

THE AUSTRALIAN COMPETITION AUTHORITY'S 2018 REPORT CARD

The Australian Competition and Consumer Commission (ACCC) recently released its 2017/2018 Annual Report. The ACCC has been highly active in merger reviews with 281 mergers assessed, high enforcement activity with penalties levied of AU\$170 million, including a new record penalty against Yazaki Corporation of AU\$46 million, and ground-breaking market studies such as those in the digital platforms inquiry focusing on a "deep dive" into Google and Facebook and the foreign currency conversion inquiry. This briefing provides an overview of some of the ACCC's key activities in each of these areas over the past year.

MERGER REVIEW AND ASSOCIATED ENFORCEMENT ACTIONS

Merger review

The ACCC's assessment of 281 mergers in 2017/2018 was a comparable number of mergers to those notified to the ACCC under the informal review regime in 2016-2017. The number of merger matters cleared during 2017-2018 also remained high, with 90% of merger matters considered under the informal merger review process cleared during pre-assessment. Of the remaining 10% of mergers considered by the ACCC under the informal review process, 60% were cleared unconditionally. While clearance rates are continuing to remain high, the time taken by the ACCC to finalise its reviews is trending upwards, which the ACCC attributes to the increasing complexity of the merger matters before it. For example, the number of merger matters that were resolved at Phase 1 but which took longer than the ACCC's target time period of 8 weeks to finalise was 55% in 2017-2018, compared with 20% in 2016-2017. Similarly, the number of mergers which proceeded to Phase 2 and which took longer than the ACCC's target time period of 20 weeks was 29% in 2017-2018 compared to 6% in the previous year.

One merger was opposed publicly – BP Australia's proposed acquisition of Woolworth's retail service station sites – with a further three being withdrawn by the notifying parties following the raising of concerns by the ACCC.

Key issues

- ACCC has reviewed some 281 mergers in the period, with 90% subject to short form review
- First gun jumping merger case was brought by the ACCC as well as its first case brought for an anti-competitive merger proposal involving alleged agreements to close a competing business
- 2018 is the year of the criminal cartel cases in Australia with three separate criminal cartel prosecutions commenced including a high-profile case against ANZ, Deutsche Bank and Citigroup in relation to an alleged cartel arrangement involving a share underwriting arrangement
- Record penalties and fines obtained by the ACCC in 2017-18 of AU\$170million with new record fine of AU\$46 million against Yazaki Corporation
- Inquiry into price competition among suppliers of foreign currency conversion announced
- Digital Platforms Inquiry with a "deep dive" into Google and Facebook launched, interim report due 3 December 2018

We also note that the amendments to the *Competition and Consumer Act 2010 (CCA)* that changed the authorisation process (in the first instance merger authorisation applications are now assessed by the ACCC only) have been in force for more than a year but have not yet been utilised.

Enforcement actions arising out of mergers

Consistent with global merger enforcement trends, the ACCC has also focused on pre-completion conduct, bringing proceedings for alleged anti-competitive conduct arising out of a merger context.

On 12 July 2018, the ACCC instituted proceedings under Australia's cartel laws against Cryosite for alleged 'gun-jumping' in relation to the proposed sale of its umbilical cord blood and tissue business to Cell Care Australia Pty Ltd (**Cell Care**). This is the first 'gun-jumping' case brought by the ACCC in respect of the implementation of a merger prior to completion or the conclusion of an ACCC merger review. The conduct in question involved Cell Care making a non-refundable payment of AU\$500,000 to Cryosite at the signing of the asset sale agreement, which included requirements that Cryosite must refer new customers to Cell Care from the time of signing (before completion) and for Cell Care not to deal with any customer that had dealt with Cryosite in the preceding five years. This case demonstrates the importance of ensuring that merger parties remain sufficiently independent and refrain from integration until such time that completion occurs and/or the ACCC indicates that it has no objections to an acquisition.

