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Recent trends in complex ACCC merger review cases

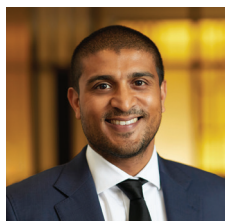
Third Edition, March 2019



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**A special thank you to Jesse McNaughton
in assisting to prepare this report.**

This report

We are pleased to share with you the third edition of our report on recent trends in complex merger review cases by the Australian Competition & Consumer Commission (ACCC).

This report provides a complete statistical analysis of ACCC merger review decisions which involve the publication of a Statement of Issues (SOI) since they were first published in 2006 and the use of the “traffic light” system to indicate the ACCC’s preliminary competition concerns with a transaction.

Generally, the ACCC will only issue a SOI in relation to transactions that raise serious or complex competition concerns. Accordingly, SOIs make up a small proportion of the total number of transactions considered by the ACCC in any given year.

A SOI provides a strong indication of the ACCC’s preliminary views as to whether a proposed transaction has competition concerns or is likely to be granted informal clearance.

The ACCC’s views in a SOI are classified under the following “traffic light” system:

- issues **likely** to be of concern (red light);
- issues that **may** be of concern (orange light); and
- issues **unlikely** to be of concern (green light).

This report outlines the recent trends in complex merger cases including a statistical analysis of the likelihood of SOI transactions being cleared or opposed, with or without remedies on the basis of their classification under the traffic light system. The report also provides a statistical analysis of the timing of the ACCC informal merger review process based on the traffic light system.

The findings in this report should not be relied upon as an accurate predictor of future ACCC merger decisions. Rather they should be considered together with a legal analysis of the substantive competition issues involved in any particular case.



“

There seems, if anything, a current bias to excessive consolidation; to fewer firms in each sector. As a community we need to question whether this is the outcome we want. ...The ACCC will continue to argue that, overwhelmingly, company behaviour will most benefit consumers and the community if it occurs within a framework of those companies facing strong competition from a sufficient number of competitors.

Rod Sims, Chairman, ACCC, 2019 Compliance and Enforcement Policy, Committee for Economic Development Australia (CEDA) Conference 26 February 2019

”





Commentary

For many years, the ACCC's informal merger review process has been the most important regulatory mechanism in Australia for ensuring corporate transactions result in efficient market outcomes without substantially lessening competition in any relevant market.

That process has been fine-tuned over the last decade as sectors of the economy, merger parties and the ACCC have all become more sophisticated. While the significant majority of transactions are cleared by the ACCC without a SOI, there are several transactions each year that raise serious competition concerns and result in the ACCC publishing a SOI.

IN RELATION TO THESE TRANSACTIONS (WHERE A SOI IS INVOLVED), WHAT ARE THE LATEST TRENDS?

The ACCC continues to take a number of months to make a final decision for a SOI transaction. In 2018, the average time taken to make a final decision for a SOI transaction was over 6 months being the third highest annual average in history.

There are many reasons for this. Firstly, the ACCC is increasingly clearing transactions without public review or SOI. This means that those transactions that justify the publication of a SOI are generally the most complex. As a result, even though the number of SOI transactions are not increasing, the average time taken by the ACCC to consider them is longer.

Secondly, in 2010, the ACCC amended the informal review process to improve the transparency of its decision making (by ensuring competition concerns were set out in writing). Since that time, there has been a clear trend of SOI transactions taking longer.

Thirdly, while the total number of transactions before the ACCC has not materially changed over time, the rigour with which the ACCC examines complex transactions has increased. This, combined with the practice of Chairman Rod Sims (since 2011) allowing parties to stop the clock on transactions rather than pushing through to decision, has resulted in more time for the consideration of SOI transactions.

Fourthly, the ACCC has recently indicated that it will use its compulsory investigative powers to obtain data and information from parties to assess the competitive effects of a merger. This has increased the time taken to make a decision as in many instances the volume of data and information requested is significant.

Finally, increased concentration in key markets as a result of merger activity over time has resulted in the ACCC having to address more complex issues for each successive merger in such markets. This has naturally resulted in increased timeframes in SOI transactions.



Red lights have traditionally not been fatal – nearly half have been cleared and only one quarter blocked, but in the last 3 years, less than 30% have been cleared. That is, the ACCC’s preliminary view that there is a red light is getting harder to change.

Since 2006, 47% of all transactions with one or more red lights have been cleared while 26% have been blocked. However, in the last 3 years, less than 30% of red light SOIs have been cleared.

Red lights have not traditionally meant that it is necessary to offer remedies to obtain clearance. However, in the last 3 years, only one quarter of red light SOI transactions were cleared without a remedy.

Since 2006, almost half (40%) of all cleared transactions with one or more red lights have not required any remedy. In the last 3 years, only 25% of all cleared transactions with one or more red lights have not required any remedy.

The ACCC still prefers divestments over behavioural undertakings.

This is not surprising given that the ACCC is often reluctant to be tasked with monitoring compliance with undertakings. While several years ago there was a view that the ACCC was more willing to accept behavioural remedies, our analysis does not reflect this. In fact, for 46% of all cleared transactions with one or more red lights, a divestment remedy was required. Only 4 of 35 (11%) red light cleared transactions involved behavioural remedies (with 1 of 35 (3%) cleared with a combination of both).

The large majority of orange light (no red light) transactions have been cleared by the ACCC.

68% of all transactions with one or more orange lights (no red lights) have been cleared while 13% have been blocked.

Almost every orange light transaction that has been cleared by the ACCC did not require a remedy.

92% of all cleared orange light transactions (35 of 38) did not require any remedy. The remaining three transactions required remedies (one divestment, two behavioural).

KEY OBSERVATIONS

Red light transactions

- **47%** of all transactions with a red light have been cleared by the ACCC.
- In the last 3 years however, only **29%** of red light transactions have been cleared.
- **26%** of all transactions with a red light have been blocked by the ACCC.
- Of all cleared red light transactions, **40%** did not require a remedy.
- Of all cleared red light transactions, **46%** required a divestment remedy.

Orange light transactions

- **68%** of all transactions with an orange light have been cleared by the ACCC.
- **13%** of all transactions with an orange light have been blocked by the ACCC.
- Of all cleared orange light transactions, **92%** did not require a remedy.
- Of all cleared orange light transactions, **8%** required a remedy.

Average timing for ACCC decisions

- **5.3 months** for all ACCC decisions (with SOI).
- **5.9 months** where the SOI has a red light.
- **6.3 months** for all cleared ACCC decisions where the SOI has a red light.
- **7 months** where the SOI has a red light and remedies were required.
- **4.8 months** where the SOI has a red light and no remedies have been required.
- **4.4 months** where the SOI has an orange light (but no red light).

Industry analysis

Transactions in the following industries have received the **most SOIs**: grocery, industrial, health, media & technology, infrastructure and retail. These sectors make up **over half** of all SOIs since 2006.

Transactions in the following industries have had the **lowest ACCC clearance rate**: liquor (25%), energy (33%), resources (33%).

Transactions in the following industries have had the **highest ACCC clearance rate**: transport & tourism (75%), media & technology (73%).

Year by year

The ACCC continues to take a number of months to consider SOI transactions.

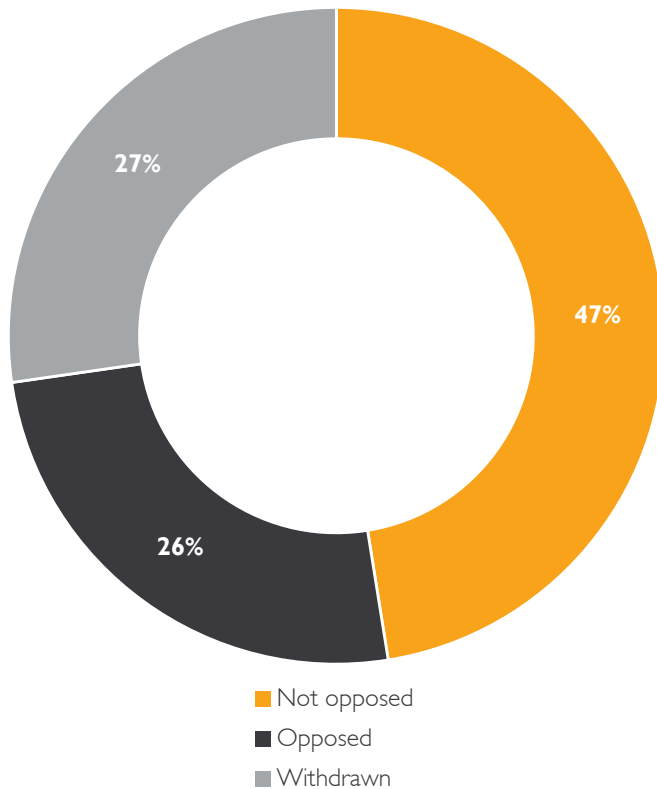
For example, in 2018, the average time taken was **1-2 months longer** than the historical average (2006-2017):

- **6.4 months** (up from 5.2 months) for all decisions;
- **6.6 months** (up from 5.8 months) for red light transactions; and
- **6.2 months** (up from 4.2 months) for orange light transactions.

