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AUSTRALIAN NEWSLETTER

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Australia is proposing to make a range of changes to its consumer protection laws, aimed at creating a truly national consumer protection law system, called the Australian Consumer Law (ACL). Legislation has been tabled in the Australian Parliament in this regard: the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*. It is national legislation and will be eventually mirrored at the State level to fill any constitutional gaps. Furthermore, there will be agreements on the administration of the new law between Federal and State consumer affairs authorities.

The draft legislation proposes two main changes to the existing consumer protection law system:

- unfair contracts law; and
- new enforcement powers and remedies for the Australian Competition and Consumer Commission (ACCC) and, in relation to “financial services”, the Australian Securities and Investments Commission (ASIC).

There will also be associated legislation in relation to the introduction of a national product safety system. Furthermore, a range of miscellaneous changes to standardise consumer protection laws across Australia is also under consideration for future legislative change.

Unfair Contracts

The Bill proposes the introduction of unfair business to consumer contracts legislation. There are two main aspects to this proposed legislation:

- specific unfair contracts legislation which will give the ACCC and individuals the right to challenge unfair terms in standard form contracts; and
- banning of particular terms in standard form contracts on the basis that they are unfair.

The unfair contracts provisions are in addition to the existing unconscionable conduct provisions.

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Unfair Contract Terms Legislation

The Bill defines unfair contract terms as terms that:

Cause a significant imbalance in the parties' rights and obligations under a contract and is not reasonably necessary to protect the legitimate interests of the person who would be advantaged by the term.

The description of unfair contract term legislation suggests that there will be a two-step process in applying the legislation. A contract term will be considered unfair if:

1. the relevant term causes a significant imbalance in the parties' rights and obligations; and
2. the relevant term is not reasonably necessary to protect legitimate interests of the person who would be advantaged by the term.

The Bill proposes three limitations on the unfair contract term legislation. First, remedies under the legislation will only be available where the claimant can show that the contractual term is likely to cause detriment, or a substantial likelihood of detriment, to the consumer. Detriment is not limited to financial detriment. In other words, remedies will not be available to claimants in relation to unfair contract terms if they are not likely to result in any consumer detriment. This will prevent claimants, including the regulator, from taking action in relation to a particular term which appears unfair on its face but which the supplier is not proposing to enforce against the consumer.

The second limitation is that the unfair contract term legislation will only apply to standard, non-negotiated contracts. The onus will be on the supplier to prove that the contract is not a standard contract. This is a necessary limitation on the scope of the legislation which is aimed at addressing the problems arising from contracts which are not subject to any negotiation of the contract terms.

The third limitation is that claims that the upfront price for a good or service is unfair are excluded from the operation of the legislation. This appears to be a sensible limitation as an upfront price should not be considered unfair, as the consumer would normally be aware of the price before signing the contract.

The Bill also refers to one additional feature of the proposed unfair contract term legislation – namely that in considering whether a contract term is unfair “all of the circumstances of the contract (are) to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected”.

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Banning Unfair Contract Terms

The Bill also proposes that mechanisms be put in place to ban unfair contract terms from all standard form contracts. The Bill lists a number of contract terms which give an indication of what terms may be of concern, including:

- terms retaining title in goods to suppliers even though the goods cannot be removed from the consumers' premises without damage;
- terms denying the existence or validity of pre- or post-contractual representations made to consumers;
- terms deeming something to be a fact when it is not actually factual or true;
- terms under which consumers acknowledge that they have read or understood the contract;
- conclusive evidence terms; and
- terms requiring consumers to pay more than the suppliers' reasonable enforcement costs.

Whether such terms will be "unfair" will be ascertained on the facts of each issue.

Business to Business Contracts

The Bill only applies to consumer contracts, being contracts for goods or services intended for personal or domestic use.

The initial ACL proposal covered business to business contracts up to \$2 million. The business to business coverage was deleted when the Bill was tabled in Parliament and the Bill was confined to business to consumer dealings. That has been a highly controversial move and the subject of much discussion at a recent Senate Committee Inquiry into the Bill. There are strong views either way and the Government has said it will continue to consider the business to business issue.

New Enforcement Powers and Remedies

The new enforcement powers being proposed for the ACCC and ASIC are:

- substantiation notices;
- public warning powers; and
- infringement notices.

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The new remedies which will be available to the ACCC and ASIC in consumer protection matters are:

- civil pecuniary penalties;
- disqualification orders; and
- non-party redress.

Substantiation Notices

A substantiation notice is described in the proposed legislation as a notice which “requires a supplier to provide a consumer regulator with a basis for representations that it makes regarding its goods and services”. A substantiation notice would require that the trader provide specific information to the ACCC within a particular time.

The main advantage of substantiation notices for the ACCC is that it will lower the factual threshold it needs to satisfy itself that a trader may have engaged in a contravention of the consumer protection provisions of the *Trade Practices Act 1974* (TPA). Currently, the ACCC requests information from a trader either on a voluntary basis or pursuant to a statutory demand for information. The limitation of a voluntary request for information is that the trader is not required to provide the information and does not have to provide the information within a particular timeframe.

