

SAILING STEADY IN ROUGH SEAS: MERGERS IN 2020

NOVEMBER 2020

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INTRODUCTION

2020 has been the most extraordinary, disruptive year in recent memory.

But has that disruption been felt in Australian merger administration?

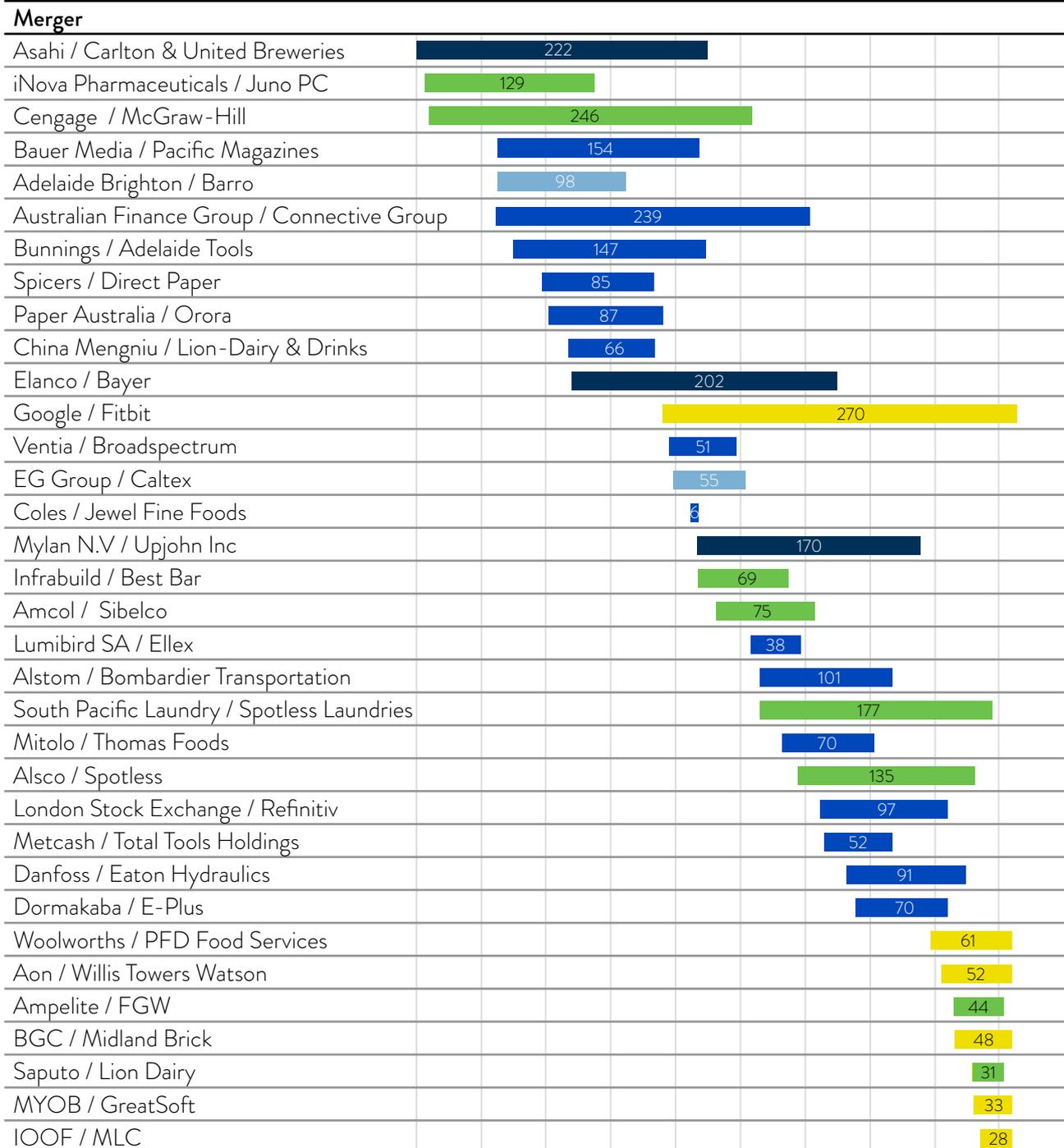
In this article we look at the key developments in the ACCC's enforcement of the Australian merger law in 2020, including the impacts of the COVID-19 pandemic.

We conclude that, despite the adjustment to working during lockdowns, it has largely been business as usual for the ACCC, and this is something that it should be commended for.

