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SLATTERY

Recent trends in complex ACCC merger review cases

Fourth edition, April 2020



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A special thanks to Luisa Johnson and Melinda Jensen in assisting to prepare this report.

This report

We are pleased to share with you the fourth 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. 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.

As this report does not consider any ACCC final decision made after 31 December 2019, it does not account for any ACCC decisions made in light of the current unprecedented health crisis. Our 2021 report will address any new trends arising from the crisis.





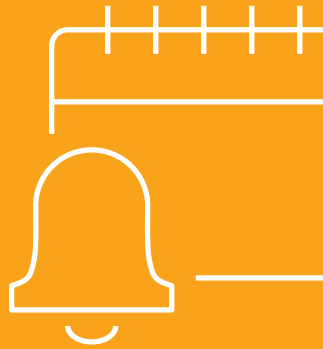
“

**The dominant view by 99 per cent
of the population and most business
organisations I go to... is that we don't
block enough.**

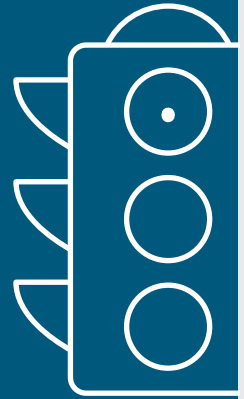
Rod Sims, Chairman, "ACCC's Rod Sims hits back at
business fears over crackdown", SMH 14 October 2019

”

ACCC still taking 6 months to make a final decision in SOI transactions.



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



Red lights do not necessarily require a remedy.



Most orange light SOIs are cleared and without a remedy.



Parties are less prepared to go through the whole process where there is a red light SOI. They may pull the deal or try other avenues for approval.



ACCC continues to lose cases where merger parties seek a court decision.



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 2019, the average time taken to make a final decision for a SOI transaction was almost 6 months, which is around the historic average.

There are many reasons for this. Firstly, most transactions continue to be cleared by the ACCC without public review or SOI. This means that those transactions that justify the publication of a SOI are generally the most complex and accordingly take time to consider.

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 generally taking longer.

Thirdly, while the total number of transactions considered by the ACCC on an annual basis has not materially changed over time, the number of transactions requiring a SOI has slightly increased reflecting the ACCC's current views against consolidation and its practice to take a more rigorous approach to complex transactions.

Fourthly, the ACCC is more frequently using its compulsory powers to obtain data and information from parties and to conduct formal interviews with executives to assess the competitive effects of a merger. This continues to result in long timelines for SOI reviews.

Fifthly, the 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 naturally continues to result in long timeframes in SOI transactions.

Red lights are not fatal – since 2006 nearly half have been cleared and only one quarter blocked.

Since 2006, 48% of all transactions with one or more red lights have been cleared while 25% have been blocked. In the last 4 years, 35% of red light SOIs have been cleared, but only 10% were blocked.

Red lights do not mean that it is necessary to offer remedies to obtain clearance.

Since 2006, 42% of all cleared transactions with one or more red lights have not required a remedy. Consistent with the average, in the last 4 years, 43% of all cleared transactions with one or more red lights have not required a remedy.

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

Between 2016-2019, the percentage of red light SOIs that were withdrawn before final ACCC decision almost quadrupled compared to the previous 4 year period (2011-2015). There are a few reasons for this trend. Firstly, some parties ceased the informal clearance process after a red light SOI and sought authorisation from the Australian Competition Tribunal instead (a strategy that is no longer available under the current law). Secondly, given the time sensitivity of many deals, parties may have been unwilling to continue with the second phase of the ACCC informal clearance process. Thirdly, parties may have considered that it was unlikely that the ACCC would reverse its preliminary view in the SOI that the transaction should be opposed and accordingly withdrew the deal.



The ACCC still prefers divestments over behavioural undertakings.

The ACCC is reluctant to be tasked with monitoring compliance with undertakings and is accordingly less willing to accept behavioural undertakings. While several years ago there was a view that the ACCC was more willing to consider and accept behavioural remedies, our analysis does not reflect this. The ACCC has accepted 6 behavioural undertakings since 2006 (4 in relation to red light SOIs). Only 4 of 38 red light cleared transactions involved behavioural remedies and 2 involved a combination of both.

Divestiture undertakings, as expected, are more common with 16 red light SOI divestiture undertakings accepted since 2006 (42% of red light cleared transactions). Since 2006, 58% of all red light cleared transactions required a remedy.

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

71% of all transactions with one or more orange lights (no red lights) have been cleared while 12% have been blocked.

Orange light SOI transactions take as long as red light SOI transactions.

In 2006, the time taken for an orange light decision was around 2 months but this has steadily increased to 5 months in 2019. That is only slightly less than the time taken by the ACCC to make a red light SOI decision.

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

88% of all orange light cleared transactions (36 of 41) did not require any remedy. The remaining 5 transactions required remedies (1 divestment, 2 behavioural and 2 combination).

The ACCC continues to lose merger cases that proceed to the Federal Court.

In addition to a spate of other decisions over the years, the ACCC lost 2 further cases where it had previously provided a red light SOI decision – the Vodafone/TPG merger and the Pacific National/Aurizon acquisition. The ACCC has suggested that it will use these losses to seek changes to the merger laws.

KEY OBSERVATIONS

Red light transactions

- **48%** of all transactions with a red light have been cleared.
- In the last 4 years, only **35%** of red light transactions have been cleared.
- **25%** of all transactions with a red light have been blocked.
- In the last 4 years, **10%** of red light transactions have been blocked.
- **27%** of all red light transactions have been withdrawn.
- In the last 4 years, **55%** of red light transactions have been withdrawn.
- Of all red light cleared transactions, **42%** did not require a remedy.
- Of all red light cleared transactions, **42%** required a divestment remedy.

Orange light transactions

- **71%** of all transactions with an orange light have been cleared.
- **12%** of all transactions with an orange light have been blocked.
- **17%** of all transactions with an orange light have been withdrawn.
- In the last 4 years, **24%** of orange light transactions have been withdrawn.
- Of all orange light cleared transactions, **88%** did not require a remedy.
- Of all orange light cleared transactions, **12%** required a remedy.

Average timing

- **5.2 months** for all SOI decisions.
- **5.5 months** where the SOI has a red light.
- **5.9 months** for all cleared decisions where the SOI has a red light.
- **6.6 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).
- The number of SOIs issued in any given year does not necessarily correspond to the length of time taken by the ACCC to make a decision.

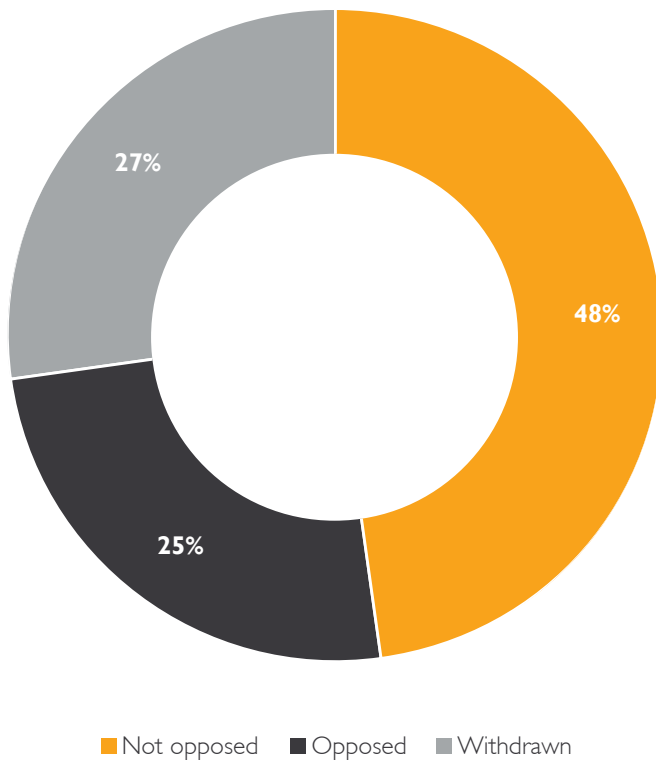
Industry analysis

Transactions in the following industries have received **the most SOIs**: agriculture, health, industrial, media, retail and transport & tourism. These sectors make up 53% of all SOIs since 2006.