On 19 July 2018, the ACCC instituted proceedings against Pacific National and Aurizon for allegedly reaching an understanding and proposing acquisitions that had the purpose and/or would be likely to have the effect of substantially lessening competition in relevant markets, in breach of s45 of the CCA. The understanding reached between the parties made provision for Aurizon to terminate its sales process for its intermodal business, including a terminal and Queensland and interstate businesses, with other bidders, and instead enter into exclusive negotiations with Pacific National. The agreement was to sell the assets and businesses to Pacific National or close down, and/or appoint Pacific National as long-term operator of, those components of the business that the ACCC did not allow Aurizon to sell to Pacific National. The ACCC alleges the understanding has the purpose or effect of substantially lessening competition as there was at least one alternative purchaser for the business which would have been more competitive, a potential new entrant, but Aurizon chose not to continue with this process because it was more lucrative for it to agree to sell parts of its business to its closest competitor. The ACCC succeeded in obtaining an interlocutory injunction to require Aurizon to carry on its Queensland intermodal business until the determination of the proceedings by the Federal Court. The case is scheduled for trial in late November 2018 and the ACCC is seeking declarations, pecuniary penalties and orders restraining Pacific National from acquiring the business.

ENFORCEMENT

Criminal cartels

2018 could be said to be 'the year of the criminal cartel' with three proceedings commenced during 2018. On 15 February 2018, Australia's first criminal cartel prosecution against an Australian corporation, Country Care Pty Ltd (**Country Care**) was announced. Criminal cartel charges have been laid against Country

Care and two individuals (Country Care's Managing Director and a former employee). It is alleged Country Care engaged in cartel conduct in relation to assistive technology products used in aged care and rehabilitation, such as beds, mattresses, wheelchairs and walking frames.

In June 2018, criminal cartel charges were laid against Citigroup Global Markets Australia Pty Ltd (**Citigroup**), Deutsche Bank Aktiengesellschaft (**Deutsche Bank**), Australian and New Zealand Banking Group Ltd (**ANZ**) and six senior executives. It is alleged that cartel arrangements occurred in trading ANZ shares held by Deutsche Bank and Citigroup. It is alleged that ANZ and each of the individuals have been knowingly concerned in some or all of the conduct. The charges are a result of an ACCC investigation that has been running for more than two years.

In August 2018, criminal cartel charges were laid against the Construction, Forestry, Maritime, Mining and Energy Union and its ACT Divisional Branch Secretary. The charges are a result of a joint investigation between the ACCC and the Australian Federal Police.

Increasing penalties

The ACCC obtained record penalties in 2017-2018 for contraventions of the cartel provisions with Japanese companies Yazaki Corporation Pty Ltd and Nippon Yusen Kabushiki Kaisha Pty Ltd being penalised AU\$46 million and AU\$25 million respectively for their role in the shipping liner criminal cartel. The penalty for a third company involved, Kawasaki Kisen Kaisha will be handed down shortly, with sentencing scheduled for 15 and 16 November 2018.

Record penalties were also obtained by the ACCC in other areas of its enforcement remit. Penalties totalling AU\$11.95 million were imposed against a supplier and two of its distributors for breaching the exclusive dealing provisions of the CCA and the highest ever penalty imposed against an individual for a breach of the competition provisions of the CCA - AU\$350,000 – was ordered against the director of the supplier for being "knowingly concerned" in the contravention. Additionally, penalties of AU\$10 million were imposed against each of Telstra and Ford and AU\$9 million against Apple for contraventions of the consumer protection laws. The ACCC and Optus have recently applied to the Federal Court to consent to a proposed penalty on Optus of AU\$10 million for false or misleading representations made to consumers in relation to its third-party billing service.

The ACCC also welcomed changes to the consumer laws which increased the maximum penalty under the Australian Consumer Law from AU\$1.1 million per contravention to the greater of AU\$10 million, three times the value of the benefit received or 10% of the annual turnover in the preceding 12 months. The ACCC has also been agitating for the introduction of pecuniary penalties for breach of the unfair contract terms regime.

REGULATORY ACTIVITIES

Glencore / Port of Newcastle Access Arbitration

On 18 September 2018, the ACCC issued its Final Determination in the arbitration of the access dispute between Port of Newcastle (**PNO**) and Glencore Coal Assets Australia (**Glencore**) in relation to the terms and conditions for accessing the 'declared' shipping channel service at the Port of Newcastle.