Having said that, the ACCC was slightly quicker in considering SOI transactions for all decisions compared to the previous year.

The number of SOIs in a given year does not necessarily correspond to the length of time taken by the ACCC to make a decision (i.e. it does not follow that more SOIs means more time in a given year).

Red light statistics



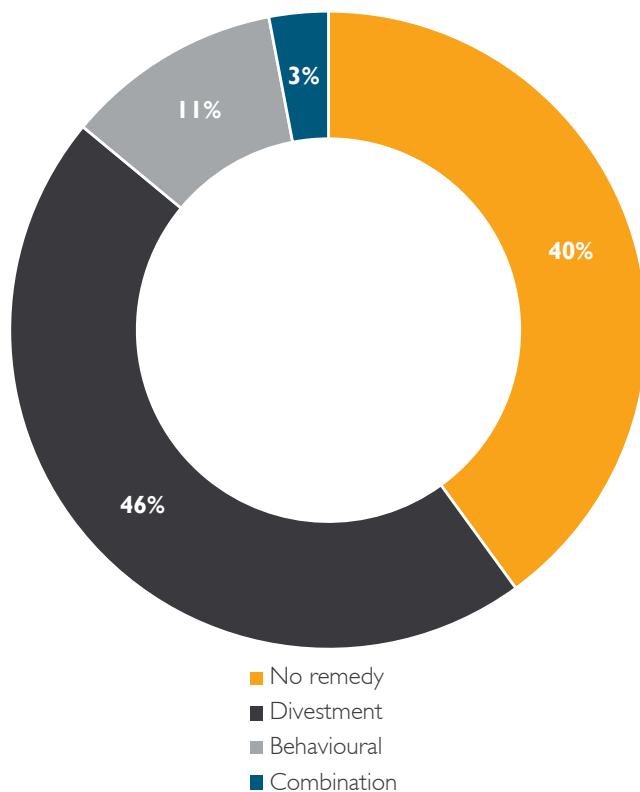
CLEARANCE ANALYSIS

There have been **130** SOIs published by the ACCC since 2006.

Of those **130** SOIs, **74** had one or more red lights.

Of those **74** red light SOIs:

- **35** were not opposed
- **19** were opposed
- **20** were withdrawn



REMEDY ANALYSIS

There have been **130** SOIs published by the ACCC since 2006.

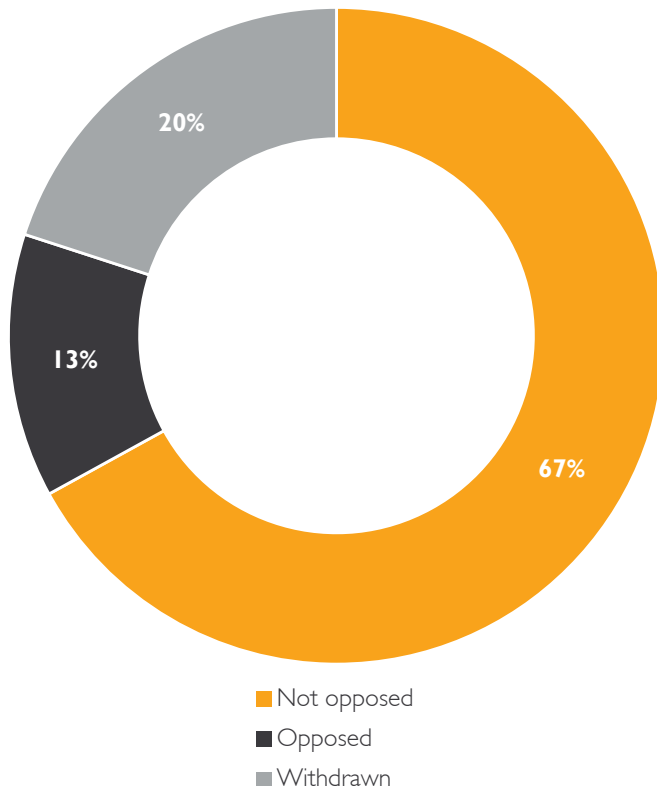
Of those **130** SOIs, **74** had one or more red lights.

Of those **74** red light SOIs, **35** were not opposed.

Of the **35** red light SOIs that were not opposed:

- **14** required no remedy
- **16** required divestments
- **4** required behavioural undertakings
- **1** involved a combination of remedies

Orange light statistics



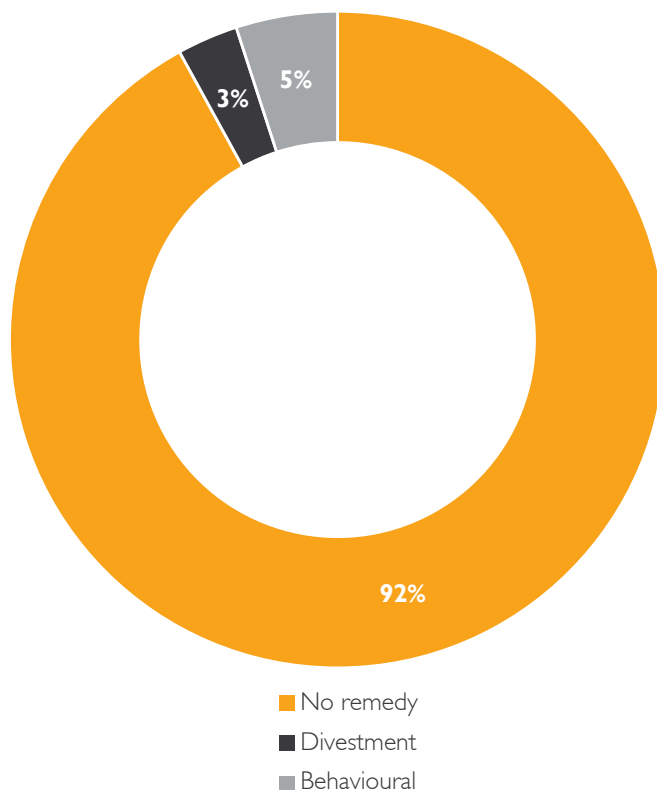
CLEARANCE ANALYSIS

There have been **130** SOIs published by the ACCC since 2006.

Of those **130** SOIs, **56** had one or more orange lights (but no red lights).

Of those **56** orange light SOIs:

- **38** were not opposed
- **7** were opposed
- **11** were withdrawn



REMEDY ANALYSIS

There have been **130** SOIs published by the ACCC since 2006.

Of those **130** SOIs, **56** had one or more orange lights (but no red lights).

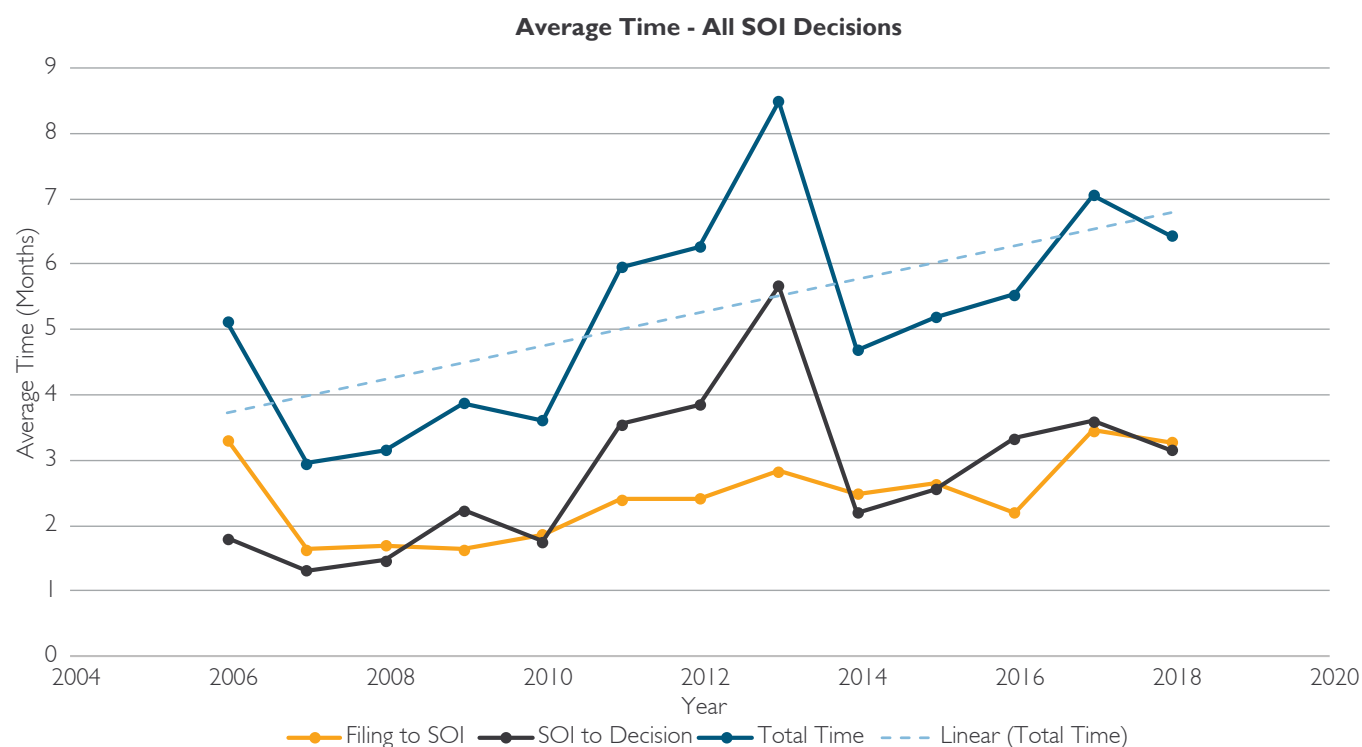
Of those **56** orange light SOIs, **38** were not opposed.