Transactions in the following industries have had **the lowest ACCC clearance rate**: grocery (44%), petrol (40%), finance (38%), liquor (33%), and energy (33%).

Transactions in the following industries have had **the highest ACCC clearance rate**: infrastructure (100%), media (73%), food and beverage (67%), industrial (64%), and agriculture (64%).

Red light statistics



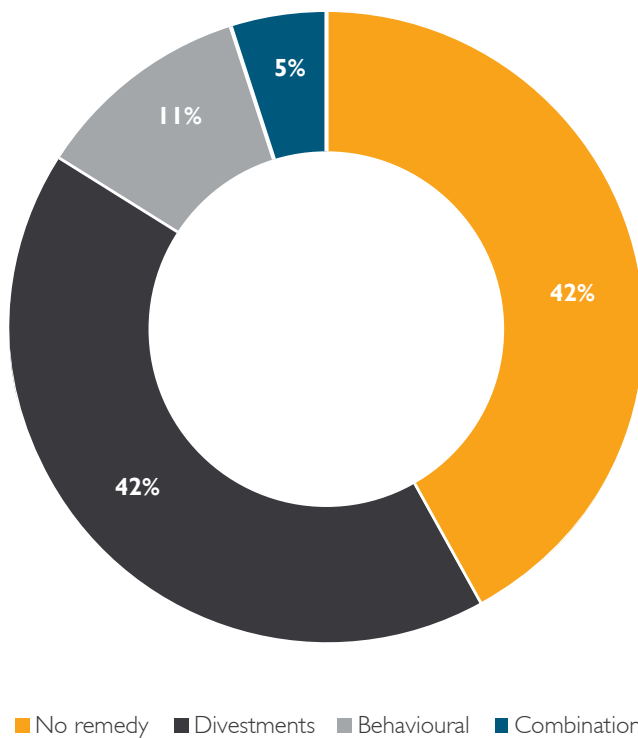
CLEARANCE ANALYSIS

There have been **137** SOIs published by the ACCC since 2006.

Of those **137** SOIs, **79** had one or more red lights.

Of those **79** red light SOIs:

- **38** were not opposed
- **20** were opposed
- **21** were withdrawn



REMEDY ANALYSIS

There have been **137** SOIs published by the ACCC since 2006.

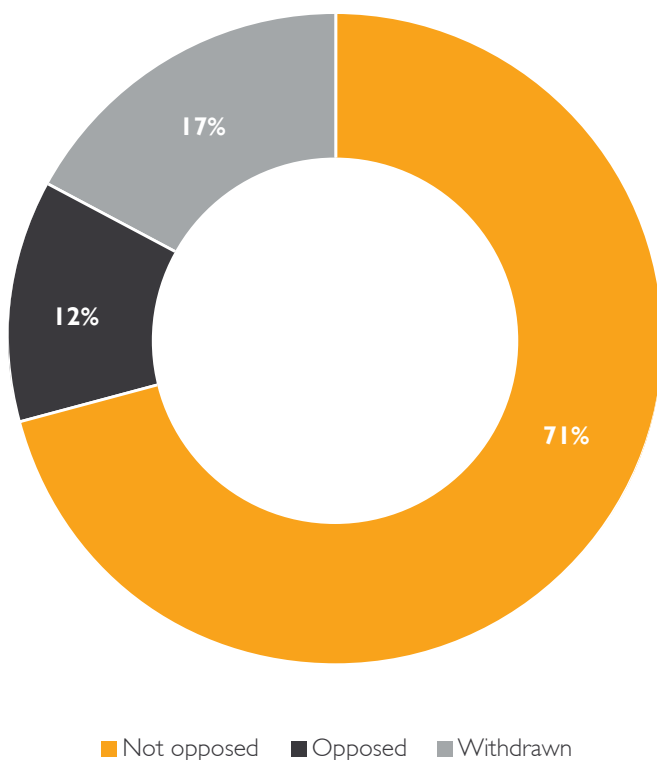
Of those **137** SOIs, **79** had one or more red lights.

Of those **79** red light SOIs, **38** were not opposed.

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

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

Orange light statistics



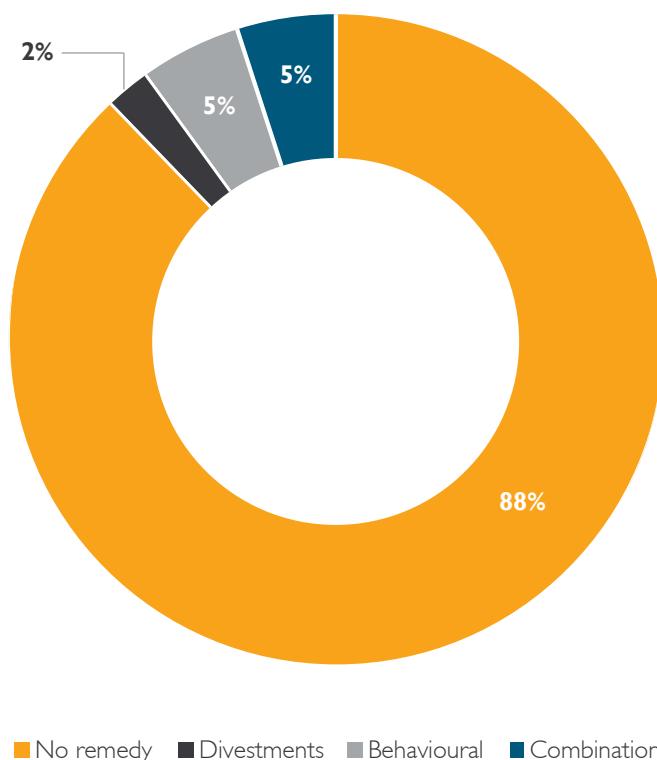
CLEARANCE ANALYSIS

There have been **137** SOIs published by the ACCC since 2006.

Of those **137** SOIs, **58** had one or more orange lights (but no red lights).

Of those **58** orange light SOIs:

- **41** were not opposed
- **7** were opposed
- **10** were withdrawn



REMEDY ANALYSIS

There have been **137** SOIs published by the ACCC since 2006.

Of those **137** SOIs, **58** had one or more orange lights (but no red lights).

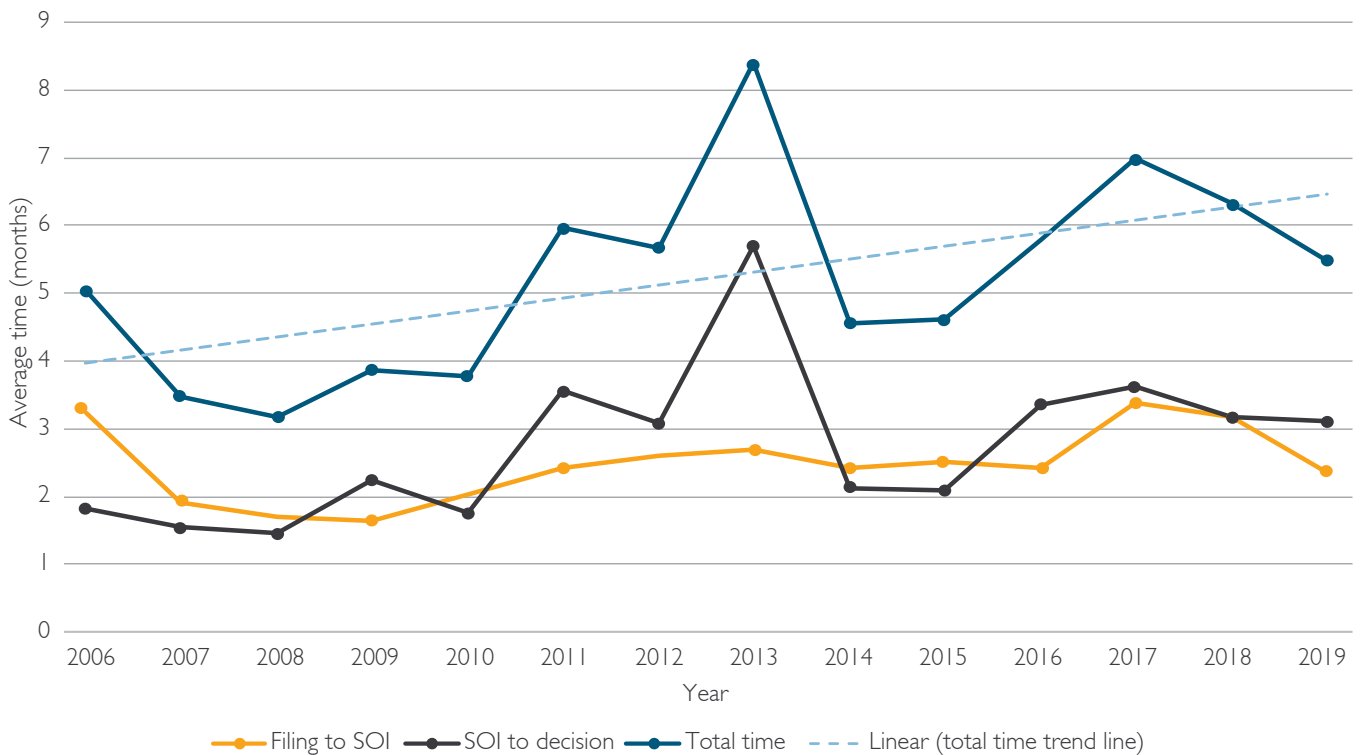
Of those **58** orange light SOIs, **41** were not opposed.

