THE JURY IS OUT: AN ASSESSMENT OF PROPOSED REFORMS TO AUSTRALIA'S MERGER CONTROL REGIME FOR ADDRESSING COMPETITIVE HARM IN THE (DIGITAL) ECONOMY

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I. INTRODUCTION

In recent times, competition authorities globally have been strongly advocating for law reform to enhance their enforcement powers in relation to so called "killer acquisitions." Killer acquisitions are said to arise where a dominant or incumbent firm seeks to acquire a start-up or potential competitor with the ultimate purpose (or effect) of eliminating future or potential competition. Much of the concerns around the ineffectiveness of existing merger control laws in regulating killer acquisitions have emerged as a result of the growing importance and value of "big data" to businesses and to the commercial drivers for undertaking acquisitions in a number of industries, including but not limited to health and pharmaceuticals, and digital markets such as search and display advertising. More specifically, in recent times such concerns have often been attributed to a small number of "big tech" firms such Google and Facebook, among others.

The Australian Competition and Consumer Commission (the "ACCC") has similarly raised concerns around the effectiveness of Australia's existing merger control regime and its ability to examine and regulate acquisitions involving nascent competitors in a consistent, timely and effective manner. In July 2019, the ACCC released its Final Digital Platform Inquiry Report (the "DPI Report"),[2] which was one of the first and most comprehensive market studies carried out by a competition regulator in recent times that considered the impact of online search engines, social media and digital platforms on competition in the media and advertising services markets.

As part of this inquiry, the ACCC looked specifically at whether Australia's merger control regime was fit-for-purpose to address "killer acquisitions" through examining acquisitions by Google and Facebook, and economies of scope created via control of data sets. The DPI Report concluded that these were two factors that had contributed to the dominant market positions of Google and Facebook in Australia and that law reform was needed.

This paper examines the substantive and procedural proposals put forward by the ACCC in the DPI Report that seek to address concerns around the ACCC's views of the inability of Australia's current merger control framework to adequately regulate acquisitions involving nascent competitors and data. This paper will also review the extent to which such proposals would materially change Australia's current merger control framework, and whether they would be likely to facilitate more effective regulation of killer acquisitions.

2 ACCC Digital Platforms Inquiry – Final Report, July 26, 2019; Available at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

II. CONTEXT: A BRIEF OVERVIEW OF AUSTRALIA'S MERGER CONTROL REGIME

Australia's merger control framework centers around section 50 of the *Competition and Consumer Act 2010* (Cth) ("CCA"), which is supplemented by the ACCC's *Merger Guidelines*[3] (sometimes called the Analytical Merger Guidelines) and *Informal Merger Process Guidelines.*[4] Section 50 of the CCA prohibits any acquisition that has the effect, or likely effect, of substantially lessening competition in any relevant market in Australia. Due to the reasonably limited jurisprudence on section 50, the *Merger Guidelines* provide an important source of reference for analytical concepts the ACCC considers as part of its merger reviews.

In recent times, following a number of high-profile losses by the ACCC in seeking to oppose a number of mergers before the Federal Court of Australia and the Australian Competition Tribunal (the "Tribunal"), the Chairman of the ACCC, Mr. Rod Sims, has advocated for an overhaul of Australia's merger control regime. The ACCC Chairman is advocating for these changes based on the ACCC's view that it is unable to effectively regulate merger activity and oppose allegedly anticompetitive transactions in a timely or effective manner.

Notwithstanding the ACCC Chairman's recent comments, Australia's merger control system has, and continues to be viewed for the most part by practitioners and the Australian Government, as being effective and striking the right balance.

The substance of Australia's merger control laws have remained largely unchanged following the recent and wide-ranging Competition Policy Review (often called the Harper Review after the Committee Chair, Professor Ian Harper) into Australia's competition laws in 2017,[5] which followed on from the Review of the Competition provisions of the Trade Practices Act (often called the "Dawson Review" after the Committee Chair, the former High Court Judge, Sir Daryl Dawson) in 2003.

