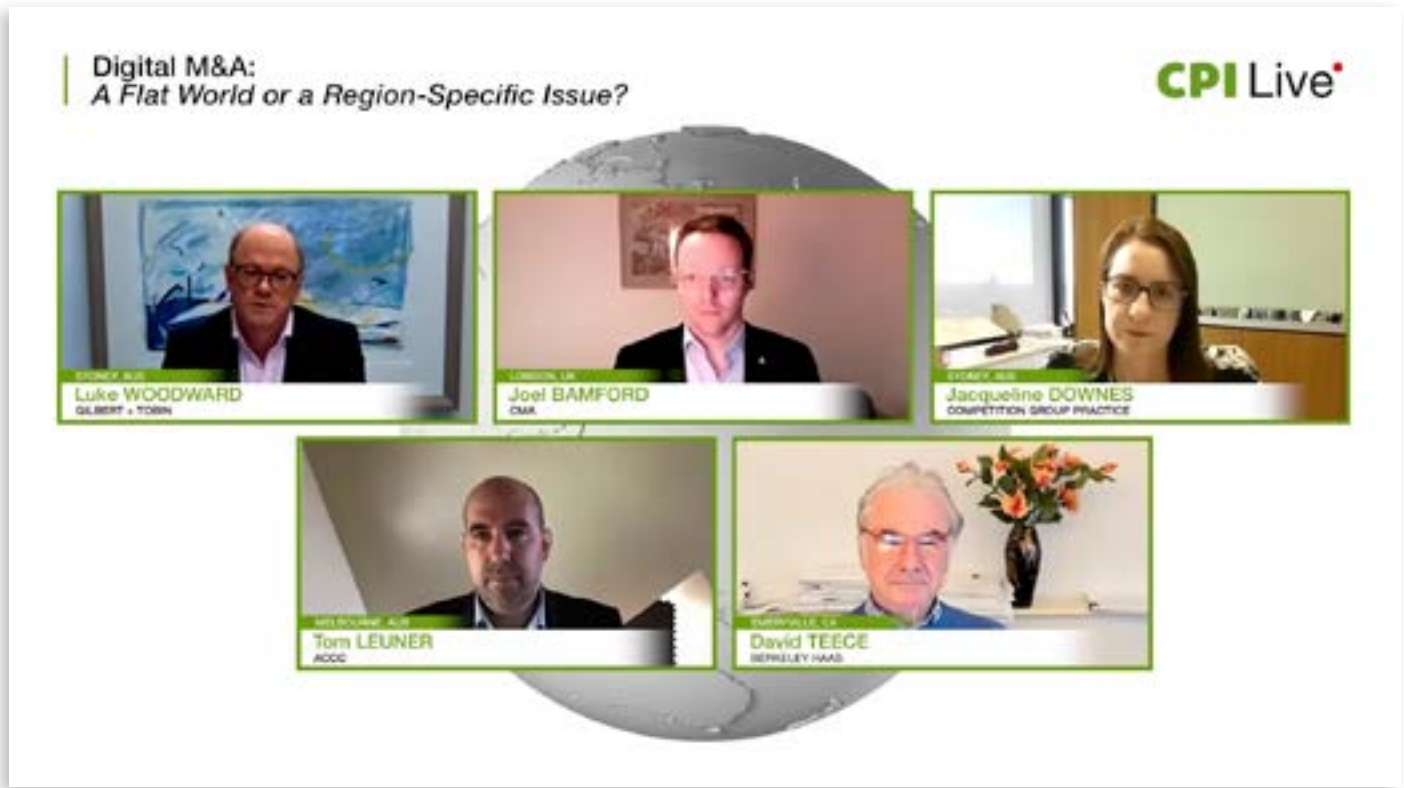


Dynamic Competition in Dynamic Markets: *A Path Forward in the APAC Region*

DIGITAL M&A:
A FLAT WORLD OR A REGION SPECIFIC ISSUE?



