The Merger Control Review

Twelfth Edition

Editor
Ilene Knable Gotts

The Law Reviews

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Ilene Knable Gotts

The Law Reviews

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 28 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor),

particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted the potentially most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from

notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for

subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority

holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, Japan, the Netherlands, Norway, South Africa, Ukraine, Vietnam and the United States). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction).

We are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2021

Part II

Jurisdictions

Chapter 5

AUSTRALIA

Peter Armitage and Amanda Tesvic[1]

I INTRODUCTION

The Australian merger control regime appears, superficially, to have many similarities with merger control regimes in other countries. It is, however, materially different from many of the mandatory notification regimes in other countries, because the first question to be addressed in the Australian context is not whether certain filing thresholds are triggered but, rather, whether the transaction is likely to give rise to competition concerns in Australia.

The core of Australia's merger control regime is contained in Section 50 of the Competition and Consumer Act (Cth) 2010 (CCA) (previously known as the Trade Practices Act), which prohibits any direct or indirect acquisition of shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.[2] The authority responsible for enforcing the CCA's merger control regime is the Australian Competition and Consumer Commission (ACCC). The ACCC may investigate any transaction to ascertain whether it involves an anticompetitive acquisition of shares or assets, and it may seek an injunction from the Federal Court of Australia (the Federal Court)[3] blocking a proposed acquisition.[4] Post-closing, the ACCC (or any other interested

1 Peter Armitage is a senior partner and Amanda Tesvic is a senior associate at Ashurst.

2 In addition, Section 50A of the CCA applies to acquisitions that occur outside Australia that result in a controlling interest in a corporation and that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.

3 The Federal Court may grant injunctions on such terms as it determines to be appropriate. In merger cases where closing of a proposed transaction is imminent, the ACCC may seek an interlocutory injunction restraining the merger parties from consummating the proposed transaction pending a hearing of the case on a final basis. The Federal Court has wide discretion in relation to the granting of interlocutory injunctions. The Federal Court must be satisfied that there is a serious question to be tried, and that the balance of convenience favours granting an interlocutory injunction. The Federal Court will then make its decision about the granting of a final injunction after a full trial.

4 Third parties cannot seek an injunction from the Federal Court to prevent a proposed transaction from closing.

person) can apply to the Federal Court for a divestiture order.[5] In addition, the ACCC may also seek a court order imposing a pecuniary penalty on the merger parties if a completed merger has the effect, or is likely to have the effect, of substantially lessening competition.[6]

In considering a transaction, the ACCC can use its wide-ranging compulsory information-gathering powers to obtain the information and market data that it considers necessary to assess the competitive effects of that transaction in Australia.

The ability of the ACCC to investigate any transaction and the risks of court action to prevent a transaction from closing (or post-closing court action for divestiture, declaration that a transaction is void or penalties) have resulted in the practice in Australia of seeking 'informal clearance' from the ACCC where a proposed merger may raise competition concerns in Australia.

In its Merger Guidelines of November 2008 (updated in November 2017), the ACCC provides guidance as to when it would be prudent for the merger parties to seek clearance. It 'encourages' merger parties to notify the ACCC of a proposed merger in advance of completing it where the products of the merger parties are either substitutes or complements; and the merged entity will have a post-merger market share of greater than 20 per cent in the relevant market or markets. The ACCC adds that, as market shares are an imprecise indicator of likely competition effects, a proposed merger that does not meet these thresholds may still raise competition concerns and be subject to an investigation.

The ACCC can investigate transactions, even if informal clearance is not sought. The circumstances in which there is a heightened risk that the ACCC may commence an investigation on its own initiative include, in particular, where there are substantial complaints by industry participants; where the ACCC is already focusing on that industry as part of its current priorities; where the parties are required to notify the Foreign Investment Review Board (FIRB) under the Foreign Acquisitions and Takeovers Act (the FIRB, as a matter of course, seeks the ACCC's views as part of its consultation process); or, in global merger cases, where the proposed merger raises competition concerns in other jurisdictions, particularly where it is subject to a second-phase investigation in the European Union or the United States. The ACCC may also investigate closed transactions where it has concerns but the parties did not request informal clearance.[7]

5 To date, however, a divestiture order has never been made in Australia for breach of Section 50 of the CCA. Where the vendor is involved in the contravention, the ACCC may apply for a declaration that the transaction is void and order that the shares or assets be deemed not to have been disposed of by the vendor, and that the vendor refund payment made to it (CCA, Section 81(1A)).

6 The maximum penalty for corporations per contravention is the greater of A$10 million; three times the total value of the benefits that have been obtained by the contravention; or, if the court cannot determine the total value of those benefits, 10 per cent of the annual group turnover referable to activities in Australia. Penalties totalling A$4.8 million were imposed in 1996 on Pioneer International Limited and others for contravening Section 50.

