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Recent trends in complex ACCC informal merger clearance decisions

Sixth edition, April 2022

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A special thanks to Morgan Blaschke-Broad, Angelica Sorn and Liz Tang who provided invaluable assistance in preparing this report.

This report

We are pleased to share with you the 6th edition of our report on recent trends in complex informal merger clearance decisions made by the Australian Competition & Consumer Commission (ACCC).

The report provides a complete statistical analysis of ACCC informal merger clearance decisions where a Statement of Issues (SOI) has been published.

It examines the likelihood of transactions being opposed or not opposed (with or without remedies) depending on the seriousness of the preliminary competition concerns identified in a SOI. It also analyses the time taken by the ACCC to make those decisions.

A SOI provides a good indication of the ACCC's preliminary views as to whether a transaction is likely to be granted informal clearance.

Those views are classified as:

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

The ACCC will only publish a SOI in relation to transactions that raise serious competition concerns. SOI transactions accordingly represent a small proportion of the total number of transactions considered by the ACCC in any given year.

The findings in this report should not be relied upon as an accurate predictor of future ACCC informal merger clearance decisions. They should be considered alongside the substantive competition issues involved in any particular case.

“

Looking forward, Australia like many countries, is experiencing a significant surge in merger and acquisition (M&A) activity. This is resulting in high numbers of merger notifications to the ACCC. In 2021, 472 mergers were notified to the ACCC, up 41% on the previous year. The number of mergers considered by the ACCC in 2021 was 63% higher than the average over the last five years.

While we have been able to deal with over 90% as pre-assessments, which is a quick triage process, we are also seeing an increase in the number and complexity of recent public reviews commenced. These have involved important sectors including ports, container handling equipment and services, rail transport, aviation, health and pharmaceuticals. We are currently not seeing any signs that the M&A surge is on the decline.

ACCC Compliance and Enforcement Priorities 2022 speech, Rod Sims

”

Key trends

While the ACCC considered substantially more transactions in 2021 than in any previous year, there was no corresponding increase in SOI transactions.

This does not mean the ACCC is taking a more lenient approach to informal merger clearance. Rather, the small number of SOI transactions reflects the fact that businesses generally made smaller or complementary acquisitions in response to the ongoing effects of the COVID-19 pandemic.

Why are there so few SOIs?

While the ACCC ordinarily publishes around 10 SOIs each year, in 2021 it only considered five transactions that ultimately proceeded to SOI.

We think the economic effects of the COVID-19 pandemic played a significant role in this.

First, as a result of upstream disruptions, many companies sought to shore up their supply chain by making vertical acquisitions rather than rely on third party supply and inputs.

Secondly, in order to respond to business uncertainty, companies sought to diversify their offering through complementary acquisitions.

Thirdly, companies had greater opportunities to make “failing firm” acquisitions.

All of the above types of transactions are less likely to raise serious competition concerns than, for example, horizontal transactions in concentrated sectors.

In relation to these transactions (where a SOI is involved), what are the latest trends?

Almost all SOIs last year had orange lights. They were not opposed and did not require any remedy.

While the incidence of red light transactions have generally been higher than orange light transactions in recent years, in 2021 there were four orange light transactions compared to one red light transaction.

All orange lights were not opposed and did not require a remedy. The one red light transaction was ultimately withdrawn by the parties.

Red lights are not fatal – since 2006 just under half have been cleared and only one quarter blocked - but the clearance rate is declining.

Since 2006, 45% of all transactions with one or more red lights have been cleared while 25% have been blocked. In the last 5 years however, only 35% of red light transactions have been cleared and 10% have been blocked.

Red lights do not mean that remedies are required to obtain clearance.

Since 2006, 49% of all cleared transactions with one or more red lights have not required a remedy. Consistent with the average, in the last 5 years, 57% of all cleared transactions with one or more red lights have not required a remedy.

There has been an increasing tendency by parties to withdraw their transactions after a red light but before a final ACCC decision.

Between 2017-2021, the percentage of red light transactions that have been withdrawn before the final ACCC decision (55%) has almost doubled compared to 2012-2016 (30%).

The large majority of orange light (no red lights) transactions since 2006 have been cleared, but more are being withdrawn.

On average, 71% of all transactions with one or more orange lights (no red lights) have been cleared while only 11% have been blocked. The remaining transactions were withdrawn. Between 2017-2021, 21% of orange lights transactions were withdrawn (compared to 17% in the period 2012-2016).

Almost every orange light transaction that has been cleared by the ACCC since 2006 did not require a remedy.

89% of all cleared orange light transactions did not require any remedy. The remaining transactions required remedies (two divestitures, two behavioural and one combination).

The ACCC is taking longer to consider SOI transactions.

While the average time for the ACCC to make a decision for SOI transactions is approximately 5.3 months, in 2021 the ACCC took around 6 months for such transactions.

There are a few reasons for this.

First, the substantial majority of transactions continue to be cleared by the ACCC without public review or SOI. Those transactions that proceed to SOI are complex and take time to consider.

Secondly, the record number of transactions considered by the ACCC in 2021 would have resulted in resource and time constraints.

Thirdly, companies sought urgent authorisations for collaborations in response to the COVID-19 pandemic which in turn extended the timelines for informal merger clearance processes.

Fourthly, even though the ACCC continues to be willing to use its compulsory evidence gathering powers to consider

the competitive effects of a transaction, it has been prepared to extend the time for compliance due to the COVID-19 pandemic. The ACCC has also experienced delays from market participants due to the logistical difficulties associated with COVID-19.

Orange light transactions last year took longer than the average time for red light transactions.

In 2006, the average time taken for an orange light transaction was around 1.8 months but this has steadily increased to over 6 months in 2021 (a 32% increase from the all-time average of 4.6 months).

The average time for a red light transaction is 5.6 months and slightly longer where remedies are required.

The ACCC still prefers divestitures over behavioural undertakings.

Since 2006, 51% of all red light cleared transactions have required a remedy, 55% of which have been divestitures. Since 2015 however, 60% of all remedies for red light cleared transactions have been divestitures. These statistics reflect the ACCC's preference from structural remedies over behavioural remedies.

Significantly, the ACCC also showed that it was prepared to take legal action to prevent completion of a transaction while informal clearance was still being considered.

In 2021, the ACCC successfully sought an urgent injunction to prevent merger parties completing a transaction while its informal clearance process was still running.

This was the first successful ACCC interlocutory injunction in a merger case in 27 years.

Key observations

RED LIGHT TRANSACTIONS

- **57%** of all SOIs contain red lights.
- **45%** of all transactions with a red light have been cleared.
- In the last 5 years, only **35%** of all transactions with a red light have been cleared.
- **25%** of all transactions with a red light have been blocked.
- In the last 5 years, **10%** of all transactions with a red light have been blocked.
- **30%** of all transactions with a red light have been withdrawn.
- In the last 5 years, **55%** of transactions with a red light have been withdrawn.

ORANGE LIGHT TRANSACTIONS

- **43%** of SOIs contain orange lights.
- **71%** of all transactions with an orange light have been cleared.
- In the last 5 years, **74%** of all transactions with an orange light have been cleared.
- **11%** of all transactions with an orange light have been blocked.
- In the last 5 years, **5%** of all transactions with an orange light have been blocked.
- **18%** of all transactions with an orange light have been withdrawn.
- In the last 5 years, **21%** of all transactions with an orange light have been withdrawn.

REMEDIES

- **51%** of cleared red light transactions required a remedy.
- **49%** of cleared red light transactions did not require a remedy.
- **28%** of cleared red light transactions required a divestiture remedy.
- **23%** of cleared red light transactions involved a behavioural remedy or combined divestiture/behavioural remedy.
- **89%** of all cleared orange light transactions did not require a remedy.

- **11%** of all cleared orange light transactions required a remedy.
- **4%** of all cleared orange light transactions required a divestiture remedy.
- **7%** of cleared orange light transactions involved a behavioural remedy or combined divestiture/behavioural remedy.

TIMING

- **5.3 months** for all SOI transactions.
- **5.6 months** for red light transactions.
- **5.7 months** for red light transactions that are not opposed.
- **5.8 months** for red light transactions where remedies are required.
- **4.9 months** for red light transactions where no remedies are required.
- **4.6 months** for orange light transactions.

INDUSTRY ANALYSIS

- The six industries that have the most SOI transactions are: **retail** (11%), **industrial** (11%), **agriculture** (9%), **health** (8%), **media and technology** (8%), and **transport and tourism** (8%). These sectors make up 55% of all SOI transactions.
- The five industries with SOI transactions that are most opposed by the ACCC are: **grocery** (40%), **petrol** (40%), **food and beverage** (38%), **energy** (33%), and **finance** (27%).
- The five industries with SOI transactions that have the highest ACCC clearance rate are: **media and technology** (83%), **entertainment** (75%), **infrastructure** (67%), **industrial** (65%), and **agriculture** (64%).