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Background Note:

- This Panel discusses recent developments in and critiques of merger control rules, in particular in relation to the tech sector.
- Specifically, the panel addresses the ACCC's proposed merger reforms (particularly relating to digital mergers), the inherent process difficulties related to global mergers, and the importance of coordination between regulators on merger reviews.
- The panel seeks to learn from past experience to chart a way forward in terms of merger control in the Asia-Pacific region specifically (but also drawing broader lessons for global enforcement).
- Namely: What are the sources of concern in terms of digital transactions? Are digital platforms serial acquirers in a way that increases or entrenches market power?
- Further, are there examples of acquisitions which should not have been allowed to proceed? Are digital sector-specific merger rules necessary or justified (particularly those proposed by the ACCC)? How do these proposals compare to those from other jurisdictions (e.g. the EU and the UK)?

Participants:



Jacqueline DOWNES | Competition Group Practice Leader, Allens



Tom LEUNER | Executive General Manager, Mergers, Exemptions and Digital Division, ACCC



David TEECE | Professor in Global Business, Faculty Director, Tusher Center for The Management of Intellectual Capital, Berkeley Haas



Joel BAMFORD | Senior Director of Mergers, CMA

Moderator:



Luke WOODWARD | Partner, Gilbert + Tobin

Panel Summary

The chair was **Luke WOODWARD** (Partner at Gilbert + Tobin). He opened discussions by raising the issues above and eliciting the panelists' reactions.

The Panel included **Tom LEUNER** (Executive General Manager for Mergers, Exemptions and Digital at the ACCC), **Jacqueline DOWNES**, Senior Competition Partner at Allens Linklaters in Sydney, **Joel BAMFORD** of Fingleton Associates (recently head of mergers at the CMA), and Professor **David TEECE** from the Haas Business School at Berkeley.

Jacqueline DOWNES of Allens Linklaters opened, discussing Australia's role at the forefront of competition law and policy in digital issues. This arguably began in 2017, when the ACCC kicked off a two year digital platform inquiry, a broad-ranging examination of issues facing digital platforms in terms of competition law, and in particular, the impact on media in Australia. This set in motion a wave of investigations and inquiries by regulators all around the world over the last four years.

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Key Talking Points | Jacqueline DOWNES

- The original Digital Platform Report ("DPI") report, focused on the fact that search engines and social media platforms, are digital content aggregators, as well as participating in media and advertising markets.
- The report made a series of recommendations for reform, some of which have already been enacted, including the introduction of the news media bargaining code. Even though it technically doesn't apply to any of the platforms yet, the threat of that media bargaining code has been successful in achieving fairly negotiated commercial agreements between the digital platforms and a number of news media businesses.
- Other proposals that were put forward at the time are in the process of further consultation, including amendments to privacy laws. The final report did introduce, or recommend, a number of other measures that haven't yet been introduced, and these include changes to the merger laws to incorporate additional merger factors that target nascent acquisitions and advanced notification requirements by digital platforms.
- This has now been wrapped up in the merger proposals that the ACCC, the more broad-ranging merger proposals we'll come to that the ACCC has recently announced.
- Following that initial two year inquiry, the government directed the ACCC to undertake a broader five-year inquiry into digital markets, with reports delivered every six months. This allows the ACCC to perform a deep dive into various segments of digital platforms.
- There have been three interim reports in the digital platform service inquiry.
 - First, there are online private messaging services, search engines, and social media.
 - The second concerns app marketplaces.
 - The third concerns web browsers and search engines, including the effectiveness of choice screens.

The ACCC is due to deliver its fourth interim report on online retail marketplaces in March next year.

- The ACCC was also directed, following its initial inquiry, to take a targeted inquiry into digital advertising services, or "ad tech." The final report was handed down in September, 2021, with the ACCC, again, making findings that digital platforms had market power, and that various measures would be needed to address market power issues in relation to those digital platforms, particularly in relation to issues around data and self-preferencing.
- The ACCC has now announced that it will be conducting a much broader review of whether there is a need for specific digital platform regulation throughout 2022. Each of the reports sets out a range of findings regarding market power and the conduct of various digital platforms and the resulting competition and consumer issues. It stated that these issues have been broadly similar in nature.
- Other than the media bargaining code, the ACCC's view appear to be that many of the issues around "self-preferencing," tying and bundling strategies, and strong network effects are common across a range of platforms, and a range of issues, including app stores and ad tech, use of social media, choice screens. The ACCC has indicated that this broader regulation may be necessary.



Jacqueline DOWNES | Competition Group Practice Leader, Allens

This was followed by **Tom LEUNER**, who discussed enforcement from the ACCC perspective.