Of the **41** orange light SOIs that were not opposed:

- **36** required no remedy
- **1** required divestments
- **2** required behavioural undertakings
- **2** required a combination of remedies

Timing statistics

AVERAGE TIME - ALL SOI DECISIONS



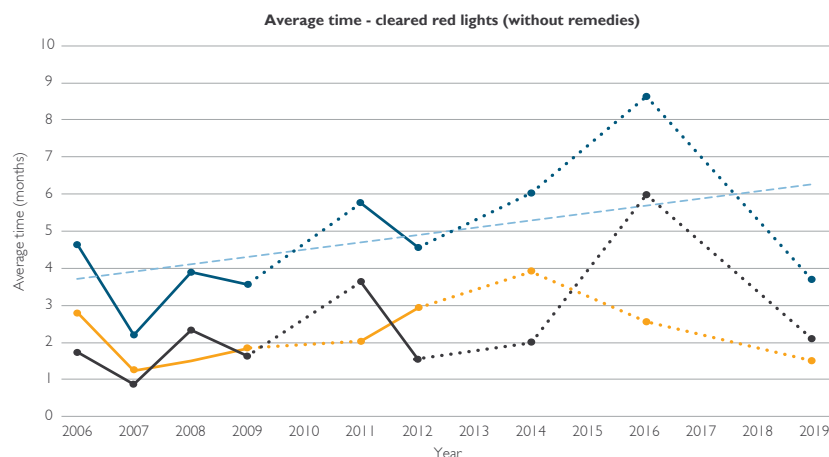
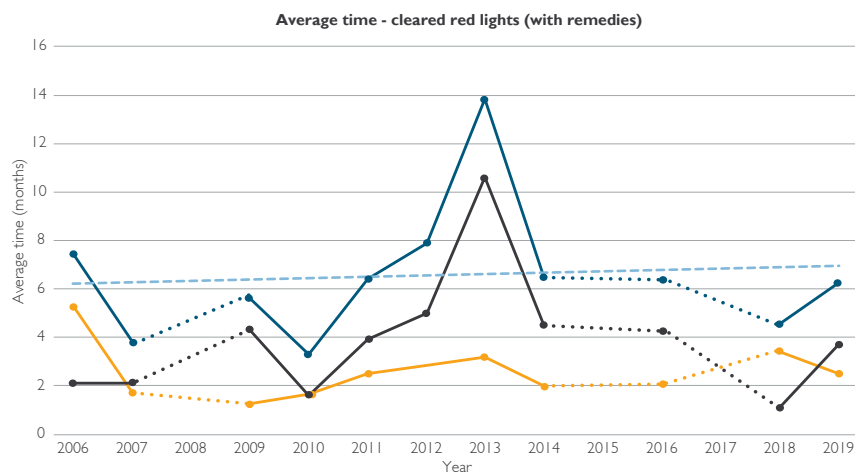
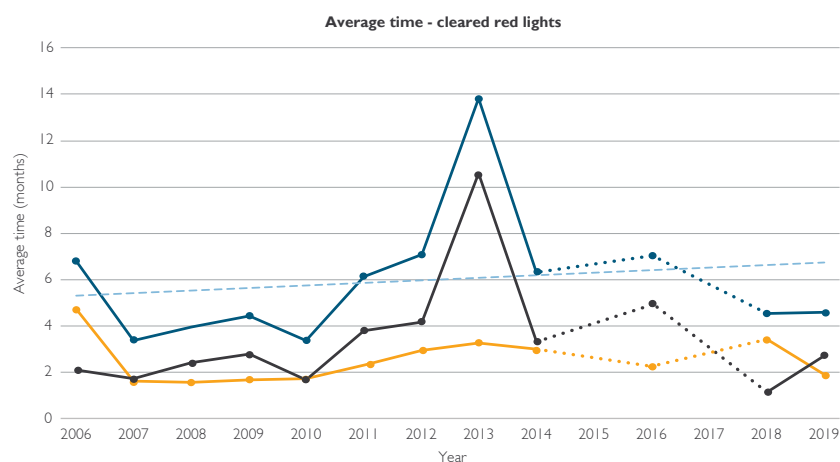
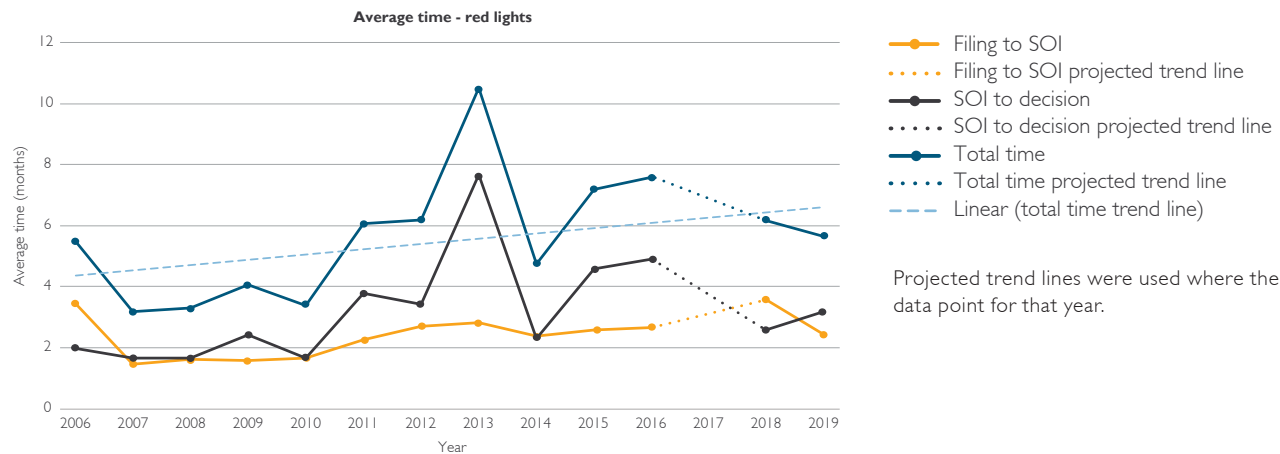
“While the ACCC will endeavour to complete these reviews as quickly as possible, the focus is on getting the right decision. In the past year, the ACCC has signalled that it would use its compulsory information gathering powers more in merger investigations where our concerns warrant increased evidence 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)