III. FINDINGS RELATING TO "KILLER ACQUISITIONS" CONTAINED IN THE DPI REPORT

While merger control and "killer acquisitions" were not the primary or sole focus of the ACCC's Digital Platform Inquiry, the ACCC's analysis found that the acquisition of potential competitors by Google (and Facebook) and economies of scope created via the growing control of data sets were two substantial factors that had contributed to the dominant market positions of Google in search and search advertising, and Facebook in search and search advertising markets, respectively.

The ACCC linked Google's advantages of scope and a reduction of potential competition in a number of search and search advertising markets to a series of acquisitions, including but not limited to DoubleClick, Admob and YouTube, that resulted in both Google's expansion into related markets and the removal of possible rivals to Google's core products. The ACCC has characterized these acquisitions as having significantly weakened dynamic competition and reducing the level of competitive constraints in a number of markets. More specifically, the ACCC concluded that Google's strategic acquisitions had compounded already high barriers to entry and expansion and have resulted in Google being largely insulated from competition.

Numerous strategic acquisitions by Facebook, including acquisitions of Instagram and WhatsApp, were also found by the ACCC to have increased associated advantages of scope and entrenched Facebook's market power in respect of social media and display advertising. Specifically, the ACCC found that Facebook benefits from significant economies of scale and advantages of scope in its ability to accumulate data from multiple platforms, which had been acquired by Facebook.

More broadly, the ACCC also indicated that it is increasingly concerned about its ability to oppose anticompetitive mergers in court (and the capacity of behavioral undertakings to solve structural competition concerns), particularly in digital markets where market dynamics are fast-moving and undertaking a counterfactual analysis is more challenging.

3 ACCC Merger Guidelines, November 2008 (and as amended in November 2017); Available at https://www.accc.gov.au/publications/merger-guidelines.

4 ACCC Informal Merger Review Process Guidelines, September 2013 (and as amended in November 2017); Available at https://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013.

5 Competition Policy Review Final Report, March 31, 2015; Available at https://treasury.gov.au/publication/p2015-cpr-final-report.

In light of the ACCC's findings that numerous strategic acquisitions by Google and Facebook have led or contributed to their respective market power in relevant markets and have had sizeable effects on competition, the ACCC concluded that it was very important to amend Australia's merger laws to better account for certain competitive dynamics such as potential competition and the role of data, and to establish processes that ensure the ACCC is notified early of potential acquisitions.

IV. PROPOSED REFORMS TO CAPTURE KILLER ACQUISITIONS IN THE (DIGITAL) ECONOMY

The ACCC made two key recommendations in the DPI Report, one substantive and the other procedural, in respect of updating Australia's merger control framework to ensure that factors relevant to the competition impact of acquisitions in digital markets are taken into account in a merger assessment and that the ACCC is properly notified of such acquisitions.

Recommendation one, which is substantive in nature, included proposed amendments to expand section 50(3) of the CCA, which are the statutory merger factors that must be considered by a Court when undertaking a merger analysis. The proposed reforms seek to incorporate two additional merger factors:

- the likelihood that the acquisition would result in the removal from the market of a *potential competitor*;
- the *nature and significance of assets*, including data and technology, being acquired directly or through the body corporate.

Interestingly, this first recommendation is not limited to acquisitions relating to digital markets and would appear to have a broad-ranging application irrespective of the relevant sectors and markets in which an acquisition occurs notwithstanding that these proposed reforms came from an examination of acquisitions in specific digital markets.

The Australian Government has not yet accepted this proposed reform in its response to the DPI Report but has indicated that it will undertake further consultation as to form and substance over the course of 2020.