7 For example, the ACCC investigated Primary Health Care's completed acquisition of Healthscope's pathology assets in Queensland in 2015, Qube Logistics' acquisition of Maritime Container Services in 2018, Qantas Airways Limited's acquisition of 19.9 per cent stake in Alliance Aviation Services Limited in 2019 and proposed and completed acquisitions by Innovation Holdings that would provide it with 35 per cent of iSelect Limited in 2020–21.

II YEAR IN REVIEW

The ACCC has considered, in recent years, around 300 merger proposals each year. As the following table from the ACCC indicates,[8] the vast majority of transactions either did not require a public review, or were reviewed and cleared.[9]

	2014 FY (to 30 June)	2015 FY (to 30 June)	2016 FY (to 30 June)	2017 FY (to 30 June)	2018 FY (to 30 June)	2019 FY (to 30 June)	2020 FY (to 30 June)
Matters (pre-)assessed – no (public) review required	242	278	287	253	252	305	257
(Public) reviews undertaken	55	44	32	35	29	26	31
Not opposed	36	35	17	21	17	17	18
Finished – no decision (including withdrawn)							
Post-statement of issues	-	-	5	8	2	1	5
Other	2	1	1	2	5	0	3
Publicly opposed outright	4	0	2	0	1	2	1
Confidential review – opposed or ACCC concerns expressed	2	0	1	2	1	1	0
Resolved through undertakings	10	7	5	2	1	5	4
Variation to remedy accepted	1	1	1	0	2	0	0
Variation to remedy rejected	0	0	0	0	0	0	0
Total matters (pre-)assessed and reviews undertaken	297	322	319	288	281	331	288

The overwhelming majority of mergers notified to the ACCC are dealt with in the 'pre-assessment' process, which is outlined further below. This process is designed to provide faster clearance for 'non-contentious mergers', without referring the transaction to public market inquiries. Details of those mergers that have been pre-assessed are not made public by the ACCC, nor is the basis for the ACCC's pre-assessment decision. Even the parties are provided with limited information regarding the pre-assessment analysis. As a result, it is sometimes difficult to predict whether a transaction will be pre-assessed or publicly reviewed. This uncertainty can be challenging for parties to manage, particularly when the timing of clearance is important.

While the number of mergers the ACCC classifies as 'publicly opposed outright' is low (only one in the financial year (FY) to 30 June 2020), this statistic can be slightly misleading as it excludes those transactions in which the parties withdrew their request for informal clearance following the ACCC publishing a statement of issues outlining serious competition concerns with the transaction, or in some cases even before that. The ACCC identified eight such cases in the year to 30 June 2020 and there have been several more since then (see, for

8 ACCC, ACCCount, 1 April to 30 June 2020, Table 1.2. See www.accc.gov.au/system/files/ACCCount%201%20April%20to%2030%20June%202020.pdf.

9 Final figures for the 2021 FY were not available at the time of writing.

example, Ampelite Australia Pty Ltd's proposed merger with FGW Corporation Pty Ltd,[10] South Pacific Laundry's proposed acquisition of Spotless Laundries[11] and Alsco Pty Ltd's proposed acquisition of Spotless' garment business).[12]

We have observed a number of trends in the past 12 months that are outlined below.

i ACCC contemplating merger reform following losses in high-profile cases

In 2020, the ACCC suffered two significant losses in high-profile merger cases in the Federal Court after a string of losses in the years prior.

In May 2020, the Full Federal Court delivered judgment in the ACCC's case opposing Pacific National Pty Limited's (PN) proposed acquisition of Aurizon Holdings Limited's intermodal assets.[13] The ACCC failed to prove that the acquisition would have the likely effect of substantially lessening competition. Both the trial and appeal courts were satisfied that ownership of the terminal by PN would raise barriers to entry to interstate intermodal rail line haul. It was essential, however, that the ACCC also prove that there was a real commercial likelihood of entry if PN did not own the terminal. The appeal judges held unanimously that the ACCC's evidence had failed to prove that entry was more than speculative and that, accordingly, the acquisition of the terminal was not likely to substantially lessen competition when compared with the situation if PN did not acquire the terminal.[14] The ACCC also subsequently applied for special leave to appeal the matter to the High Court but the application was rejected.[15]

The chairman of the ACCC, Rod Sims, has noted that the *PN/Aurizon* case 'illustrates the significant hurdles faced by the ACCC in opposing mergers in Court' and has said 'we need a real re-think of how merger issues are dealt with in Australia'.

In early May 2019, after a seven-month investigation, the ACCC opposed the merger of TPG Telecom and Vodafone Hutchison Australia.[16] Vodafone, for reasons connected with Australia's foreign investment control regime, applied to the Federal Court in late May for a declaration that the merger would not contravene the prohibition in Section 50 because it would not be likely to have the effect of substantially lessening competition in any relevant market. In February 2020, the Court made that declaration and the ACCC did not appeal the decision.[17] The case was factually and legally complex but, significantly, the Court was not persuaded that the increase in concentration resulting from this merger would cause any lessening of competition. In fact, the Court concluded that competition would be improved because the merged entity would be a stronger competitive force.

