

Acquisition and
merger advice and
information



A Introduction to the Legislative Framework in Australia

The Competition and Consumer Act (2010) Cth (CCA),^[1]is the legislative framework that provides clarity around anti-competitive behaviour and ensures healthy competition and fair-trading in the Australian market. The relevant sections of the CCA include: Part IV (Divisions One and Two) and II.^[2]Part IV “ Restrictive Trade Practices”, aims to restrict all anti-competitive conduct between businesses to ensure fairness in the Australian marketplace. Additionally, it is important to mention that Part II of the Act initiates the function of Australian Competition and Consumer Commission (ACCC). As per the ACCC website, their main function is to enforce the CCA and some other legislation, to promote competition and fair trading.^[3]The ACCC is an independent statutory authority which has the jurisdiction to investigate and sue entities who are alleged to have breached the Act.^[4]As such, this body is of paramount importance to the Australian economy as it allows for meticulous and unbiased investigation into trade practices to protect competition.

B Application and Analysis of CCA Provisions

Division One concerns itself with Cartel Conduct (CC). CC is where a provision of any agreement aims to fix prices, restrict outputs, allocate territory and or rig bidding procedures.^[5]The section that provides for the prohibition of mergers and acquisitions (M&A) in Australia under Division One is s50. Under this provision of the CCA, M&A would be deemed prohibited if they would have the effect, or be likely to have the effect, of substantially lessening competition in any market.^[6]As per s50(1), any corporation that

directly or indirectly acquires shares in the capital of a body corporate or acquires assets of a person where the market competition would lessen substantially, is in breach of the Act.[7]For the purpose of this memorandum, the former bares relevance given the interest of Faltex, a corporation, to acquire 100% of Redback Oil Ltd, another corporation. Section 50(3) contains a non-exhausted list of factors that must be considered in determining whether or not a M&A may be prohibited.[8]Some of these include the actual and potential level of import competition in the market, the degree of countervailing power in the market and whether or not that the likelihood of the that the acquisition would result in the removal from the market of a vigorous and effective competitor.[9]In this instance, Faltex in their action to acquire Redback Oil Ltd, must meet the requirements in the CCA to ensure that they will not be in breach of the Act. Given that Faltex has approximately 35% of the market share in the retail unleaded fuel market, by acquiring 100% of the market share of ethanol fuels from Redback Oil Ltd, Faltex will be diversifying their range compared to that of their competitors; Scottish Petroleum Ltd, Kangaroo Petroleum Ltd and independents. However, should Faltex acquire 100% of the ethanol fuel market, as well as their current 35% market share in unleaded fuels, they would be lessening the market competition in both areas substantially. The factors stipulated under s50 of the CCA would be the basis for review by the ACCC should Faltex pursue the entire acquisition of Redback Oil Ltd.

C Application, Analysis and Advice Regarding ACCC Authorisation

As previously established, the ACCC has the authorisation to enforce the CCA under Part II of the Act. Parties to a M&A have two options to obtain

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clearance that grants them the ability to merge, or to have one corporation acquire the other. That is, parties to a M&A can have their proposition reviewed informally, and or they can seek formal authorisation by the ACCC. The informal review process enables M&A parties to seek the ACCC's view on whether the proposed acquisition is likely to have the effect of substantially lessening competition.[10] This process is not underpinned by the CCA or any other legislation, but rather, it is a mechanism by which the ACCC can provide its viewpoint on whether it would seek an injunction before the court to prevent a merger or acquisition from proceeding on the basis that it will or is likely to breach the CAA. M&A parties may seek statutory protection from legal action under s50 of the CCA by lodging an application for authorisation. [11] If granted, the authorised parties can acquire relevant shares without risk of the ACCC or third parties initiating legal proceedings for a contravention of section 50 of the Act. Additionally, the ACCC will not grant authorisation unless it is satisfied that either, the proposed acquisition or merger would not be likely to substantially lessen competition or the likely public benefit from the proposed acquisition or merger outweighs the likely public detriment, including any lessening of competition.[12] As such, provided that Faltex and Redback Oil Ltd were to propose this acquisition to the ACCC the likelihood of the opinion given would see to that Faltex does not acquire 100% of the market share in ethanol fuels due to the need for competitiveness in the market. Although Redback Oil Ltd currently possesses 100% of the market share for ethanol fuels, they do not have any share in the unleaded fuels market, therefore there is no competition that they need to consider. However, Faltex must consider how the M&A would lessen the competitiveness of the unleaded fuels market, and if, this proposal would

hold up in the authorisation process at the ACCC. The power for the ACCC to grant this clearance to Faltex is under s95AC, however, it is unlikely that if the parties sought clearance it would be granted unless the proposal was revised; for instance if Faltex were to acquire only 50% of Redback Oil Ltd rather than 100%.

