



Australia

Global merger control handbook – Update

APRIL 2020

Merger control legislation updates since 1 July 2018

There have been no legislative updates to the merger control provisions of the *Competition and Consumer Act 2010* (CCA) during this period.

However, on the back of the merger control cases referred to below, the Australian Competition and Consumer Commission (ACCC) Chairman Rod Sims has suggested that the ACCC may seek legislative reform. Mr Sims said that the cases demonstrate ‘the real difficulty of applying the substantial lessening of competition provisions in the legislation’. He further commented that ‘we’ve got a merger law at the moment that is probably damaging the productivity of the economy so I would have thought this is as important a reform as others that are being mentioned in the context of the post-COVID recovery’.

Landmark merger control cases since 1 July 2018

There have been two important cases during this period. In both cases the ACCC was unsuccessful in establishing that proposed mergers and acquisitions would likely result in a substantial lessening of competition.

TPG AND VODAFONE

The ACCC opposed the AUD15bn merger of TPG Telecom Limited and Vodafone Hutchison Australia Pty Ltd which was announced in 2018. The ACCC opposed the proposed merger on the basis that it would substantially lessen competition in the supply of mobile services because the proposed merger would preclude TPG entering as the fourth mobile network operator in Australia. However, in February 2020 the Federal Court of Australia declared that the proposed merger would

not substantially lessen competition on the basis that there was no realistic chance of TPG credibly entering as the fourth mobile network operator in the Australian market for the supply of mobile services. Subsequently in May 2020, the Foreign Investment Review Board (FIRB) gave the merger the go-ahead.

PACIFIC NATIONAL ACQUISITION OF ACACIA RIDGE RAIL TERMINAL

In July 2017, Aurizon announced its proposed sale of the Acacia Ridge rail terminal in Queensland to Pacific National, the largest provider of rail linehaul services in Australia. The ACCC refused to grant informal clearance to the proposed acquisition, and in July 2018 commenced proceedings in the Federal Court alleging that the acquisition would have the likely effect of substantially lessening competition in breach of section 50 of the CCA 2010. The ACCC also alleged that a 'terminal services subcontract' between Pacific National and Aurizon that provided for Pacific National to conduct the day to day operations at the interstate side of the Acacia Ridge Terminal would substantially lessen competition in the interstate and Queensland intermodal rail markets in contravention of section 45 of the CCA.

In May 2019, the Federal Court dismissed the ACCC's proceeding. The Court indicated that it would have found that the proposed acquisition had the likely effect of substantially

lessening competition in breach of the CCA had it not been for an undertaking offered to the Court by Pacific National on the last day of the hearing. Pacific National offered the ACCC a court-enforceable undertaking that it submitted would prevent it from discriminating in providing access to other rail operators at the Acacia Ridge Terminal. The ACCC rejected the proposed undertaking as it considered that the undertaking would not protect potential entrants from discriminatory conduct in the terminal's day-to-day operations under Pacific National ownership or the operating agreement.

The ACCC appealed the judgment. However in May 2020 the Full Federal Court dismissed the ACCC's appeal. The Full Court found there was insufficient evidence to establish that the acquisition was likely to result in a substantial lessening of competition because it considered that the prospect of another player seeking to enter the market in the next five to ten years was no more than speculative. The ACCC may seek special leave to appeal the Full court's decision to the High Court of Australia.

Web link to the national competition authority

The Australian Competition and Consumer Commission:
<https://www.accc.gov.au/>

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