10 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/ampelite-australia-pty-ltd-fgw-corporation-pty-ltd.

11 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/south-pacific-laundry-spotless-laundries.

12 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/alsco-pty-ltd-spotless-garment-business.

13 *Australian Competition and Consumer Commission v. Pacific National Pty Ltd* (2020) 277 FCR 49, www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2020/2020fcafc0077.

14 The appeal decision was delivered on 6 May 2020.

15 www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2020/213.html.

16 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/tpg-telecom-limited-tpg-proposed-merger-with-vodafone-hutchison-australia-pty-ltd-vha.

17 *Vodafone Hutchison Australia Pty Ltd v. Australian Competition and Consumer Commission* [2020] FCA 117, www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0117.

The significance of these losses in an assessment of the effectiveness of the merger regime may be exaggerated. As noted above, in FY19–20, eight transactions were withdrawn in the face of ACCC concerns, which suggests that the merger test is well known and working well. Nonetheless, following these losses, the ACCC has increased its lobbying for reforms to Australia's merger laws, but has not yet proposed any concrete amendments. Such proposals are expected later in 2021. In the meantime, the ACCC has also (in April 2021) signed a landmark joint statement on merger control enforcement with the UK's Competition and Markets Authority (CMA) and Germany's Federal Cartel Office.[18] The statement is consistent with the ACCC's lobbying, in that it notes the difficulties with forward-looking merger control tests (such as Australia's) where the regulator is required to prove the likely effect of a merger on competition in the future, to successfully oppose the merger in court.

ii Continued close scrutiny of transactions involving acquisitions of nascent competitors or the combination of data sets

In April 2021, the joint statement by the ACCC, the CMA and the German Federal Cartel Office outlined some of the issues with which regulators are concerned when reviewing increasing numbers of transactions in dynamic and fast-paced markets such as technology markets. The statement noted: 'Anticompetitive mergers in these markets can cause significant harm given the increased importance of these products and services and the aggregation of data over time across various services. Technology markets can also be examples of highly concentrated markets with features such as high barriers to entry due to network effects,' and relatedly 'Harm to consumers may arise where incumbents seek to protect their market position by acquiring potential competitors in the form of smaller firms or potential entrants in adjacent markets.'[19]

These are familiar issues for the ACCC following its detailed Digital Platform Inquiry (which reported in 2019).[20] In the past 12 months, the ACCC has continued its close scrutiny of transactions involving nascent competitors (especially in technology markets) or the combination of data sets, or both.

In June 2020, in its statement of issues in relation to Google's proposed acquisition of Fitbit, the ACCC noted its preliminary concerns regarding the acquisition of FitBit's individual user data by Google.[21] The ACCC did not ultimately reach a concluded view on this transaction as the parties proceeded to completion without ACCC clearance.

The ACCC has also recently considered two separate mergers involving the acquisition of nascent technology-focused competitors by larger entities. In March 2021, the ACCC granted clearance for National Australia Bank Limited's acquisition of neo-bank 86-400 Holdings Limited. 86-400 Holdings Limited was an innovative fintech providing banking services only through a smartphone app. The ACCC considered the matter closely, but ultimately cleared it in Phase 1.[22]

18 www.accc.gov.au/publications/joint-statement-on-merger-control-enforcement.

19 id.

20 www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

21 www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of%20Issues%20-%2018%20June%202020.pdf.

22 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/national-australia-bank-limited-86-400-holdings-ltd.

In April 2021, the ACCC also cleared MYOB Invest Co Pty Ltd's acquisition of GreatSoft Pty Ltd. In that case, the ACCC noted that its investigation focused on GreatSoft's potential to grow into a strong competitor, given that GreatSoft had succeeded in winning a number of medium-to-large customers, including MYOB customers, when it first launched its product in 2019. The ACCC clearance came after a Phase 2 review and statement of issues.

These recent cases serve to illustrate that in any merger involving technology products or markets, the acquisition of data or smaller or potential competitors, the ACCC will be alert to these issues and will closely scrutinise the impact on market dynamics. However, the *National Australia Bank/86-400* case also illustrates that this will not necessarily lead to a Phase 2 review in every such case.

iii Covid-19 and merger clearance

The ACCC continues to take a sceptical approach when considering failing firm arguments in merger reviews, even in light of the covid-19 crisis. In a speech on 30 March 2020, early in the covid-19 crisis, Rod Sims outlined the ACCC's approach to merger reviews, particularly when dealing with failing firm arguments:

> *Do not expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anticompetitive increases in market power, or the rise of so-called 'national champions'.*[23]

The recent joint statement by the ACCC, the CMA and the German Federal Cartel Office on merger control enforcement has confirmed this still to be the case.[24]

The likely financial failure of a firm is a relevant consideration in the competition assessment of a proposed acquisition of that firm. Mere speculation that a target firm will exit in the near future or evidence of declining profitability will not establish a likely absence of future competition between the target and the acquirer.