The ACCC will often choose to issue a statutory notice to a trader to compel the production of information and documents rather than seek documents voluntarily. However, in order to issue a notice, the ACCC must satisfy itself that it has reason to believe that the trader has information or documents which relate to a matter which constitutes or may constitute a contravention of the law.

Public Warning Powers

The Bill also proposes that the ACCC/ASIC be provided with the power to issue a public warning about a trader. In this regard, the Bill states that “public warnings are (to be) issued to inform the public of potentially harmful conduct taking place in the very short term”.

It would appear that the public warning power is to be directed against “... ‘fly-by-night’ operators, itinerant traders and financial, investment and property spruikers and advisors who often move across state and territory borders.” Therefore, the focus would appear to be on bogus traders which are simply seeking to misappropriate money from consumers and then vanish, making subsequent legal action against them all but impossible.

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It is proposed that the public warning power would be subject to certain protocols to govern its use and prevent its misuse. These protocols are likely to be based on existing safeguards contained in state legislation in respect of public warning powers. For example, the decision to issue a public warning will only be exercised in very blatant situations of misleading and deceptive conduct, bordering on fraud. In addition, the decision to issue a public warning is likely to be subject to a public interest test and must be exercised in accordance with the principles of natural justice.

Infringement Notices

A controversial new power being proposed is the power of the ACCC/ASIC to issue infringement notices. The regulator will have the power to issue a notice stating that a corporation has engaged in conduct in breach of a provision of the consumer law provisions and requiring that corporation to pay a penalty. It is likely that infringement notices will only be issued for less serious contraventions of the consumer protection laws.

A number of state consumer protection agencies currently have the power to issue infringement notices. These infringement notices can be issued in relation to administrative breaches and less serious substantive breaches. ASIC also has the power to issue infringement notices in respect of breaches of the *Corporations Act 2001*.

The proposed power to issue infringement notices is controversial in Australia as it raises separation of powers issues – namely the blurring of executive and judicial functions. The power to impose a pecuniary penalty on a corporation for a breach of legislation is the exercise of a judicial function, which should properly reside in the Courts, rather than a federal government agency.

New Remedies

Pecuniary Penalties

The most significant new remedy being proposed is the power of the ACCC /ASIC to seek a pecuniary penalty for a contravention of the consumer protection law provisions. Currently, the regulators can seek injunctions, declarations, non-punitive orders and compensation in a civil consumer protection case. Currently, if the ACCC/ASIC wishes to obtain a penalty for a contravention of the consumer protection provisions it must take a criminal prosecution.

Civil penalties are not currently available under either federal or state consumer protection legislation. This is seen as a “significant gap in the range of enforcement options available to consumer regulators”

Access to civil penalties for contraventions of consumer law provisions will have a significant impact on enforcement activities. Civil penalties will give the regulators considerably more leverage in dealing with corporations which have contravened consumer protection laws.

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Another area where the availability of civil penalties will improve the enforcement outcomes is in relation to fly by night operators. Often these types of operators will obtain a significant amount of money from consumers, transfer the money out of the country and then liquidate the company. The regulator is often faced with the prospect of taking legal action against a company in liquidation and former directors and managers of the company, seeking only injunctions and declarations.

Disqualification Orders

The Bill also proposes the introduction of disqualification orders for individuals who have engaged in conduct in breach of the consumer protection law.

The Bill states these orders may “ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations or undertaking specific business conduct”. Disqualification orders are already available for contraventions of the restrictive trade practices provisions of the TPA.

The introduction of a disqualification order for breaches of consumer protection law is a significant reform. The regulator often deals with individuals who set up a succession of different companies so that they can continue to engage in the same type of illegal conduct.

Non-party Redress

The final proposed order in the Bill is non-party redress. Non-party redress is the power to seek an order from the Court to “seek redress for persons who are not parties to the particular action”. The Full Federal Court has held that there was no power in the TPA to order a business to provide redress to non-parties to a proceeding.

Currently there are two ways that the regulator can get financial redress for consumers for a contravention of the consumer protection provisions of the TPA. It can either take an action under section 87(1B) of the TPA (representative actions) or a class action under the *Federal Court Act* (FCA).

In the past, the ACCC has shown a clear preference for proceedings under section 87(1B). This is because under such proceedings the ACCC remains in control of the legal action and can decide when to settle and on what terms. However, under FCA, the class controls the legal proceedings and can decide when and on what terms to settle the litigation. The ACCC is often attempting to achieve other outcomes in its litigation, in addition to compensation for consumers, and it may not want to settle the litigation on the same terms as a class would.

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Product Safety

Associated legislation will be introduced for a national regulatory regime for product safety.

