Anti-trust in a Time of Global Crisis: An Australia Perspective

Kluwer Competition Law Blog
November 18, 2020

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Please refer to this post as: Ayman Guirguis, Mei Gong, 'Anti-trust in a Time of Global Crisis: An Australia Perspective', Kluwer Competition Law Blog, November 18 2020, http://competitionlawblog.kluwercompetitionlaw.com/2020/11/18/anti-trust-in-a-time-of-global-crisis-an-australia-perspective/

The theme of antitrust in crisis is very timely for the current global climate, but more so than ever for Australia where we had already dealt with unprecedented drought, bushfires and now the global COVID-19 pandemic. Not for a century have Governments had to manage a health and economic crisis of such intensity, scale or speed.

Part of the complexity in solving this dilemma, at least economically, lies in the numerous shifting battlegrounds being fought, based on conflicting views about market dynamics and values we wish to espouse in a COVID-19 and post COVID-19 world. Often, but not always, the scale balancing exercise is between public interest as against other equally legitimate interests, such as personal liberties, consumer responsibility, industry coordination, saving 'failing' firms and embracing technological innovations.

Unsurprisingly, competition law has not been immune to both the practical and ideological challenges posed by the pandemic. Like other global anti-trust enforcement agencies, the Australian Competition and Consumer Commission (**ACCC**) has had to adapt to mass remote working, with a swift successful focus on the sweep of COVID-19 related competitor collaborations necessitated by the need to effectively respond to the immediate effects of the pandemic. With the pandemic now momentarily suppressed in Australia (hopefully), the ACCC is pondering on longer-term market effects issues, including considering whether it is time to introduce a more 'regulator' friendly merger paradigm. Perhaps an equally mammoth issue for the ACCC to grapple with is the appropriate reins it should (or should not) place on large technological platforms. Such platforms are undoubtedly some of the most transformative, innovative companies in the world, but their methods of accumulating market power and dealing with small businesses are increasingly subjected to the expansive lens of regulatory scrutiny.

The ACCC's approach to responding to a global crisis

Like other antitrust enforcement agencies around the world, the ACCC has had to rapidly shift their operations and priorities to respond to a new global reality. However, one must look deeper beyond these 'one size fits all statements' to truly assess the effectiveness of regulatory action during COVID-19, now with the benefit of some level of hindsight. The ACCC has adopted a nuanced and highly responsive regulatory approach that has been pivotal to successfully assist Australian businesses to weather the COVID-19 storm.

Operationally, the ACCC has had to reconfigure its workforce to work remotely almost entirely overnight. During the pandemic's peak, it focussed on providing pragmatic regulatory oversight over a number of enforcement areas. However, it now appears that there has been a greater resumption of 'business as usual' activities, as follows:

1. At the start of the pandemic, the ACCC temporarily recalibrated its 2020 compliance and enforcement priorities to COVID-19 related issues (a number of which will be discussed in this paper).[1] More recently, the ACCC has initiated a number of proceedings on non-COVID-19 specific issues, including alleging cartel conduct in the construction industry and unfair contract terms in the printing industry that are aligned with its original 2020 compliance priorities of focusing on anti-competitive behaviour in the construction sector and protecting small businesses.[2]
2. While we can all agree that the ACCC's merger review/assessment process is very efficient by world standards, there is a level of opacity, particularly due to the large number of reviews finalised under the pre-assessment process – which makes it impossible to know the true impact of COVID-19 on Australian merger review, including whether the ACCC's initial public warning about limiting its resources on 'speculative' mergers was warranted.[3] However, our recent experience indicates that the ACCC is achieving quick turnaround times, perhaps as a result of reduced pressure on its resources to deal with the initial sweep of COVID-19 authorisations;
3. It formed a COVID-19 Taskforce which focussed on early intervention and engagement with businesses on issues such as consumers' refund rights and remedies due to forced service cancellations;