It is necessary to supply convincing evidence that, in the relevant future, there will be no competition between the target and the acquirer, such as:

a the target will fail imminently and it is unlikely to be successfully restructured or acquired by any other firm; and

b in the absence of the proposed acquisition, the target's assets, including brands, will exit the industry.

Even if such evidence is available, parties should expect that it will be difficult to persuade the ACCC to grant clearance on the basis of these facts.

iv Phase 2 matters now taking longer to reach decision

Although it is not subject to statutory deadlines in the informal merger review process, the ACCC sets itself targets regarding the time it takes to review and make decisions on informal merger applications. In FY 2019–2020, it set itself a target of finalising 50 per cent of mergers that are subject only to a Phase 1 review within eight weeks (excluding time periods where information was outstanding). In FY 2019–20 it exceeded this target, finalising its view on

23 www.accc.gov.au/speech/will-competition-survive-the-current-crises.

24 www.accc.gov.au/publications/joint-statement-on-merger-control-enforcement.

67 per cent of Phase 1 reviews within eight weeks. In the same time period, the ACCC's target time for completing matters involving a Phase 2 review was 20 weeks. It met this target in only 40 per cent of cases. This is compared with its FY 2018–2019 result in which it achieved this time frame in 88 per cent of Phase 2 cases.[25]

The ACCC explains the longer review periods by noting the increased complexity of Phase 2 reviews as well as the need to use compulsory information-gathering powers (though it likely would have stopped the clock while parties gathered these documents). It also notes that four matters where it exceeded the 20-week target were decided within an additional 10 days. In light of these figures, it is prudent for parties, particularly those in mergers requiring undertakings, to assume that the ACCC may take longer than 20 weeks to make a final decision.[26]

v More documents and data required in contentious merger reviews

In recent years, the courts have been critical of the theoretical nature of the evidence relied on by the ACCC in cases in which it has opposed a merger.[27] As a result, in August 2017 the ACCC announced changes to its merger review process for contentious mergers that were designed to ensure that it is armed with sufficiently probative evidence should it oppose a merger.[28] In practice, this means that in a small number of contentious mergers the ACCC will use its compulsory information-gathering powers to require the merger parties to produce more documents and data and to submit their executives to examination under oath. As noted above, this results in considerably longer time frames for the informal merger clearance process in those cases. In some mergers, it may be a factor in parties offering remedies earlier in the process, to avoid having to respond to time-consuming and burdensome document and information requests.[29] In the FY ending 30 June 2020, the ACCC reported that it used its compulsory information-gathering powers in 15 merger reviews.[30]

III THE MERGER CONTROL REGIME

The Australian merger control regime has a number of distinctive features that result, directly or indirectly, from the fact that there is no mandatory notification requirement and no statutory suspension of closing of transactions. As previously discussed, a process of informal clearance by the ACCC evolved as a result of, on the one hand, the desire of merger parties

25 ACCC and the Australian Energy Regulator (AER) Annual Report 2019–20, p. 52: www.accc.gov.au/system/files/ACCC%20and%20AER%20Annual%20Report%202019-20.pdf.

26 id., p. 54.

27 See the Australian Competition Tribunal's decision in Application by Sea Swift Pty Ltd [2016] A Comp T 9, at [47] and [245]–[251]: www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2016/2016acompt0009, and echoed in Application by Tabcorp Holdings [2017] A Comp T 1, at [88]–[90]: www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2017/2017acompt0001.

28 www.accc.gov.au/speech/law-council-of-australia.

29 For example, in CK Consortium's proposed acquisition of APA Group, divestiture undertakings were offered at the outset of the ACCC process in June 2018. See www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/ck-consortium-proposed-acquisition-of-apa-group.

30 ACCC and AER Annual Report 2019–20, p. 54.

to manage the risk of contravening the prohibition on anticompetitive acquisitions and, on the other, the desire of the ACCC to engage with merger parties in relation to transactions rather than in litigation.

There are two processes available for parties who wish to seek clearance for a proposed merger: the informal clearance process, and the authorisation process. These are outlined below.

i Informal clearance

The informal clearance process is a merger review process that concludes with an informal decision by the ACCC as to whether it considers that a particular merger proposal is likely to contravene Section 50 of the CCA. If it considers that a proposed merger is likely to result in anticompetitive effects in Australia, the ACCC will 'oppose' it by giving the merger parties notice in writing of its informal view and (in the case of a public merger review) by issuing a media release (sometimes followed by a more comprehensive public competition assessment explaining its reasons in more detail). Otherwise, it will inform the merger parties in writing that it does not propose to intervene in the proposed merger. The ACCC's decision is 'informal' – it is effectively the exercise of the regulator's discretion. A decision opposing a merger (or clearing a merger only subject to remedies) cannot be appealed by the merger parties, and a clearance decision does not afford protection from third-party court action challenging the merger.

The process is usually commenced by the purchaser providing the ACCC with submissions that outline the nature and structure of the transaction, provide information on the relevant markets and assess the likely competitive impact of the transaction on those markets. The ACCC will also request information about customers, suppliers and competitors in those markets.