The ACCC takes over 5 months to make a final decision from the time of filing if the transaction receives a SOI.

The ACCC takes approximately 6 months to clear a red light transaction.

49% of red light transactions are cleared without a remedy.

Red lights are not fatal but they are becoming harder to resolve.

89% of orange light transactions are cleared without a remedy.



What are the latest developments?

ACCC CALLS FOR RADICAL CHANGES TO INFORMAL MERGER CLEARANCE PROCESS

In August 2021, the ACCC proposed radical changes to the current informal merger clearance regime. They include:

- **A compulsory merger clearance regime based on value thresholds** – consistent with other jurisdictions, the ACCC proposes replacing the current voluntary informal merger clearance process with a compulsory regime for transactions that meet certain monetary thresholds. There would be a prohibition on such transactions unless clearance is obtained.
- **Assessing competitive effects by changes to market structure and incentives rather than counterfactual** – the ACCC proposes shifting the focus away from predicting the competitive state of the market without the transaction to whether the transaction changes the structure of the market and incentivises the merged entity to increase price or reduce output, among other factors.
- **Certain acquisitions deemed to substantially lessen competition** – acquisitions by parties with substantial market power that are likely to entrench, materially increase or extend that market power will be deemed anti-competitive.
- **A bespoke regime for digital platforms and data players** – the ACCC proposes a tailored merger test for digital markets, including lower thresholds for establishing competitive harm and with a greater focus on the possibility that a merger may remove a potential future competitor.

It remains to be seen whether these reforms will come into effect. In the interim:

- the ACCC will continue taking a tough approach to acquisitions in highly concentrated sectors, by larger companies or of close competitors; and
- the ACCC will continue to use its compulsory information gathering powers to obtain board papers, emails and other internal documents to test submissions made by the merger parties as well as third party complainants.

LESSONS FROM ANALYSING THE OUTCOMES OF PAST MERGERS

In February 2022, the ACCC published its first review of outcomes in certain markets where it had not opposed a particular transaction. The report found that:

- new entry, the existence of low barriers to entry or countervailing buyer power did not eventuate as merger parties had claimed, which means the ACCC will be reluctant to rely on such claims in the future unless they are backed by evidence;
- information put forward by merger parties was not necessarily true or reflective of the full picture, which is likely to lead to more frequent and comprehensive information requests;
- market shares mean less than whether the potential target is a close competitor; and
- the competitive effects in one segment of the market may not apply to other segments.

CLOSE SCRUTINY OF FAILING FIRM ACQUISITIONS

We expect that the economic impacts of the COVID-19 pandemic will continue through 2022.

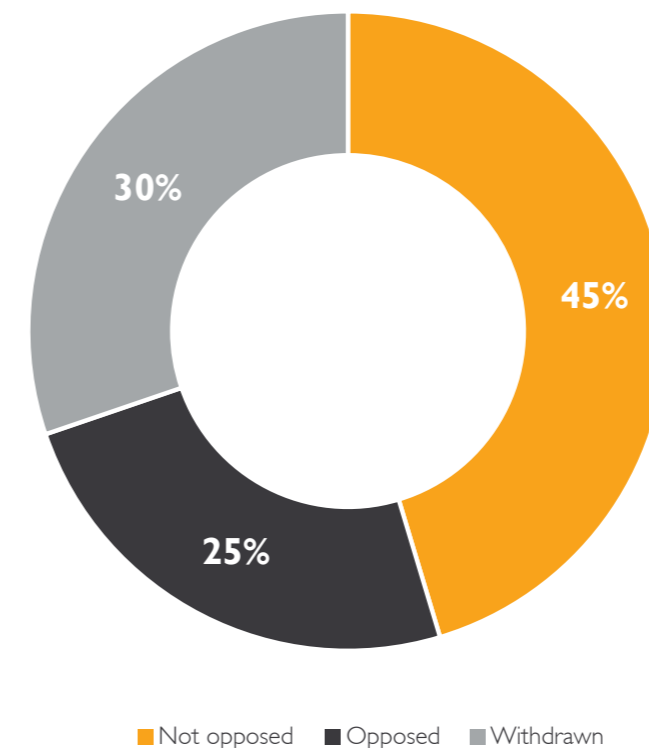
While this means that there may be further acquisition opportunities of failing firms, the ACCC will closely scrutinise any such transactions on the basis they could fundamentally change market structure for the foreseeable future.

NEW CHAIR OF THE ACCC

Rod Sims' third term as Chair of the ACCC has come to end.

We expect the new Chair, Gina Cass-Gottlieb will continue the ACCC's vigorous assessment of mergers. Ms Cass-Gottlieb will bring a heightened level of rigour and sophistication to the informal clearance process having acted for merger parties for over 25 years as a leading private practitioner.

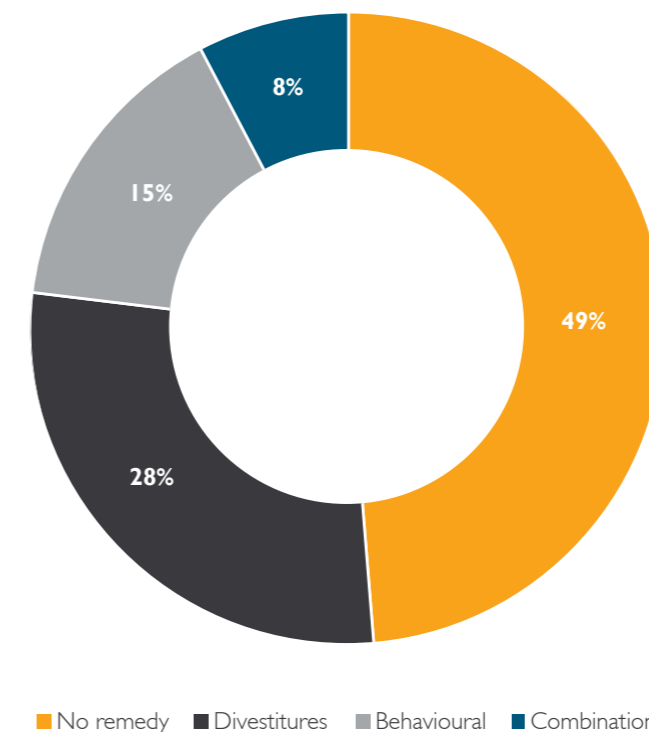
Red light statistics



CLEARANCE ANALYSIS

There have been **151** SOIs published by the ACCC since 2006.

- Of those **151** SOIs, **86** had one or more red lights.
- Of those **86** red light SOIs:
 - **39** were not opposed
 - **21** were opposed
 - **26** were withdrawn



REMEDY ANALYSIS

There have been **151** SOIs published by the ACCC since 2006.

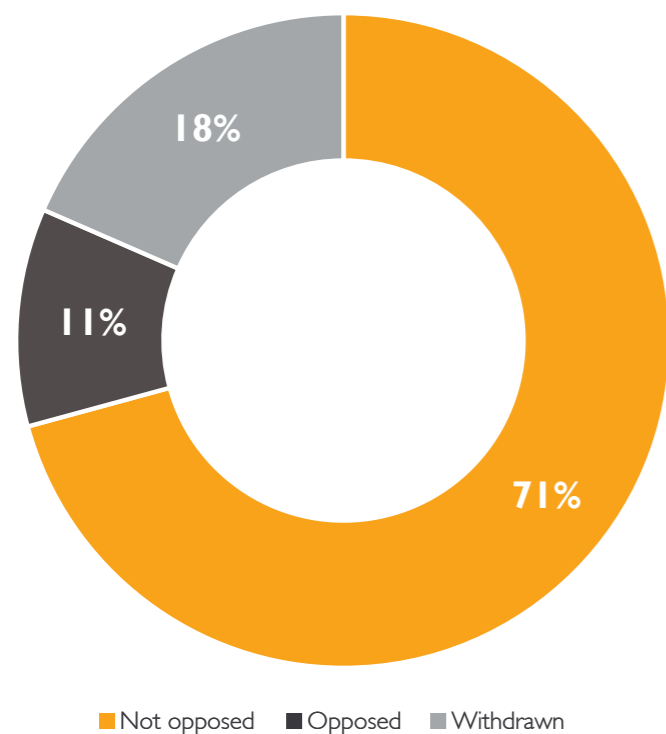
Of those **151** SOIs, **86** had one or more red lights.

Of those **86** red light SOIs, **39** were not opposed.