This is an area where the ACCC appears to have changed its regulatory approach during the course of the pandemic. At the start of the pandemic, understandably, the ACCC was very concerned about stranded consumers left without any remedy and companies charging consumers large cancellation fees. It consequently applied regulatory pressure on a number of travel and aviation companies to provide *full* refunds to eligible consumers rather than compelling them to offer credit vouchers.[4] The ACCC has now pared back its approach, and recently indicated that partial refunds are allowed as long as the reduction is "reasonable and appropriate".[5]

Such a nuanced change in the ACCC's approach may be indicative of its confidence of increased consumer awareness about their rights. It is also consistent with the reality that these companies were "ready, willing and able" to provide such services, but for COVID-19. Arguably, their inability to provide services to consumers in these circumstances may amount to 'force majeure' and that they may not have been legally obligated to provide full refunds.

4. Taking a pragmatic and yet principled approach to COVID-19 related competitor collaborations, resulting in approvals, at a breakneck pace, of close to 30 authorisations allowing for competitor collaborations across the grocery, finance, pharmacy/healthcare, retail, energy and telecommunication sector in the space of 4 short months, with interim authorisations often being granted within 48 hours of lodgement (which would usually take at least a month in pre-COVID-19 times).[6]

Competitor Collaborations during COVID-19

At this point, one may ask whether the ACCC's rapid pace of regulatory approvals amount to 'rubber stamping' competitor collaborations? If so, should Australia adopt a forbearance/self-assessment regime such as is in other jurisdictions like the US, EU, and the UK?[7]

The 'tried and tested' approach to authorisation involves a public 6-month consideration of the benefits of the public benefits resulting from the proposed conduct.[8] The primary benefits, as against other forbearance/self-assessment regimes, for both the applicants, as well as the ACCC, are legal protections from regulatory/private actions, while providing the ACCC with unparalleled clarity on what collaborative conduct is actually occurring 'on the ground'.

Extraordinary times call for extraordinary measures, and even the conventional authorisation process has had to be significantly and promptly adapted to address the urgency of COVID-19 challenges. Such transformation has been in various forms:

Firstly, in the ordinary course, both the applicants and any interested third parties have various opportunities to make written submissions, including to respond to the ACCC's interim determination.[9] To address these voluminous applications on an urgent basis, the ACCC has decided, in many cases, to short circuit the process by seeking interested parties' feedback only *after* the issue of its interim authorisation. This has allowed the ACCC to make interim decisions in an extraordinarily timely manner, in many cases, within 48 hours of lodgement.

As an aside, there are outliers to this trend, particularly as the pandemic 'stabilises'. Notably, in a recent application by Virgin Australia and Alliance Airlines to cooperate in relation to the provision of services on various regional and international routes due to the COVID-19 pandemic for 2 years, the ACCC is seeking submission *prior* to its interim authorisation decision (the longest authorisation period being applied for so far out of the COVID-19 related authorisations also reflects pessimism about the pandemic's enduring economic effects).[10]

Secondly, perhaps to counter concerns that some material impacts of the competitor collaborations may not have been properly considered/the scope of the authorised conduct may be too broad, the ACCC both:

- proactively sought individual participants' feedback as a part of its consideration of the authorisation applications, as well as providing for third parties that were not part of the 'applicant group' to be added to that group, so as not to be at a competitive disadvantage during the pandemic period; and
- imposed significant and onerous regular reporting conditions both as a part of its consideration of the authorisation applications and following its final determination, requiring much of the reporting to be made public. For the pharmaceutical wholesalers whom we represented, this has meant an onerous fortnightly reporting regime for at least the next year.[11] The ACCC may well be legitimately concerned about maintaining oversight to deter potential complacency/unnecessary collaboration outside of the scope of authorisations between competitors (given the significant number of sectors/market participants affected simultaneously). However, query whether this well-meaning intention may have unintended consequences for struggling businesses who are left with onerous and ongoing compliance burdens.

