its likely effectiveness in the face of digital consumer manipulation facilitated by the third wave.