Recommendation two, which is procedural in nature, would require large digital platforms (such as Google and Facebook but potentially others in other industry sectors) to agree to a notification protocol to provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia. This recommendation would ensure that the ACCC is made aware of, and provided the opportunity to review, acquisitions by large digital platforms. Although details regarding the proposed protocols are limited, such protocols would be agreed between the ACCC and each large digital platform business and would need to specify the types of acquisitions requiring notification (including any applicable minimum transaction value), and the minimum advance notification period prior to completion of the proposed transaction to enable the ACCC to assess the proposed acquisition.

The ACCC has indicated that if such a commitment from large digital platforms is not forthcoming, it will consider making further submissions to the Government on this issue presumably to seek an ability impose some form of mandatory merger notification requirements on specified businesses or in respect of acquisitions occurring in certain markets.

The Australian Government accepted this proposed reform in its response to the DPI Report but has re-affirmed the view that the protocol will be voluntary.

Separate to the recommendations above, the DPI Report also considered broader issues in relation to Australia's merger control regime, particularly around the ability of the ACCC to effectively challenge allegedly anticompetitive acquisitions due to issues around the sufficiency of evidence and undue confidence placed by the courts in the ability of market forces and behavioral commitments to overcome increased barriers to entry caused by an acquisition. The ACCC has indicated that it is considering the appropriateness of advocating for further legislative change to introduce a rebuttable presumption that applies to merger cases in Australia. Such a presumption would effectively signal that, in the absence of clear and convincing evidence from the merger parties, the starting point for a court's assessment of an acquisition opposed by the ACCC would be that it will substantially lessen competition. It remains unclear whether such a presumption would resemble or be guided by the presumption contained in the U.S. Horizontal Merger Guidelines in respect of market concentration.

Unlike Recommendations 1 and 2 above, any potential reform involving the introduction of a rebuttable presumption did not form part of the Australian Government's response to the DPI Report. Therefore, this potential reform is unlikely to be introduced in the near future.

V. SAME BUT DIFFERENT: THE SIGNIFICANCE AND PRACTICAL IMPLICATIONS OF THE PROPOSED REFORMS

A. Implications of Recommendation One on the Substantive Merger Control Framework

The recommendation to expand the section 50(3) statutory merger criteria is unlikely to result in any meaningful or practical changes to the nature of the merger control framework or test under the CCA.

The factors set out in section 50(3) of the CCA are non-exhaustive and the language of the current legislative provision does not preclude the ACCC from considering the proposed factors in its merger analysis of acquisitions in either the digital economy or any other industry. In fact, the forward-looking nature of the merger test under section 50 of the CCA arguably already imposes a requirement for the ACCC to consider potential competitors and the effect that the removal of such entities could have on the competitive dynamics within the relevant markets. The nature and significance of any assets being acquired should (and do) already form an integral part of any merger assessment.

In addition, the ACCC's *Merger Guidelines*, which also form an important conceptual anchor for Australia's merger control framework, make provision to consider the role and impact of potential competition or a potential competitor when assessing issues associated with the range and extent of potential constraints, barriers to entry, and market definition within the merger context.

Recent cases where the ACCC has sought to oppose mergers under section 50 of the CCA and the preliminary views and focus of the ACCC regarding their assessment of a number of transactions suggest that the ACCC can readily (and does) have regard to the role and extent to which a merger target is, or would likely become, a competitor to the acquirer as well as the nature of the assets being acquired:

- *Merger between Vodafone Hutchinson Australia and TPG*: In May 2019, the ACCC opposed the USD 10 billion merger between Vodafone and TPG on the basis of potential competition that could arise between the parties in the market(s) for mobile services (based on indications from TPG that it had intended to establish its own 5G network), and fixed broadband. The merger parties are neither direct competitors nor the largest market participants (by some way) within the relevant markets in which they operated. Vodafone instituted proceedings against the ACCC seeking a declaration that the acquisition did not contravene section 50 of the CCA. In February 2020, the Federal Court of Australia found that that Vodafone had successfully established that the merger was not likely to have the effect of substantially lessening competition in either the relevant market for mobile services or fixed broadband. The Court found that it was extremely unlikely that TPG would roll out a retail mobile network or become an effective competitive fourth mobile network operator. While the ACCC failed on the evidence in this case, the ability to base a theory of harm on a doctrine of "potential competition" was accommodated under the existing merger control framework.