Of the **39** red light SOIs that were not opposed:

- **19** required no remedy
- **11** required divestitures
- **6** required behavioural undertakings
- **3** involved a combination of remedies

Orange light statistics



CLEARANCE ANALYSIS

- There have been **151** SOIs published by the ACCC since 2006.
- Of those **151** SOIs, **65** had one or more orange lights (but no red lights).
- Of those **65** orange light SOIs:
 - **46** were not opposed
 - **7** were opposed
 - **12** were withdrawn

REMEDY ANALYSIS

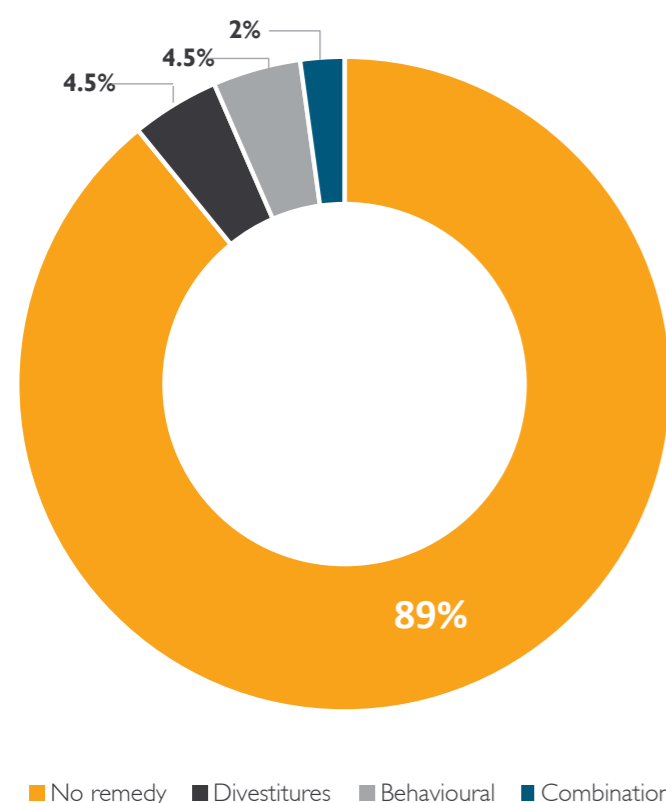
There have been **151** SOIs published by the ACCC since 2006.

Of those **151** SOIs, **65** had one or more orange lights (but no red lights).

Of those **65** orange light SOIs, **46** were not opposed.

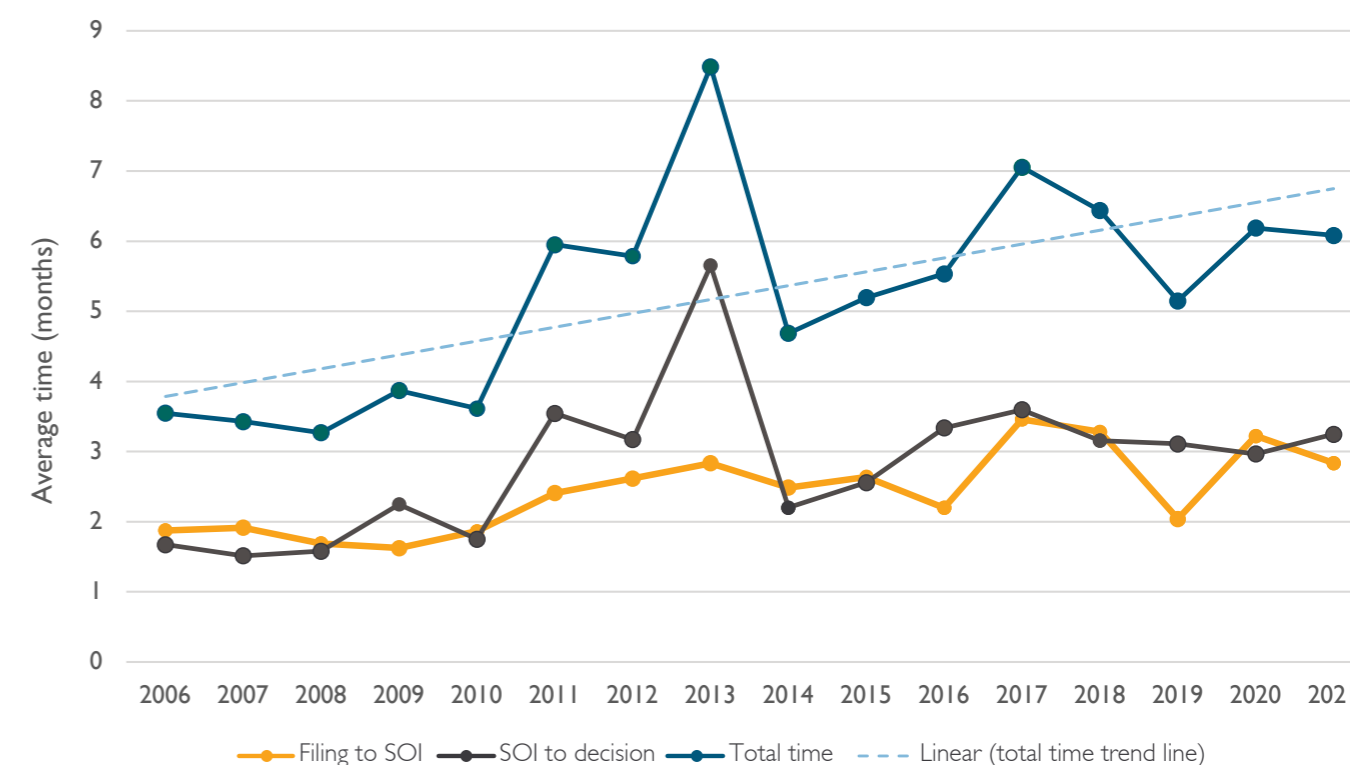
Of the 46 orange light SOIs that were not opposed:

- **41** required no remedy
- **2** required divestitures
- **2** required behavioural undertakings
- **1** required a combination of remedies