Nevertheless, the ACCC has also lost two significant merger cases in Federal Court this year, with the Court in both cases finding that the ACCC had failed to establish that the proposed transactions were likely to substantially lessen competition when compared with the counterfactual – what would occur absent the merger. ACCC Chair, Rod Sims, has flagged that the ACCC will put forward its proposals for changes to the merger laws early next year. We anticipate robust debate on this issue in 2021.

OVERVIEW OF INFORMAL MERGER REVIEWS WITH PUBLIC MARKET INQUIRIES COMPLETED IN 2020 AND THEIR DURATION

Individual merger review calendar days



KEY

- Not opposed
- Not opposed subject to undertakings
- Withdrawn
- No decision
- Ongoing

23/08/19 12/10/19 1/12/19 20/01/20 10/03/20 29/04/20 18/06/20 07/08/20 26/09/20 15/11/20

Calculated to 23 November 2020

OUTCOMES

+ Similar volume of informal merger reviews in 2020

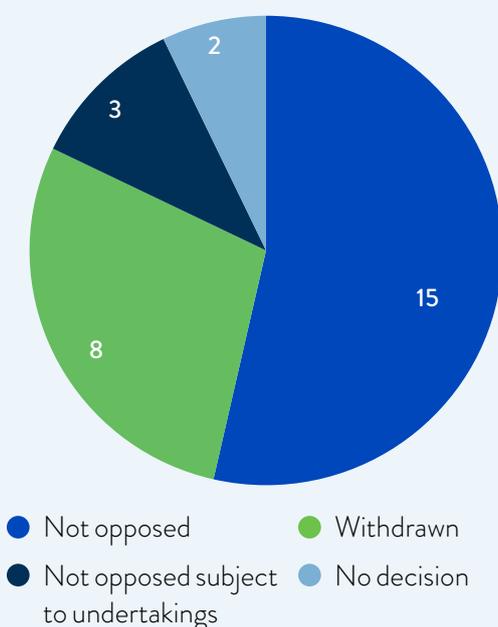
For the last few years, around 90% of informal merger reviews that the ACCC has dealt with have been via confidential pre-assessment.

Although information as to how many confidential pre-assessments the ACCC has conducted so far this year is not fully available yet, we do know that as at 23 November 2020, the ACCC has completed public informal reviews of 28 proposed mergers.

The ACCC has continued to receive merger notifications during the pandemic, and compared to 2019, there has not been a reduction in the number of informal merger review applications subject to public market inquiries. In fact, the ACCC has completed more public inquiry merger reviews in 2020 than it did in 2019. There are also 6 mergers currently under consideration.

Of the 28 informal merger inquiries completed this year, the breakdown of outcomes is as follows:

Informal Merger review outcomes - 2020



+ One formal merger authorisation application in 2020 so far

The ACCC received one formal merger authorisation application this year, being Gumtree AU Pty Ltd's proposed acquisition of Cox Australia Media Solutions. Gumtree lodged its application on 14 January 2020, and authorisation was granted on 30 April 2020, being 107 calendar days. Both Gumtree and Cox supplied online automotive classified advertising to private and commercial advertisers in Australia, and space on their websites and mobile applications to display advertising. The ACCC considered that the acquisition would not cause a substantial lessening of competition in any market and granted authorisation under the first limb of the test.

The only other application for formal merger authorisation that the ACCC has received since the process was reformed in November 2017 was AP Eagers Limited's proposed acquisition of Automotive Holdings Group in 2019 which took 87 calendar days. This is slightly lower than the average calendar days in both 2019 and 2020 so far for the ACCC to complete public informal merger reviews (being around 104 in 2019 and 108 in 2020). This was also decided on the basis that the proposed acquisition would not cause a substantial lessening of competition, taking into account an undertaking that AP Eagers would divest its existing new car retailing dealerships and related business sites in Newcastle and the Hunter Valley, where the ACCC had competition concerns. AP Eagers and Automotive Holdings both supplied new and used cars, trucks and buses and associated services in various parts of Australia.

While for completeness in both decisions the ACCC outlined the public benefit arguments made by the respective applicants, it did not grant authorisation under this limb of the test. It appears that we will need to wait until at least 2021 for an authorisation decision that really grapples with the public benefits test

+ No transactions were opposed outright in 2020

The ACCC has opposed at least one merger outright every year for which there are records available on the public [register](#), except 2016. In 2020 it has not opposed any mergers outright so far. In 2019 it opposed two mergers:

- TPG's proposed merger with Vodafone, where the ACCC opposed and the parties successfully challenged the opposition in Federal Court, obtaining a declaration that the merger was unlikely to result in any substantial lessening of competition; and
- B&J City Kitchen's proposed acquisition of the business and assets of Jewel Fine Foods.