- *iNova Pharmaceuticals (Australia) Pty Ltd's proposed acquisition of Juno PC Holdings Pty Ltd:* In December 2019, the ACCC released a Statement of Issues in respect of this transaction on the basis that it would substantially lessen competition in the market(s) for the supply of phentermine-based weight-loss medications and weight-loss medications more broadly. The ACCC's primary concern was that the acquisition would remove potential and likely competition from Juno PC and in the absence of the acquisition, Juno PC's product would likely compete directly and strongly with iNova and put downward pressure on prices for phentermine-based weight-loss medications. The ACCC focused on a forward-looking assessment and specifically whether there would be opportunities for a competitor to enter the relevant markets, even if such firms had very small to no market share. In January 2020, the merger parties withdrew their application for informal review as the transaction was discontinued.

- *Google's proposed acquisition of Fitbit Inc*: On 27 February 2020, the ACCC commenced a public merger review of Google's proposed USD 2.1 billion acquisition of fitness tracking company, Fitbit. Concerns have been raised by politicians and industry around Google gaining access to a cache of data that would feed its own growing health care business and create a new range of personalized health services that would give Google another way to surveil users and entrench its monopoly power online by combining Fitbit's sensitive and individualized health data with data from Google's current services. These concerns highlight the importance of health data to the future of competition in the digital marketplace and the ability of competitors to actively participate in this space, the consumer privacy implications of Google gaining access to the sensitive data of Fitbit users when it has previously violated privacy laws, and the ability of Google to use such data to leverage its existing market power and dominance in other online advertising markets. The ACCC

Chairman has publicly expressed concern around Google's commitment to transparency with respect to what data will be collected from Fitbit consumers and how it will be used. Mr. Sims has stated that, "given the history of digital platforms making statements as to what they intend to do with data and what they actually do down the track, it is a stretch to believe any commitment Google makes in relation to Fitbit users' data will still be in place five years from now."[6] In looking at the matters that are the subject of the ACCC's market consultation, it is clear that both potential competition and the nature and significance of the asset(s) being acquired in respect of competitive dynamics in both relevant and adjacent markets (such as advertising) are at the forefront of the ACCC's review.

What is clear from these examples is that the ACCC already has legislative foundations and tools to consider the issues of potential competitors and the significance of the asset being acquired under the existing section 50(3) merger factors.

However, the ACCC's findings and recommendations in the DPI Report do suggest that strategic acquisitions undertaken by incumbents that give advantages of scope or remove potential competition and/or involve the combination of valuable data sets (in any industry but particularly those that are favorable for killer acquisitions) will receive close regulatory scrutiny by the ACCC. This is evidenced in the recent examples outlined above.

B. Implications of Recommendation Two on the Merger Review Process and Approach

Recommendation two, if implemented, would sit somewhat uncomfortably with Australia's current merger control regime and will change the current voluntary nature of the regime for "large digital platforms."

The ACCC has indicated that this obligation would be principally aimed at Google and Facebook but has not ruled out the application of this recommendation to other market participants. Indeed, it could provide a starting point for the imposition of further exceptions to Australia's voluntary merger control regime that could result in the emergence of a mandatory style merger control regime, at least in respect of certain sectors.

While Recommendation two appears reasonably simple on its face, the DPI Report and the ACCC's recommendation fail to address a number of key practical considerations that would invariably affect the way in which the recommendation would be implemented and the way in which it would operate. There has been no consideration to date as to how a transaction would be identified as being notifiable (including the size or nature of the target, value thresholds or the transaction's nexus to Australia), how such protocols would interact with or affect the ACCC's existing indicative merger review processes and timelines or how disputes regarding the protocols would be resolved or otherwise enforced notwithstanding the protocols appear intended to be agreed between large digital platforms and the ACCC.