On receipt of the submissions, the ACCC will conduct its own brief internal review known as a 'pre-assessment', over approximately two to four weeks. For straightforward transactions, the ACCC may 'clear' the transaction at this point. In some cases, the ACCC may request the merger parties to agree to limited or targeted enquiries of particular market participants. In these transactions, the review may take four to six weeks.

Those transactions that are not cleared will then undergo a full public review process where the ACCC seeks the views of market participants in relation to the transaction. This public process will commence only once the transaction has been announced.

There are no statutory time periods for the informal review process. According to ACCC practice, the public review typically takes six to 12 weeks. At the conclusion of this process, it will decide whether to clear the proposed merger or enter into a second phase investigation by releasing a statement of issues, which is a public document setting out the ACCC's competition concerns and inviting interested parties to comment on the concerns raised in it.

The ACCC will commence a Phase 2 review where, following conclusion of the initial public market inquiries, it considers that the proposed merger raises substantial competition concerns that are incapable of being resolved without further information from the marketplace. There is no standard timeline for the Phase 2 process. The duration of the review depends on, in particular, the complexity of the competition issues and whether merger remedies are necessary to resolve the competition concerns. The Phase 2 review will generally be completed six to 12 weeks after the statement of issues is published. In some

cases (for instance, where the merger is opposed), the ACCC may issue a public competition assessment setting out the reasons for its decision, though it is not required to do so and there is often a delay in issuing this if litigation is anticipated.[31]

Merger parties may request the ACCC to consider a merger proposal confidentially. The ACCC will first decide whether it is prepared to conduct a confidential merger review. If it is prepared to do so, it will endeavour to provide the parties with an interim view within four weeks as to whether the proposal is likely to raise competition concerns. Unless it is obvious that a confidential merger proposal will not raise any competition concerns, the ACCC will not provide an unqualified final view until the proposal is public and market inquiries have been conducted. Approaching the ACCC on a confidential basis may have some utility in transactions in which the parties do not wish to make a public announcement unless they have received an indication from the ACCC that obtaining clearance for the proposal may be a real possibility.

ii Authorisation

There is an alternative, more formal merger clearance route under which parties may seek that the ACCC 'authorise' the transaction. The ACCC has the power to authorise an acquisition where either: (1) it forms the view that the transaction would not (and is not likely to) have the effect of substantially lessening competition in a market; or (2) the likely benefit of the transaction would outweigh the likely detriment of the transaction. The ACCC has 90 days in which to decide an application for authorisation, which can be extended by any additional period with agreement by the parties.[32] Following the ACCC's decision, the parties (or third parties with sufficient interest) may seek limited merits review of the ACCC's decision by the Australian Competition Tribunal. The Tribunal has an additional 90 days to make its decision (with the potential to extend further if it receives further information or there are special circumstances).

Merger authorisation is a public process and the application and any submissions by interested parties are made available on the ACCC's website, subject to limited confidentiality claims. Merger authorisation, in this form, is a relatively new power for the ACCC, coming into effect in November 2017. Previously the Australian Competition Tribunal (a separate body) had power to authorise mergers.

Some of the previously perceived advantages of the merger authorisation process no longer exist because the initial decision-making power is now held by the ACCC rather than the Tribunal. On the other hand, the disadvantages of the process remain potentially significant and few transactions can withstand the extended timetable and the opportunities for opponents to attack the transaction on a wide range of grounds (not just competition grounds).

31 The ACCC says its practice is to issue a public competition assessment (PCA) for all proposals where a merger is opposed; a merger is subject to undertakings; the parties seek such disclosure; or a merger otherwise raises important issues that the ACCC considers should be made public. There is often a significant delay in publication of the PCA, especially where litigation may be contemplated.

32 If the ACCC does not make a decision in the 90 days or any agreed longer period, it is taken to have refused the application.

Since obtaining the power to decide merger authorisation applications in November 2017, the ACCC has granted two applications and is currently considering a third.[33]

IV OTHER STRATEGIC CONSIDERATIONS

Aspects of the Australian merger control regime that can take on particular significance in the context of global or multi-jurisdictional transactions include the interaction of the ACCC's information-gathering powers with its desire to exchange information and documents with overseas regulators; the absence of any minimum threshold for identifying share acquisitions that may be of concern; and ambiguity about the consequences of not obtaining informal clearance.

i Information gathering and exchange

The number of international mergers that are being reported to the ACCC has increased significantly over the past few years. The ACCC appreciates that parties to international mergers will often have to deal with multiple competition authorities around the world, and that it can be a challenging task to coordinate multi-jurisdictional filings with a view to ensuring that all regulatory processes are completed in time for the global closing of the deal. For these reasons, the ACCC is increasingly involved in discourse and cooperation with overseas competition authorities. Merger parties should endeavour to ensure that the ACCC clearance application is lodged simultaneously with the merger notifications in other jurisdictions (in particular, the EU and the US). The ACCC expects to be given the same notice of proposed mergers as other authorities.