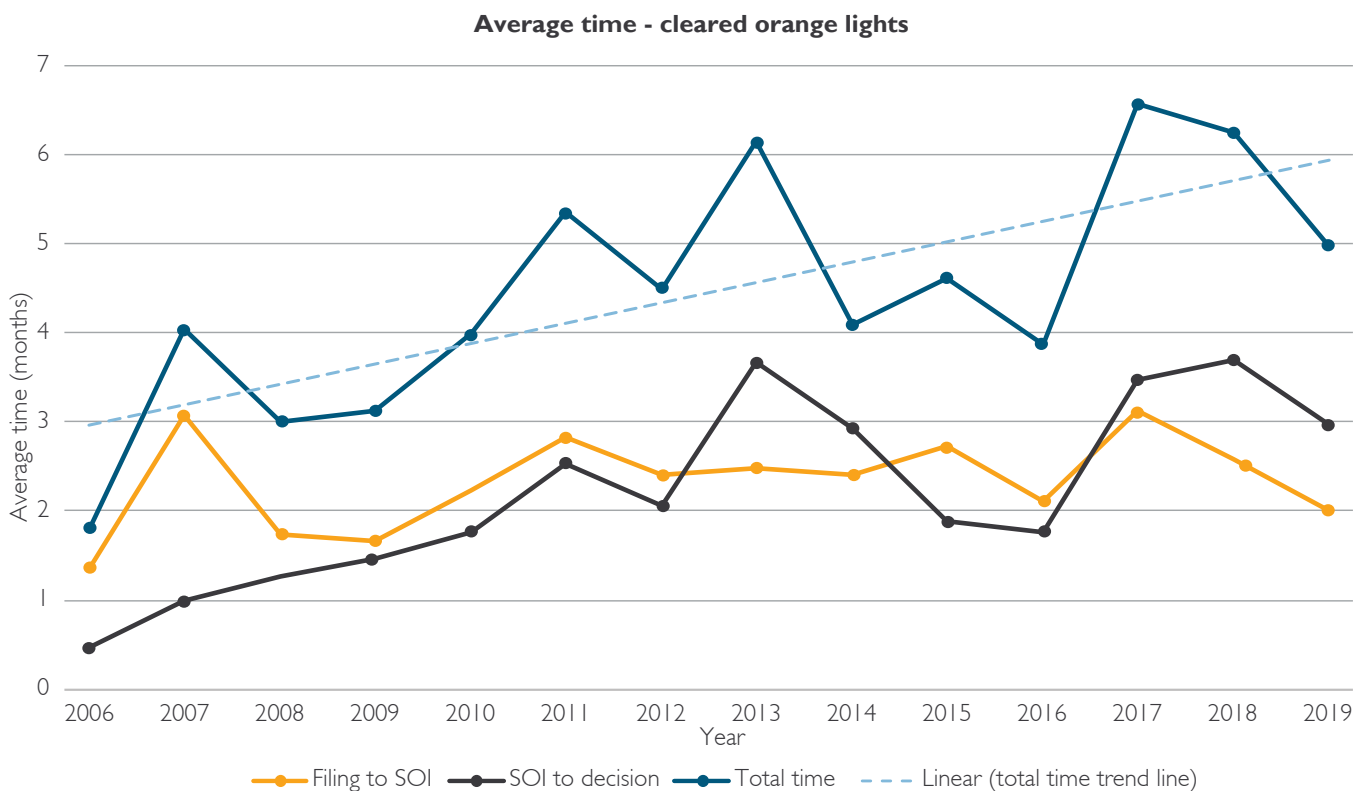
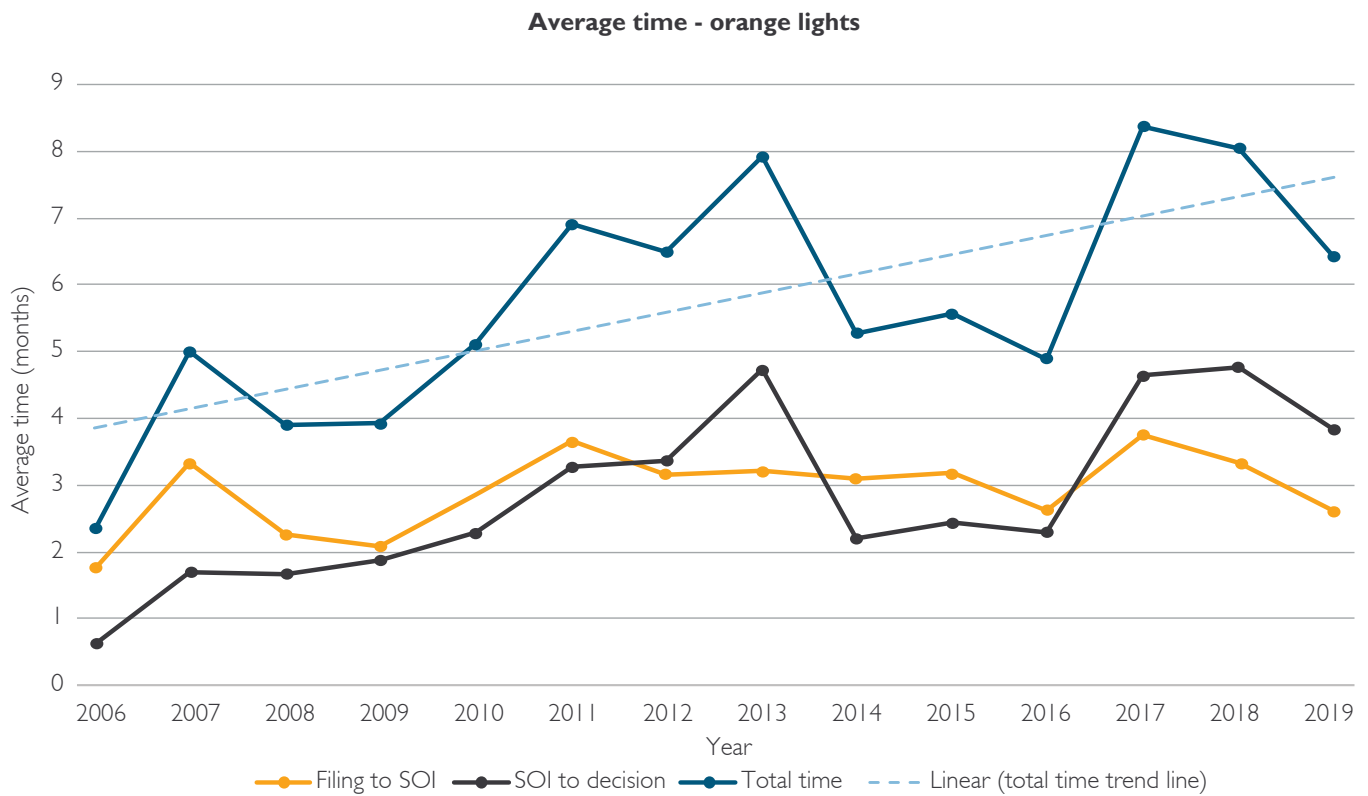


Note, only completed decisions are included in timing statistics. Withdrawn applications are not included.

