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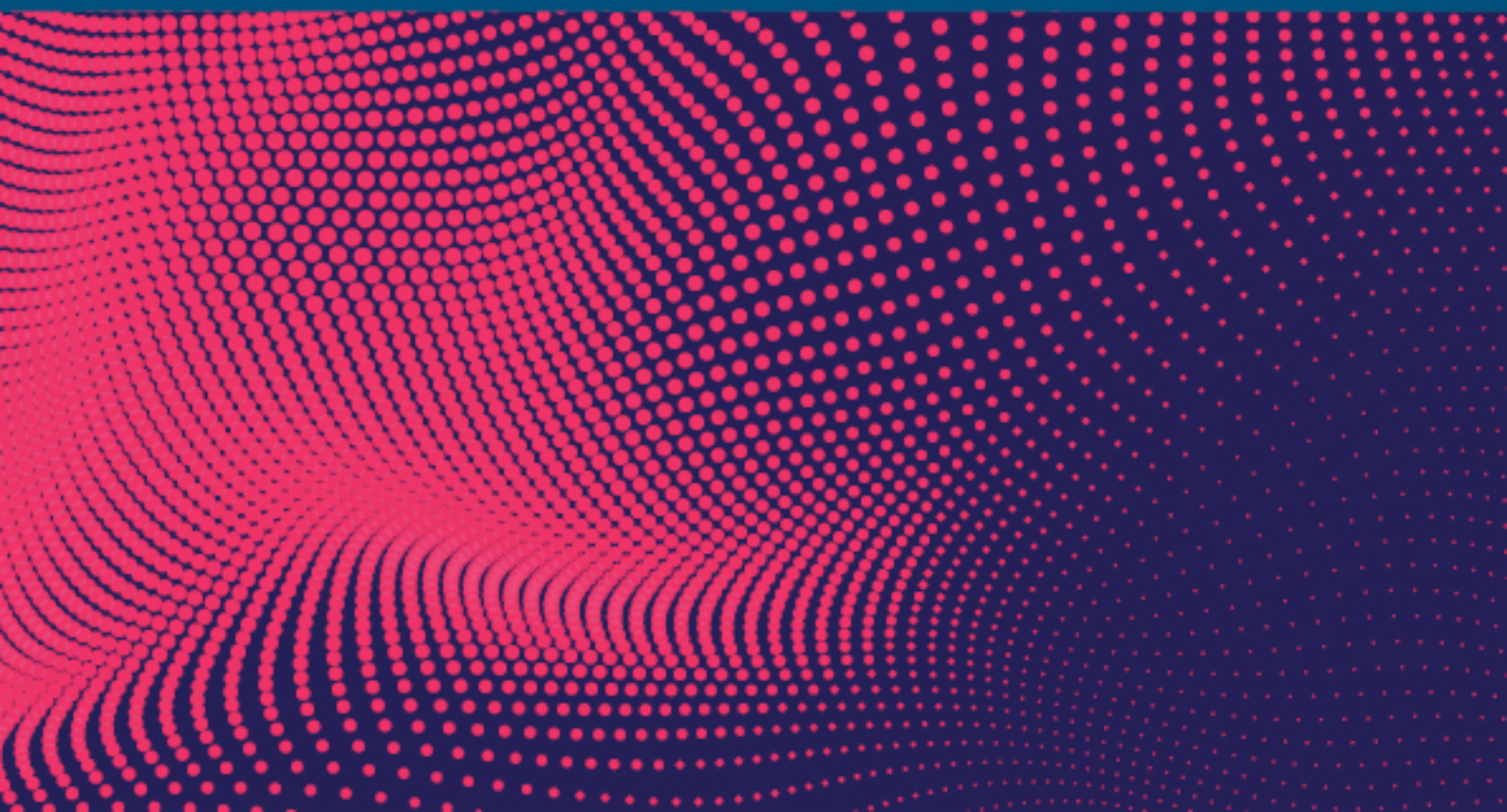
FEDERAL COURT RELEASES REASONS IN TPG & VODAFONE MERGER CASE



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HSF TEAM ADVISED TPG, ONCE AGAIN ASSISTING A CLIENT TO OBTAIN MERGER CLEARANCE IN THE FACE OF ACCC OPPOSITION

The HSF contested mergers team assisted TPG Telecom Limited (**TPG**) to obtain Federal Court clearance for its transformative merger with Vodafone Hutchison Australia (**Vodafone**), despite ACCC opposition.