For businesses that find the more drawn-out process of authorisation unappetising, the two other regulatory alternatives may not be much more appealing. The class exemption option bears the closest resemblance to the forbearance/self-assessment regimes in the UK, EU or US. Since November 2018, the ACCC has had the option to offer class exemptions allowing businesses covered to be exempt from competition law breaches for certain anticompetitive conduct that do not substantially lessen competition and/or are likely to have net public benefits.

The ACCC has recently announced that its first-class exemption will be commencing in early 2021. The new exemption will allow small businesses, including franchisees and fuel retailers to collectively negotiate with their supplier counterparties.[12] Such exemptions, at least in principle, can equalise the bargaining power of the respective parties without any legal compulsion (such as a boycott right by the collective bargaining parties) on the target to engage in collective bargaining. However, seeking particular class exemptions for the period of a crisis is unlikely to be practical given its slow and considered pace, coupled with the associated regulatory processes required (in the form of Parliamentary tabling and disallowance procedures).

Take, for example, the collective bargaining class exemption which was initially under consideration since August 2018, over 2 years ago.[13] Or the ocean liner shipping class exemption which was first under consideration in December last year, but the consultation process has not yet recommenced.[14] Although COVID-19 undoubtedly contributed to some delays, it is unlikely that ad-hoc class exemptions will be the 'magic silver bullet' for the range of urgent and bespoke competitor collaborations that have arisen as a result of the global health pandemic.

Finally, parties may seek to the self-assess under joint venture exception to cartel conduct. If provisions of a collaboration that may amount to cartel conduct are 'reasonably necessary' for, and 'for the purposes of', the objectives of the joint endeavour, the pandemic specific collaborations may be exempt from per se liability. However, the sector-wide collaborations we have seen in COVID-19 are unlikely to be suited for this route due to the limited scope of these joint endeavours. For example, the pharmaceutical wholesalers' collaboration and the others with which we are familiar, did not involve any business cost or revenue sharing arrangements and only allowed for limited non-pricing data sharing, arguably uncharacteristic of a typical joint venture.

It is clear that the authorisation process has been a very powerful and successful tool for the ACCC and businesses to deal with urgent competitor collaborations during a crisis.

Price Gouging

A slight detour to consider 'price gouging' behaviour which has become more prevalent or perhaps public during the pandemic, where the supply of essential goods cannot keep up with demand-driven largely by irrational consumer behaviour. Similar to a number of jurisdictions, price gouging in Australia is not illegal. Although the Minister for Health has made a Biosecurity Determination prohibiting price gouging on 'essential goods',[15] to date, the ACCC has not undertaken any enforcement activities against price gouging (or related misleading conduct), save for perhaps, pressuring petrol retailers to pass on cost savings to consumers.[16]

Exploitative behaviours such as price gouging are often symptomatic of a lack of effective competition. Alongside with unfair contract terms (which currently have do not attract penalties but may be declared void by the Court), the ACCC has increasingly expressed impatience with its role of being a 'toothless tiger' in tackling these loopholes of Australian Consumer Law. Its recent proposal to renaming the Australian Consumer Law to be the Australian Consumer and Fair Trading Law, as well as renewing calls to penalise unfair contract terms and introduce a broader unfair trading practices provision may well suggest its ideal market economy involves further curbing the market power of larger players and strengthening protection for small businesses and consumers.[17] Only time will tell whether such reforms are warranted.

The unlikely (public) rise in 'failing or flailing firm' arguments amidst pandemic-related insolvencies

Although much has been said about competitor collaboration in times of crisis, what about businesses that cannot 'hold-out' during the economic slump and goes into voluntary administration or insolvency? As has been the case in the US and elsewhere in the world, Australia has also been vulnerable to some high profile corporate collapses. Household names such as Virgin, a number of fashion houses, stationary retailer Kikki.K and foreign currency exchange chain Travelex have collapsed into administration. However, even if a seismic shift of more failing businesses is observed, we are unlikely to see much, if any, 'failing' firm arguments being publicly used in Australia or observe a regulatory position change in respect of such arguments. There are both substantive, as well as process-related issues contributing to this.