Of the **38** orange light SOIs that were not opposed:

- **35** required no remedy
- **1** required divestments
- **2** required behavioural undertakings

Timing statistics

AVERAGE TIME - ALL SOI DECISIONS



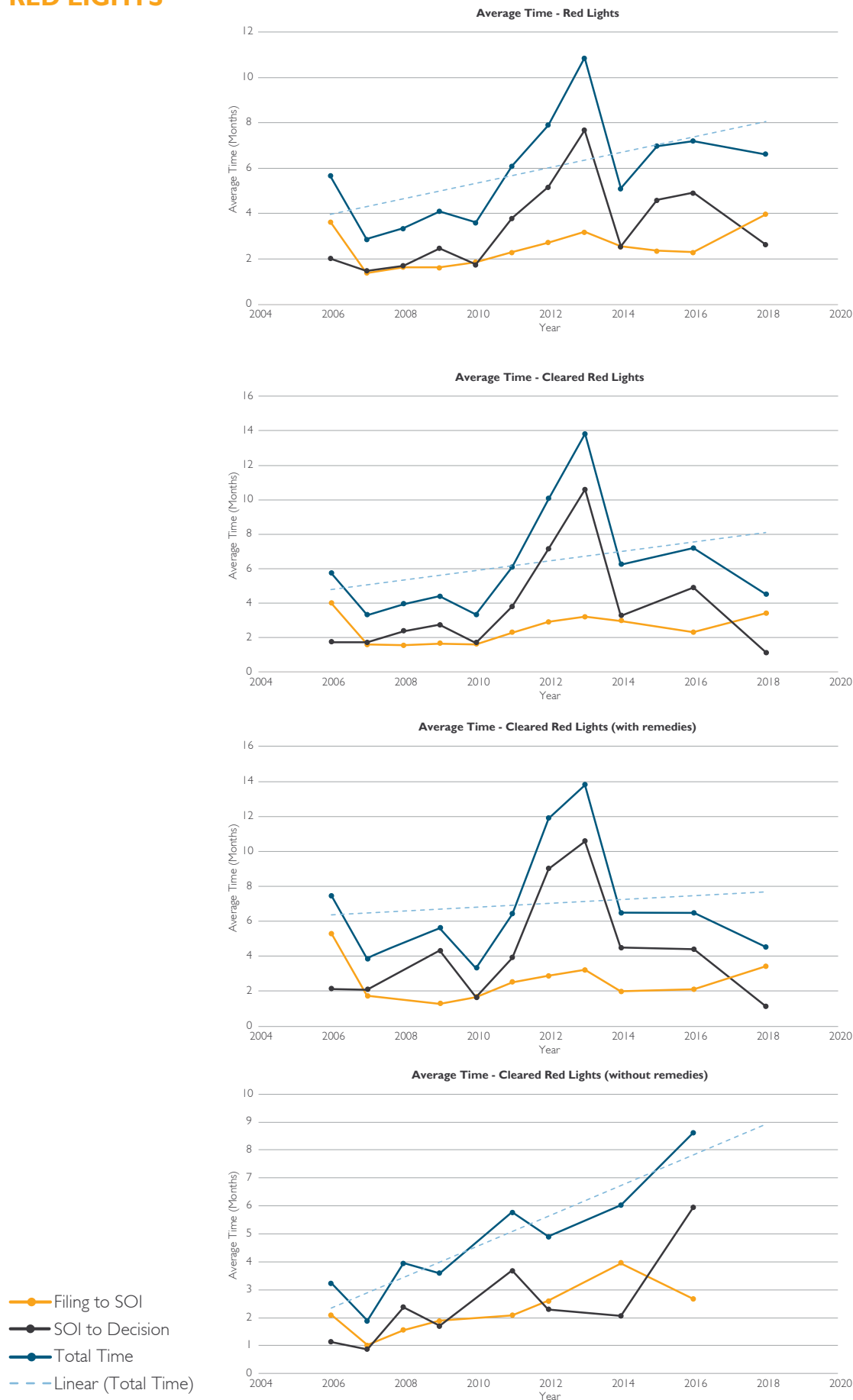
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“While the ACCC will endeavour to complete these reviews as quickly as possible, the focus is on getting the right decision. In the past year, the ACCC has signalled that it would use its compulsory information gathering powers more in merger investigations where our concerns warrant increased evidence gathering to reach a decision and, for some matters, prepare for possible litigation. ... The greater use of these powers and related complexity of publicly reviewed matters led to an increase in average review length.”

ACCC and AER Annual Report 2017-2018 (pages 44-45)