Completion is expected to occur mid-year (subject to satisfaction of outstanding conditions, including receipt of FIRB, TPG shareholder and Court approval). The HSF team wishes the combined TPG / Vodafone, which will be listed on the ASX as TPG Telecom Limited, every success in the next phase.

With this recent success, the HSF contested mergers team has acted in and won five of the seven contested merger cases in the last 15 years. Between partners Liza Carver, Patrick Gay, Grant Marjoribanks, Bruce Ramsay and Sarah Benbow, the HSF team has been on the winning side of *AGL v ACCC (re Loy Yang Power)* (2003), *ACCC v Metcash* (2011), *AGL / Macquarie Generation* (2014), *Tabcorp / Tatts* (2017) and now *Vodafone v ACCC* (2020, acting for TPG).

Liza Carver, HSF Competition Regional Head of Practice, stated:

> *The TPG case once again demonstrates the important role of the Federal Court in ruling on contested mergers.*
>
> *The Court has applied a careful and forensic approach to analysing the extensive lay, technical and economic evidence presented about the complex and dynamic commercial environment in this sector, and the incentives and challenges faced by the merging parties.*
>
> *The Court only considers a vanishingly small number of ACCC decisions, but these are the hardest cases and the Court's guidance is critical.*

Grant Marjoribanks, HSF Litigation partner, added:

> *The lesson from TPG repeats the lesson from Metcash – facts matter. It's fine to start with a theory. But if the theory doesn't fit the facts you must abandon the theory, not the facts.*

This note outlines HSF's observations on the public version of the judgment released today.

Overview

On 13 February 2020, the Federal Court of Australia declared that the proposed TPG/Vodafone merger would not have the likely effect of substantially lessening competition in the retail mobile market, and therefore would not contravene of section 50 of the *Competition and Consumer Act 2010* (**CCA**).

Subject to any ACCC appeal (which must be lodged by 12 March 2020), the Court's decision effectively overrules the ACCC's May 2019 decision to oppose the transaction, and provides TPG and Vodafone with competition clearance to proceed with the proposed $15 billion merger.

The ACCC argued that there is a real chance that TPG will roll-out a mobile network absent the merger, that the merged entity would not offer any substantially greater competitive constraint than Vodafone alone, and that the merger would therefore substantially lessen competition by eliminating the prospect of TPG's entry.

Middleton J concluded 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 MNO [mobile network operator]*". Rather, a merger between Vodafone and TPG was a "*rational and business-like solution*" to combat the competitive strength of Telstra and Optus in mobile.

Middleton J's findings on the three issues critical to the Court's decision, and the key reasons and TPG evidence relied on, are summarised below.

Further authority on the "real chance" test, without complete certainty

Middleton J made three points that provide further clarity on the relevant test and legal standard in assessing merger cases.

- **"Real chance" as the relevant test**. All parties urged the Court to follow the approach of French J in *AGL v ACCC* (2003) and Beach J in *ACCC v Pacific National* (2019), that to oppose a merger under section 50 requires the demonstration of a "real chance" that the relevant acquisition would substantially lessen competition. While Middleton J found that the Court was not formally bound by those authorities, he agreed that "*the weight of authority supports such an interpretation*" and adopted that approach.

- **A "single evaluative judgment"**. Middleton J also adopted the "single evaluative judgment" approach, consistent with the authority of French J in *AGL v ACCC* (2003), Yates J in *ACCC v Metcash* (2011) and Beach J in *ACCC v Pacific National* (2019). In this case: had the applicant satisfied the Court that there is no "real chance" that the merger would likely have the effect of substantially lessening competition?

  This approach was preferred to the two-stage test proposed by Emmett J in *ACCC v Metcash* at first instance, which separated and applied different legal thresholds to the questions of (i) the relevant state of the market with and without the merger; and (ii) the resulting competitive effects.

- **Meaning of "substantial"**. Middleton J held that a "substantial" lessening of competition must be one that is "*commercially relevant or meaningful*" to the competitive process, noting that this has a temporal element, and referring to French J in *AGL v ACCC* (2003) and Beach J in *ACCC v Pacific National* (2019).

Absent the merger, TPG is "extremely unlikely" to roll out a fourth mobile network

Middleton J rejected the ACCC's core contention that *without* the merger there was a "real chance" that TPG would roll-out a retail mobile network.

