The Merger Control Review

Ninth Edition

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, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

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. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, 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 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. 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.

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

this year. 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 recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. 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 similarly is no 'local' effects 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 this year 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, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to 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.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. 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 prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

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 Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. 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 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 Japan Federal Trade Commission (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. Some jurisdictions even within the EC remain 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 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 United States, 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 CADE, 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 European Commission 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 was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC 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, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, 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). This book should 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 2018

Chapter 7

AUSTRALIA

Peter Armitage, Ross Zaurrini 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, Ross Zaurrini is a 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 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; 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 has recently investigated several closed transactions. In 2016 the ACCC accepted legally enforceable undertakings from Primary Health Care and Healthscope in relation to Primary's acquisition of Healthscope's pathology assets in Queensland, which completed in 2015 without ACCC clearance.[7] The parties undertook to divest assets to a third party, unwinding the effects of the merger. Separately, in March 2018 it obtained a hold-separate undertaking from Qube Logistics while the ACCC reviewed its completed acquisition of Maritime Container Services Pty Ltd.[8]

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 http://registers.accc.gov.au/content/index.phtml/itemId/1196388/fromItemId/751043.

8 http://registers.accc.gov.au/content/index.phtml/itemId/1205120/fromItemId/751046.

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, the vast majority of transactions either did not require a public review, or were reviewed and cleared.[9]

	2013 FY (to 30 June)	2014 FY (to 30 June)	2015 FY (to 30 June)	2016 FY (to 30 June)	2017 FY (to 30 June)
Matters assessed – no review required	213	242	278	287	253
Reviews undertaken	76	55	44	32	35
Not opposed	55	36	35	17	23
Finished – no decision (including withdrawn)	4	2	1	6	8
Publicly opposed outright	6	4	0	2	0
Confidential review – opposed or ACCC concerns expressed	5	2	0	1	2
Resolved through remedies	2	10	7	5	2
Variation to remedy accepted	4	1	1	1	0
Variation to remedy rejected	0	0	0	0	0
Total matters assessed and reviews undertaken	289	297	322	319	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 (hence why it is described in the table above as 'no review required'). 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.

In the last 12 months,[10] the ACCC has publicly opposed only one merger – BP's proposed acquisition of Woolworths' retail service station sites. However, this statistic is slightly misleading as it excludes those transactions where the parties withdrew their request for informal clearance following the ACCC publishing a statement of issues outlining serious competition concerns with the transaction (see, for example, APN Outdoor Group's proposed merger with ooh!media Limited[11] and Camp Australia Pty Ltd's proposed merger with Junior Adventures Group Pty Ltd).[12] It also excludes reference to the ACCC's opposition to the *Tabcorp/Tatts* merger, as this opposition did not take place through the informal review process.

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

9 Final figures for the 2018 FY were not available at the time of publishing.

10 1 May 2017 to 30 April 2018.

11 http://registers.accc.gov.au/content/index.phtml/itemId/1202240/fromItemId/751043.

12 http://registers.accc.gov.au/content/index.phtml/itemId/1203805/fromItemId/751043.

i More documents and data required in contentious merger reviews

The ACCC has not successfully opposed a litigated merger in many years and the courts have been very critical of the theoretical nature of the evidence relied on by the ACCC in those cases.[13] As a result, the ACCC has recently (in August 2017) announced changes to its merger review process for contentious mergers that are designed to ensure that it is armed with sufficiently probative evidence should it oppose a merger.[14] In practice this means that in a small number of contentious mergers the ACCC will increasingly be using 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. This, in turn, will result in considerably longer time frames for the informal merger clearance process in those cases. In some mergers, we expect it may also result in parties offering remedies earlier in the process, to avoid having to respond to time-consuming and burdensome document and information requests. Our recent experiences indicate that the ACCC has already implemented this change of practice.

ii Detailed concluded analyses of mergers not published by ACCC; merger decision-making is more opaque

A public competition assessment (PCA) is a document published by the ACCC that provides a detailed summary of the issues considered when making a particular merger decision. The ACCC says its practice is to issue a PCA for all transactions where it opposes a merger, 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. Unfortunately, this has not been its recent practice. In the period 1 May 2017 to 30 April 2018, there have been no PCAs published by the ACCC; the last PCA was issued in February 2017.