The ACCC may share information of a non-confidential nature and discuss with other regulators the competition issues that are raised by a proposed merger. In controversial or complex international mergers, it will almost invariably request a confidentiality waiver from the merger parties, allowing it to exchange and discuss confidential information about a particular merger with overseas competition authorities. A refusal to grant a confidentiality waiver may cause delays in the review process.

In theory, the ACCC does not require a confidentiality waiver because Section 155AAA of the CCA allows it to disclose information provided to it in confidence to a 'foreign government body' (which includes antitrust authorities) if the ACCC chairperson is satisfied that particular confidential information will 'enable or assist' the foreign government body to 'perform or exercise any of its functions or powers'. Although it has this broad power to disclose confidential information to overseas regulators, the ACCC's practice to date has been to request the parties' consent in the form of a confidentiality waiver prior to such disclosure so that it can be confident that the overseas regulators are permitted to disclose confidential information to it.

The ACCC has the power to compel merger parties and non-merger parties to produce documents, provide information and make individuals available for interview. It is increasingly prepared to exercise these far-reaching powers when considering transactions, even if the transaction is subject to an 'ACCC clearance' condition precedent. In exercising these powers it may obtain information that concerns other jurisdictions. For example, the

33 www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/proposed-amalgamation-of-bpay-eftpos-and-nppa.

ACCC commonly requests merger parties to provide (voluntarily or compulsorily) copies of all documents disclosing the rationale for the transaction or consideration of its effects on competition, namely, studies, surveys and reports prepared by or for directors and other senior executives for the purposes of analysing the proposed transaction (such as board papers and presentations). This locally gathered information is likely to be of significance in global transactions, because the ACCC is statutorily entitled to disclose such information to overseas regulators. The ACCC is also increasingly requesting that parties to a multi-jurisdictional transaction disclose to it documents and materials that have been supplied to regulators overseas in connection with the transaction.

ii Acquisitions of minority interests

Australia's merger control regime applies to any acquisition of shares in a corporation, irrespective of the level of shareholding involved. That is, even an acquisition of a minority interest (e.g., of less than 20 per cent) would be prohibited if it is likely to result in a substantial lessening of competition in a market in Australia. There is also no particular shareholding level at which it is customary to seek clearance from the ACCC. Whether it may be advisable to seek clearance from the ACCC for an acquisition of a minority interest depends on the circumstances of each individual case and, in particular, on the substantive competition effects the acquisition is likely to have in Australia. In determining the appropriate strategy, merger parties should note that there have been a number of cases in recent years where the ACCC has challenged proposed acquisitions that involved minority shareholdings of 20 per cent or 30 per cent on the basis that the minority shareholding would give the acquirer the ability to 'exert a high degree of influence' over the target company.[34]

The Merger Guidelines of November 2008 (updated in 2017) provide some guidance on how the ACCC analyses acquisitions of partial shareholdings:

a an acquisition of a controlling interest will be treated in the same way as an acquisition of all of the shares in the target company. While an acquisition of a majority interest will typically ensure control, an acquisition of a 'much lower' level of shareholding may suffice to confer control over the target company; and

b a level of shareholding that is less than a controlling interest may give rise to competition concerns where it alters the commercial incentives of the parties involved.

In horizontal mergers, the ACCC's main concern is the resulting interdependence between the rivals that may result in muted competition or coordinated effects. In vertical and conglomerate mergers, it is particularly concerned about foreclosure effects. A further significant concern that may arise in all types of mergers is gaining access to commercially sensitive confidential information of competitors.

Currently, the ACCC is investigating a completed acquisition of a minority interest for which the merger parties did not seek merger clearance from the ACCC.[35] On 1 February 2019, Qantas announced that it had acquired a 19.9 per cent interest in Alliance Aviation Services (Alliance), and on 7 February 2019, the ACCC announced that it had

34 For example: BG Group's proposed acquisition of Origin Energy Ltd in 2008; Alinta Ltd's proposed acquisition of AGL in 2006; DUET Consortium's proposed acquisition of the DBNG Pipeline in 2004; and AGL's proposed acquisition of the Loy Yang power station in 2003.

35 See www.accc.gov.au/media-release/investigation-into-qantas%E2%80%99s-stake-in-alliance-airlines-continues in which chair Rod Sims states: 'The Australian aviation industry remains highly concentrated

commenced an enforcement investigation of the acquisition. On 1 June 2020, the ACCC confirmed that the investigation was continuing and explained that it was focused on the competitive dynamics between Qantas and Alliance, examining whether Qantas' stake affects Alliance's ability to raise funds, consider takeovers or participate in commercial ventures, and whether Qantas is attempting to exert influence on Alliance's decision-making or operations.[36] As at 1 March 2021, the investigation was reportedly ongoing. The ACCC also recently investigated a series of acquisitions by Innovation Holdings Australia Pty Ltd (owner of comparison website comparethemarket.com.au), which would provide it with a 35 per cent interest in its competitor iSelect Limited.[37]

iii Merger remedies

The ACCC has a strong preference for 'fix-it-first' remedies. In its Merger Guidelines of November 2008 (updated in 2017), it states that 'wherever practicable, divestiture should occur on or before the completion date of the merger, particularly in cases where there are risks in identifying a (suitable) purchaser or asset-deterioration risks'. It will usually seek to require:

a the vendor to divest overlapping assets to a third party prior to, or simultaneously with, completion of the merger;

b the purchaser to divest a package of assets to an identified (and ACCC-approved) purchaser simultaneously with the completion of the merger; or

c a combination of both approaches.