As stated earlier, Australia's merger control process facilitates a very efficient consideration of mergers, as compared with many jurisdictions. However, the reality is that our system does not lend itself to gaining great insight into this issue.

Arguably, the most critical factor contributing to some opacity of Australia's merger regime is the availability of the confidential 'pre-assessment' process which the overwhelming majority of merger proposals are assessed through. In fact, in FY19, the ACCC considered 92% of its 331 merger matters through this process.[18] Added to this is the fact that there are no pre-merger notification requirements in Australia (not that we are advocating for any such requirement). In addition, the ACCC has also recently announced that for mergers that are completed without prior notification to the ACCC, any post-merger review will no longer be placed on the ACCC's public merger register.[19] Consequently:

- there may well be parties who consider that a failing company argument is available to their transaction without it being brought to the ACCC's attention; and/or
- if such arguments are raised in the context of confidential pre-assessment processes and decisions, the 'market' is generally not privy to the decisions by the ACCC (recognising that significant proposed mergers are generally subject to the "standard" informal clearance process that involves public market enquiries and public position/decisions being taken by the ACCC).

While the ACCC's pre-assessment process is very efficient for merger parties, it does not always assist in providing clarity/transparency to businesses about the ACCC's approach to market definition and market dynamics in a merger control context.

Notwithstanding these criticisms, the ACCC has been very clear with its regulatory approach to assessing 'failing' or 'flailing firm' arguments. Both in pre-pandemic times and the current extraordinary times of 2020, the ACCC has publicly indicated that merger assessments involving concerns about the financial viability of firms will need to go beyond considering current market impacts, with due regard paid to the longer-term impact on competition arising from any change in market structures.[20]

That is not to say that the ACCC will make a 'blanket claim' and reject the validity of the 'failing' firm argument in every case. In fact, merger considerations specific for 'failing firms' are clearly outlined in the ACCC's *Merger Guidelines*, which considers whether the 'failing' firm's assets will leave the industry and the likely state of the competition after the 'failing firm' has exited from the market.[21] While it is clear that considering the financial position of the 'failing firm' will not be sufficient to secure merger clearance alone, it is likely that the financial impacts of the pandemic will nonetheless play a key role in determining 'failing or flailing firm' mergers, similar to what has happened in a number of bank mergers following the 2008 Global Financial Crisis (**GFC**). [22]

Ultimately, what the COVID-19 market paradigm, particularly in its long road to recovery, will look like, may well be shaped by not just the unpredictable nature of the global health crisis, but by the market structures that the ACCC (and the Government) may wish to preserve for our future.

Renewed regulatory interest in large technology platforms and Fintech markets

Consumer data is a new source of market power. As the recent Netflix documentary 'Social Dilemma' sharply states it, "*if you're not paying for the product, then you're the product*". Arguably, what is driving regulatory interest is a greater normative appreciation of the power of data, algorithms and automation underlying these large technology platforms' interactions with customers – in addition to the sheer 'size' of the technology platform providers.

It is uncontroversial that market power, by itself, is not illegal, and competitors are generally encouraged to engage in commercial tactics to advance their market shares. And although these issues are not necessarily unique to COVID-19, our increasing reliance on technology platforms during these socially distanced times have inadvertently has entrenched the power of technological platforms and the resultant ancillary market issues.