This is particularly problematic in circumstances where the ACCC has opposed a merger but not released its detailed analysis (such as BP's proposed acquisition of Woolworths' retail service station sites in December 2017)[15] and in instances where the ACCC has released a statement of issues indicating concerns in relation to a merger then subsequently cleared the transaction (such as Moly-Cop's proposed acquisition of Donhad[16] and Platinum Equity's proposed acquisition of OfficeMax Australia[17] both in the past 12 months).

It is also concerning in circumstances where the vast majority of mergers are being processed through the non-public pre-assessment process. No information is provided to the public regarding the ACCC's review of these transactions and very little information is provided to the parties regarding the basis of the ACCC's decision. The combination of the absence of PCAs plus the large number of matters being pre-assessed has meant that the ACCC's merger decision-making process has become increasingly opaque, to the detriment of Australian merger theory and practice.

13 See the Australian Competition Tribunal's decision in *Application by Sea Swift Pty Ltd* [2016] A Comp T 9,at [47] and [245]-[251], http://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]: http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acompt/2017/2017acompt0001.

14 https://www.accc.gov.au/speech/law-council-of-australia.

15 http://registers.accc.gov.au/content/index.phtml/itemId/1204787/fromItemId/751046.

16 http://registers.accc.gov.au/content/index.phtml/itemId/1205255/fromItemId/751046.

17 http://registers.accc.gov.au/content/index.phtml/itemId/1204628/fromItemId/751043.

iii ACCC's theories of harm continue to focus on concentrated markets and closeness of competition

The ACCC has long been concerned about mergers that result in highly concentrated markets, as well as mergers that combine a market's closest competitors due to the potential for such mergers to result in increased prices and reduced service levels. The last 12 months are no exception.

In almost all the mergers that were publicly reviewed by the ACCC in the last 12 months[18] in which the ACCC published a statement of issues (i.e., Phase II), the ACCC expressed horizontal concerns regarding the level of concentration in the market and the closeness of competition between the parties (with the potential that the merger would result in increased prices, reduced service levels or reduced innovation).

In its review of APN Outdoor Group Limited's proposed merger with oOh!media Limited,[19] the ACCC outlined serious concerns that the merger would combine the two largest providers of out-of-home advertising services and create a market leader with over 50 per cent share, based on its (narrow) market definition of the market for out-of-home advertising. It also highlighted the fact that the parties were each other's closest competitors, as they were the only two providers present in categories of all out-of-home advertising. The merger was subsequently abandoned by the parties as a result of these concerns.

Similarly, in the proposed merger of Camp Australia and Junior Adventures Group,[20] the ACCC's statement of issues noted that the merger involved the consolidation of the two largest providers of before and after school care who were each other's closest competitor, potentially resulting in higher fees for parents or lower quality services. This merger was also abandoned following the statement of issues.

While high levels of market concentration and close competition between merger participants will raise the ACCC's concerns, they are not necessarily fatal to all transactions. The ACCC cleared Platinum Equity's proposed acquisition of OfficeMax Australia in November 2017, despite the transaction raising these types of concerns as it was satisfied that the remaining market participants would provide sufficient competitive constraint on the merged entity.[21] The transaction was effectively a 'four into three', but involved combining the two largest competitors. Unfortunately, no PCA has been released and until it is, it is difficult to understand precisely the factors on which the ACCC relied in providing clearance for this transaction.

iv Barriers to entry and expansion

Unsurprisingly, the absence of barriers to entry or expansion is often a key factor in many of the ACCC's decisions not to oppose proposed acquisitions. The basis of the ACCC's conclusions is not always clear, however. In many of the short notes on acquisitions it has cleared, the ACCC states that barriers to entry or expansion are low, without supplying facts. While this is understandable, it makes it difficult to predict the outcome of the ACCC's assessment of this issue in other transactions. This unpredictability is of particular significance in sectors that are undergoing dynamic change. For instance, in its decision to oppose the

18 1 May 2017 – 30 April 2018.

19 http://registers.accc.gov.au/content/index.phtml/itemId/1202240/fromItemId/751043.

20 http://registers.accc.gov.au/content/index.phtml/itemId/1203805/fromItemId/751043.

21 http://registers.accc.gov.au/content/index.phtml/itemId/1204628/fromItemId/751043.

proposed acquisition by Carsales of assets associated with the Trading Post,[22] the ACCC concluded that the barriers to entry for the supply of online automotive classified advertising were high. It is unclear, however, why the ACCC reached that conclusion. The acquirer itself was a relatively recent and successful entrant, and the impediments to entry by others were not obvious.