These types of considerations will have profound commercial implications for digital platforms and other businesses that become subject to this requirement, particularly if an acquisition involves a competitive or confidential bid process for an emerging or nascent firm. Due to the potentially far-reaching implications of this recommendation, it is expected that further Government consultation should occur to address such matters.

6 Speech made by Mr. Rod Sims to the Consumer Policy Research Centre Conference on November 19, 2019.

VI. VALUE QUOTIENT: ASSESSING THE POTENTIAL MERITS OF THE ACCC'S RECOMMENDATIONS AGAINST GREATER AMBIGUITY AND REGULATORY REQUIREMENTS

A. Recommendation One Would Appear to be Unlikely to Provide a Clearer Conceptual Framework to Regulate Killer Acquisitions

The ACCC has acknowledged in the DPI Report that it is not currently precluded from considering matters that are the subject of Recommendation one under the existing legal framework but rather, Recommendation one if adopted, would signal the importance of these considerations to both business and the courts.

However, there are dangers and risks for merger parties if the ACCC relies on the adoption of Recommendation one as a mandate to place more (and potentially disproportionate) emphasis on such factors at the expense of a more holistic assessment of the facts and prevailing market dynamics. Such risks become amplified if there is an increasing reliance on non-traditional theories of harm centered around 'potential competition' in the absence of any settled or meaningful guidance around how and the standard upon which 'potential competition' is to be assessed against.

Recommendation one does not address the significant analytical uncertainty that surrounds an assessment of potential competition or how the ACCC would practically go about undertaking such an assessment. There appears to be little consideration of existing concepts and important differences that exist in U.S. jurisprudence between "actual potential competition" and "perceived potential competition" and the practical evidentiary issues that have arisen in relation to bringing a case under each.

Practically speaking, the potential range of firms that could effectively constitute a "potential competitor" in interconnected and highly dynamic digital industries and the hypothetical analysis that would be required to identify whether a target of an acquisition has a real chance of becoming a meaningful competitor could entrench the ACCC (and merger parties) in speculative and theoretical debates that are not reasonably capable of being supported by adequate qualitative or quantitative evidence. As the interpretation and application of economic factors used to assess whether an acquisition will change incentives to invest often give rise to significant debate and require reasonable volumes of data that are less likely to be readily available, there is the potential to create significant uncertainty for merger parties and significantly extend ACCC review timelines.

The Recommendation in respect of evaluating the significance of assets being acquired would also benefit from further guidance around how that would be assessed by the ACCC and viewed in light of considerations such as network effects and economies of scale.

Overall, without further consideration as to its practical application, this Recommendation is unlikely to provide a clearer legal framework from which to more effectively regulate killer acquisitions, but rather has the potential to result in an over reliance on factors in a manner that is disproportionate to other prevailing and relevant market considerations. Significantly, the recommendation may also create uncertainty in the application of the law. This would be unfortunate as such uncertainty does not assist businesses in ensuring they comply with competition law.

B. Recommendation Two May Catch Suspected Killer Transactions but Significantly Increase Regulatory Burdens Without Any Tangible Improvement to the Current Framework

The primary driver underlying this proposal was that the ACCC considered it critical to ensure it is notified of potential acquisitions sufficiently early. Recommendation two will ensure that the ACCC is made aware of, and is at least provided the opportunity to review, acquisitions by large digital platforms that may substantially lessen competition. However, there remains significant uncertainty around whether all transactions for which a notification is received under a protocol would necessarily require a public review.