In circumstances where none of the options is commercially viable, merger parties will need to devote significant time and resources to persuading the ACCC of their difficulties. A mere commercial preference for divestiture after consummation is unlikely to be sufficient to change the ACCC's mind.

Despite the ACCC's stated preference for fix-it-first remedies, it has accepted post-closing divestiture undertakings in a number of instances. In cases where the ACCC allows divestiture after completion, the merger parties will be required to agree to detailed and stringent 'hold-separate' obligations until divestiture to an ACCC-approved purchaser has occurred; a short period in which the sale process for the divestiture business can take place; 'fire-sale' provisions by a third-party agent if the divestiture business is not sold within the divestiture period (including a 'no minimum price' clause); and in some cases, a requirement to include 'crown jewels' in the fire sale to put more pressure on the parties to perfect the sale process within the allocated time and to make the divestiture business more attractive to third-party purchasers.

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and it is crucial that competition provided by smaller airlines is maintained long-term. The ACCC has been closely scrutinising the effects of the acquisition of this shareholding by Qantas. Acquiring a strategic stake in a close competitor in such a concentrated market raises clear competition concerns.'

36 www.accc.gov.au/media-release/investigation-into-qantas%E2%80%99s-stake-in-alliance-airlines-continues.

37 www.accc.gov.au/media-release/accc-does-not-oppose-compare-the-markets-owners-increasing-stake-in-iselect.

A corollary of the fact that the ACCC has accepted post-closing divestitures is that it typically inserts itself more deeply into the divestiture process. Where the divestiture will take place post-completion, the ACCC will now commonly require parties to seek its approval of the following aspects of the divestiture:

a any technical assistance or interim supply agreements proposed with the purchaser of the divestiture business (as part of the ACCC's approval of the proposed purchaser);

b the separation and management plan (as part of the ACCC's approval of the independent manager of the divestiture business); and

c the marketing and sale plan (as part of the ACCC's approval of the divestiture agent who will conduct the fire sale of the divestiture business if it is not sold within the time specified).

Recent examples of the ACCC accepting post-closing divestitures, with the requirements outlined above, include undertakings accepted in July 2020 in connection with Elanco Animal Health Incorporated's acquisition of Bayer AG's animal health business.[38]

Notwithstanding the ACCC's preference for divestiture remedies, it will, in some circumstances, clear transactions on the basis of behavioural remedies. In some cases, the behavioural remedies support a divestiture remedy (see the Asahi remedy described below) and in some cases they are effectively stand-alone remedies (see the *ANZ Terminals* remedy described below).

In 2020, the remedies required by the ACCC to clear Asahi Group's acquisition of Carlton & United Breweries included not only the divestment of a number of cider and beer brands, but also, to assist the viability of the divested brands, an undertaking by Asahi that it would ensure that the divested brands would get the same access to bars, pubs and clubs as well as off-premise space under the same tap-tying agreements as Asahi's brands for the next three years.[39]

In 2019, the remedies required by the ACCC to clear ANZ Terminals' acquisition of GrainCorp's Liquid Terminals business included the divestment of a terminal in Adelaide to address market concentration issues in that geographic market. They also included, to preserve the potential for new entry in another market, an undertaking by ANZ Terminals not to acquire any land in the vicinity of its terminals in Port of Melbourne without first obtaining the consent of the ACCC.[40]

iv Options if the ACCC does not clear the transaction

There is no appeal avenue against an informal clearance decision by the ACCC. If the ACCC opposes a proposed merger, the choices for the merger parties are to seek a court declaration to the effect that the transaction will not have the likely effect of substantially lessening competition or to 'threaten' to complete the merger, thereby forcing the ACCC to seek an injunction from the court blocking the merger. (A third option, seeking authorisation of the merger from the Tribunal, no longer exists as the power to authorise mergers now rests with

38 www.accc.gov.au/public-registers/undertakings-registers/elanco-animal-health-incorporated.

39 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/asahi-group-holdings-carlton-united-breweries-owned-by-anheuser-busch-inbev-sa-nv.

40 www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/anz-terminals-pty-ltd-proposed-acquisition-of-graincorp-liquid-terminals-australia-pty-ltd.

the ACCC, as described above. Hypothetically, parties could seek authorisation from the ACCC on public benefit grounds after the ACCC opposed informal clearance, but this has not yet happened and seems unlikely.)