In more static markets, the ACCC's analysis of barriers to entry and expansion has been more rigorous. It requires convincing evidence of the likelihood of new entry or expansion and that it will provide a sufficient and timely competitive constraint on the merged entity. For example, in Iron Mountain's proposed acquisition of Recall,[23] the ACCC concluded that new entry or expansion of existing smaller firms would not constrain the merged firm because of high barriers including the trend away from physical storage of documents which limits a new entrant's ability to attract new customers to the industry, significant customer 'stickiness' due to permanent retrieval fees in contracts and the need to operate at a particular scale to attract large customers.[24]

v Vertical effects

The ACCC continues to focus on the vertical effects of transactions, notwithstanding statements in its Merger Guidelines to the effect that 'it is often the case that vertical mergers will promote efficiency' and that 'in the majority of cases [vertical] mergers will raise no competition concerns'. This focus is perhaps due to the weight the ACCC places on the third-party views that it obtains through its public market inquiry process. Third parties will frequently articulate vertical concerns, even if they are not economically rational.

The Merger Guidelines indicate that the ACCC will focus on the merged firm's ability and incentive to foreclose rivals in the market and the likely effect of any such foreclosure. The ACCC has adhered to this focus on foreclosure in some recent transactions. One such example is its consideration of Metcash's proposed acquisition of Home Timber & Hardware Group in 2016.[25] Home Timber & Hardware Group was Metcash's only rival full-service hardware wholesaler and the ACCC was concerned that in addition to the acquisition potentially resulting in raised prices and reduced service to hardware stores, the acquisition would allow Metcash to foreclose entry and expansion by other wholesale suppliers, by imposing terms on retail stores that restricted their ability to obtain supply from other sources. The ACCC was also concerned that without another wholesale supplier to switch to, Metcash could discriminate against independent retail stores who compete with stores in which Metcash has an ownership interest. The ACCC accepted undertakings from Metcash to address these concerns.

In 2017, vertical concerns were raised in the proposed merger of Essilor International SA with Luxottica Group SpA, which would result in a vertically integrated eyewear business. The ACCC found that the transaction would not give the merged firm the ability to engage

22 http://registers.accc.gov.au/content/index.phtml/itemId/1094677/fromItemId/751043.

23 http://registers.accc.gov.au/content/index.phtml/itemId/1194800/fromItemId/751043.

24 Barriers to entry and expansion were also explored in Camp Australia's proposed acquisition of Junior Adventure Group that was abandoned following the statement of issues. In the statement of issues, the ACCC expressed the view that barriers to entry and expansion in the relevant markets were 'significantly higher than suggested by a simple analysis of the time and cost of establishing a new provider'. See: http://registers.accc.gov.au/content/index.phtml/itemId/1203805.

25 http://registers.accc.gov.au/content/index.phtml/itemId/1197122/fromItemId/751043.

in bundling or foreclosure conduct in any market, as there was sufficient competition in each of the markets to constrain such conduct and its brands were not 'must-haves'. On this basis, the merger was cleared.

The ACCC has also outlined vertical concerns in its statement of issues regarding *Pacific National/Linfox*'s proposed acquisition of intermodal assets from Aurizon.[26]

vi Coordinated effects

A review of the ACCC's public competition assessments (PCAs) over the past several years indicates that concerns from the increased risk of coordinated effects do not arise frequently in the analysis of mergers in Australia.

The ACCC's stated approach to the assessment of coordinated effects, as set out in its Merger Guidelines, is uncontroversial and in some instances, the actual approach taken by the ACCC is similarly uncontroversial.[27] On the other hand, the ACCC's discussion of coordinated effects has, in some transactions, been less rigorous, and as a consequence less predictable. For example, its controversial refusal to clear the acquisition of the petrol retail assets of Mobil Oil Australia by Caltex Australia Limited in 2009.[28]

More recently, in December 2017 the ACCC announced it would oppose BP's proposed acquisition of Woolworths' retail service station sites. The statement of issues in that transaction referred to concerns which included the removal of a strong competitor with a discounting strategy (Woolworths) and replacement with a less aggressive pricing strategy (BP's), as well as coordinated effects, by enabling the remaining retailers to more effectively co-ordinate price increases during the 'price increase' phase of the petrol price cycle. As the ACCC has not yet published a PCA, it is unclear exactly how much importance it ultimately gave to these concerns when deciding to oppose the merger and in particular whether the assertion that BP was likely to price fuel at the acquired Woolworths sites less competitively than Woolworths would, was justified.

