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Disentangling Consummated Mergers – Experiences and Challenges – Note by Australia

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This document reproduces a written contribution from Australia submitted for Item 6 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

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Australia

1. Introduction – Overview of how Australia's current system applies in the context of consummated mergers

1.1. Outline of Australia's merger control regime

1. Under section 50 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), acquisitions are prohibited if they would have the effect, or are likely to have the effect, of substantially lessening competition in a market in Australia.

2. For most mergers,[1] the Australian Competition and Consumer Commission (**ACCC**) does not have a formal administrative decision-making role, but instead operates under an enforcement/prosecutorial model. If the ACCC decides to challenge a merger and the merger parties do not abandon or modify the transaction, the ACCC needs to commence legal proceedings in the Federal Court of Australia. The Federal Court will then make a final determination on whether a merger breaches section 50 of the CCA.

3. Australia does not have a mandatory merger notification requirement. While there is no statutory requirement to notify the ACCC prior to completion, the vast majority of relevant mergers are notified on a voluntary basis and those that complete without the ACCC's knowledge are relatively rare.

4. Mergers may be reviewed by the ACCC through the ACCC's informal merger review process or following an application for formal merger authorisation. Under the informal merger review process, transactions are not suspended pending the ACCC's decision so merger parties may complete a transaction before the ACCC has concluded its review, even after having voluntarily notified the ACCC of the transaction. As merger authorisation cannot be granted in relation to completed acquisitions, merger parties must provide an undertaking not to complete the transaction until the ACCC's review of the application is complete.[2]

5. The vast majority of mergers are considered via informal merger review. There is no legislation underpinning the ACCC's informal process; rather, it has developed over time to provide an avenue for merger parties to seek the ACCC's view prior to completion of a merger on whether the ACCC would challenge the merger in the Federal Court. It relies on the willing cooperation of merger parties to provide sufficient information upfront and allow the ACCC sufficient time to complete its review. The ACCC's Merger Guidelines provide indicative guidance regarding the types of transactions that should be notified and on the ACCC's approach to its competition assessment.[3] The ACCC's decision on a merger under the informal process does not provide any statutory protection against future legal action from the ACCC or other parties.

[1] A reference to a "merger" includes an acquisition of shares in a corporation or assets of a business.

[2] *Competition and Consumer Act 2010* (Cth) s 88(6).

[3] Australian Competition and Consumer Commission (ACCC), *Merger Guidelines*, November 2008 (updated November 2017), p 6.

6. Parties seeking statutory protection may apply to the ACCC for merger authorisation, which, if granted, prevents legal action under section 50 of the CCA.[4] This is a separate process from the informal merger review process with prescribed timelines and a different test, which considers the benefit to the public as well as lessening of competition.

1.2. Remedies

7. The remedies for breaching section 50 are the same whether a merger has been notified or not. If the ACCC reaches a view that an acquisition would have or is likely to have the effect of substantially lessening competition, the ACCC can apply to the Federal Court for orders which may include an injunction, divestiture, penalties, or a declaration that the relevant acquisition is void (meaning the shares or assets will be deemed not to have been disposed of by the vendor, and the vendor will be required to refund the consideration to the acquirer).

8. Only the ACCC can apply for an injunction to restrain an acquisition prior to completion, and for penalties and/or a declaration that the transaction is void after completion.[5] Both third parties and the ACCC can apply for divestiture orders,[6] and/or other declarations and injunctions post-completion. Any person suffering loss or damage as a result of a merger that breaches section 50 can seek damages up to 6 years post-acquisition.[7]

1.3. Completed acquisitions under Australia's regime

9. The ACCC is not prevented from investigating whether a completed acquisition has contravened the merger law, including by making public inquiries and the use of compulsory information gathering powers to assist its investigation and, if appropriate, taking legal action.

10. Reviews of completed mergers will generally undergo a different process to reviews of proposed acquisitions. Completed mergers are not reviewed by the ACCC in accordance with its merger process guidelines but rather are treated as enforcement investigations of potential breaches of the CCA that have already occurred.

11. If the ACCC considers that a completed merger has contravened section 50 of the CCA, it may seek remedies in the Federal Court (outlined above in paragraphs 7 and 8).

2. Post-merger enforcement in Australia

12. While the ACCC can and does investigate and intervene in completed mergers, our experience is that once a merger is completed, the commercial incentives of merger parties and any third parties to cooperate and assist with the investigation are often diminished.

13. Before a merger has completed, merger parties generally have an incentive to provide timely and comprehensive information to the ACCC for the purpose of obtaining the ACCC's view on the transaction. Third parties are also more likely to provide

[4] *Competition and Consumer Act 2010* (Cth) s 88.

[5] *Competition and Consumer Act 2010* (Cth) ss 77, 80(1A), 81(1A).

[6] *Competition and Consumer Act 2010* (Cth) s 81.

[7] *Competition and Consumer Act 2010* (Cth) s 82.

information and engage with the ACCC if they perceive that there is a possibility that the transaction may not proceed. These incentives change once the merger is completed, impacting the quality and timeliness of information available to the ACCC in its investigation, and make it significantly harder to assess the impact on competition.