The pathway of merger parties seeking a court declaration that the proposed transaction does not contravene the CCA had been used only once before the application in May 2019 by Vodafone Hutchison Australia for a declaration that its merger with TPG would not contravene the CCA.[41] The ACCC's preferred practice has been to seek an injunction to prevent a transaction proceeding, rather than permit a merger party to seek a declaration of non-contravention. In four merger cases that have been commenced in the Federal Court, this was the ACCC's approach.[42]

Court adjudication of mergers and acquisitions in Australia has been rare. There has been a total of five proceedings brought before the Federal Court and three before the Tribunal (under the previous authorisation process that no longer exists).[43] The ACCC's track record of (litigation) opposing mergers has been described by the ACCC's chairman as 'not good', and its latest cases against Pacific National and Aurizon and against Vodafone and TPG are no exception, with the Court rejecting the ACCC's arguments in both cases.[44]

V OUTLOOK AND CONCLUSIONS

In recent years, the ACCC has repeatedly stated that it will approach mergers in already concentrated industries with a substantial amount of scepticism and a belief that competition benefits from a sufficient number of competitors. Parties contemplating acquisitions in concentrated markets will need to devote significant resources to moving the ACCC from

41 *Australian Gas Light Company v. Australian Competition & Consumer Commission* (No. 3) (2003) 137 FCR 317: www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2003/2003fca1525.

42 See Boral's proposed acquisition of Adelaide Brighton: www.accc.gov.au/media-release/accc-institutes-against-boral-limited; see also Toll Holdings' proposed acquisition of Patrick Corporation: www.accc.gov.au/media-release/accc-institutes-proceedings-against-toll-holdings-limited; Metcash's proposed acquisition of the Franklins supermarket business: www.accc.gov.au/media-release/metcash-franklins-decision-disappointing; and Pacific National's proposed acquisition of Aurizon's intermodal business: www.accc.gov.au/media-release/accc-takes-action-against-pacific-national-and-aurizon. The ACCC's decision to oppose the merger of TPG and Vodafone was challenged by Vodafone in May 2019.

43 See Application for Authorisation of acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1: www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2014/2014acompt0001; see also Application by Sea Swift Pty Limited for the proposed acquisition of certain assets of Toll Marine Logistics Australia's marine freight operations [2016] ACompT 9: www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2016/2016acompt0009; and see also Applications by Tabcorp Holdings Limited for authorisation to acquire shares in Tatts Group Limited [2017] ACompT 5: www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2017/2017acompt0005. A further application was also brought by Murray Goulburn Co-operative Co Limited for merger authorisation of its proposed acquisition of Warrnambool Cheese and Butter Factory, but was subsequently withdrawn (2013/4).

44 In relation to the Full Court of the Federal Court finding unanimously that the acquisition of the Acacia Ridge Terminal by Pacific National was not likely to have the effect of substantially lessening competition, the ACCC chair stated that, 'this was a particularly important case for Australia's merger laws, and the outcome demonstrates the real difficulty of applying the substantial lessening of competition provisions in the legislation'.

this increasingly firmly held position. Where this is not successful, the ACCC has shown its willingness to oppose such acquisitions, including by commencing legal proceedings that (to date) it has found difficult to win.

In light of its most recent losses in the *Pacific National/Aurizon* and *TPG/Vodafone* cases, we expect the ACCC to increase its lobbying for legislative change in relation to merger litigation in Australia. The form of that possible change is as yet unknown.

Appendix 1

ABOUT THE AUTHORS

PETER ARMITAGE

Ashurst

Peter Armitage is a senior partner in Ashurst Australia's competition and consumer protection team and has been a partner since 1992. He is recognised as one of Australia's leading competition law practitioners. He specialises in complex merger clearances in both domestic and international transactions. He also has a long track record of effectively defending clients in investigations and legal actions by the ACCC.

Mr Armitage has advised on competition law issues and obtained merger clearances from the ACCC in numerous acquisitions in the retail, transport and logistics, pharmaceutical, hospitals, medical equipment, payments, telecommunications, food ingredients, gas, paper, chemicals, entertainment, sugar, airline catering, metal manufacturing, automotive components, building materials, plastics, explosives, clothing and mining equipment sectors.

Mr Armitage advised Pick n Pay on the merger clearance process for the sale of its Franklins business to Metcash, and Aurizon in its successful defence of the ACCC's challenge to Aurizon's sale of the Acacia Ridge Terminal to Pacific National. He is very experienced in working with overseas counsel in the coordination of global merger clearances.

AMANDA TESVIC

Ashurst

Amanda Tesvic is a senior associate in the competition and consumer protection team. She advises on all aspects of competition law in Australia.

ASHURST

Level 11, 5 Martin Place
Sydney, NSW 2000
Australia
Tel: +61 2 9258 6000
Fax: +61 2 9258 6999
peter.armitage@ashurst.com
amanda.tesvic@ashurst.com
www.ashurst.com

an LBR business

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