SPOTLIGHT: THE FAILING FIRM DEFENCE

At the start of the pandemic, ACCC Chair Rod Sims stated:

“Do not expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anti-competitive increases in market power, or the rise of so-called ‘national champions’”.

Contrary to what we might have expected at the beginning of the pandemic, the ACCC has not (at least so far) been inundated with public submissions claiming that a merger between two competitors is necessary because one or both parties would otherwise exit the market due to COVID-related pressures.

However, should this start to happen in the future (bearing in mind that the long-term economic impact of the pandemic is still unknown), the attempted merger between B&J City Kitchens / Jewel Fine Foods in 2019 gives us an insight into how the ACCC might treat such arguments.

B&J and Jewel were the two largest producers of chilled ready meals that met the requirements of major retailers. Jewel was in administration and B&J sought to acquire it using a failing firm argument.

However, the ACCC found that if the acquisition did not proceed, Jewel was likely to be sold to an alternative

acquirer and continue to compete with B&J. The ACCC consequently opposed the transaction. Jewel was eventually sold to Coles, and the ACCC approved that transaction in just 6 days.

It will not be enough for merger parties to simply point to the economic impact of the pandemic when making a failing firm argument. They must be able to show that if the transaction did not proceed, the relevant business and assets would be likely to exit the market altogether (rather than be acquired in a less problematic merger).

More recently in the ACCC’s annual report for 2019-20, ACCC Chair Rod Sims stated:

In 2020-21 we will pay particular attention to the potential for opportunistic purchases of distressed or failing firms caused by the worsening economic climate to ensure that acquisitions of assets or businesses do not substantially lessen competition..



+ But the ACCC continues to raise and resolve competition issues

Most often, if the ACCC raises an ‘issue of concern’ that it considers means the proposed transaction is likely to result in a substantial lessening of competition (or ‘red light’ issue) in a Statement of Issues, the merger parties will either seek to resolve the ACCC’s concerns with a court-enforceable undertaking (usually to divest part of the business) or will abandon the transaction altogether, so that the ACCC is not required to actually oppose the transaction.

This has been the case in the majority of merger reviews completed in 2020 where the ACCC identified a “red light” issue (in some cases releasing the Sol in late 2019):

ASAHI GROUP HOLDINGS / CARLTON & UNITED BREWERIES:

After the ACCC raised concerns in December 2019 about significant consolidation in the supply of cider product in the Australia that would be likely to result in a substantial lessening of competition, the parties undertook to divest three Carlton & United cider brands (Strongbow, Bonamy’s and Little Green). The ACCC also considered that the proposed transaction may result in a substantial lessening of competition in the beer market and accepted an undertaking to divest Stella Artois and Beck’s to address these concerns. The ACCC considered that the divestments would enable a new or existing supplier to replace the competition lost between Asahi and Carlton & United.

CENGAGE LEARNING / MCGRAW-HILL EDUCATION:

The ACCC raised concerns in December 2019 that that the market for higher education publishing in Australia was already highly concentrated and that Cengage and McGraw-Hill were each other’s major competitors, given their scale and the breadth of their offerings. The parties withdrew in May 2020, after the US Department of Justice and the UK Competition and Markets Authority had also raised significant concerns.

INOVA PHARMACEUTICALS / JUNO PC HOLDINGS:

The ACCC raised concerns in December 2019 that the acquisition would remove iNova’s likely closest future competitor in the supply of weight-loss medication, which otherwise would have placed downward pressure on the prices of iNova’s phentermine-based weight loss products. The parties withdrew their application a few weeks later, in early January 2020.

ALSCO / SPOTLESS’ GARMENT BUSINESS:

The ACCC raised concerns in October 2020 that the acquisition was likely to cause a substantial lessening of competition in the supply of commercial laundry services for garments in NSW, SA, Qld, Tas, Vic and WA, and some multi-state markets. The parties withdrew their application two weeks later.