What is at stake here is more than competitive markets. Privacy concerns over technology platforms' use of personal data and the importance of 'public interest' journalism have all been central to the debate on the role of platforms. The intersection of these complex spheres may well raise a separate debate about whether the ACCC, as a traditional competition and consumer law regulator, is appropriately placed to traverse the complex array of privacy and media regulation concerns associated with these large technology platforms' activities.[23]

In Australia, the ACCC appears to be concerned about the manner in which large technology platforms are expanding, entrenching, and potentially misusing their market power.[24] As Mr Sims stated in a recent speech discussing market power during the COVID-19 era, although Facebook and Google achieved their dominant market positions by "*excellent and beneficial innovation... We need as a society to ask how much market concentration do we want to tolerate?*" [25]

It is also increasingly clear that the undercurrents of this controversy lie in debates about the kinds of regulatory enforcement tools and regulation (and thereby the economic values which we should support as a society) that will be the most effective in nurturing innovation while curbing any unintended side effects.

Putting to one side these thorny ideological questions, it is clear that the ACCC and other overseas regulators are playing a rapid 'catch-up' race in attempting to understand as much as about these complex, extremely dynamic and intangible digital markets as possible. The ACCC is doing this through undertaking detailed market studies into digital markets, including its 18-month long Digital Platforms Inquiry which concluded last year, its 2020-2025 Digital Platforms Services Inquiry (which recently published its first interim report) as well as its ongoing Digital Advertising Services Inquiry.[26]

Knowledge is power and the ACCC has been keen to put its new-found knowledge to the test. It now has an enforcement branch focusing particularly on digital platforms and has initiated two court proceedings against Google (with at least three other ongoing investigations against large technology platforms, and no doubt more following its current market studies).[27] Both of the ACCC's current proceedings against Google allege misleading or deceptive conduct in regard to the collection and use of personal data by Google.[28] If the ACCC's recent successful discovery order against Google's US company and the Court's recent rejection of Facebook's extraterritoriality arguments in a privacy regulator action are anything to go by, there will be ongoing attempts by regulators to reach into the information and documents of large technology platforms, wherever the information/documents 'reside'.[29] No doubt, across the continent, the US Department of Justice's lawsuit against Google over allegations that its longstanding agreements with Apple and Android phone makers to make its search engine the default on their device have made barriers to entry too high for search rivals will be observed with equally bated breath.[30]

Perhaps one of the most controversial, and innovative tools, that the ACCC has come up with in recent times to rein in large technological platforms' market power is the proposed mandatory Code of Conduct to address the 'acute bargaining power imbalances' between Australian news businesses and Google and Facebook.[31]

There are two unique features of this Code. One is that, unlike a significant number of the other Codes of Conduct over which the ACCC has oversight, such as the Food and Grocery Code for the large supermarkets, this Code is intended to be incorporated directly into the CCA, rather than as a declared regulation. The key difference is that a breach of this Code of Conduct could be exposed to the same penalties as a breach of key provisions of the *Competition and Consumer Act*.[32] Undoubtedly, the ACCC may be hoping that the higher penalties will provide for greater deterrent effects in moderating the behaviours of large technology platforms.

The other feature of the Code has been the subject of much media contention and heated debate, namely the binding nature of the 'final offer' arbitration process, where the news business can negotiate with Google/Facebook for up to three months on the amount Google/Facebook should pay for including their news content on their platforms.[33] If no agreement has been reached on payment, the news business can choose to proceed to arbitration where both parties can put forward their best offer (and each can make a submission in response to the opposing offer) and the arbitrator then chooses one of the offers.[34] At the same time as the arbitrator's consideration, the parties can continue to negotiate throughout the arbitration process and if a commercial agreement is reached independent of the arbitration process, the arbitration process will come to an end.[35]

Undoubtedly, both businesses and the ACCC must remain cognizant that a 'one size fits all' approach is unlikely to work for regulating digital markets generally. Take, for example, Amazon, an established technology major in the US and other but otherwise considered a relatively new entrant into the Australian market, and hence has been previously considered by the ACCC as a disruptor to incumbent retailers and potentially lowering barriers for third party/smaller retailers. Consider also the ACCC's oversight of the recently introduced Consumer Data Right (**CDR**) regime which was intended to provide consumers with greater access to and control over their data and lower barriers to Fintech competitors (it will apply in due course to energy and telecommunications sector).[36] The CDR regime is in its nascent phase but has not appeared to have a substantive impact on competition in the Fintech sector as yet. As against that is the market penetration by the new 'buy now, pay later' entrants such as Afterpay and zipPay without the need for regulatory assistance.