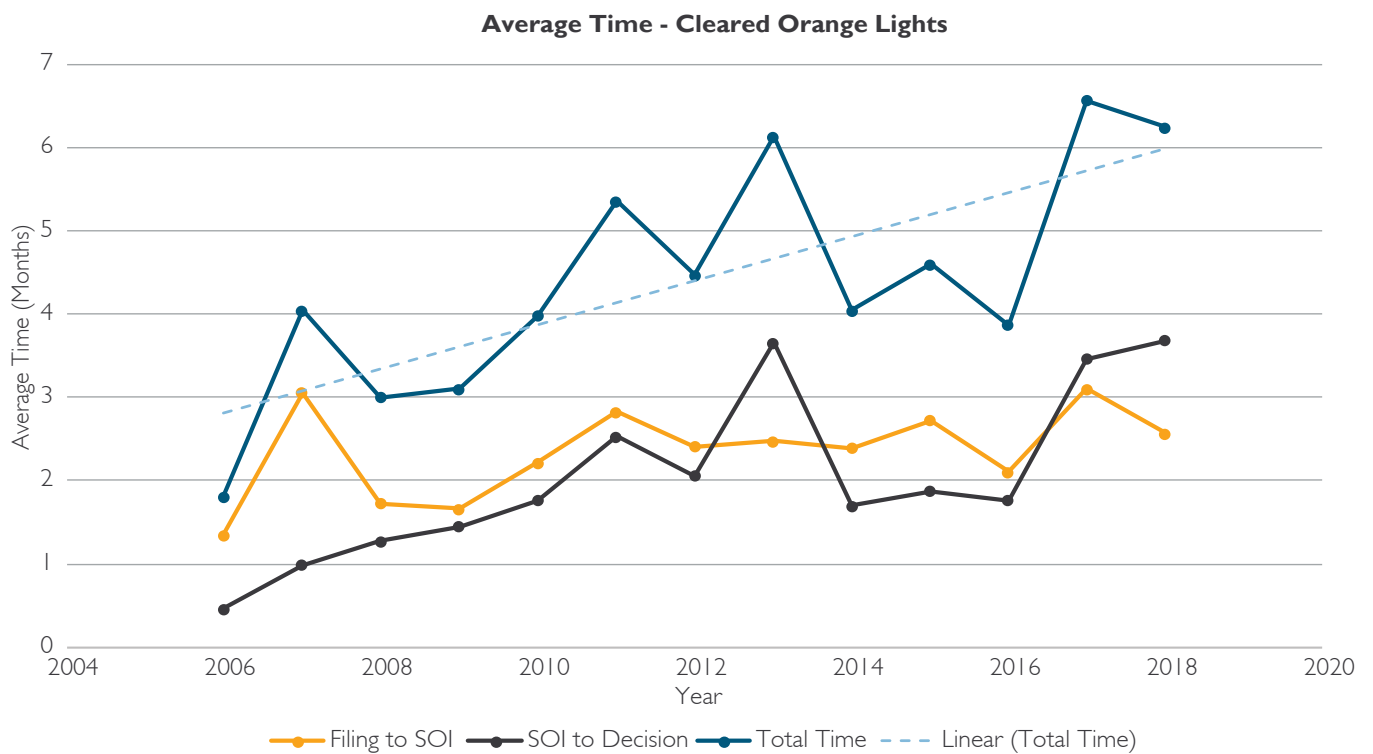
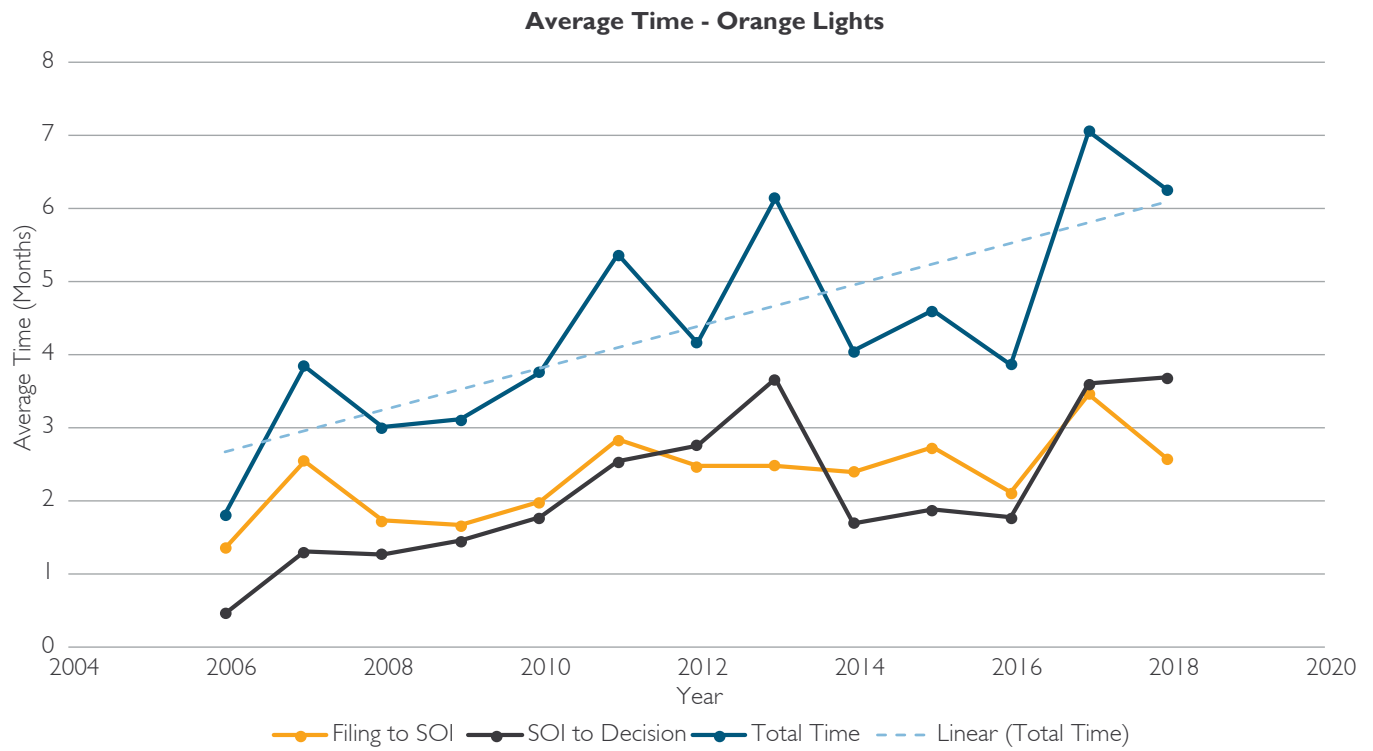
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RED LIGHTS

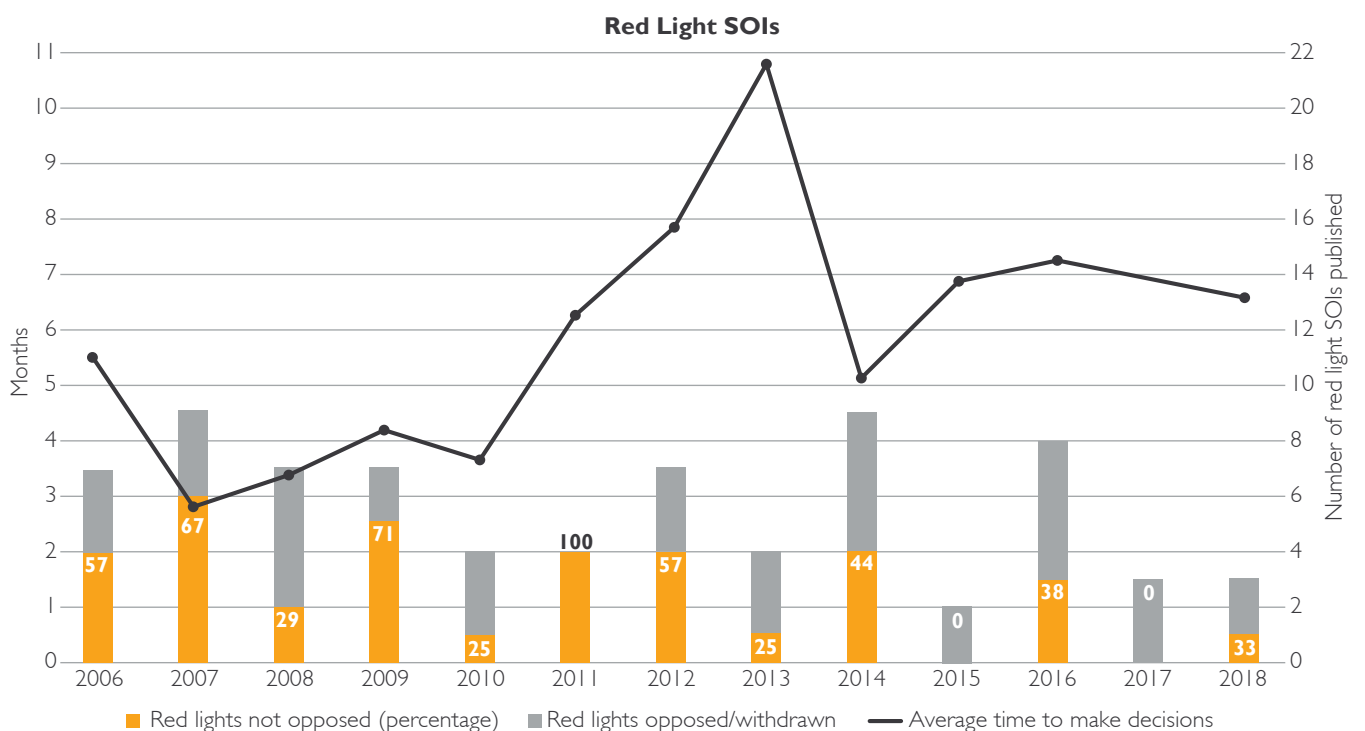
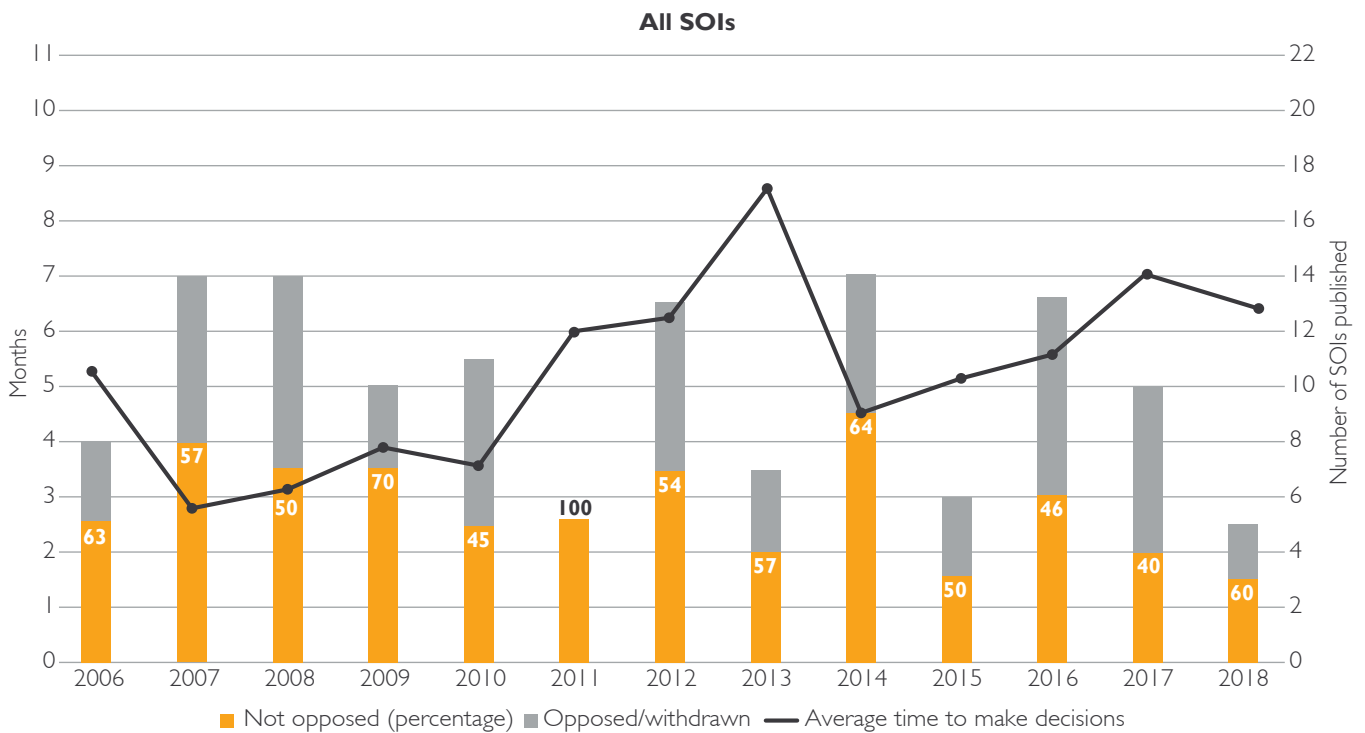