Timing statistics

AVERAGE TIME - ALL SOI DECISIONS

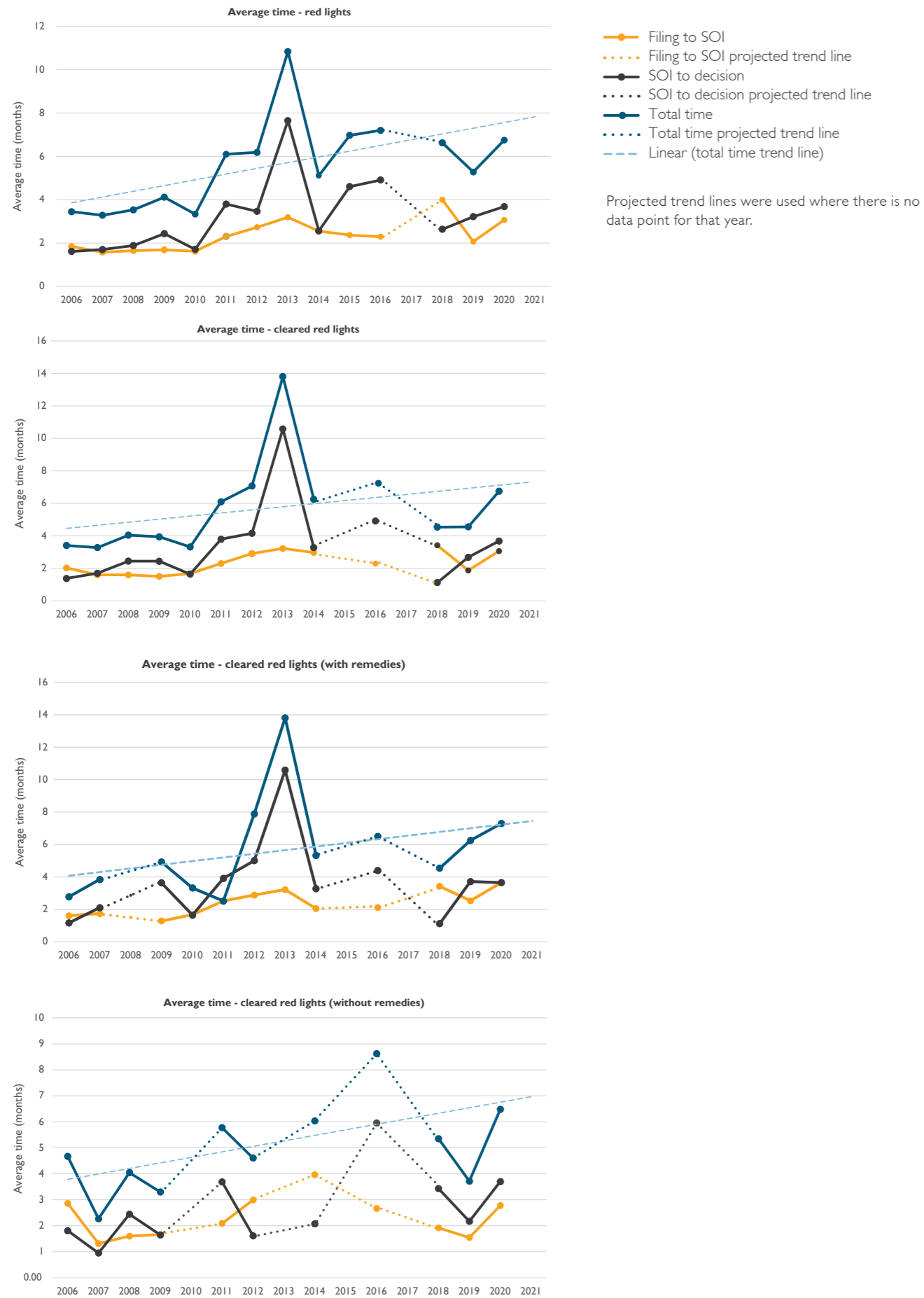


“
While the ACCC endeavours to complete merger reviews as quickly as possible, the focus is on getting the right decision. The ACCC has signalled that it will use its compulsory information gathering powers more in merger investigations where its concerns warrant increased evidence gathering. We exercised these powers in 7 reviews this year.
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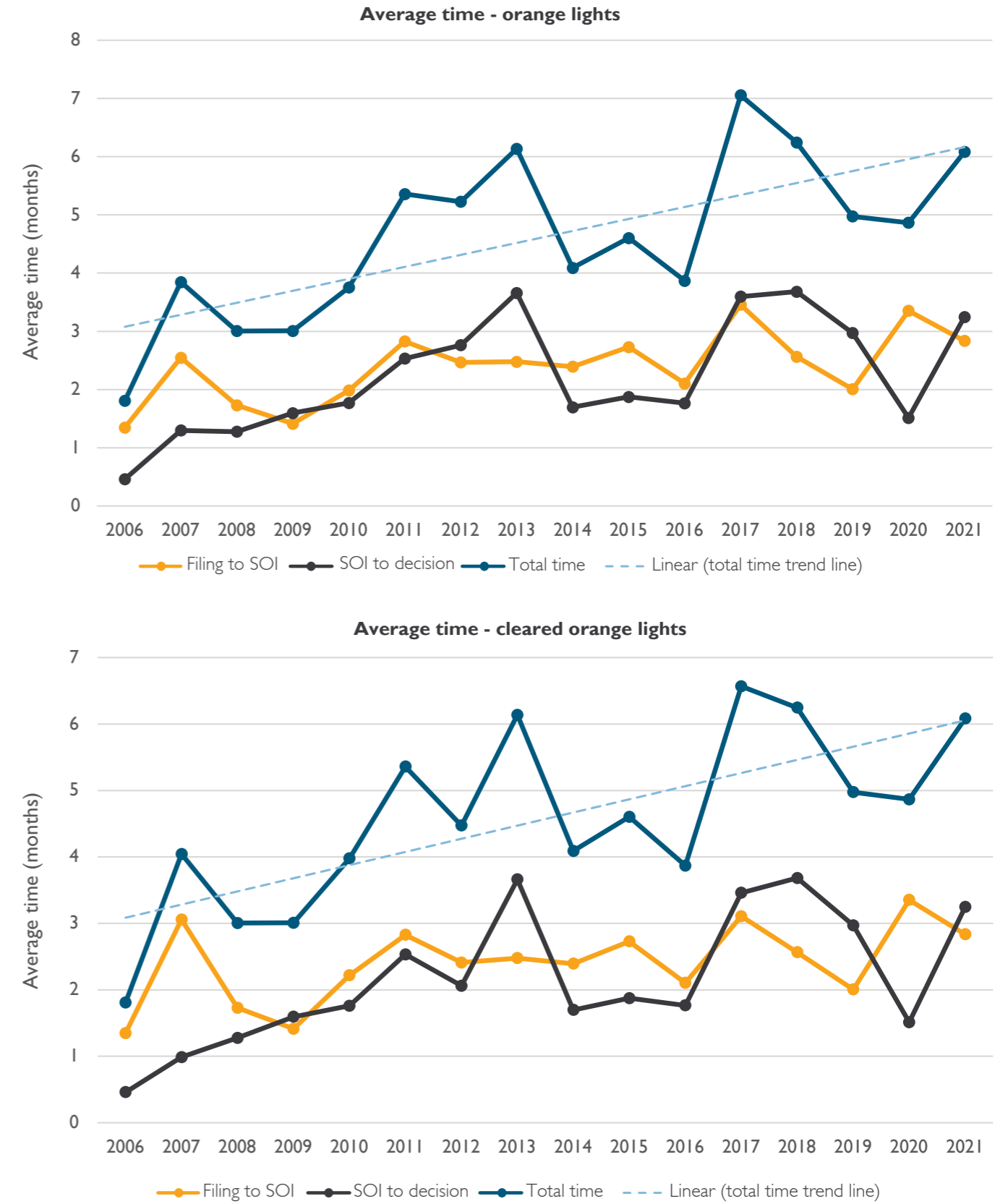
Annual Report, Australian Competition and Consumer Commission and the Australian Energy Regulator (October 2021)