Recently, the Government has announced that it will strip the ACCC of oversight of the CDR regime (although the ACCC will retain enforcement rights) to the Treasury, and perhaps as a precursor to establishing a CDR regulator.[37] It is likely that we will continue to see ongoing debates about the appropriateness of expanding

the ACCC's regulatory reach with new emerging markets.

Conclusion

If one were to ask us what is the moral of this evolving COVID-19 story, our answer is it will depend on the perspective of the questioner.

From the vantage point of the regulator (which has the hardest job of trying to please common interests while maintaining its integrity as an enforcement authority), the moral is likely to be to anticipate the unexpected and prepare for the unknown.

In the context of authorisations, the ACCC has adeptly modified the process, finely balancing the benefits of having coordinated industry responses to COVID-19 related challenges without leaving competitors with undue comfort to continue collaboration beyond what is necessary to address pandemic related challenges. Similarly, in approaching price-gouging concerns, the ACCC is careful to recognise that it is not a consumer advocacy body and there is a risk that by adopting an overly proactive interventionist approach, may result in the ACCC 'biting more than it can chew' in terms of the breadth of regulatory responsibilities.

In relation to mergers, the ACCC remains as focussed as ever on a longer-term analysis of competitive market structures without being blindsided by short term 'failing firm' arguments. The ACCC's fervent interest in understanding the competitive impact of large technology platforms will no doubt see it engaging more with other global competition regulators to reduce the level of opacity in these data-driven markets holistically.

The vantage points of businesses and consumers are likely to be much more diverse, but perhaps the biggest takeaway so far is that the importance of industry coordination, saving 'failing' firms and protecting consumers' interests are not all completely lost causes and the regulator is certainly well-tuned to such issues.

Uncertainties about the future remains a predictable facet of our efforts in navigating the pandemic going forward. However, unprecedented uncertainties also provide for unprecedented opportunities – whether it is for regulators to present innovative solutions to address emerging competition law issues, for private parties to independently and proactively scrutinise the market conduct of large corporations, or for us, as private practitioners, to test and challenge the boundaries of competition law.

This paper has been adapted from a paper prepared on 6 November 2020 to comment on a paper and presentation by Maureen Ohlhausen (former acting Chairman of the Federal Trade Commission, currently a partner at Baker Botts LLP)'s keynote address to the CLPINZ Virtual workshop on 19 August 2020 and the Australian Law Council Competition and Consumer Law Workshop held on 6 November 2020.

[1] ACCC, '*ACCC response to COVID-19 pandemic*' (27 March 2020) https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic.

[2] See the ACCC's civil cartel proceedings against overhead crane company NQ Cranes Pty Ltd (19 October 2020): https://www.accc.gov.au/media-release/action-over-alleged-market-sharing-cartel-in-the-overhead-crane-industry; the ACCC's unfair contract terms proceedings against Fuji Xerox (22 October 2020): https://www.accc.gov.au/media-release/fuji-xerox-in-court-over-alleged-unfair-contract-terms.

[3] ACCC, '*COVID-19 pandemic – what it means for ACCC merger clearances, authorisations, notifications and CTMS*' (27 March 2020)https://www.accc.gov.au/update/covid-19-pandemic-what-it-means-for-accc-merger-clearances-authorisations-notifications-and-ctms.

[4] Refer to ACCC's media releases, '*Flight Centre to refund cancellation fees*' (3 May 2020) https://www.accc.gov.au/media-release/flight-centre-to-refund-cancellation-fees and *'Qantas offers refunds for flight cancellations'* (19 June 2020) (https://www.accc.gov.au/media-release/qantas-offers-refunds-for-flight-cancellations where both entities changed their refund approaches after the ACCC applied regulatory pressure.