SOUTH PACIFIC / SPOTLESS LAUNDRIES

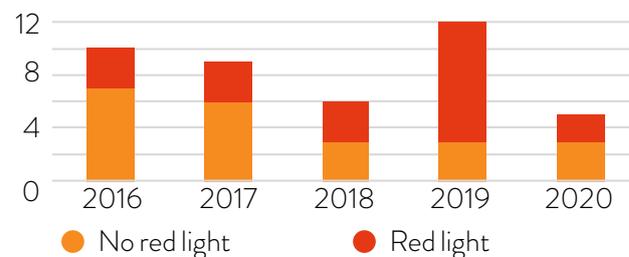
There was also one merger that was withdrawn after the ACCC raised ‘amber light’ concerns (i.e. ‘issues that may raise concerns’): *South Pacific Laundry / Spotless Laundries*. The ACCC’s preliminary view in August 2020 was that the proposed acquisition may substantially lessen competition in the supply of commercial laundry services in multiple areas where the parties overlapped. The parties withdrew their application on 4 November 2020.

However, the ACCC has:

- released fewer Statements of Issues (Sols); and
- identified fewer “red light” issues,

in 2020 than in 2019.

Sols released by ACCC 2016-2020



While this is an interesting decrease, we can’t say that this is because of any change within the ACCC. The ACCC considers each merger on a case-by-case basis and does not appear to have relaxed its approach because of the pandemic. Most likely, a high number of particularly complex mergers happened to be notified in 2019.

SPOTLIGHT: “RED LIGHT” TURNAROUNDS

We noted above that where the ACCC raises a red-light issue in a Statement of Issues (“Sol”) the merger parties normally resolve the issue with a divestment or withdraw the transaction (and if they don’t, the ACCC opposes the transaction). This is almost always the case – before FY19-20, the last instance of the ACCC raising a red light but ultimately not opposing the transaction was in December 2014.

However, in FY19-20 this happened three times (two of them in calendar year 2020).

JUNE 2020

Australian Finance Group proposed acquisition of Connective Group Pty Ltd

The proposed acquisition was to merge the two largest mortgage aggregators in a market that the ACCC considered was already concentrated with significant barriers to entry. The ACCC initially identified two red light issues – that there would be a substantial lessening of competition in the supply of mortgage aggregation services to brokers, and in the supply of mortgage distribution services to lenders. However on 18 June 2020 the ACCC cleared the acquisition, finding that existing competitive constraints would prevent any substantial lessening of competition.

MARCH 2020

Bauer Media / Pacific Magazines

The ACCC was initially concerned that the proposed acquisition would be likely to substantially lessen competition because the number of major print magazine publishers would be reduced from 2 to 1. The ACCC was particularly concerned about the loss of competition between Woman’s Day and New Idea, and Take 5 and That’s Life. However, on 26 March 2020 the ACCC cleared the acquisition, finding that the combination of Bauer and Pacific Magazine’s titles would not mean the combined entity would be likely to significantly increase prices or decrease quality. In its reasons the ACCC cited that “significant declines in the circulation and revenue experienced by many magazines are sustained, substantial and likely to continue, resulting in less investment in content and fewer retail promotions” and that the transaction was not likely to substantially lessen competition because publishers in other media, particularly online publishers, will increasingly compete with Bauer.

OCTOBER 2019

Emergent Cold / AB Oxford Cold Storage Company

The ACCC was initially concerned that the proposed acquisition would substantially lessen competition because it would reduce the number of large third-party cold storage providers in Victoria from 4 to 3 and remove each party’s closest competitor, such that it would be likely that prices would increase or service levels would decrease. However on 23 October 2019 the ACCC cleared the acquisition, finding (after further market inquiries) that the merged entity would actually continue to be constrained by a number of other suppliers and, to a lesser extent, the prospect of some large customers self-supplying in response to price increases.

Perhaps a red light in an Sol is no longer the death knell it once was?

+ ACCC still seeking divestitures over behavioural undertakings

Three mergers have been cleared this year subject to undertakings following an in-depth review: *Mylan N.V. / Upjohn* (10 September), *Elanco Animal Health / Bayer Aktiengesellschaft’s animal health business* (9 July), and *Asahi / Carlton & United Breweries* (1 April).

All of these clearances involved structural divestiture undertakings. The ACCC therefore does not appear to have taken a lenient approach to remedies (i.e. by accepting behavioural undertakings where it otherwise would have insisted on divestiture) during this period. This is consistent with Mr Sims’ comments highlighted above.

ACCC MAINTAINING TIMEFRAMES IN 2020

So far this year we have noticed that, overall, public informal merger reviews have taken on average **less than 1 calendar week longer and around 20 more ACCC review days**¹²³ than they did in 2019. This includes transactions that continue to a “Phase 2” review (being where a Sol is issued).