As all three red light SOIs in 2017 were withdrawn, there is no plotted data for how many months those decisions took.

ORANGE LIGHTS



Year by year statistics

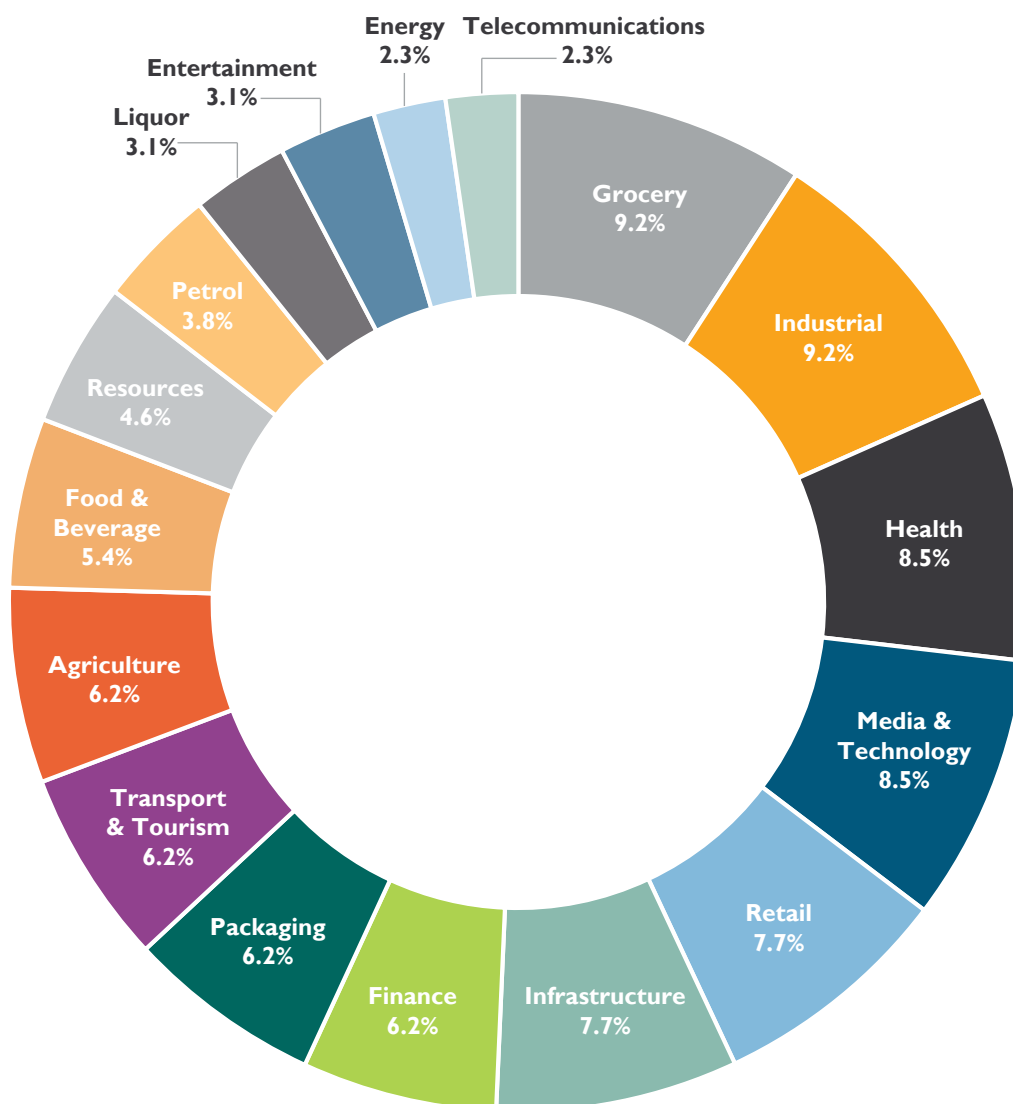


Note, only completed decisions are included in timing statistics. Withdrawn applications are not included.

As all three red light SOIs in 2017 were withdrawn, there is no plotted data for how many months those decisions took.

Industry statistics

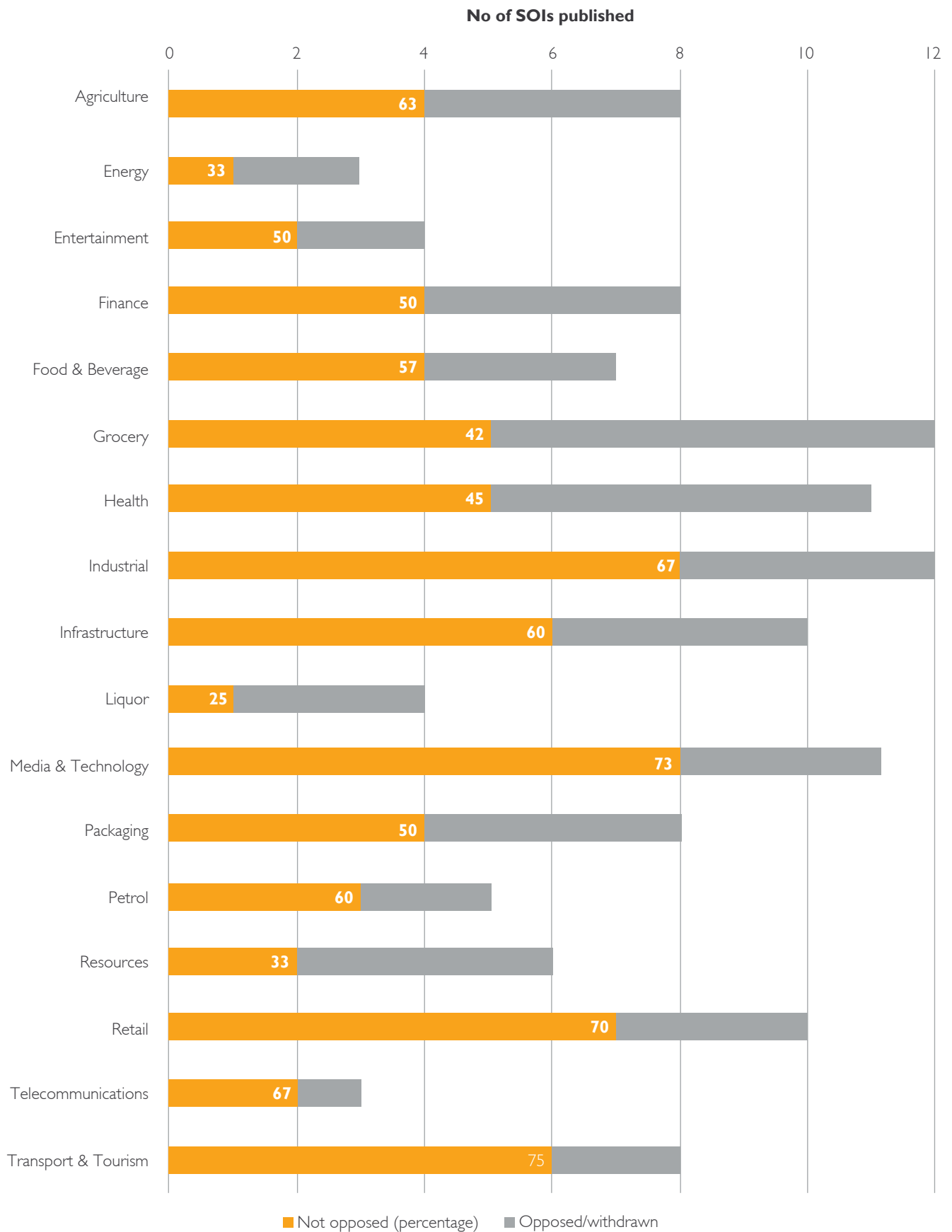
PERCENTAGE OF SOIs BY INDUSTRY (2006–2018)