vii Conglomerate effects

The ACCC has investigated conglomerate effects theories more frequently in recent years. In *Pfizer/Wyeth*,[29] it was concerned that, post-acquisition, the merged entity would have the ability and incentive to bundle its range of vaccine products to leverage its strong position in the supply of animal health vaccines into other animal health markets. Pfizer was able to allay these concerns by providing a court-enforceable undertaking to divest a range of sheep and cattle-worming products. More recently, the ACCC's market inquiries letter in Bayer's proposed acquisition of Monsanto revealed the ACCC was concerned with exploring

26 http://registers.accc.gov.au/content/index.phtml/itemId/1203319/fromItemId/750991.

27 For example, in its assessment of the proposed acquisition of Newreg, a share registry provider, by Link Market Services, which also provided, *inter alia*, share registry services, the ACCC concluded that the transaction would have been likely to increase the ability and incentive of Link and the only other major supplier of registry services to engage in coordinated conduct. This was because, *inter alia*, changes in the providers of share registry services are highly visible, the barriers to entry and expansion in this activity are high, and the customised nature of the services and the stickiness of customers (because of the perceived risks of switching) were, in combination, likely to give rise to a real chance of muted competition or tacit market sharing post-acquisition.

28 http://registers.accc.gov.au/content/index.phtml/itemId/904294/fromItemId/751043.

29 http://registers.accc.gov.au/content/index.phtml/itemId/895088/fromItemId/751043.

similar issues in that transaction. However, the ACCC published only very brief notes on this transaction after clearing it on the basis of divestiture undertakings to the European Commission.[30]

It also explored this concern in Cleanaway's acquisition of Tox Free Solutions Ltd in April 2018, but found sufficient competition to constrain the combined entity.[31]

viii Change in approach to merger remedies in multi-jurisdictional transactions

In the past 12 months the ACCC has made a significant yet unheralded change to its approach to merger remedies in multi-jurisdictional transactions. In matters where global divestitures are contemplated, the ACCC's practice has previously been to require the parties to provide it with a separate divestiture undertaking to the same effect as those made to other regulators. However, in three recent global transactions, the ACCC has been satisfied to provide its clearance on the basis of the commitments provided to other competition regulators, without requiring it be provided with a separate undertaking.

In Dow Chemical Company's proposed merger with EI du Pont de Nemours and Company, the ACCC initially released a statement of issues outlining concerns, then cleared the acquisition in June 2017 on the basis of divestiture commitments made to the European Commission, without requiring a separate undertaking.[32]

In March 2018, the ACCC also cleared Bayer AG's proposed acquisition of Monsanto Company following divestiture commitments made to the European Commission, also without a separate undertaking.[33] Lastly, confirming that this is not an approach that is limited to mergers involving commitments to the European Commission, in June 2017 the ACCC cleared General Electric Company's proposed acquisition of Baker Hughes Incorporated on the basis of a consent decree filed by the US Department of Justice that required divestment of an overlapping business.[34] This is a welcome change to the ACCC's previous practice and will reduce administrative costs for the parties.

A by-product of this new approach to remedies in global transactions is that the ACCC has effectively removed itself from any involvement in 'pre-approval' of the purchaser of the divestiture assets in those cases.[35] For instance, in the *Bayer/Monsanto* transaction, BASF was identified on 21 March 2018 as a potential purchaser of part of Bayer's crop science business, but only cleared by the European Commission to acquire these assets on 30 April 2018. Before the European Commission had approved BASF as a purchaser, the ACCC cleared the deal on 22 March 2018, without separate undertaking. In doing so, the ACCC removed itself from the process of pre-approval of the purchaser. This is in contrast with its approach in Saputo's proposed acquisition of Murray Goulburn, in which it has significant involvement

30 http://registers.accc.gov.au/content/index.phtml/itemId/1205227/fromItemId/751046.

31 http://registers.accc.gov.au/content/index.phtml/itemId/1205330/fromItemId/751046.

32 http://registers.accc.gov.au/content/index.phtml/itemId/1202487/fromItemId/751046.

33 http://registers.accc.gov.au/content/index.phtml/itemId/1205227/fromItemId/751046.