[5] John Kehoe, '*Part-refunds for cancelled travel is OK, says ACCC*' (23 October 2020) https://www.afr.com/policy/economy/part-refunds-for-cancelled-travelled-is-okay-accc-20201023-p567w9.

[6] The ACCC also authorised chicken processors in Victoria to work together to reduce the impact of the COVID-19 pandemic and associated Victorian stage 4 restrictions on the chicken meat industry, see Ingham's Group Ltd, other chicken processors and the Australian Chicken Meat Federation's authorisation application (granted on 29 October 2020): https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/inghams-group-ltd-other-chicken-processors-and-the-australian-chicken-meat-federation.

[7] In contrast to Australia, in New Zealand, individual authorisation are not required or are otherwise not available for COVID-19 related competitor collaborations. For example, the New Zealand Commerce Commission has published COVID-19 guidelines outlining factors businesses should take into account when self-assessing for COVID-19 related collaborations with competitors (https://comcom.govt.nz/__data/assets/pdf_file/0019/215812/Business-collaboration-under-COVID-19-guidelines-May-2020.pdf).

[8] The 'public benefits' test involves an evaluative exercise balancing the public benefits and public detriments resulting from the proposed conduct.

[9] All submissions relating to the authorisation application from the applicants and any interested third parties is placed on the ACCC's register subject to valid confidentiality claims.

[10] See Virgin Australia and Alliance Airline's authorisation application (23 October 2020): https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/virgin-australia-alliance-airlines.

[11] See National Pharmaceutical Services Association authorisation application (granted 17 September 2020): https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/national-pharmaceutical-services-association-npsa.

[12] ACCC, 'Class exemption will enable small businesses to collectively bargain' (22 October 2020) https://www.accc.gov.au/media-release/class-exemption-will-enable-small-businesses-to-collectively-bargain.

[13] ACCC, collective bargaining class exemption (commenced 23 August 2018) https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption.

[14] ACCC, ocean liner shipping class exemption (commenced 3 December 2019) https://www.accc.gov.au/public-registers/class-exemptions-register/ocean-liner-shipping-class-exemption.

[15] For more, see the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* (Cth).

[16] See, for example, the ACCC's press release: '*Petrol retailers should reduce their prices in line with falls in international petrol prices*' (22 April 2020): https://www.accc.gov.au/media-release/petrol-retailers-should-reduce-their-prices-in-line-with-falls-in-international-petrol-prices.

[17] ACCC Chair, Rod Sims' speech to National Press Club '*Tackling market power in the COVID-19 era'* (21 October 2020) https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era.

[18] *Australian Competition and Consumer Commission and the Australian Energy Regulator: Annual Report 2018-2019* https://www.accc.gov.au/system/files/ACCC-AER%20annual%20report_2018-19.pdf p49. The number of merger matters in 2020 considered by the ACCC 'behind closed doors' through the confidential pre-assessment process is likely to be higher than previous years. This is due in part to the temporary nil threshold for foreign investments to be subjected to the review of the Foreign Investment Review Board, who consults with the ACCC as a matter of course in considering relevant foreign acquisitions.

[19] Alison Eveleigh, Lawyerly '*ACCC to keep investigations of completed mergers close to its chest'* (31 August 2020) https://www.lawyerly.com.au/accc-to-keep-investigations-of-completed-mergers-close-to-its-chest/.

[20] Misa Han, James Thomson and Max Mason: *'ACCC chair Rod Sims says failing firms need a better excuse to support mergers'* (January 9 2017):https://www.afr.com/companies/accc-chair-rod-sims-says-failing-firms-need-a-better-excuse-to-support-mergers-20170109-gto2pe see also ACCC media update: '*COVID-19 pandemic – what it means for ACCC merger clearances, authorisations, notifications and CTMS*' (27 March 2020)- https://www.accc.gov.au/update/covid-19-pandemic-what-it-means-for-accc-merger-clearances-authorisations-notifications-and-ctms.