The arbitration process commenced in 2016 after the Port's shipping channel was originally declared in June 2016 (and was reaffirmed as declared on appeal by PNO to the Full Federal Court in 2017). Glencore submitted that the main access charge should be reduced from the then imposed charge of AU\$0.69 (which was subsequently increased to AU\$0.76) to AU\$0.41 per GT. PNO submitted that an arbitrated charge using the factors set out in s44X of the CCA should result in a charge of AU\$1.3643 per GT.

The ACCC determined that PNO should reduce its charge for Glencore to AU\$0.61 per gross tonne.

This was the first major arbitration of an access dispute following a declaration under Part IIIA. Both parties have applied to the Australian Competition Tribunal for review, with Glencore seeking that the access charges should be lower still.

MARKET STUDIES AND INQUIRIES

Foreign Currency Conversion Inquiry

An inquiry into price competition among suppliers of foreign currency conversion services was announced on 2 October 2018 and submissions closed on 22 October 2018. As part of the inquiry the ACCC will consider barriers to entry in the market and whether potential new entrants to the market can compete with existing market participants. The ACCC is particularly interested in the way in which prices are presented to customers.

The Productivity Commission recently found consumers did not understand and found it difficult to compare the prices charged for international money transfers. Additionally, consumers have also complained to the ACCC that there are high mark-ups and transaction fees that apply to sending money overseas. According to ACCC Chairman Rod Sims, on average if you send AU\$1,000 from Australia overseas you will pay AU\$9 more than if you sent the equivalent amount from the United Kingdom and AU\$23 more than if you sent it from the United States.

The inquiry is being completed by the ACCC's Financial Services Unit and it is expected that the final report will be provided to the Treasurer in May 2019.

Digital Platforms Inquiry

The Digital Platforms Inquiry was announced on 4 December 2017 to look into the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. The ACCC Chairman described it as being a "deep dive" into the emergence of powerful platforms such as Google and Facebook and whether they pose a threat to this industry. The ACCC has indicated it will assess digital platforms through a competition and consumer lens. The ACCC is focused on improving transparency and making recommendations to the government.

An issues paper has been released by the ACCC, more than 70 submissions have been received and public forums have been held. The preliminary report is due on 3 December 2018 and the final report on 3 June 2019.

Retail Electricity Inquiry

On 11 July 2018, the ACCC released its final report on the retail electricity inquiry it was directed to hold by the Treasurer in March 2017 to identify the reasons for high electricity prices across the entire electricity supply chain.

The ACCC's main recommendations were:

- Abolishing the current retail 'standing' offers (which are not the same between retailers) and replacing them with a new 'default' offer consistent across all retailers, set at a price determined by the Australian Energy Regulator (AER) and requiring retailers to reference any discounts to the new 'default' offer pricing determined by the AER, making it easier for consumers to compare offers.
- Government support to make bankable new investment by new players in generation capacity to help commercial and industrial customers and drive competition.
- Limiting companies with 20% or more market share from acquiring more generation capacity.
- Improving the transparency of over-the-counter contract trading by requiring reporting of these trades to a central registry.
- Improving the AER's powers to investigate and address problems in the market and increasing penalties for serious wrongdoing.

Notably, whilst the ACCC did not generally recommend divestiture as a strategy to restoring competition in the wholesale market (with the ACCC of the view that "the divestiture of privately owned assets is an extreme measure to take in any market"), it did recommend that the Queensland Government, which owns over 65% of the generation capacity in the region, divide its generation assets into three portfolios – each separately owned and operated – to reduce market concentration. Additionally, despite the lack of a divestment power recommendation in the ACCC's report, Prime Minister Scott Morrison has since consulted on a package of measures designed to reduce energy prices including such a divestment power for the Treasurer.¹

The ACCC estimates that its recommendations, if adopted, will save large commercial and industrial customers around 26% on their electricity bill per year.

Dairy Inquiry

In April 2018 (18 months after the Dairy Inquiry was first announced), the ACCC released its final report. Eight recommendations were made as a result of the report to improve transparency and the allocation of risk between dairy processors and farmers. One of these recommendations is that a mandatory code of conduct be introduced. The Dairy Inquiry commenced in April 2016 to assess the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry.

¹ See the consultation paper here:
https://static.treasury.gov.au/uploads/sites/1/2018/10/T337042_EPM_consultation_paper.pdf

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