Key Talking Points | Tom LEUNER

- The first point is that the ACCC is looking at digital mergers more closely than before. This reflects the work during the digital platforms inquiry, which commenced in 2017 and finalized in 2019. These days the ACCC is more attuned to the effects that might come about from a digital merger, including the impact of an acquisition of data and how that can cement positions of market power. The ACCC is also more focused on network effects, the tipping of markets. This goes to the arguments about “killer acquisitions.”
- The other effect the ACCC is focusing on is innovation. What is the impact of innovation on the market? Innovation by the target? Or the buyer?
- The issues are complex. But the ACCC has put itself in as a good place as it can to analyze these issues. The ACCC has a large team focused on digital platforms issues, and they are producing six monthly reports.
- Cooperation between agencies has never been as strong as it is now, but there’s also a much greater need for it right now. That is because the issues are common around the world. We are often having weekly or even more frequent meetings between the merger assessment teams across the different jurisdictions. We have debates between economists. We share data, we share documents, and different regulators convince other regulators to adjust their approach.
- Although, in digital markets, the issues tend to be much more global, it is worth highlighting that often the dynamics are quite different in some neighboring countries.
- In China, for example, the digital sector is entirely different to Australia. Even in countries like Japan and South Korea, the position of certain companies isn’t the same as in Australia.

- Therefore some of the closest coordination can come with countries that are not necessarily in the same region, but perhaps others that have a similar economy and a similar presence of the digital platforms. For example, the ACCC has worked closely with the UK, Europe, U.S., and also New Zealand (along with other countries in the region).



Tom LEUNER Executive General Manager, Mergers, Exemptions and Digital Division, ACCC

Joel BAMFORD of the UK CMA then discussed the above issues from a comparative perspective. He began by noting the historical context of the ACCC initiatives and the UK Furman Report and their commonalities.

Key Talking Points | Joel BAMFORD

- The 2019 Furman Report had a section focusing on mergers. One of its points concerned under-enforcement in digital mergers, and also the types of theories of harm that might be relevant. This speaks very much to what the focus should be (narrow focus on competition/future competition/focus on an individual market, etc.)
- Following that, the CMA asked an economic consultancy, do an ex post review of digital mergers. Some are familiar to many commentators, things like Facebook, Instagram. Although that report didn’t focus on the answer to that question, it did focus on the methods of investigation: the different theories of harms and the way competition might manifest itself in the future.
- There are also other cases dealt with by the CMA, the U.S. FTC and the DOJ. For example, Illumina/PacBio, concerned DNA sequencing. It raised similar themes. PacBio was a new company bringing in a very different technology, which the parties argue quite strongly didn’t compete, and were complements. It’s a familiar theme in digital markets. The CMA found a concern in that case, as did the FTC, and that started to evo-

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lutionize the thinking around internal documents and how companies think about their competitors and the other players in their market.

- In April 2020, Sabre/Farelogix was notified. Sabre is one of the big airline booking systems, there are three players and Farelogix was the nascent competitor and fragmenting the market into different, more innovative services. The CMA sought to block that merger, the DOJ went to court and unfortunately lost, but we were appealed only on the basis of jurisdiction, but not on our substantive analysis.
- When authorities assess dynamic competition, people often focus on the likelihood of entry, but it's really about the ultimate end-point. The process of rivalry to get to the end-point is just as important as the end-point itself: driving competition and innovation depends on uncertainty.
- The CMA has two types of tests. In phase one, the CMA looks at a realistic prospect of a substantial lessening of competition. In phase two, the CMA looks at a balance of probabilities, i.e. is it more likely than not that a competition concern will occur. But, we've been very clear in our merger assessment guidelines that uncertainty doesn't lead to clearance. Therefore we must default to clearance.
- There's always uncertainty about the outcome of an investment, the outcome of innovation efforts absent the merger, including whether the investment being made by merger firms would ultimately result in products or services being made available to customers.
- Yet uncertainty about the outcome of a dynamic competitive process doesn't preclude the CMA from assessing the impact of the merger on that dynamic process. A process of dynamic competition can increase the likelihood of new innovations or products being made available and therefore having economic value in the present, not just in the future.

David TEECE picked up on the themes above, questioning whether regulators are dealing well with these issues and how they ought to be thinking about them in future.