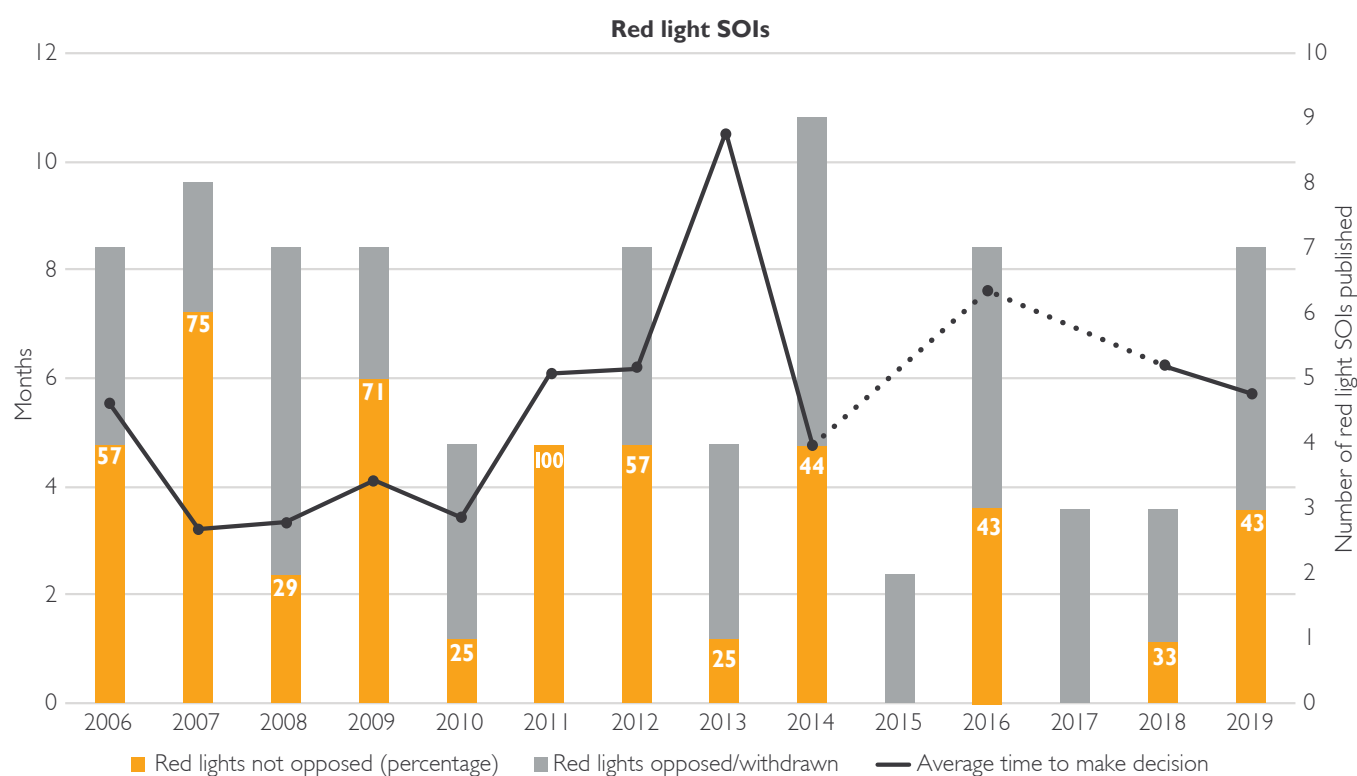
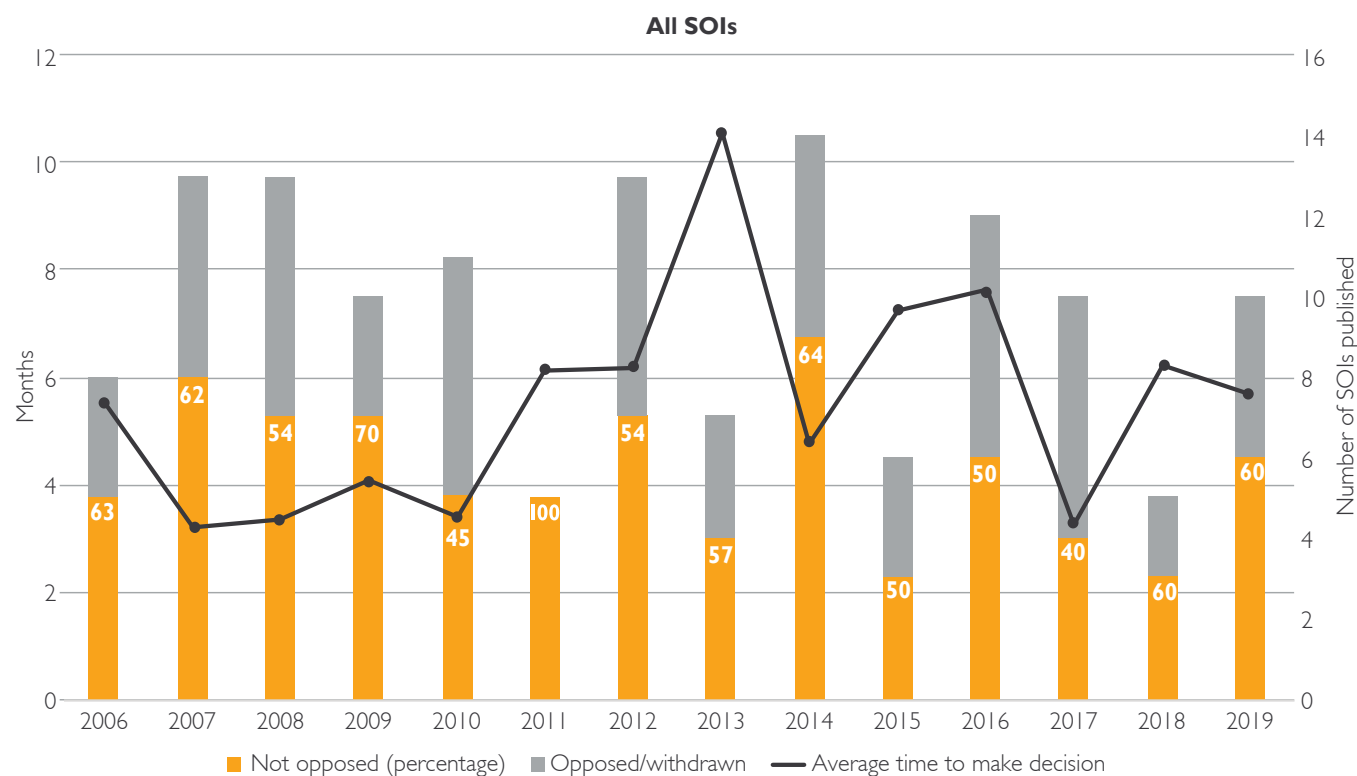
RED LIGHTS