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

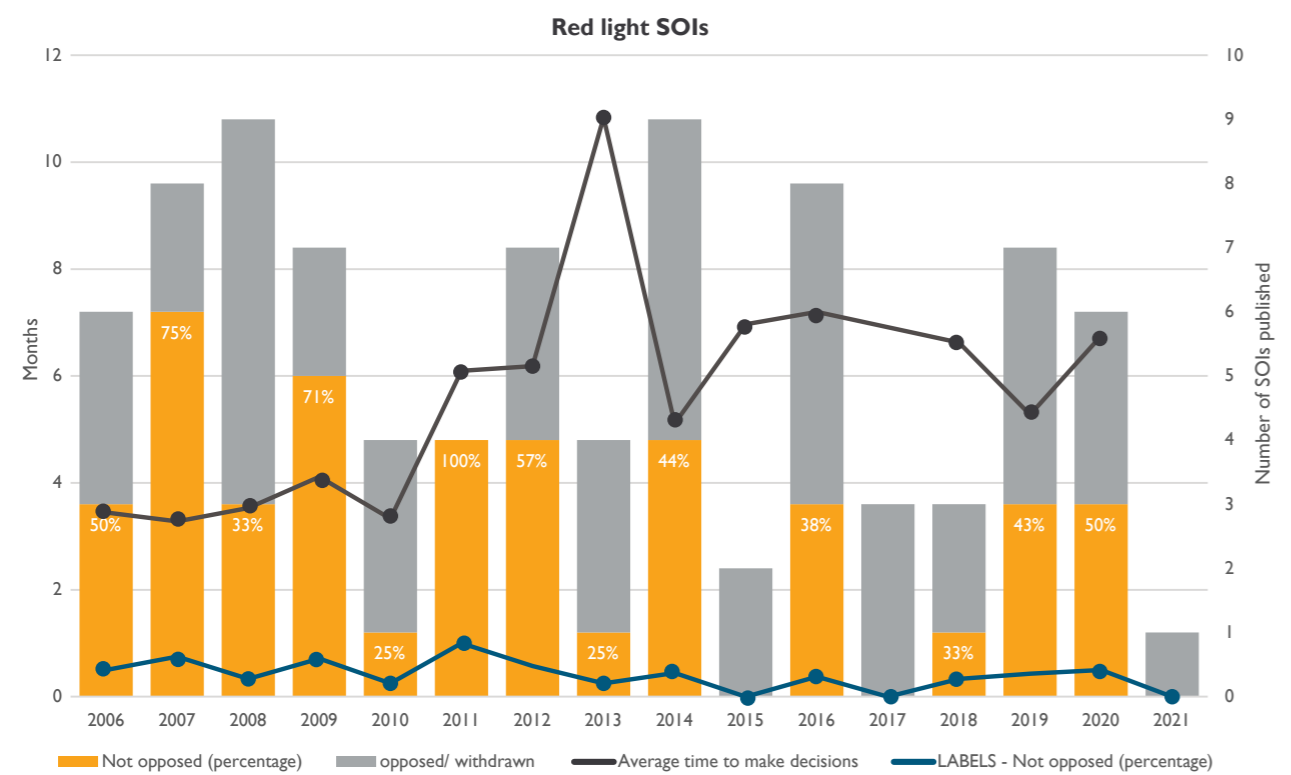
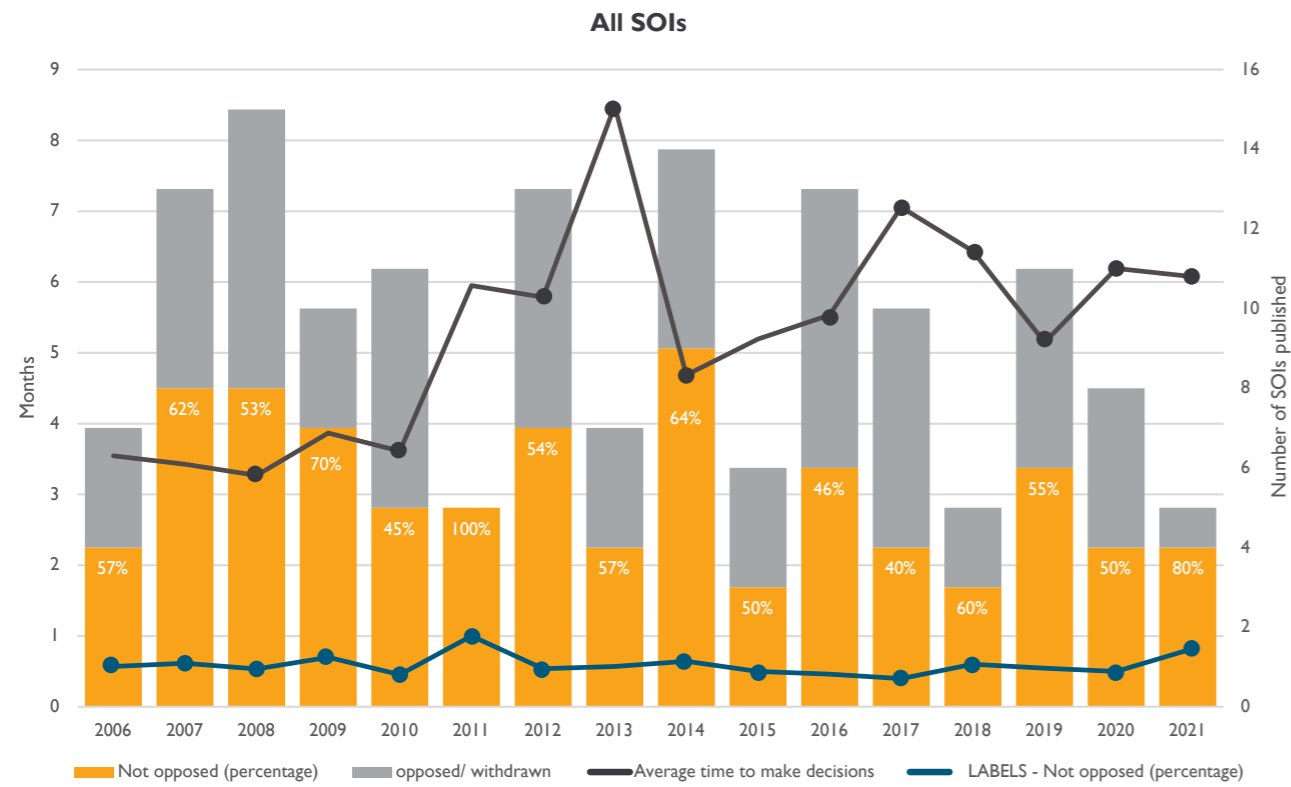
RED LIGHTS