Rather, Middleton J held "*it is extremely unlikely and there is no real chance that TPG will roll-out a retail mobile network or become an effective competitive fourth [MNO] in Australia in the relevant future*", being the next five years.

Middleton J found that, whilst there had been a business opportunity in 2017 for TPG to roll out a mobile network, the evidence from TPG showed that this business case no longer exists:

> *Back in 2017, there was a moment in the affairs of TPG … for a business opportunity to be taken to roll-out a mobile service. That moment has passed.*

In coming to that conclusion, Middleton J accepted:

- the evidence provided by TPG executives regarding the technical difficulties that stand in the way of TPG changing its mind to roll-out a retail mobile network following the Huawei Ban. Importantly, Middleton J accepted that absent a technical solution for a 5G upgrade path, or the ban being reversed, TPG would not roll-out a mobile network. Middleton J then accepted TPG's evidence that there are currently no suitable replacement 5G solutions available, and that the other potential solutions highlighted by the ACCC were not suitable for TPG's network design.
- the evidence provided by TPG executives that TPG could not make a "*disruptive*" retail mobile offer today. His Honour emphasised the "*significant*" time that has elapsed since TPG conceived its initial offering and accepted that the market has "*moved on and become increasingly aggressive*". Therefore, TPG's originally planned $9.99 unlimited offer would no longer be disruptive, and TPG would not be one of the first movers in 5G.
- evidence that any network roll-out would be years from completion. Middleton J referred to, and accepted, various factors raised in TPG's evidence which would cause difficulties and delay in TPG building a mobile network and adds to the challenges that TPG's Board would need to consider in any future decision to roll-out.
- the evidence put forward by TPG regarding the difficulties with TPG funding the substantial capex necessary to roll-out a 5G mobile network on terms that would be acceptable to the existing shareholders.
- that any decision by TPG to proceed with a mobile network roll-out would be dependent on Mr Teoh, TPG's Executive Chairman and CEO, voting in favour of that decision. Ultimately, the Court accepted Mr Teoh's evidence that he would not change his mind about his decision not to roll-out a mobile network. In assessing Mr Teoh's testimony generally, Middleton J commented that: *"No attack was made upon his credibility, and none was warranted."*

Even if TPG did enter as an MNO, TPG would not be competitive

The findings above notwithstanding, Middleton J also addressed as a separate matter a scenario in which TPG did enter as an MNO.

Middleton J rejected the ACCC's contention that any entry by TPG would have a substantial effect on competition in the retail mobile market:

> *I cannot conclude that there is any likelihood or any real chance that TPG could offer a competitive offering in the next five years.*

In coming to that conclusion, Middleton J:

- accepted evidence from TPG's executives regarding the current and future state of competition in the retail mobile market. In particular, Middleton J emphasised that there was "*little doubt*" that prices would continue to fall and data inclusions continue to rise. Therefore, Middleton J accepted that there is no likelihood or real chance that TPG's original retail mobile offer (announced in May 2018) would be competitive at some future point of entry.
- concluded that reconsideration of the rollout would take time and careful consideration, meaning that any TPG decision to roll-out a mobile network "*cannot be imminent*", rather at some point necessarily many months from now.
- noted that the unlikelihood of TPG entering with a meaningful competitive offering increases as one assumes a more distant date of entry. Even assuming a new rollout, TPG would likely not enter until sometime in 2021 (based on analysis by the ACCC's expert, Mr Wright) and "*probably*" later.
- accepted TPG evidence that there was no viable business case for entry, as the market is moving to 5G making a 4G product obsolete, a 5G product in three or four years' time would be too late, and TPG's spectrum constraints mean that it could not keep up with Optus and Telstra as customer demand for data capacity and speed increases.

Post-merger, TPG/Vodafone will be a more competitive force

Finally, Middleton J accepted the parties' arguments that the acquisition would substantially increase the competitiveness of the merged entity relative to a standalone Vodafone and TPG based on four key reasons.

In short, the Court considered TPG and Vodafone to have complementary spectrum holdings, "*significant cross-selling opportunities*" based on complementary businesses (Vodafone's mobile and TPG's fixed broadband businesses), improved ability to fund investment in network capacity, and an ability to rollout high-quality 5G services to customers faster than Vodafone or TPG would be able to separately.

Our team

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