ORANGE LIGHTS



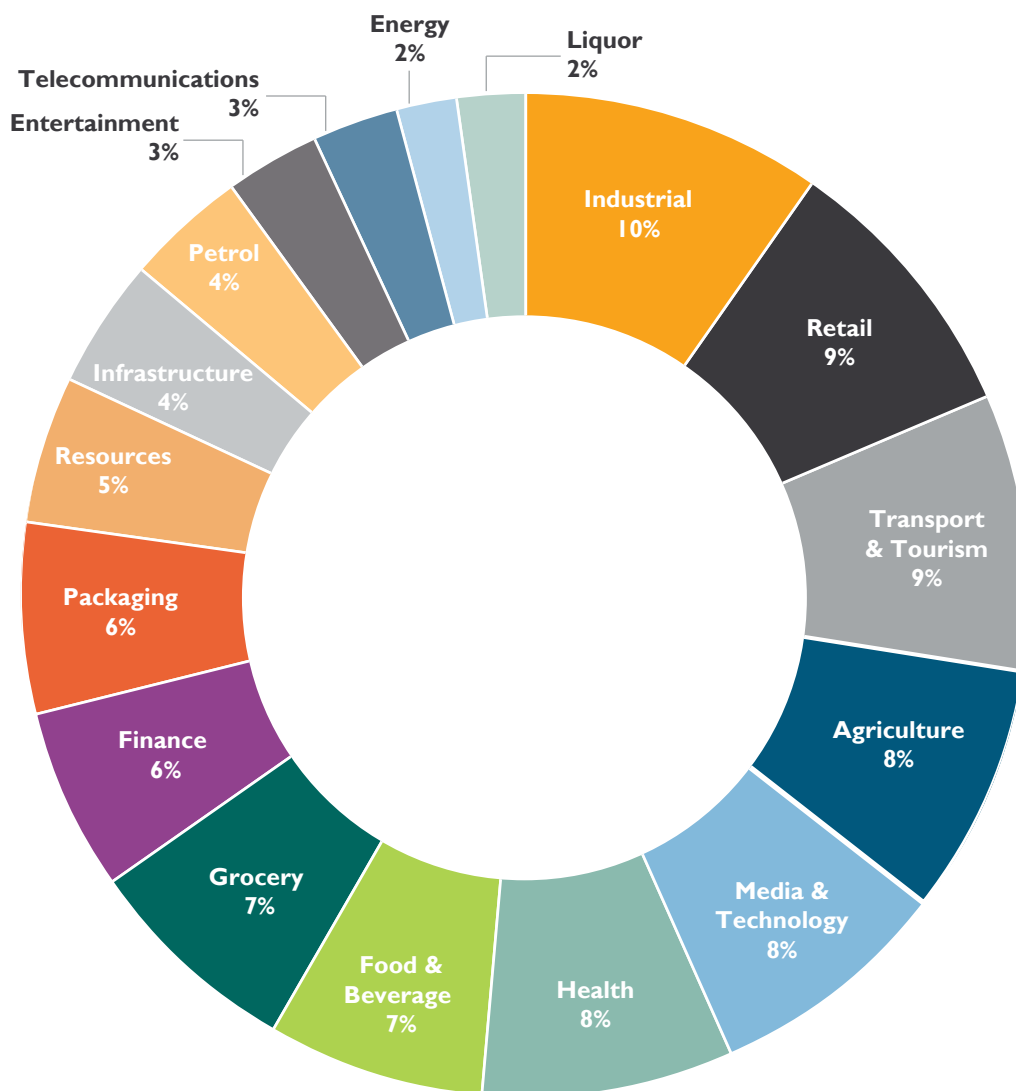
Year by year statistics



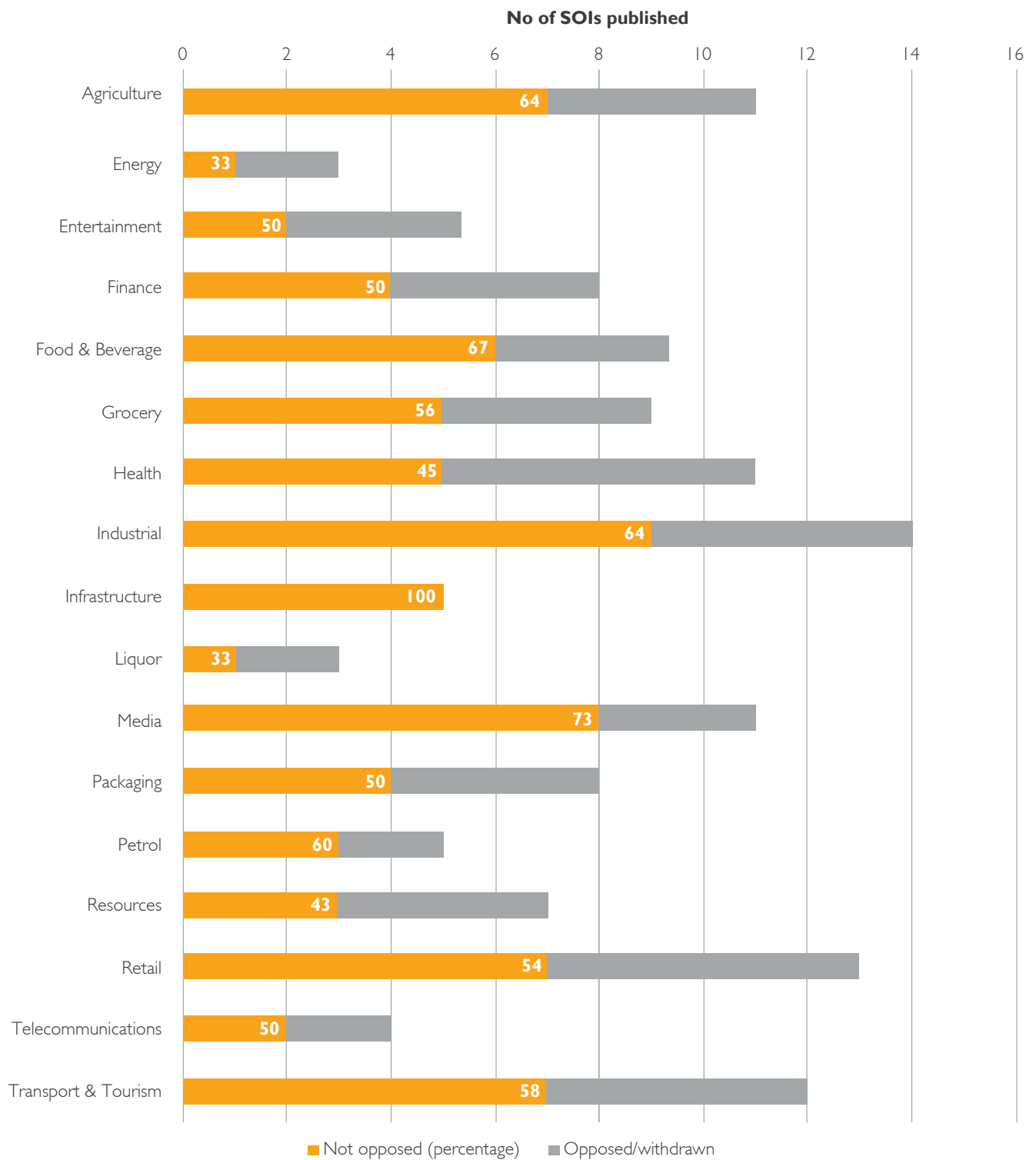
Note, only completed decisions are included in timing statistics. Withdrawn applications are not included. Average time is determined across cleared and opposed decisions.

Industry statistics

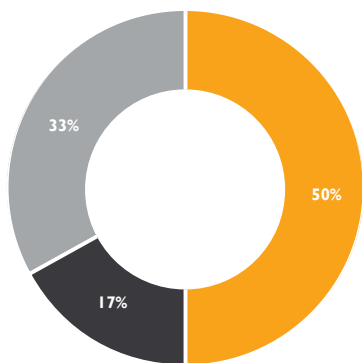
PERCENTAGE OF SOIs BY INDUSTRY (2006-2019)



ACCC CLEARANCE RATE BY INDUSTRY (2006-2019)



■ Not opposed ■ Opposed ■ Withdrawn

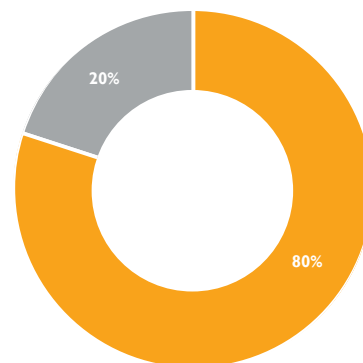
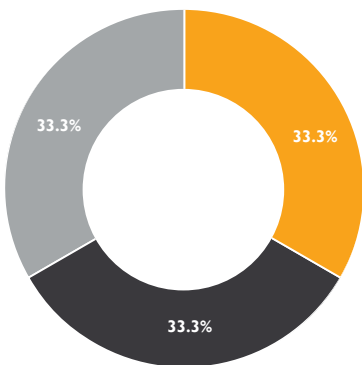
Red lights**Agriculture**

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

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

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

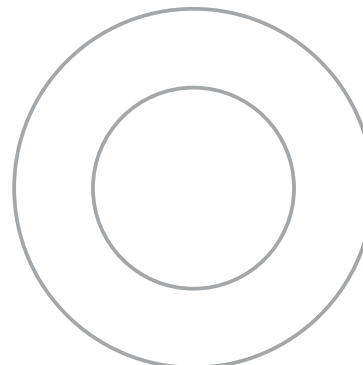
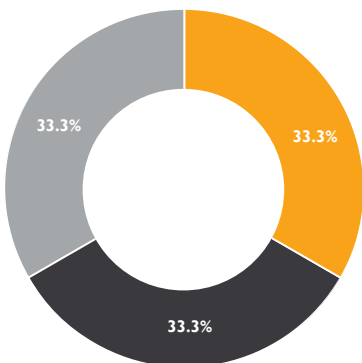
- 4 were not opposed
- 1 was withdrawn

Orange lights**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

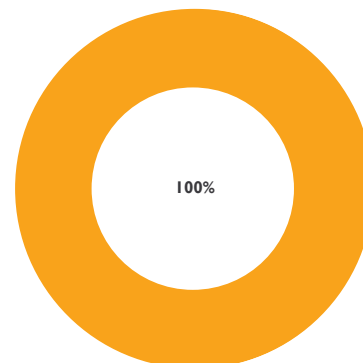
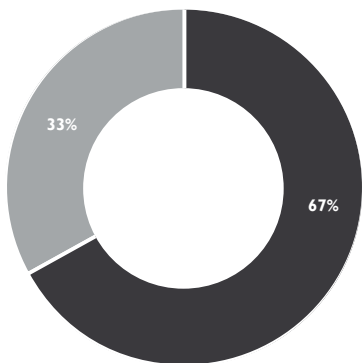
Of the 3 decisions in the energy industry none were orange light SOIs.