[21] Refer to sections 3.22-3.23 of the ACCC's Merger Guidelines (October 2008, updated November 2017): https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF.

[22] For examples, refer to the ACCC's public competition assessment on Commonwealth Bank of Australia's proposed acquisition of BankWest and St Andrew's Australia (not opposed on 10 December 2008) https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/commonwealth-bank-of-australia-proposed-acquisition-of-bankwest-and-st-andrews-australia; also contrast with Westpac Banking Corporation's proposed acquisition of St George Bank Limited where a 'failing firm' argument was not used despite it being a post GFC crisis acquisition (not opposed on 13 August 2008): https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/westpac-banking-corporation-proposed-acquisition-of-st-george-bank-limited.

[23] Ayman Guirguis and David Howarth, 'ACCC's Digital Platforms Report: Market Power in Advertising, Search Services and Media and Privacy Implications' (12 August 2019): https://www.klgates.com/ACCCs-Digital-Platforms-Report-Market-Power-in-Advertising-Search-Services–Media–Privacy-Implications-08-12-2019.

[24] For comparison, see other overseas regulators' actions against large technology platforms. For example, EU Commission press release, 'Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising' (20 March 2019); Cecilia Kang, Jack Nicas and David McCabe: 'Amazon, Apple, Facebook and Google prepare for their 'Big Tobacco Moment' (29 July 2020).

[25] See ACCC Chair Rod Sim's speech to the National Press Club 'Tackling market power in the COVID-19 era' (21 October 2020) https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era.

[26] See the ACCC's Digital Platforms Inquiry (2019): https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry; the ACCC's 2020-2025 digital platforms services inquiry: https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025; and the ACCC's digital advertising services inquiry: https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry.

[27] See Mr Rod Sim's speech, '*The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses*' (6 August 2020): https://www.accc.gov.au/speech/the-acccs-digital-platforms-inquiry-and-the-need-for-competition-consumer-protection-and-regulatory-responses.

[28] See the ACCC's media releases on the two Google proceedings: '*Google allegedly misled consumers on collection and use of location data'* (29 October 2019) https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data; and '*CORRECTION: ACCC alleges Google misled consumers about expanded use of personal data'*(*27 July 2020) https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data.

[29] See Lawyerly, Christine Caulfield: '*Google execs held' Oh Shit' meeting after report on location data disclosures, court hears*' (14 October 2020): https://www.lawyerly.com.au/google-execs-held-oh-shit-meeting-after-report-on-location-data-disclosures-court-hears/; *Australian Information Commissioner v Facebook Inc* interlocutory judgment (14 September 2020): https://www.oaic.gov.au/assets/updates/news-and-media/2020-09-14-Orders.pdf.

[30] See The New York Times, '*Read the Antitrust Lawsuit Against Google*' (20 October 2020): https://www.nytimes.com/interactive/2020/10/20/us/doj-google-suit.html.

[31] ACCC 'News media bargaining code' (31 July 2020): https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation, also contrast with the other Codes of Conduct the ACCC has oversight of, including Franchising Code of Conduct and the Food and Grocery Code of Conduct. The Code may be expanded to cover other large technology platforms in due course.

[32] See exposure draft *News Media and Digital Platforms Mandatory Bargaining Code Bill 2020 – Division 8 enforcement: https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf*.

[33] ACCC, '*Australian news media to negotiate payment with major digital platforms'* (31 July 2020) https://www.accc.gov.au/media-release/australian-news-media-to-negotiate-payment-with-major-digital-platforms.

[34] Same as above.

[35] Same as above.

[36] ACCC, Consumer data right (CDR): https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0.

[37] James Eyers, '*ACCC to be stripped of oversight of consumer data right*' (30 October 2020): https://www.afr.com/companies/financial-services/accc-to-be-stripped-of-oversight-of-consumer-data-right-20201028-p569fh.