ORANGE LIGHTS



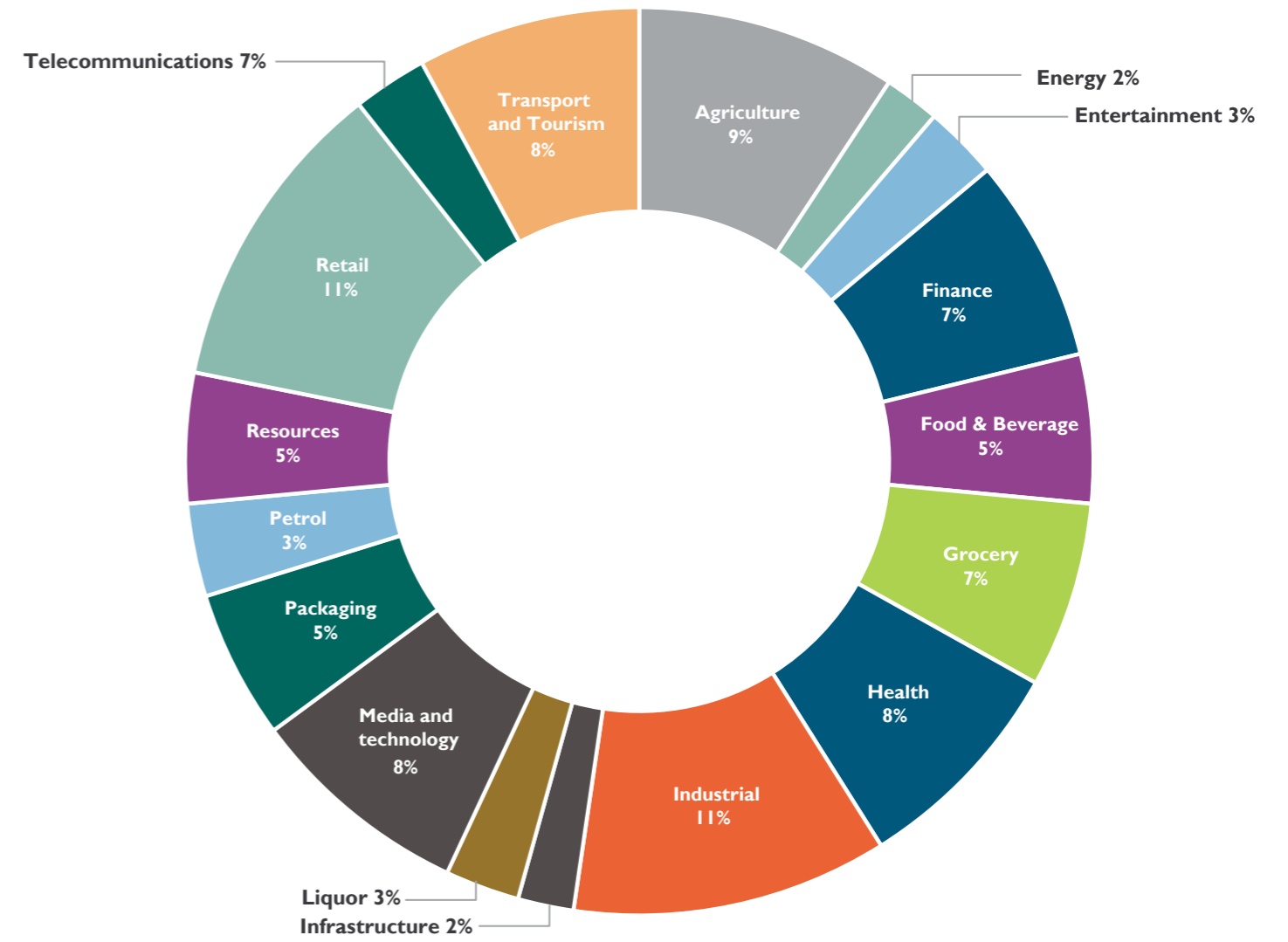
Year by year statistics



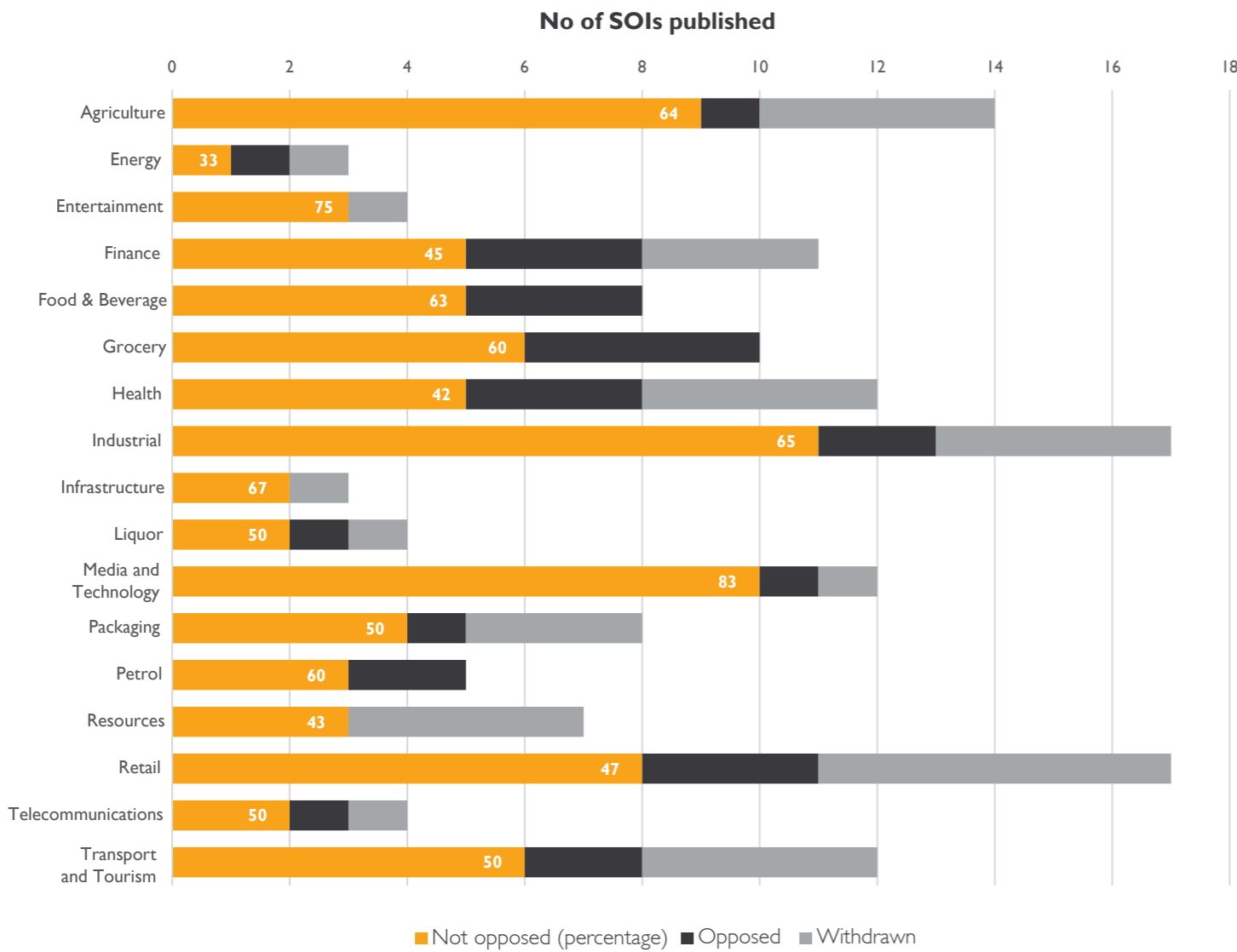
Note, only completed decisions are included in timing statistics. Withdrawn applications are not included. Average time is determined across cleared and opposed decisions.

Industry statistics

PERCENTAGE OF SOIs BY INDUSTRY (2006-2021)

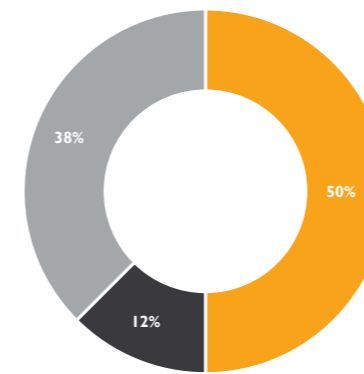


ACCC CLEARANCE RATE BY INDUSTRY (2006-2021)



RED LIGHTS

ORANGE LIGHTS



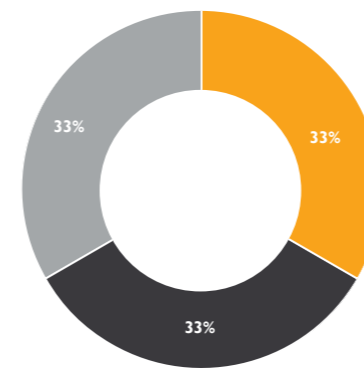
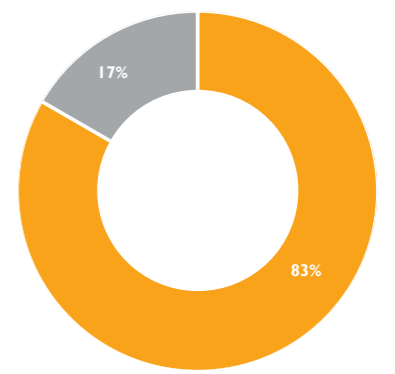
Agriculture

Of the 14 decisions in the agriculture industry, 8 were red light SOIs. Of those 8 red light SOIs:

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

Of the 14 decisions in the agriculture industry, 6 were orange light SOIs. Of those 6 orange light SOIs:

- 5 were not opposed
- 1 was withdrawn

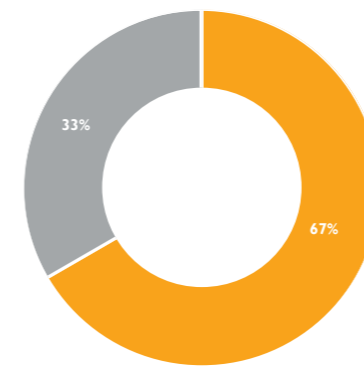
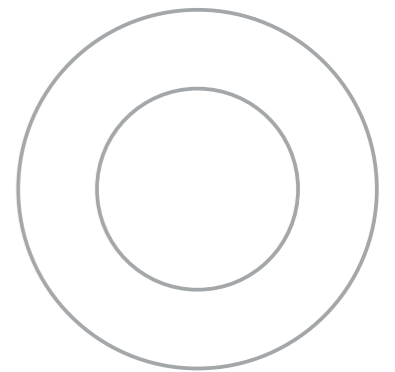


Energy

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

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

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

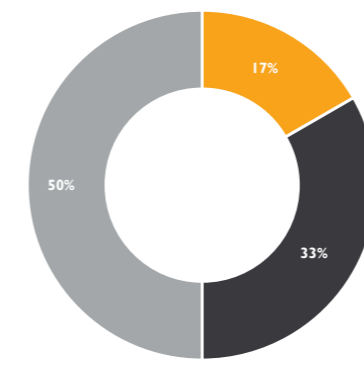
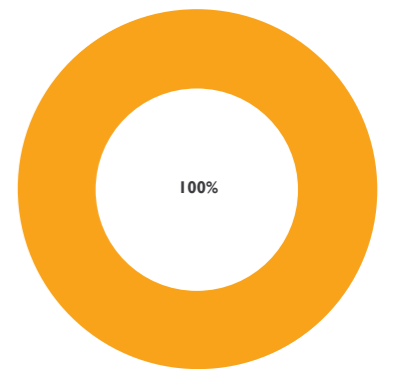


Entertainment

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

- 2 were not opposed
- 1 was withdrawn

Of the 4 decisions in the entertainment industry, 1 was an orange light SOI. That orange light SOI was not opposed.



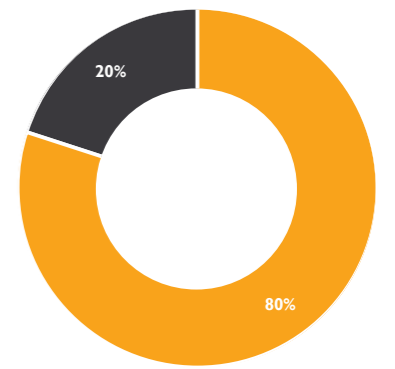
Finance

Of the 11 decisions in the finance industry, 6 were red light SOIs. Of those 6 red light SOIs:

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

Of the 11 decisions in the finance industry, 5 were orange light SOIs. Of those 5 orange light SOIs:

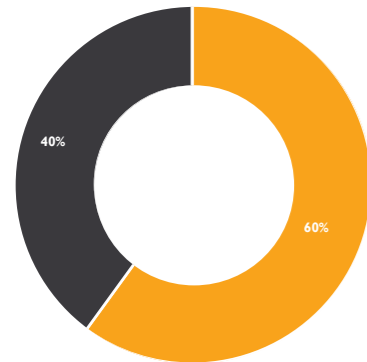
- 4 were not opposed
- 1 was opposed



RED LIGHTS

ORANGE LIGHTS

Food and beverage

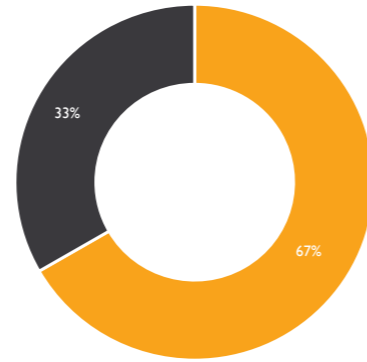


Of the 8 decisions in the food and beverage industry, 5 were red light SOIs. Of those 5 red light SOIs:

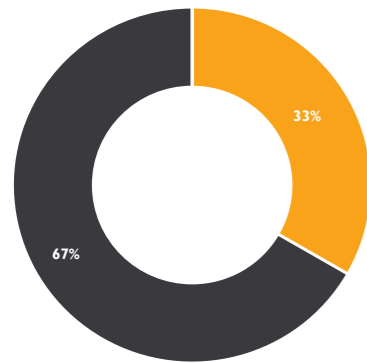
- 3 were not opposed
- 2 were opposed

Of the 8 decisions in the food and beverage industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

- 2 were not opposed
- 1 was opposed



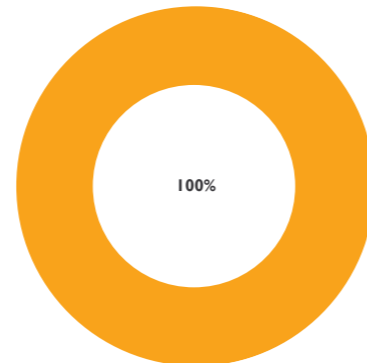
Grocery



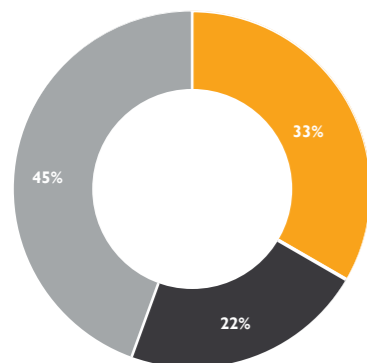
Of the 10 decisions in the grocery industry, 6 were red light SOIs. Of those 6 red light SOIs:

- 2 were not opposed
- 4 were opposed

Of the 10 decisions in the grocery industry, 4 were orange light SOIs. Of those 4 orange light SOIs all were not opposed.



Health

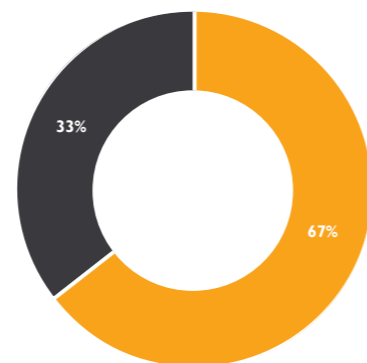


Of the 12 decisions in the health industry, 9 were red light SOIs. Of those 9 red light SOIs:

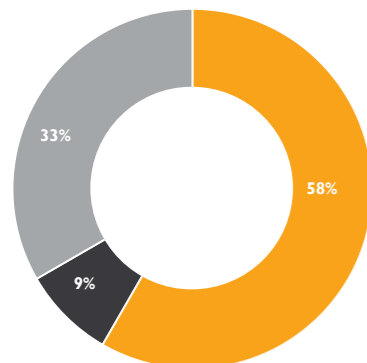
- 3 were not opposed
- 2 were opposed
- 4 were withdrawn

Of the 12 decisions in the health industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

- 2 were not opposed
- 1 was opposed



Industrial

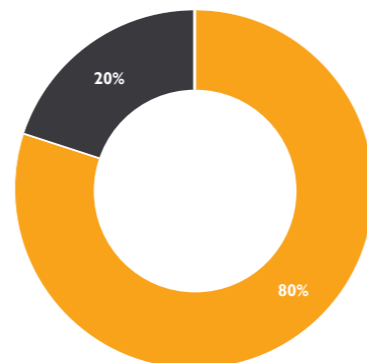


Of the 17 decisions in the industrial industry, 12 were red light SOIs. Of those 12 red light SOIs:

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

Of the 17 decisions in the industrial industry, 5 were orange light SOIs. Of those 5 orange light SOIs:

- 4 were not opposed
- 1 was opposed

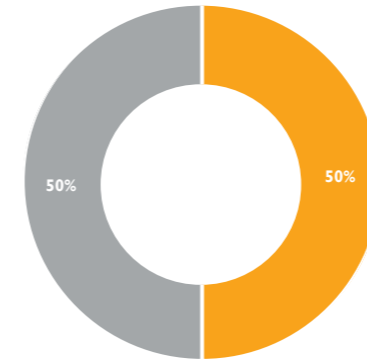


■ Not opposed ■ Opposed ■ Withdrawn

RED LIGHTS

ORANGE LIGHTS

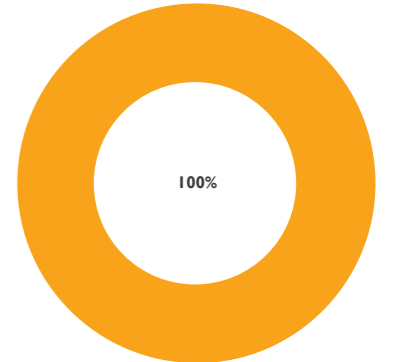
Infrastructure



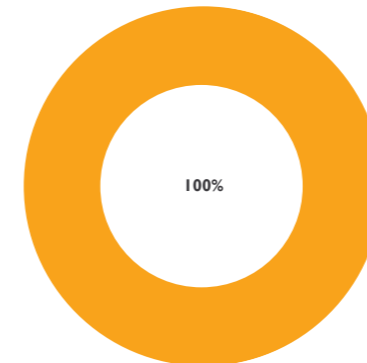
Of the 3 decisions in the infrastructure industry, 2 were red light SOIs. Of those 2 red light SOIs:

- 1 was not opposed
- 1 was withdrawn

Of the 3 decisions in the infrastructure industry, 1 was an orange light SOI. That orange light SOI was not opposed.



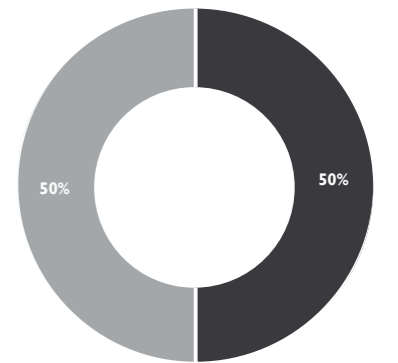
Liquor



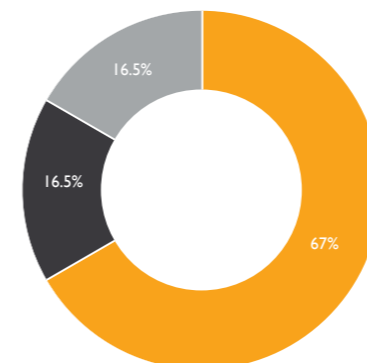
Of the 4 decisions in the liquor industry, 2 were red light SOIs. Of those 2 red light SOIs, both were not opposed.

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



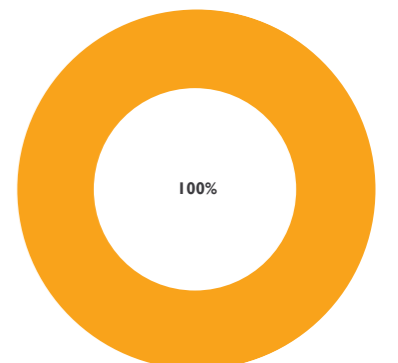
Media and technology



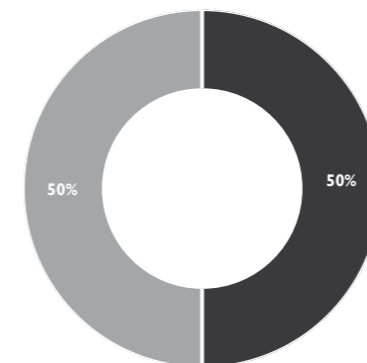
Of the 12 decisions in the media and technology industry, 6 were red light SOIs. Of those 6 red light SOIs:

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

Of the 12 decisions in the media and technology industry, 6 were orange light SOIs. Of those 6 orange light SOIs, all were not opposed.