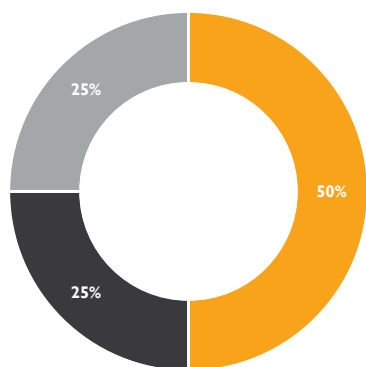
There have been **130** SOIs published by the ACCC since 2006. Below is a breakdown of SOIs by industry:

Grocery	9.2%	Agriculture	6.2%
Industrial	9.2%	Food & Beverage	5.4%
Health	8.5%	Resources	4.6%
Media & Technology	8.5%	Petrol	3.8%
Retail	7.7%	Liquor	3.1%
Infrastructure	7.7%	Entertainment	3.1%
Finance	6.2%	Energy	2.3%
Packaging	6.2%	Telecommunications	2.3%
Transport & Tourism	6.2%		

ACCC CLEARANCE RATE (BY INDUSTRY)



■ Not opposed ■ Opposed ■ Withdrawn

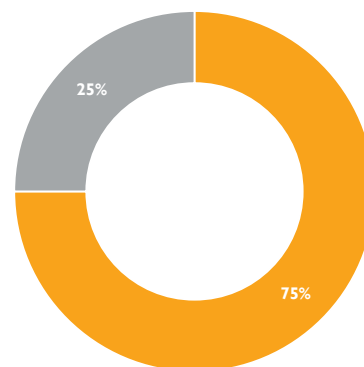
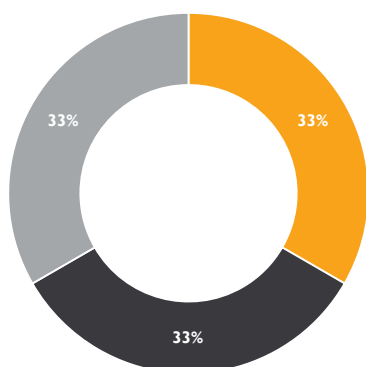
RED LIGHTS**ORANGE LIGHTS****Agriculture**

Of the 8 decisions in the agriculture industry, 4 were red light SOLs. Of the 4 red light SOLs:

- 2 were not opposed
- 1 was opposed
- 1 was withdrawn

Of the 8 decisions in the agriculture industry, 4 were orange light SOLs. Of those 4 orange light SOLs:

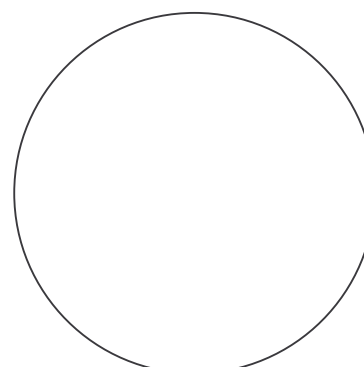
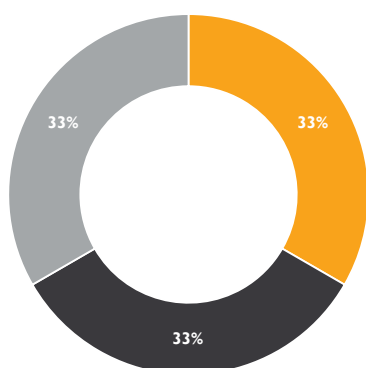
- 3 were not opposed
- 1 was withdrawn

**Energy**

Of the 3 decisions in the energy industry, all 3 were red light SOLs. Of those 3 red light SOLs:

- 1 was not opposed
- 1 was opposed
- 1 was withdrawn

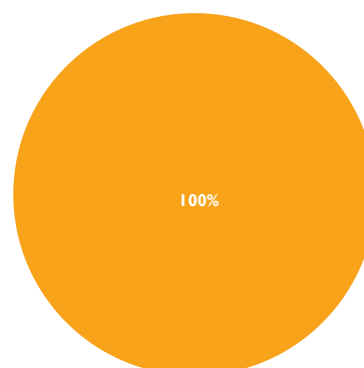
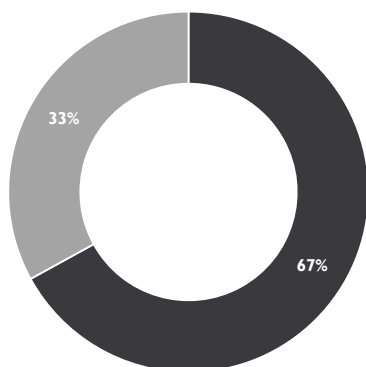
Of the 3 decisions in the energy industry none were orange light SOLs.

**Entertainment**

Of the 4 decisions in the entertainment industry, 3 were red light SOLs. Of those 3 red light SOLs:

- 1 was not opposed
- 1 was opposed
- 1 was withdrawn

Of the 4 decisions in the entertainment industry, one was an orange light SOL. That orange light SOL was not opposed.

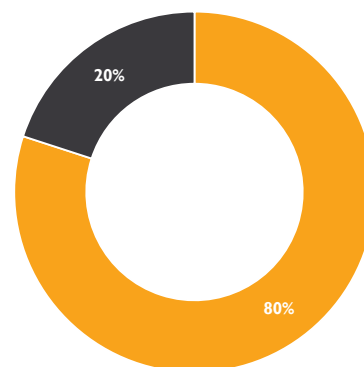
**Finance**

Of the 8 decisions in the finance industry, 3 were red light SOLs. Of those 3 red light SOLs:

- 2 were opposed
- 1 was withdrawn

Of the 8 decisions in the finance industry, 5 were orange light SOLs. Of those 5 orange light SOLs:

- 4 were not opposed
- 1 was opposed

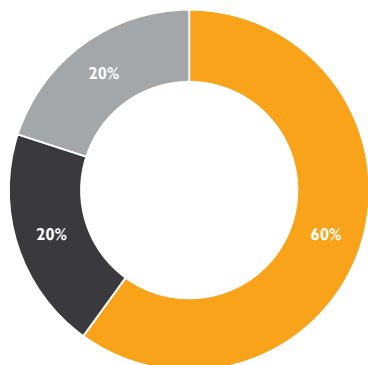


■ Not opposed ■ Opposed ■ Withdrawn

RED LIGHTS

ORANGE LIGHTS

Food & Beverage

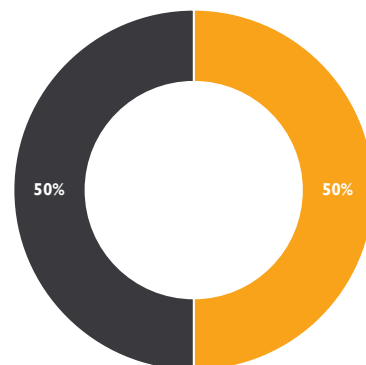


Of the 7 decisions in the food & beverage industry, 5 were red light SOIs. Of the 5 red light SOIs:

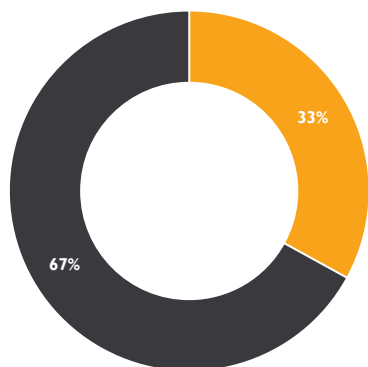
- 3 were not opposed
- 1 was opposed
- 1 was withdrawn

Of the 7 decisions in the food & beverage industry, 2 were orange light SOIs. Of those 2 orange light SOIs:

- 1 was not opposed
- 1 was opposed



Grocery

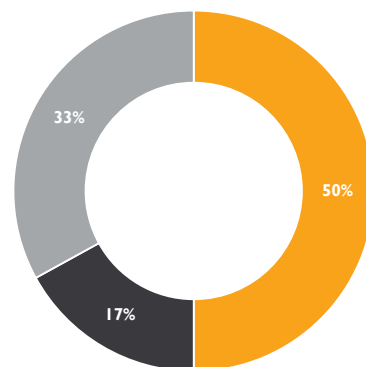


Of the 12 decisions in the grocery industry, 6 were red light SOIs. Of those 6 red light SOIs:

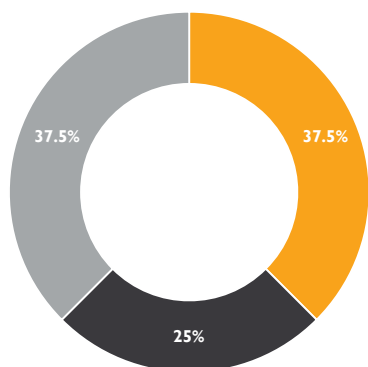
- 2 were not opposed
- 4 were opposed

Of the 12 decisions in the grocery industry, 6 were orange light SOIs. Of those 6 orange light SOIs:

- 3 were not opposed
- 1 was opposed
- 2 were withdrawn



Health

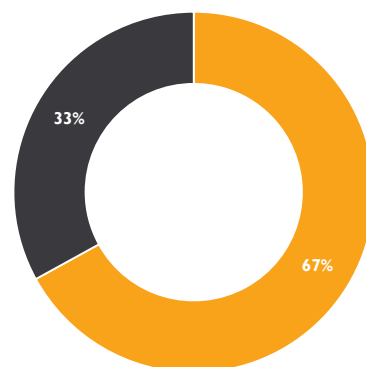


Of the 11 decisions in the health industry, 8 were red light SOIs. Of those 8 red light SOIs:

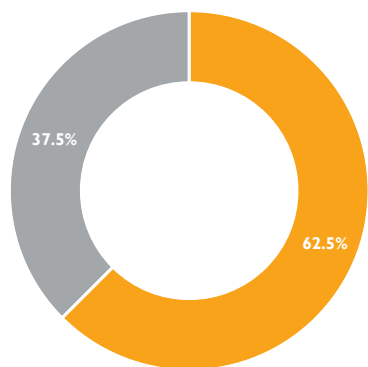
- 3 were not opposed
- 2 were opposed
- 3 were withdrawn

Of the 11 decisions in the health industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

- 2 were not opposed
- 1 was opposed



Industrial

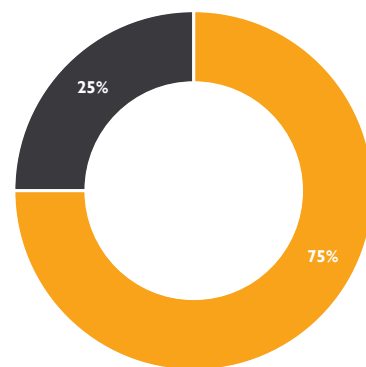


Of the 12 decisions in the industrial industry, 8 were red light SOIs. Of those 8 red light SOIs:

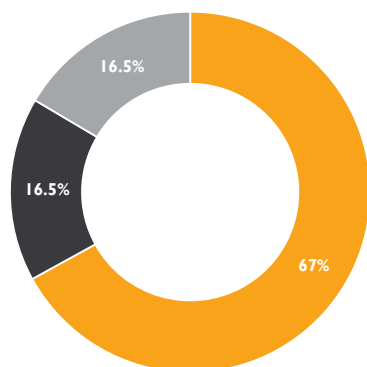
- 5 were not opposed
- 3 were withdrawn

Of the 12 decisions in the industrial industry, 4 were orange light SOIs. Of those 4 orange light SOIs:

- 3 were not opposed
- 1 was opposed



■ Not opposed ■ Opposed ■ Withdrawn

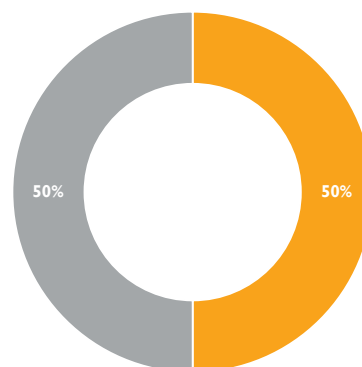
RED LIGHTS**Infrastructure**

Of the 10 decisions in the infrastructure industry, 6 were red light SOIs. Of the 6 red light SOIs:

- 4 were not opposed
- 1 was opposed
- 1 was withdrawn

Of the 10 decisions in the infrastructure industry, 4 were orange light SOIs. Of those 4 orange light SOIs:

- 2 were not opposed
- 2 were withdrawn

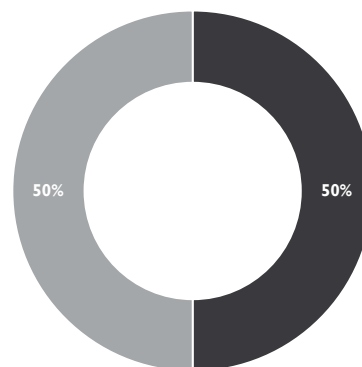
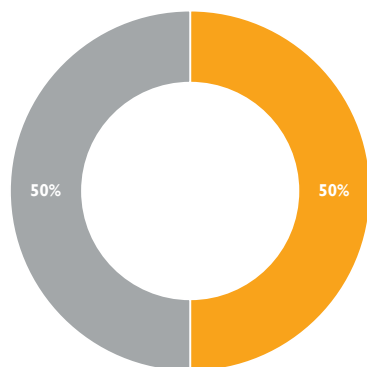
ORANGE LIGHTS**Liquor**

Of the 4 decisions in the liquor industry, 2 were red light SOIs. Of those 2 red light SOIs:

- 1 was not opposed
- 1 was withdrawn

Of the 4 decisions in the liquor industry, 2 were orange light SOIs. Of those 2 orange light SOIs:

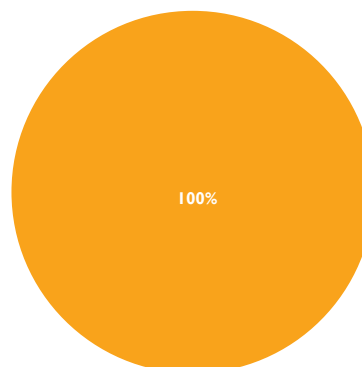
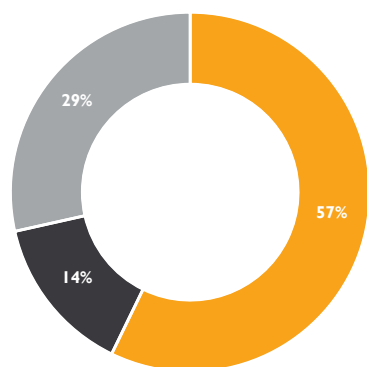
- 1 was opposed
- 1 was withdrawn

**Media & Technology**

Of the 11 decisions in the media & technology industry, 7 were red light SOIs. Of those 7 red light SOIs:

- 4 were not opposed
- 1 was opposed
- 2 were withdrawn

Of the 11 decisions in the media & technology industry, 4 were orange light SOIs. Of those 4 orange light SOIs, all were not opposed.

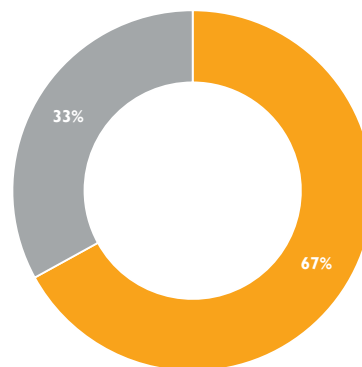
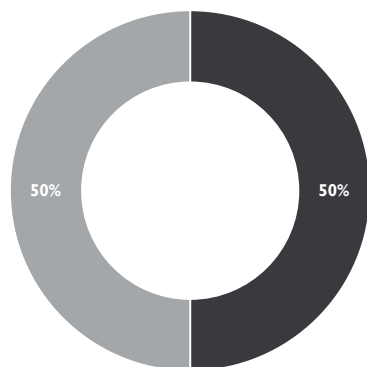
**Packaging**

Of the 8 decisions in the packaging industry, 2 were red light SOIs. Of those 2 red light SOIs:

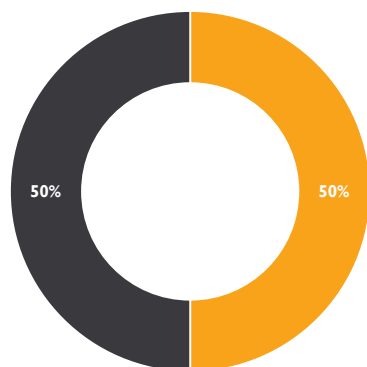
- 1 was opposed
- 1 was withdrawn

Of the 8 decisions in the packaging industry, 6 were orange light SOIs. Of those 6 orange light SOIs:

- 4 were not opposed
- 2 were withdrawn



■ Not opposed ■ Opposed ■ Withdrawn

RED LIGHTS

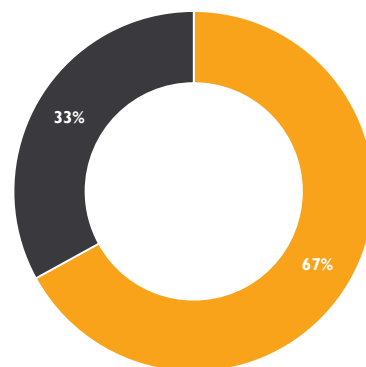
Of the 5 decisions in the petrol industry 2 were red light SOIs. Of those 2 red light SOIs:

- 1 was not opposed
- 1 was opposed

Petrol

Of the 5 decisions in the petrol industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

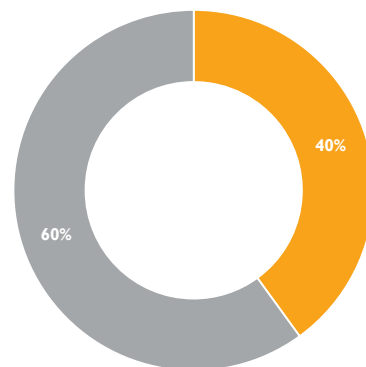
- 2 were not opposed
- 1 was opposed

ORANGE LIGHTS**Resources**

Of the 6 SOI decisions in the resources industry, one was a red light SOI. That red light SOI was withdrawn.

Of the 6 decisions in the resources industry, 5 were orange light SOIs. Of those 5 orange light SOIs:

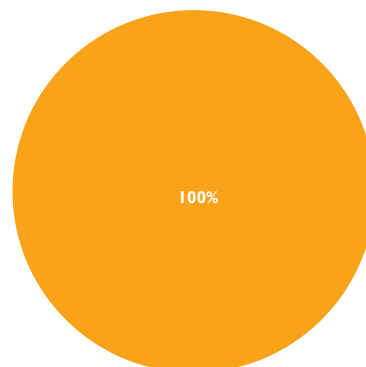
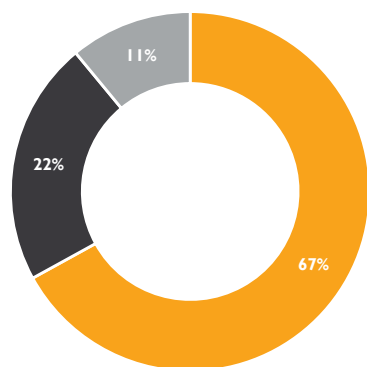
- 2 were not opposed
- 3 were withdrawn

**Retail**

Of the 10 SOI decisions in the retail industry, all 9 were red light SOIs. Of those 9 red light SOIs:

- 6 were not opposed
- 2 were opposed
- 1 was withdrawn

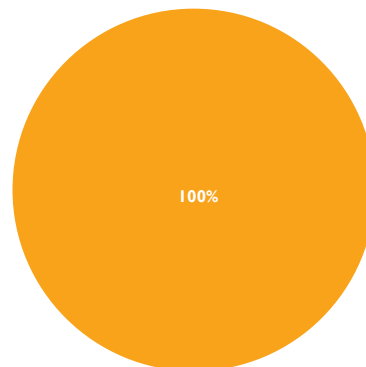
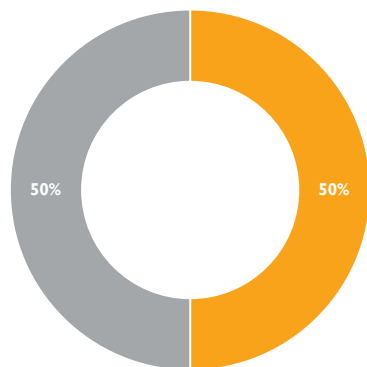
Of the 10 decisions in the retail industry, one was an orange light SOI. That orange light SOI was not opposed.

**Telecommunications**

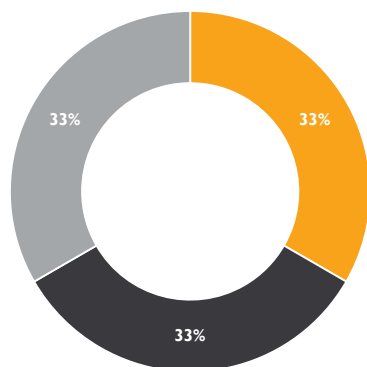
Of the 3 decisions in the telecommunications industry, 2 were red light SOIs. Of those 2 red light SOIs:

- 1 was not opposed
- 1 was withdrawn

Of the 3 decisions in the telecommunications industry, one was an orange light SOI. That orange light SOI was not opposed.



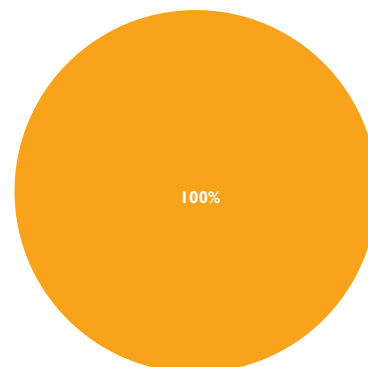
■ Not opposed ■ Opposed ■ Withdrawn

RED LIGHTS**Transport & Tourism**

Of the 8 decisions in the transport & tourism industry, 3 were red light SOIs. Of those 3 red light SOIs:

- I was not opposed
- I was opposed
- I was withdrawn

Of the 8 decisions in the transport & tourism industry, 5 were orange light SOIs. Of those 5 orange light SOIs, all 5 were not opposed.

ORANGE LIGHTS**Qualifications**

All data has been sourced from SOIs available on the ACCC's mergers register since 2005 as at 26 February 2019. Data only relates to transactions where a SOI has been issued and the "traffic light" system has been adopted. Transactions that have been cleared by the ACCC without a SOI have not been considered. While these may include global mergers or transactions where remedies have been offered upfront, our findings are unlikely to change materially if we considered these transactions.

For timing statistics, withdrawn merger applications have not been considered. Statistics have been calculated from data based on the number of days between events, which have been recorded to the nearest integer unless otherwise specified.

About us

Johnson Winter & Slattery represents Australian and international clients on their most strategic, complex and demanding transactions and disputes throughout Australia and surrounding regions.

Our business model distinguishes us from our rivals. At the heart of our approach is the recognition that when managing strategic and complex matters, superior outcomes are achieved through the 'hands-on' involvement of expert senior lawyers. We therefore maintain a higher ratio of senior to junior lawyers than our rivals and focus on assignments that are well suited to this low leverage structure.

With offices in Sydney, Perth, Melbourne, Brisbane and Adelaide, the firm draws upon a national team to ensure the most appropriate skills are brought to bear on each assignment.

OUR MAJOR PRACTICE AREAS

Our major practice areas reflect those aspects of corporate and commercial law most strategically important to our clients in the Australian context, namely:

- Corporate (mergers and acquisitions, finance, advisory and debt and equity capital markets)
- Competition
- Energy, Resources & Infrastructure
- Dispute Resolution
- Taxation

These major practice areas are supported by specialist insolvency & reconstruction, employment, property, and IP lawyers.

OUR CLIENTS

Our clients have operations in Australia and fall into four broad categories:

- ASX listed and foreign corporations
- substantial privately owned corporations
- not for profit organisations such as universities, industry bodies and charitable and cultural organisations
- Australian government, government agencies and regulators

The firm draws upon a national team to ensure the most appropriate skills are brought to bear on each assignment.

OUR DEALS

A2 Milk

Advising on its global strategic partnership with Fonterra.

ACCC

Advised in relation to the proposed bid by Birtoku and Illyria Nominees Television for Ten Network Holdings.

Bayer AG

Obtaining ACCC clearance for US\$66 billion acquisition of Monsanto.

Jetstar Airways

Multi-jurisdictional antitrust clearances for \$500 million coordination strategy between 9 airlines in Asia (Australia, New Zealand, Singapore, Taiwan, Japan, China and Vietnam).

PepsiCo

Obtaining ACCC clearance for US\$3.2 billion acquisition of SodaStream.

Qantas Airways

Multi-jurisdictional antitrust clearances for \$2-3 billion global strategic partnership with Emirates (Australia, New Zealand, EU, US).

Ruralco

Advising on \$450 million takeover offer by Nutrien.

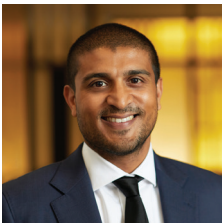
Unilever

Obtaining ACCC informal clearance for the \$50+ million acquisition of Weis.

Yahoo!

Advised on ACCC clearance for \$275 million global search agreement with Microsoft.

OUR TEAM



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“

**They are
approachable, easy
to work with and can
condense the complex
issues into easy-to-
understand concepts.**

Client feedback,
Chambers Asia Pacific 2019

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