Average ACCC review timing - Informal merger reviews 2016-2020 (so far)



This means that initial fears that the pandemic would cause major blowouts in the ACCC’s review timeframes have not materialised. In fact, you can see from our first table above that there have been several mergers that the ACCC has reviewed in 2020 in relatively tight timeframes.

Drilling further down into the data, we can make the following points:

- + Some of the lengthiest mergers (e.g. *Asahi / CUB*, *Bauer Media / Pacific Magazines and Bunnings / Adelaide Tools*) were completed in March or April 2020, so the bulk of the review would have been complete before lockdowns began.
- + The number of ACCC review days is also closer to total calendar days than usual, which suggests that on average the ACCC may have had to ‘stop the clock’ less.

1 The ACCC does not count non-business days, and it ‘stops the clock’ when it is waiting for information from the parties.

2 In 2019 the ACCC did not publish its ACCC Review Days for TPG Telecom Limited (TPG) – proposed merger with Vodafone Hutchison Australia Pty Ltd (VHA), which took 226 calendar days, so it is not included in the average ACCC Review Days for 2019. If it were included we expect that the 2019 figure would be higher.

3 These figures do not count mergers that were withdrawn, where the ACCC did not make a final decision, or investigations of completed acquisitions.

ACCC CONTINUES TO LOSE CASES IN THE FEDERAL COURT

This year the ACCC lost two contested merger cases:

+ TPG / Vodafone

TPG had announced in 2017 that it would build Australia's fourth mobile network, but it abandoned those plans after the Federal Government banned the use of Huawei's equipment in 5G networks. The ACCC opposed TPG's acquisition of Vodafone in May 2019, as it was concerned that, without the proposed merger, there was still a real chance that TPG would become a competitive fourth mobile network operator even without Huawei's equipment. Vodafone then applied to the Federal Court for a declaration that the transaction was not likely to substantially lessen competition, arguing that TPG no longer had the ability or intention to roll out its own mobile network but the merged entity could offer consumers a better mobile service.

In February 2020 the Federal Court found in Vodafone's favour, acknowledging that *'there is no commercially relevant or meaningful real chance that TPG will roll-out a retail mobile network or become an effective competitive fourth [mobile network operator]. The rational and business-like solution is for Vodafone and TPG to merge, with the result that both companies will be enhanced and will be a stronger competitive force against Telstra and Optus.'* The ACCC later announced that it would not appeal the Court's decision.

+ Pacific National / Aurizon

Pacific National is the largest provider of rail linehaul services in Australia. It entered into a sale agreement to acquire the Acacia Ridge intermodal terminal (a rail terminal located in Queensland) from Aurizon. In July 2018 the ACCC refused to grant informal clearance for the acquisition and commenced Federal Court proceedings alleging, amongst other things, that the acquisition would have the effect of substantially lessening competition in certain geographic markets for interstate rail linehaul services. The ACCC was concerned that the proposed acquisition would give Pacific National the ability and incentive to discriminate against third parties seeking to access the terminal in favour of its own rail linehaul operations, and that it would materially raise barriers to entry that would deter a new entrant from providing interstate rail linehaul services in competition with Pacific National.

In May 2019, the Federal Court found that the Proposed Acquisition would have had the likely effect of substantially lessening competition and therefore contravened s 50 of the Competition and Consumer Act (Cth) 2010 *if it were not for the s 87B undertaking proffered by Pacific National during the hearing.* Pursuant to the undertaking, Pacific National would have been required to provide third parties access to the Acacia Ridge Terminal on a non-discriminatory basis.

The ACCC appealed the decision to the Full Court. It challenged the primary judge's acceptance of, and reliance upon, the undertaking in determining that the Proposed Acquisition would not likely have the effect of substantially lessening competition, among other arguments. The Full Court dismissed the appeal and went further than the trial judge in finding that even in the absence of the undertaking, the Proposed Acquisition would not have had the likely effect of substantially lessening competition. The trial judge had found that if the proposed acquisition did not proceed then there was a possibility of a new entrant in a key rail linehaul market in about 5 years' time. The Full Court considered that prospect to be speculative, and found that given the speculative prospect of new entry within the relevant timeframe, *"the competitive constraints facing Pacific National in that timeframe will not differ in any real or substantive way whether Pacific National acquires the ART or does not acquire the ART."*

The ACCC is seeking special leave to appeal to the High Court. The special leave hearing is listed for 8 December 2020.