D TPG Telecom Limited and Vodafone Hutchison Australia Pty Ltd – Opposed Merger

The ACCC decided to oppose the proposed merger between TPG Telecom Limited (ASX: TPM) and Vodafone Hutchison Australia Pty Ltd (ASX: HTA) due to likely reduction of competition and contestability in the mobile services and broadband market.[13]ACCC Chair Rod Sims said that “ market structures should be settled by the competitive process, not by a merger which results in a market structure that would be subject to little challenge in the future.” Subject to s50, the ACCC concluded that the proposed merger is likely to substantially lessen competition in the supply of mobile services because the merger would preclude TPG entering into the mobile provider market along with Telstra, Optus and Vodafone.[14]The decision reached was a preventative measure by the ACCC to ensure breaches to the CCA did not occur.

E Nine Entertainment Co Holdings Limited (Nine) and Fairfax Media Limited (Fairfax) – Successful Merger

In 2018, Nine Entertainment and Fairfax Media proposed a merger to the ACCC. This was accepted as it was unlikely to substantially lessen competition in the acquisition of media content from content providers. The <https://assignbuster.com/acquisition-and-merger-advice-and-information/>

ACCC considered the potential effects of the proposed merger on a national basis in relation to dynamic nature of media markets and the impact of changing consumer preferences in accessing news content and, in particular, the trend towards consumption of online news.[15] As both Nine and Fairfax complied s50 of the CCA, the merger was successful and Nine shareholders now own 51. 1% of the combined entity with Fairfax shareholders owning the remaining 48. 9%.

Bibliography

A Articles/Books/Reports

- Day, Jones, ' Australia: Highlighting Changes Of Interest In Competition And Consumer Law', *Mondaq* (Web Page, last updated 5th March 2019)
- Skene, John and Lawson Jepps, ' The ICLG to: Mergers & Acquisitions Law and Regulations', *International Comparative Legal Guides* (Web Page, 2019)

B Cases

- TPG Telecom Limited (TPG) Proposed Merger with Vodafone Hutchison Australia Pty Ltd (VHA)
- (ACCC Judgement) (2018)
- Nine Entertainment Co Holdings Limited (Nine) Proposed Merger with Fairfax Media Limited (Fairfax) (ACCC Judgement) (2018)

C Legislation

- *Australian Competition and Consumer Act 2010* (Cth.)

D Other

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- ACCC, About the ACCC, Australian Competition and Consumer Commission Website
 - ACCC, About Mergers, Australian Competition and Consumer Commission Website
 - Australian Consumer Law, The Australian Consumer Law – Legislation, Australian Consumer Law Website
 - Department of Industry, Innovation and Science, Complying with the Competition and Consumer Act, Australian Government Department of Industry, Innovation and Science Website
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[1] *Australian Competition and Consumer Act 2010* (Cth.).

[2] Ibid pt IV divs 1, 2.

[3]ACCC, About the ACCC, Australian Competition and Consumer Commission Website .

[4]Above n. 1 s 6A(2(d)).

[5]Ibid. s 45AA

[6]Jones Day, ‘ Australia: Highlighting Changes Of Interest In Competition And Consumer Law’, *Mondaq* (Web Page, last updated 5th March 2019) .

[7]Above n. 1 s 50(1).

[8]Above n. 6.

[9]Above n. 1 s 50(3(a)(d)(h))

[10]ACCC, About Mergers, Australian Competition and Consumer Commission Website .

[11]Ibid.

[12]Ibid.

[13]Australia Competition & Consumer Commission, “ TPG Telecom Limited (TPG) – Proposed Merger With Vodafone Hutchison Australia Pty Ltd (VHA)” (2018) .

[14]Ibid.

[15]Australia Competition & Consumer Commission, “ Nine Entertainment Co Holdings Limited (Nine) – Proposed Merger With Fairfax Media Limited (Fairfax)” (2018)