34 http://registers.accc.gov.au/content/index.phtml/itemId/1202521/fromItemId/751043.

35 Of course, if a purchaser was concerned its acquisition of the divestiture business may substantially lessen competition it may seek informal clearance before doing so. However, it has removed the need for pre-approval of all potential purchasers in those cases.

in the divestiture process, including requiring that it approve the identity of the purchaser of the divestiture assets as well as any technical assistance agreements and transitional supply agreements if required.[36]

ix New media merger guidelines

In October 2017, the ACCC published updated Media Merger Guidelines.[37] The previous guidelines were published in 2006 and there have been significant changes to media in that time. Also in 2017, the Australian government made significant changes to Australia's media control and ownership laws, to remove certain restrictions on ownership known as the '75 per cent reach rule' and the 'two out of three rule'. The removal of these restrictions creates the potential for media mergers and acquisitions that have not been possible in the past. However, although these restrictions have been lifted, media mergers remain subject to Section 50 of the CCA. The ACCC's new Media Merger Guidelines identify some specific areas of attention for the ACCC when reviewing a media transaction, including the effect on diversity of media voices and access to key content, as well as the impact of technological change on a market.

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 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. Until November 2017, a third option (formal merger clearance) also existed but this was recently removed.

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

36 http://registers.accc.gov.au/content/index.phtml/itemId/1205274/fromItemId/751046.

37 https://www.accc.gov.au/publications/media-merger-guidelines-2017.

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 stage 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 second-stage 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 second stage 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 second stage 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.[38]

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.

38 The ACCC's 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. However, this has not been the case for mergers reviewed between 1 May 2017 to 30 April 2018. The last PCA was issued in February 2017. Prior to that, there were two in July 2016.

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.[39] 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 is a new power for the ACCC, which only took effect in November 2017. As at May 2018 no applications for merger authorisation by the ACCC had yet been made. 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 now that the decision-making power is 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).

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

39 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.

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 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.

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 ACCC 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 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.[40]

The Merger Guidelines of November 2008 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 any of the three types of mergers is gaining access to commercially sensitive confidential information of competitors.

In 2015, subscription television provider Foxtel proposed to acquire up to 15 per cent of free-to-air broadcaster Ten Network (Ten), while Ten proposed to acquire a 24.99 per cent stake in MCN, a company majority-owned by Foxtel which supplied advertising on subscription television channels. Ten also proposed to acquire an option to invest in 10 per cent of Presto TV, a joint venture between Foxtel and Seven West Media. The ACCC considered the extent to which the proposed acquisitions would result in Foxtel being able to influence Ten's decision making by looking at a range of factors, including the size of Foxtel's investment, Foxtel's right to appoint directors to the Ten Board and the composition of the rest of the Board. The ACCC also looked at whether the proposed acquisitions would lead to a greater alignment of interests of Foxtel, Ten, MCN and Presto, altering their incentives. The ACCC's review concluded that while there would be greater influence of Foxtel over Ten and greater alignment between the various companies, the proposed acquisitions were unlikely to result in a substantial lessening of competition.

iii Merger remedies

The ACCC has a strong preference for 'fix-it-first' remedies. In its Merger Guidelines of November 2008, 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.

40 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.

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.

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).[41]

The most recent example of a case in which the ACCC accepted post-closing divestitures is Saputo Dairy Australia Pty Ltd's acquisition of Murray Goulburn's operating assets.[42] In that case, the ACCC required that the divestment of the Koroit plant be completed within a prescribed time frame to a purchaser approved by the ACCC. Saputo was required to appoint an independent manager to manage the divestiture assets until the completion of the divestment. In the event the assets were not divested in the prescribed time frame, the undertaking required 'fire sale' of those assets by a divestiture agent at no minimum price.

Notwithstanding the ACCC's preference for divestiture remedies it will, in some circumstances, clear transactions on the basis of behavioural remedies. For example, in Metcash's acquisition of Home Timber and Hardware Group in 2016, the ACCC cleared the proposed acquisition on the basis of an undertaking from Metcash that it would not

41 Recent examples of these requirements are found in Iron Mountain's and Federation's undertaking referred to in the footnote above. Further examples are also found in Healthscope and Primary Health Care's undertakings in 2016, though these were given in the unusual circumstance of the parties already having completed the acquisition without seeking prior ACCC review.