Key Talking Points | David TEECE

- In short, regulators are not doing very well. The good news is that they're starting to look at the relevant issues. The problem is they don't have the right tools to look at them.
- It is positive that regulators are discussing dynamic competition because it is innovation that drives competition. For 30 years, the agencies have been barking up the wrong tree and focusing on the wrong things.
- But, one must recognize that the future is very difficult to predict. This is being augmented by the fact the economics profession has been sitting on its hands for at least three decades around the concept of potential competition. Nothing has been written of any moment about potential competition for maybe even 50 years. We're just learning the language of the relevant business models, despite the fact there's a literature out there that it's almost three decades old on such business models.
- When one does focus on the relevant issues, the first insight is that big tech companies compete fiercely. The old notion of a "monopoly" is defunct.
- There is great effort in Australia to change the law: but change economics first. There's a lot more flexibility inside the law than there is inside economic modeling right now, or at least traditional ways to think about things.
- It's not just about platforms. We should understand better the innovation process, and understand how organizations build capabilities. Only then will we be able to say whether blocking a merger makes sense.



Joel BAMFORD Senior Director of Mergers, CMA



David TEECE Professor in Global Business, Faculty Director, Tusher Center for The Management of Intellectual Capital, Berkeley Haas

SPEAKERS



Jacqueline DOWNES

Jacqueline heads Allens' national Competition, Consumer & Regulatory group. Clients rely on her advice and extensive experience in dealing with the ACCC and other regulators to resolve significant issues for their businesses.

Jacqueline has particular expertise in mergers and is well known for achieving clearance of high profile and complex mergers, domestic and international. She also has extensive experience in competition and consumer law investigations. Jacqueline advises businesses across a wide range of industries including media and technology.

Jacqueline is chair of the Competition and Consumer Committee of the Law Council of Australia. She has assisted in preparing submissions, meeting with government and attending parliamentary inquiries on matters of competition policy. Jacqueline is regularly asked to speak at conferences and seminars on competition law issues, including attending the ICN as an ACCC-nominated NGA.

Jacqueline is ranked as a leading competition and antitrust expert in Chambers, Best Lawyers, The Asia-Pacific Legal 500 and Global Competition Review.



Tom LEUNER

Tom is the Executive General Manager of Mergers, Exemptions and Digital at the Australian Competition and Consumer Commission (ACCC).



David TEECE

David J. Teece is the Thomas W. Tusher Professor in Global Business at the University of California, Berkeley's Haas School of Business. He is also the director of the Center for Global Strategy and Governance and faculty director of the school's Institute for Business Innovation. He has authored over 30 books and 200 scholarly papers, and has been cited more than 120,000 times, per Google Scholar. He is co-editor of the Palgrave Encyclopedia of Strategic Management. Dr. Teece has received seven honorary doctorates and has been recognized by Royal Honors. Dr. Teece pioneered the dynamic capabilities perspective, defined as "the ability to integrate, build, and reconfigure internal and external competencies to address rapidly changing environments." According to Science Watch (November/December 2005), his paper (with Gary Pisano and Amy Shuen) "Dynamic Capabilities and Strategic Management" was the most cited paper in economics and business globally for the period from 1995 to 2005.



Joel BAMFORD

Joel is the Senior Director of Mergers at the UK Competition and Markets Authority (CMA), where he leads the CMA's mergers team on both cases and policy initiatives. Joel has also led on a number of recent high-profile CMA merger investigations including Facebook/Giphy, Sainsbury's/Asda and 21CenturyFox/Sky. Prior to working at the CMA Joel was the Advocacy Manager at the New Zealand Commerce Commission with responsibility for the policy, education, and international portfolio. Joel is an experienced competition economist with an MA in Economics and Mathematics from the University of Edinburgh.



Luke WOODWARD

Luke is the head of the Gilbert + Tobin's Competition + Regulation group and is a member of Gilbert + Tobin's Board of partners.

In a career spanning 30 years, Luke has consistently been at the forefront of the profession: as a lead prosecution lawyer; as head of mergers, head of enforcement and General Counsel at the ACCC; and 18 years as a partner at Gilbert + Tobin. He has an outstanding track record in gaining clearances in complex merger and joint venture cases, while also successfully conducting many high-profile, market power and collusion cases. Luke was recognised as the leading thought leader in the Asia-Pacific region for Competition (International Who's Who of Competition Lawyers, 2018).