**Entertainment**

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

- 1 was not opposed
- 1 was 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.

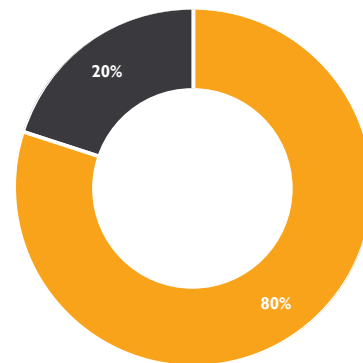
**Finance**

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

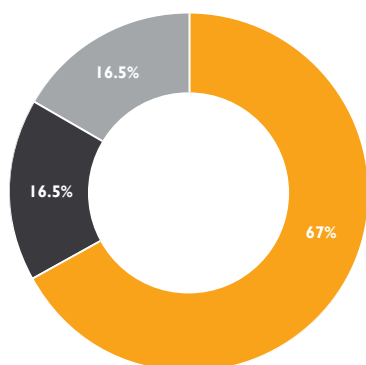
- 2 were opposed
- 1 was withdrawn

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

- 4 were not opposed
- 1 was opposed



■ Not opposed ■ Opposed ■ Withdrawn

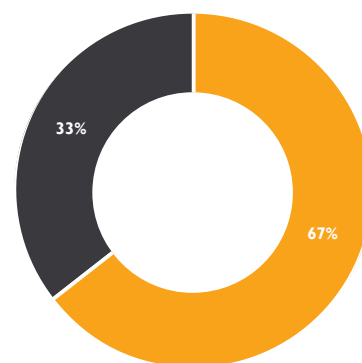
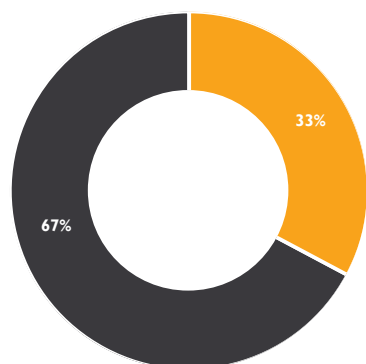
Red lights**Food & Beverage**

Of the 9 decisions in the food & beverage industry, 6 were red light SOIs. Of those 6 red light SOIs:

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

Of the 9 decisions in the food & beverage industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

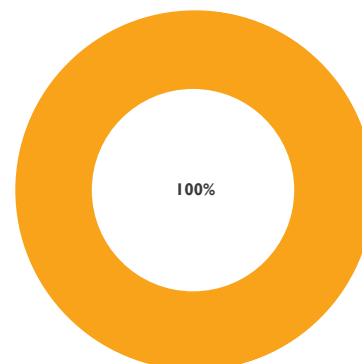
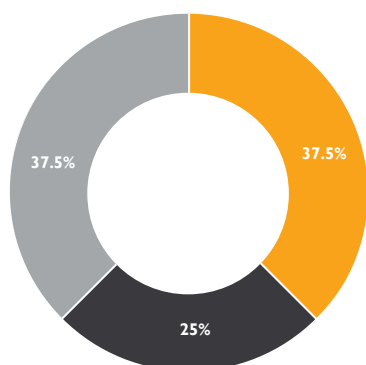
- 2 were not opposed
- 1 was opposed

Orange lights**Grocery**

Of the 9 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 9 decisions in the grocery industry, 3 were orange light SOIs. Of those 3 orange light SOIs all were not opposed.

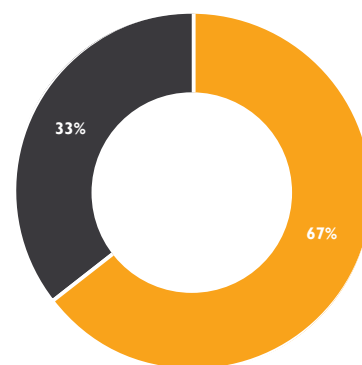
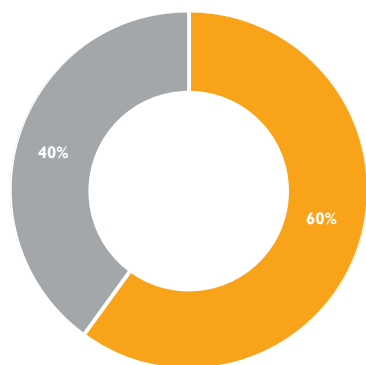
**Health**

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**

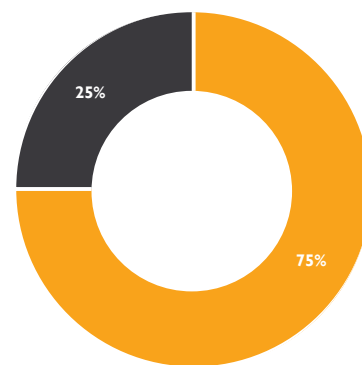
Of the 14 decisions in the industrial industry, 10 were red light SOIs. Of those 10 red light SOIs:

- 6 were not opposed
- 4 were withdrawn

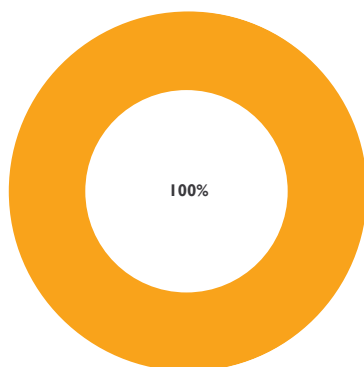
Of the 14 decisions in the industrial industry, 4 were orange light SOIs.

Of those 4 orange light SOIs:

- 3 were not opposed
- 1 was opposed

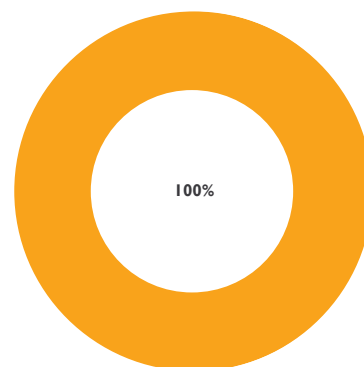


■ Not opposed ■ Opposed ■ Withdrawn

Red lights**Infrastructure**

Of the 5 decisions in the infrastructure industry, 4 were red light SOIs. Of those 4 red light SOIs all were not opposed.

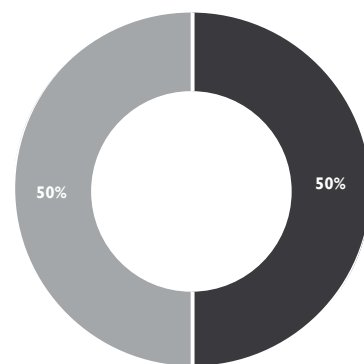
Of the 5 decisions in the infrastructure industry, 1 was an orange light SOI. That orange light SOI was not opposed.

Orange lights**Liquor**

Of the 3 decisions in the liquor industry, 1 was a red light SOI. That red light SOI was not opposed.