14. Further, different lines of inquiry and analysis are often required to deal with post-merger information and particularly to determine what weight to put on post-merger information. In some cases, the ACCC has had concerns that the outcomes of investigations of completed mergers may have been manipulated by the parties - for example, by refraining from taking certain steps or engaging in potentially anti-competitive conduct while an investigation is ongoing, to prevent the ACCC from obtaining sufficient evidence to commence proceedings in relation to the transaction.

15. In addition, where the ACCC concludes that intervention is necessary to resolve competition issues resulting from a completed merger, it can also be more difficult to formulate effective remedies post-completion. Between completion and the implementation of a remedy, there are significant risks that the assets of the acquired business will have been integrated, a degradation of assets may have occurred, commercially sensitive information will have been shared, or some assets may have been transferred or sold. Integration of assets may have progressed to the stage where it is impossible to 'unscramble the eggs'. These factors can mean that a court may not exercise its discretion to make a divestiture order or that a divestiture order may not restore the state of competition within the relevant market to pre-merger levels.

16. The potential economic harm caused by completed, anti-competitive mergers is compounded by the extensive length of time that it can take to investigate the transaction and resolve competition concerns. Even if the ACCC is notified of a completed merger immediately after it occurs, the investigation and any litigation could take six to twelve months or more. The integration of the acquired business during this time and potential changes in the asset portfolio of the merged entity may mean that even if a divestiture order is ultimately made, the harm to competition can be significant and irreversible. Anti-competitive acquisitions in digital platform markets may also be particularly difficult to disentangle after the fact, given relevant firms' reliance on data, and the rapid integration of systems, products and staff (and lack of physical assets).

17. The reasons given by the Federal Court in the recent case of *ACCC v IVF Finance Pty Ltd (No 2)* (***ACCC v Virtus***) refer to the challenges of remedying the impact of anti-competitive mergers after consummation has occurred. Virtus Health (**Virtus**) and Adora Fertility (**Adora**) are both providers of in vitro fertilisation (**IVF**) services in Australia. The parties provided a 'courtesy' notification to the ACCC and advised during the review that they proposed to complete the transaction prior to the ACCC completing its review. On 25 October 2021, the Federal Court granted the ACCC an interlocutory injunction to restrain Virtus from completing its acquisition of Adora until the ACCC's substantive section 50 case could be heard. In granting the interlocutory injunction, Justice O'Bryan noted that (emphasis added):

> *"…At the risk of stating the obvious, an injunction applies pre-acquisition and prevents the acquisition occurring. It is therefore the most effective remedy to prevent anti-competitive harm from an acquisition that would otherwise contravene s 50.* ***An order for divestiture applies post-acquisition****. It is* ***less effective in preventing anti-competitive harm*** *for two reasons. First, the completion of the acquisition, even on a temporary basis, may harm competition because* ***the acquiring company may gain access to information or other competitive advantages*** *through its ownership of the target business and* ***the target company may be weakened as an independent competitor in that period****. Second, the*

> ***divestiture of the target business under a process determined by court orders will not be a market process*** *and has* ***real potential to weaken further the competitive position of the target company****."*[8]

18. To obtain an injunction to restrain completion, the ACCC must be successful in demonstrating both a prima facie case of a contravention of section 50 and that the balance of convenience favours restraining completion of the transaction. This is very resource intensive and in instances where information is limited, obtaining an injunction may not be possible, and the ACCC may be required to investigate post-completion.

3. Case study - Primary Health Care's completed acquisition of pathology assets previously operated by Healthscope

19. In February 2015, Primary Health Care Limited (**Primary**) completed its acquisition of pathology assets operated by Healthscope Limited (**Healthscope**) without notifying the ACCC. This was despite the merger parties having been previously advised by the ACCC that the ACCC would have serious concerns about the likely competitive effect of any aggregation of two of the three largest pathology businesses.

20. Following an investigation, the ACCC ultimately accepted court enforceable divestiture undertakings from Primary and Healthscope in June 2016. The undertakings required Primary to divest most of the pathology assets it acquired from Healthscope to an ACCC approved purchaser.

21. At the time, the ACCC considered that this remedy was likely to effectively resolve our competition concerns. However, completion of the acquisition resulted in an extended investigation which impacted on the effectiveness of the remedy. During the period of the investigation, a number of the pathology collection centres were closed after agreements with associated medical practices ended or leases expired, and several third parties refused to consent to transfer leases or novate agreements to the approved purchaser of the remaining collection centres. As a consequence, while the majority of the divestiture assets were transferred to the approved purchaser, the divestiture package was smaller in scope than the assets which had been acquired. Even with a divestiture undertaking, this meant that there were fewer clinics competing with Primary (after the divestiture) than would have been had the transaction not occurred. This example highlights the risks inherent in post-completion investigations which can make it more challenging to remedy anti-competitive impacts.

4. Conclusion

22. Investigating and remedying completed mergers can create significant challenges, particularly the difficulty of restoring competition with effective remedies post-completion.

23. The ACCC considers that it is important to contribute to, and engage with, international discussion on these issues and approaches to investigating completed mergers to limit harm to consumers, and promote and protect competition.

[8] *ACCC v IVF Finance Pty Ltd (No 2)* [2021] FCA 1295 at [144].