Packaging

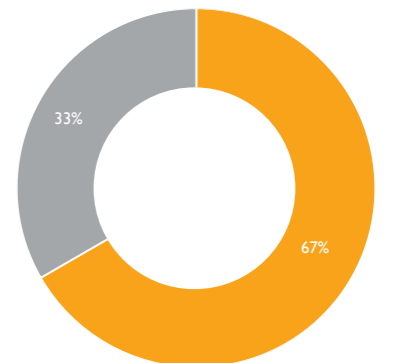


Of the 8 decisions in the packaging industry, 2 were red light SOIs. Of those 2 red light SOIs:

- 1 was opposed
- 1 was withdrawn

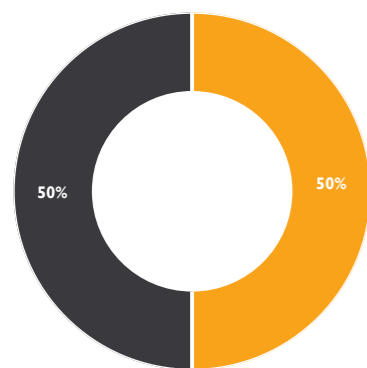
Of the 8 decisions in the packaging industry, 6 were orange light SOIs. Of those 6 orange light SOIs:

- 4 were not opposed
- 2 were withdrawn



■ Not opposed ■ Opposed ■ Withdrawn

RED LIGHTS



Petrol

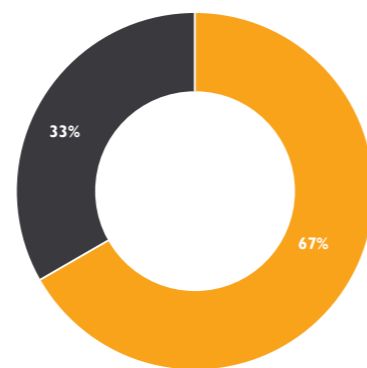
Of the 5 decisions in the petrol industry, 2 were red light SOIs. Of those 2 red light SOIs:

- 1 was not opposed
- 1 was opposed

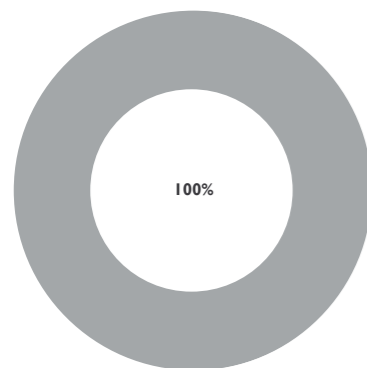
Of the 5 decisions in the petrol industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

- 2 were not opposed
- 1 was opposed

ORANGE LIGHTS



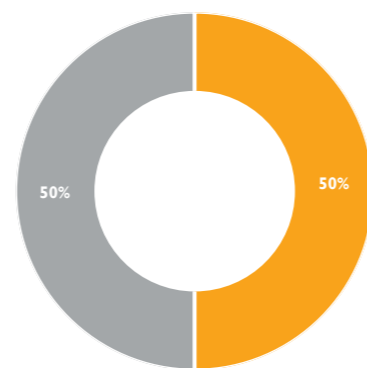
Resources



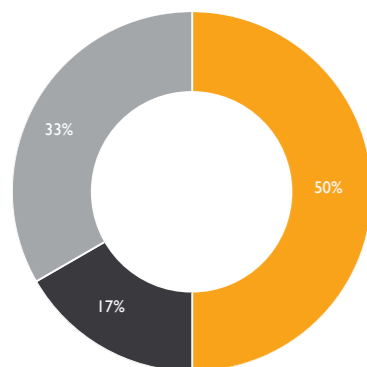
Of the 7 SOI decisions in the resources industry, 1 was a red light SOI. That red light SOI was withdrawn.

Of the 7 decisions in the resources industry, 6 were orange light SOIs. Of those 6 orange light SOIs:

- 3 were not opposed
- 3 were withdrawn



Retail

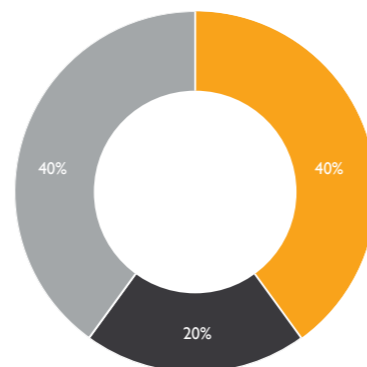


Of the 17 SOI decisions in the retail industry, 12 were red light SOIs. Of those 12 red light SOIs:

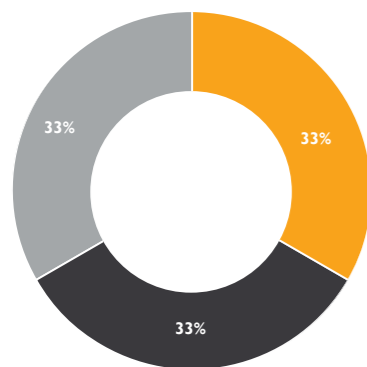
- 6 were not opposed
- 2 were opposed
- 4 were withdrawn

Of the 17 decisions in the retail industry, 5 were orange light SOIs. Of those 5 orange light SOIs:

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



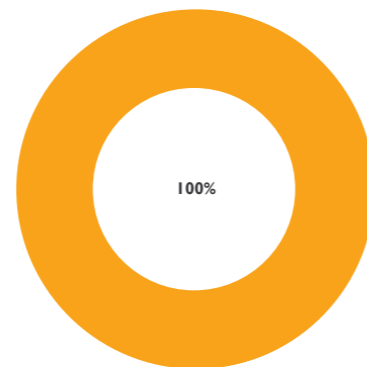
Telecommunications



Of the 4 decisions in the telecommunications industry, 3 were red light SOIs. Of those 3 red light SOIs:

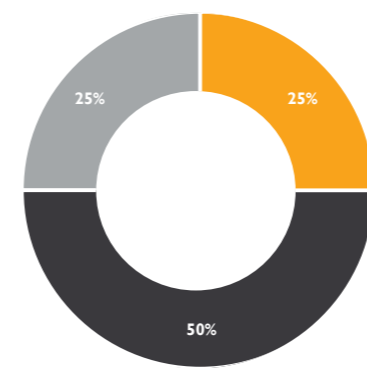
- 1 was not opposed
- 1 was opposed
- 1 was withdrawn

Of the 4 decisions in the telecommunications industry, 1 was an orange light SOI. That orange light SOI was not opposed.



■ Not opposed ■ Opposed ■ Withdrawn

RED LIGHTS



Transport and tourism

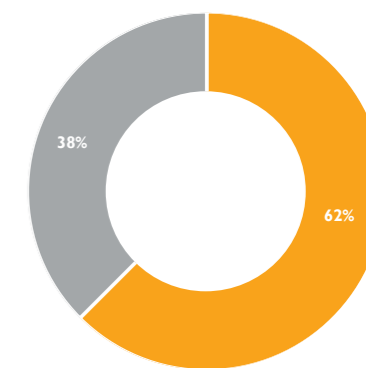
Of the 12 decisions in the transport and tourism industry, 4 were red light SOIs. Of those 4 red light SOIs:

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

Of the 12 decisions in the transport and tourism industry, 8 were orange light SOIs. Of those 8 orange light SOIs:

- 5 were not opposed
- 3 were withdrawn

ORANGE LIGHTS



■ Not opposed ■ Opposed ■ Withdrawn

QUALIFICATIONS

In terms of the data included in this report, we note the following qualifications:

- **Data:** Data presented in this report is for the calendar year January 2021 to December 2021. For example, if a transaction commenced in 2020 but was finalised in 2021, it is deemed to be a 2021 transaction for this report. All data has been sourced from SOIs available on the ACCC's mergers register since 2006 as at March 2022.
- **SOI data:** 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 and the trends are unlikely to change materially if we considered these transactions.
- **Timing:** 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.
- **Rounding:** Some figures have been rounded to whole numbers.

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 lower leverage and “no silos” model distinguishes us from other firms and enables us to provide high quality services from senior practitioners more cost effectively.

Our competition team is often briefed to “get the deal through” even if the corporate work is being undertaken by another firm or in-house. We also act for the ACCC.

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 / Competition / Energy, resources and infrastructure / Dispute resolution / Taxation / Insolvency and restructuring / Employment / Property / Intellectual property

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

OUR HIGHLIGHTS

Bauer Media: Obtaining ACCC clearance for acquisition of Pacific Magazines from Seven West Media

Bayer AG: Obtaining ACCC clearance for acquisition of Monsanto

Domain: Obtaining ACCC clearance for acquisition of IDS

InvoCare: Obtaining ACCC clearance for acquisition of Bledisloe Group

Jetstar: Multi-jurisdictional antitrust clearances for coordination strategy between 9 airlines in Asia (Australia, New Zealand, Singapore, Taiwan, Japan, China and Vietnam)

PepsiCo: Obtaining ACCC clearance for PepsiCo's acquisition of SodaStream

Qantas: Advising on ACCC investigation into minority acquisition of Alliance

Qantas: Multi-jurisdictional antitrust clearances for global strategic partnership with Emirates (Australia, New Zealand, EU and US)

Ruralco: Obtaining ACCC clearance for acquisition by Nutrien

Spotify: Obtaining ACCC clearance for acquisition of Whooshkaa

Unilever: Obtaining ACCC clearance for acquisition of Weis

Yahoo!: Obtaining ACCC clearance for global search agreement (Bing) with Microsoft

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