Of the 3 decisions in the liquor industry, 2 were orange light SOIs. Of those 2 orange light SOIs:

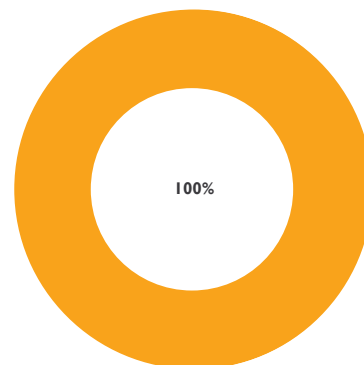
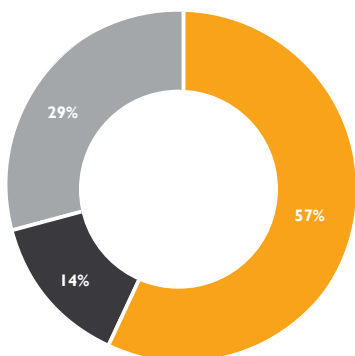
- 1 was opposed
- 1 was withdrawn

**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.

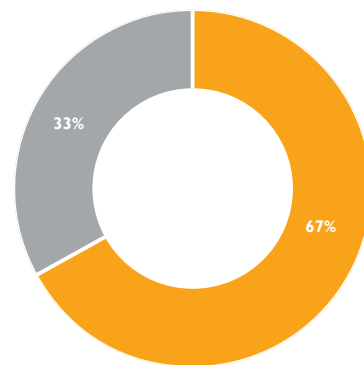
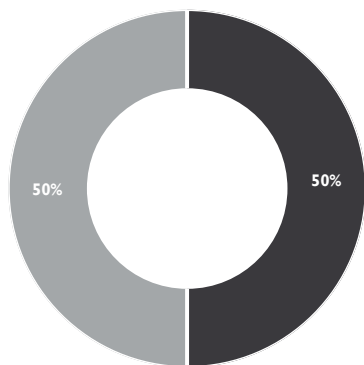
**Packaging**

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

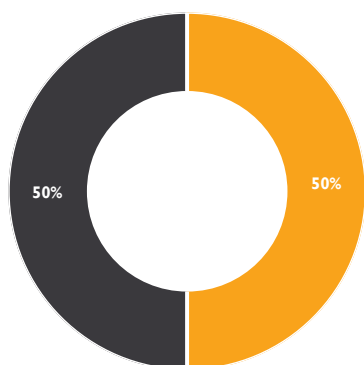
- 1 was opposed
- 1 was withdrawn

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

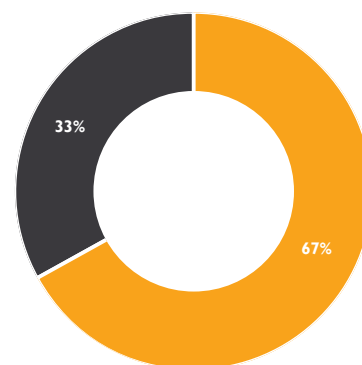
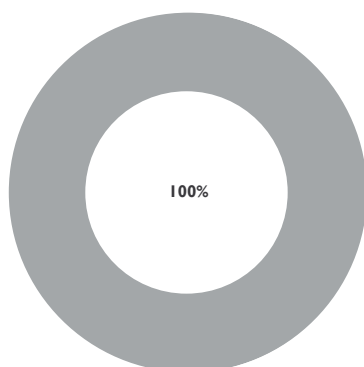
Of the 5 decisions in the petrol industry 2 were red light SOIs. Of those 2 red light SOIs:

- 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:

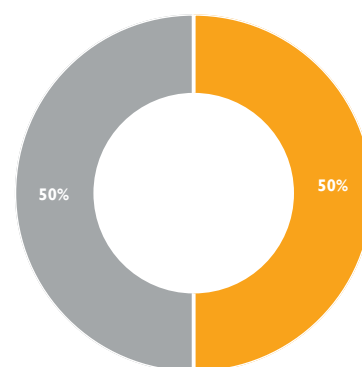
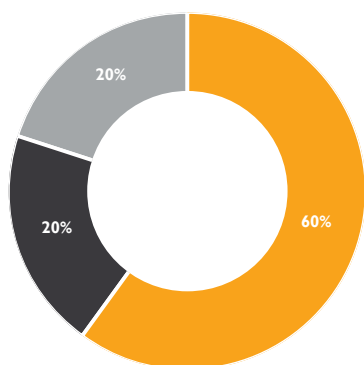
- 2 were not opposed
- 1 was opposed

Orange lights**Resources**

Of the 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

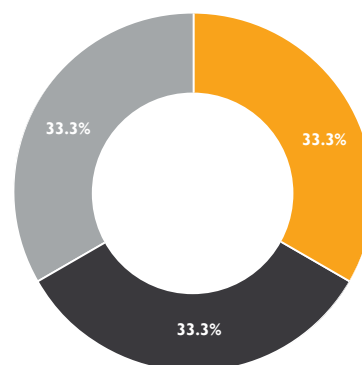
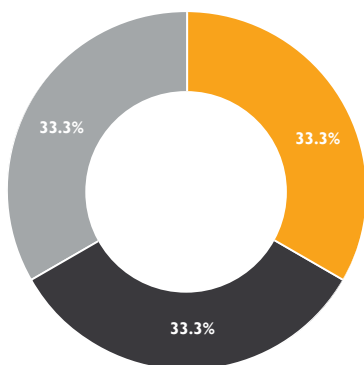
**Retail**

Of the 13 SOI decisions in the retail industry, 10 were red light SOIs. Of those 10 red light SOIs:

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

Of the 13 decisions in the retail industry, 3 were orange light SOIs. Of those 3 orange light SOIs:

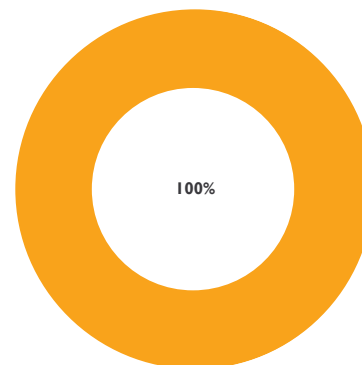
- 1 was not opposed
- 1 was opposed
- 1 was withdrawn

**Telecommunications**

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

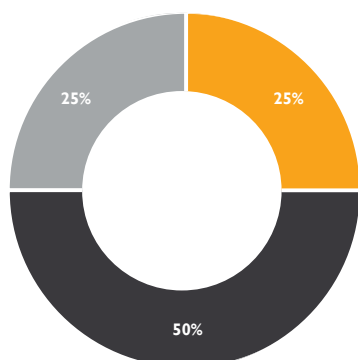
- 1 was not opposed
- 1 was opposed
- 1 was withdrawn

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 & Tourism

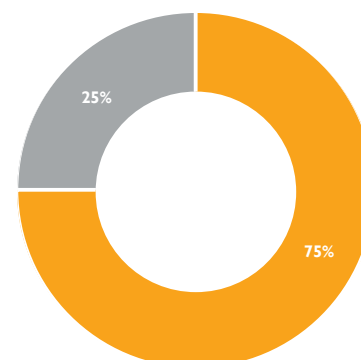
Of the 12 decisions in the transport & tourism industry, 4 were red light SOIs. Of those 4 red light SOIs:

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

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

- 6 were not opposed
- 2 were withdrawn

Orange lights



My guess, and it can only be that, is that if Adam Smith observed the world today he would believe our economies are now much too concentrated and that we have collectively all failed in our mission.

A big call, I realise, but also a challenge to us all.

...

Recently, competition authorities around the world have been challenged on whether our merger laws, and our application of those laws, is adequately achieving these goals. Some argue that high levels of concentration, and an associated increase in economic rents (or profits above those in a competitive market), are responsible for reduced investment and innovation, growing inequality and, according to some, an undermining of democracy.

...

The evidence of whether our economies are too concentrated, and the consequences of this, can be seen as mixed. The analysis is difficult and value judgements intrude, as they do in all things economic. My judgement is that Australia's economy is too concentrated.

Rod Sims, Chairman, ACCC

Address to the International Competition Network Merger Workshop 2020



Qualifications

Data presented in this report is for the calendar year, eg January 2019 to December 2019.

All data has been sourced from SOIs available on the ACCC's mergers register since 2005 as at April 2020. 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.

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 on a national team to ensure the most appropriate skills are allocated to 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

OUR HIGHLIGHTS

A2 Milk

Advising on its global strategic partnership with Fonterra.

ACCC

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

Bauer Media

Obtaining informal clearance for acquisition of Pacific Magazines.

Bayer AG

Advising on ACCC clearance of \$88 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).

Qantas Airways

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

Ruralco

Obtaining informal clearance for \$450 million takeover offer by Nutrien.

Unilever

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

Yahoo!

Advising on ACCC clearance for \$275 million global search agreement (Bing) with Microsoft.

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“

They're very proactive... they don't just sit on their hands and wait to be asked, but will be on the front foot.

Client feedback,
Chambers Asia Pacific 2020

”

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