This continues a long trend of the ACCC losing contested merger cases in court. Stay tuned for our next article on this topic, which will delve into these cases in more depth, examine exactly why the ACCC lost and put them in the context of the ongoing merger law reform debate that we expect will continue for some time.

WHAT'S HAPPENING OVERSEAS?

Regulators around the world have had to adjust to working under lockdowns but, with the exception of an initial pause by the European Commission, have largely continued to accept and review merger filings as usual, taking the view that continuing to assess and facilitate mergers – to the extent that they do not raise competition issues – is important for economies struggling to deal with the COVID-19 pandemic.

For example:

- + **UK:** In April 2020 the CMA released guidance advising that while it would continue to adhere to statutory timeframes and would not relax its substantive assessment standards, it understood that some businesses would have difficulty responding to information requests and was unlikely to impose penalties for a failure to comply. It acknowledged that its pre-notification process could take longer than usual and encouraged merger parties to consider whether filings could be delayed. The CMA also published a summary of its position on the failing firm defence to be read in conjunction with its guidance on merger reviews during COVID-19. The summary reiterates that the CMA assesses such arguments on a case-by-case basis.
- + **USA:** The DOJ requested on an additional 30 days after parties have complied with document requests to complete its review of pending and future transactions. Some early calls for a moratorium on mergers that met certain size thresholds, including from FTC Commissioner Rohit Chopra (as reported by MLex) did not eventuate. The FTC has stated on its [blog](#) that '[d]espite the challenges created by the COVID-19 pandemic, Bureau staff have not let up in fulfilling our mission to enforce the antitrust laws and promote competition. In fact, the Commission is on pace for one of its busiest years for merger enforcement in twenty years.' Regarding the failing firm defence, the FTC published an article on its [blog](#) on 27 May 2020 which advised merger parties to 'think twice before making apocalyptic predictions of imminent failure during a merger investigation'.

CMA Chairman Andrew Tyrie later said in the CMA's FY19-20 annual report that:

In spite of the practical challenges of the crisis, and the urgent competition and consumer issues that coronavirus has raised, the CMA has largely managed to maintain business as usual, continuing to progress its significant caseload to protect UK consumers.

The UK Government has introduced changes to the Enterprise Act 2002 which allow it to take action in relation to certain mergers and acquisitions for the purpose of maintaining UK capability to combat, and to mitigate the effects of, public health emergencies. However, the Government has also stated that it 'does not expect the new provisions to bring about any change in the Competition and Markets Authority's... approach to the assessment of mergers on competition grounds'.

- + **EU:** The European Commission has published 'Special Measures due to Coronavirus' that advised that 'DG Comp faces difficulties in some cases in collecting information from the notifying parties and third parties, such as their customers, competitors and suppliers, given the disturbances caused by coronavirus outbreak. Consequently, DG COMP encourages parties to discuss the timing of notifications of transactions with the relevant case team and to use electronic means to notify their transactions.' EU Commissioner Margrethe Vestager has commented that there has been a temporary, small reduction in notifications and delays in responses to questions, but 'merger enforcement never stopped'.





LUKE WOODWARD

Partner

T + 61 2 9263 4014

E lwoodward@gtlaw.com.au



ELIZABETH AVERY

Partner

T + 61 2 9263 4362

E eavery@gtlaw.com.au



JENNIFER BARRON

Partner

T + 61 2 9263 4063

E jbarron@gtlaw.com.au



GINA CASS-GOTTLIEB

Partner

T + 61 2 9263 4006

E gcass-gottlieb@gtlaw.com.au



CHARLES COOREY

Partner

T + 61 2 9263 4019

E ccoorey@gtlaw.com.au



MOYA DODD

Partner

T + 61 2 9263 4432

E mdodd@gtlaw.com.au



SIMON MUYS

Partner

T + 61 3 8656 3312

E smuys@gtlaw.com.au



PETER WATERS

Consultant

T + 61 2 9263 4233

E pwaters@gtlaw.com.au



SUSAN JONES

Special Counsel

T + 61 3 8656 3451

E sejones@gtlaw.com.au



LOUISE KLAMKA

Special Counsel

T + 61 2 9263 4371

E lklamka@gtlaw.com.au



GEOFF PETERSEN

Special Counsel

T + 61 2 9263 4388

E gpetersen@gtlaw.com.au



GENEVIEVE RAHMAN

Special Counsel

T + 61 2 9263 4194

E grahman@gtlaw.com.au



LIANA WITT

Special Counsel

T + 61 2 9263 4472

E lwitt@gtlaw.com.au