Although the ACCC is increasingly concerned about the hurdles it faces in opposing anticompetitive mergers in court, particularly in digital markets that are fast-moving, claims that a failure to notify a transaction in a timely manner prevents the ACCC from pursuing effective outcomes appear to be unfounded. This position appears to be driven both by recent court decisions questioning the sufficiency of ACCC evidence and the ACCC's concerns around the effectiveness of behavioral undertakings to address competition concerns and the willingness of courts to accept such remedies. However, this recommendation is unlikely to directly address or resolve either of those concerns.

A decision to oppose a transaction by the ACCC requires the ACCC to bring proceedings in the Federal Court to prove on the balance of probabilities that a transaction is likely to have the effect of substantially lessening competition, if merger parties do not otherwise agree to discontinue the transaction in the face of ACCC opposition. Injunctive relief can be sought to prevent a transaction from proceeding until a decision from the Court is handed down. The ACCC typically has sufficient time if it focuses its resources and relies on its strong pre-trial statutory compulsory powers to obtain relevant and necessary evidence to bring a case. If merger parties proceed with a transaction that is ultimately found to be anti-competitive, they can be forced to divest assets or unwind the transaction or face penalties of up to 10 percent of turnover.

The appropriateness and use of non-structural remedies (when unconditional in nature) to address competition concerns also continues to be a flexible way to address competition concerns in certain circumstances and continue to be affirmed by the Federal Court (although the ACCC has recently appealed a decision by the Federal Court to accept a non-structural merger remedy).[7] The acceptance by the ACCC of a behavioral remedy from Transurban in respect of its acquisition of the WestConnex toll road, to publish important traffic data to preserve competition in respect of bids for future toll road concessions, demonstrates the continued relevance and potential use for non-structural remedies to address competition concerns arising from assets such as data in certain circumstances. The non-compliance of Google in respect of certain undertakings given to competition authorities in the past is not of itself a reason to discount the use of non-structural remedies for all market participants, without consideration of other factors.

Although the ACCC has recognized that the burden on digital platforms associated with Recommendation 2 may be significant and may also have unintended effects on innovation and investment in digital markets, the stated benefits attached to this recommendation need to be considered closely as to their proportionality. They are quite likely to be disproportionate to the regulatory burden that they will impose relative to firms that will not be subject to such requirements. In any event, as digital platform mergers are typically reviewed by other global competition agencies, such notification would not appear to provide the ACCC with any additional tools or monitoring abilities that are not already available to the ACCC's market intelligence unit.

VII. CONCLUSION: CONTINUED ACCC LOSSES REGARDING MERGERS WILL LIKELY RESULT IN PUSH FOR FURTHER REFORM TO ADDRESS "KILLER ACQUISITIONS"

A careful assessment of the recommendations contained in the DPI Report suggests that the proposed merger reforms will not meaningfully change the analytical framework of Australia's merger control regime. However, such proposed changes could result in changes to Australia's merger clearance process that create additional uncertainty for business and do not sit easily with Australia's voluntary notification process, a process that is generally acknowledged to have provided an effective framework for the purposes of assessing mergers.

Nonetheless, recent losses by the ACCC in opposing mergers before the Federal Court and the Tribunal, are only likely to increase lobbying efforts by the regulator to introduce a rebuttable presumption to lower the substantive threshold needed to be met in order to oppose allegedly anticompetitive transactions. While this would invariably favor the ACCC's position in challenging mergers before the courts, it may unnecessarily dampen the willingness for merger parties to proceed with otherwise pro-competitive transactions for fear of significant costs associated with needing to discharge such a burden. This is a practical concern in relation to transactions occurring in markets that are characteristically more concentrated than in other countries, simply by virtue of the geographic size of Australia and the clustering of its population in cities located on Australia's coast. Given the need to ensure a balance between appropriate merger control and ensuring a flexible and timely merger process in Australia, the jury is still out on merger reform relating to these so called "killer acquisitions."

7 Australian Competition and Consumer Commission v Pacific National Pty Limited & Ors (VID695/2019), which is an appeal from ACCC v. Pacific National Pty Limited (No 2) [2019] FCA 669 (May 15, 2019).

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