42 For Saputo, see http://registers.accc.gov.au/content/index.phtml/itemId/1205274/fromItemId/751043. Other examples include Iron Mountain's proposed acquisition of Recall Holdings Ltd in 2016 which required a post-closing divestiture within a specified confidential period. The undertakings given by Federation and Novion in 2015 in relation to their proposed merger were also post-closing and (unusually) gave the parties the option of divesting either Novion's Bayside Shopping Centre or Federation's 50 per cent interest in Karingal Hub Shopping Centre, also in a specified confidential period.

restrict independent hardware stores from acquiring products from non-Metcash sources, and it would not favour its own hardware stores over nearby independent stores. As part of the undertaking, the ACCC required the appointment of an independent auditor who will report to the ACCC and ensure that Metcash is meeting its obligations. This is a common feature of such behavioural undertakings.[43]

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 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 has been used only once.[44] Following this case, the ACCC's 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 the three subsequent merger cases which have been commenced in the Federal Court, this was the ACCC's approach.[45]

Litigation of mergers and acquisitions in Australia on the basis of competition concerns has been rare. There have been a total of four proceedings brought before the Federal Court and three before the Tribunal (under the previous authorisation process that no longer exists).[46]

43 Another example of a recent behavioural undertaking accepted by the ACCC is in the proposed acquisition by Qube Holdings Ltd of the remaining 50 per cent of Australian Amalgamated Terminals Pty Ltd in November 2016. More recently, the divestment undertaking offered by Saputo when acquiring Murray Goulburn's assets also contained a behavioural aspect, as it required Saputo to supply raw milk to the approved purchaser of the Koroit plant on specific terms for a specified period.

44 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.

45 See Boral's proposed acquisition of Adelaide Brighton: https://www.accc.gov.au/media-release/accc-institutes-against-boral-limited; see also Toll Holdings' proposed acquisition of Patrick Corporation: https://www.accc.gov.au/media-release/accc-institutes-proceedings-against-toll-holdings-limited; and Metcash's proposed acquisition of the Franklins supermarket business: https://www.accc.gov.au/media-release/metcash-franklins-decision-disappointing.

46 See Application for Authorisation of acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1: http://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: http://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: http://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).

The ACCC's track record of opposing mergers has been described by the ACCC's Chairman as 'not good', though it is starting to make changes to its approach to evidence-gathering, in order to improve its results, as discussed above.[47]

V OUTLOOK & CONCLUSIONS

The vast majority of mergers in Australia are now being dealt with by the ACCC in the first part of the informal clearance process known as 'pre-assessment'.

ACCC does not provide any public information in relation to the identity of the parties to these transactions, the markets in question or its decision-making process. When coupled with the ACCC's delay in and reluctance to publish PCAs over the past 12 months in particular, the result is that the ACCC's decision-making process has become increasingly opaque, to the detriment of Australian merger theory and practice.

47 https://www.accc.gov.au/ speech/law-council-of-australia.

Appendix 1

ABOUT THE AUTHORS

PETER ARMITAGE

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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 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 ssectors.

Mr Armitage advised Pick n Pay on the merger clearance process for the sale of its Franklins business to Metcash. He is very experienced in working with overseas counsel in the coordination of global merger clearances. For example, he acted for Office Depot in its proposed acquisition by Staples, for Wyeth in its acquisition by Pfizer, for Google in its acquisitions of DoubleClick and Motorola Mobility, for Adidas in its global acquisition of Reebok, for Boston Scientific in its acquisition of Guidant and for Bucyrus in its acquisition of Terex's earthmoving equipment business.

ROSS ZAURRINI

Ashurst

Ross Zaurrini is a partner in the competition and consumer protection team. In addition to experience in advising clients on mergers in a range of industries, he has extensive experience in competition litigation. He also has significant experience in litigating complex competition law issues against the ACCC, conducting civil litigation with respect to consumer protection claims and responding to ACCC investigations.

Mr Zaurrini's experience includes acting for Australian Cooperative Foods Limited in successfully defending a prosecution by the ACCC for alleged price-fixing; acting for a major Australian medical products manufacturer in defending a prosecution by the ACCC for alleged misuse of market power and exclusive dealing; successfully defending two federal court proceedings for alleged third-line forcing in respect of preferred supplier arrangements and alleged unconscionable conduct against a not-at-fault party; and acting for Samsung in civil litigation with Apple involving complex issues of patent and competition law.

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