Under this system, the ACCC will be responsible for recommending permanent bans of unsafe products to the relevant Minister. State and Territory consumer affairs departments will be responsible for recommending temporary bans of no more than 60 days of unsafe products within their jurisdictions. The ACCC will be responsible for determining whether a recommendation should be made to the Minister that a temporary ban is made permanent.

These proposed changes to the administration of product safety laws are significant. Currently, there is a great degree of duplication of effort in relation to product safety between the ACCC and state consumer protection agencies. Further, the level of coordination between these agencies in terms of their product survey work is quite poor. On more than one occasion, this lack of coordination has resulted in some finger pointing when an unsafe product slips through the regulatory safety net, as occurred during the Mattel toy recalls.

Miscellaneous Proposed Reforms Not as Yet in Any Legislation

The ACL proposals outlined a number of other proposed changes to the consumer protection laws which are aimed at achieving harmonisation. Many of these proposed changes are relatively uncontroversial.

For example, consideration is being given to standardising the definition to the term “consumer” in consumer protection legislation. Currently, there are a number of different definitions of the term “consumer” in Federal and State consumer protection legislation. These definitions of “consumer” differ quite significantly. It stands to reason that such significant inconsistencies in foundational definitional issues, such as the term “consumer”, must create unnecessary costs and complexity for businesses which operate on a national basis.

Other changes under consideration include whether to:

- harmonise door-to-door legislation;
- introduce specific legislation concerning telemarketing;
- introduce specific legislation in relation to third-party trading schemes;
- introduce specific legislation banning mock auctions;
- change the current provisions of the TPA in relation to pyramid selling to make them more effective; and
- consider banning dual pricing under the ACL.

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Warranties and Conditions in Consumer Contracts

There is also a major review of warranties and conditions in consumer contracts. It is likely that national legislation will flow from this review. Currently there is myriad of Federal and State law and industry practice in relation to conditions and warranties.

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U.S. ANTITRUST LAW DEVELOPMENTS

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Overview

With just over a year with new leadership at the U.S. Department of Justice's Antitrust Division (with Assistant Attorney General Christine Varney and new Deputy Attorneys General) and at the Federal Trade Commission (with the appointment of a new Chairman, Jon Leibowitz, and pending appointments of new Commissioners), it is a useful point to assess the record on both merger enforcement activity and policy statements on mergers. Three key themes emerge:

- Divestitures and other remedies have played an active role in the resolution of a large number of mergers reviewed by the agencies that raised competitive concerns; there has been limited actual litigation on merger matters.
- Most cases focused the theory of competitive concern on fewness of incumbent suppliers either in a product or geography (or both), with unilateral effects as the alleged theory of competitive harm, and there was adjudged to be either insufficient or unlikely repositioning or entry; few cases overtly involved price discrimination theories.
- The framework by which the agencies review mergers – at least as publicly stated in the 1992 Horizontal Merger Guidelines – is under active review and consideration with a series of workshops on key issues, and the potential for clarification or restatement of some aspects of the Guidelines. The stated goal is to align the public statements with agency practice and current economic thinking.

Merger Enforcement Actions and Resolution

Even within the last six months, there have been a relatively large number of mergers that raised competitive concerns and the threat of challenge by the FTC and DOJ. The majority of these were resolved by simultaneous remedies and consent decrees involving divestiture of assets, including intellectual property, plants, technology and access to personnel. Review of these cases show that the overlap, and resulting divested assets remedy, often was a relatively modest portion of the overall transaction. The use of divestitures and remedies to address specific competitive concerns is not a new approach or a differentiator from prior years, although divestiture as an active element of enforcement policy has been strongly emphasized in a recent speech by AAG Varney.¹

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The types of industries involved in these recent merger reviews and challenges have been wide-ranging, including pharmaceuticals, medical devices, oil and gas, chemicals, service industries and electronics (e.g., ticketing), airlines and dairy, although there have been multiple transactions in a given industry – e.g., pharmaceuticals.² In a few cases, the transactions have involved consummated mergers and acquisitions,³ or were in areas of apparent heightened interest to the agency (e.g., dairy)⁴ or ones where the agency has undertaken numerous prior reviews of transactions in the industry (e.g., airlines). As in prior periods, some industries such as telecommunications and airlines involved additional review and/or decision-making by specialized agencies such as the Federal Communications Commission (“FCC”) or the Department of Transportation (international airline alliances).

To date, there have been few trials, so it is yet unclear as to how approaches to litigation may differ from prior periods, and how the competitive effects theories may evolve from the complaints to trial.

The following provides an overview of the major case decisions involving divestitures to identify the key themes, including theories of competitive harm, and other aspects of divestiture policy. Focusing specifically on the FTC, most of the cases show that the agency sought divestitures of assets and intellectual property or marketing rights to specific purchasers, with the ability of the FTC to require trustees and/or approve sales to acceptable buyers if the specific entity proved unacceptable. This is largely a continuation of a trend at the FTC. Many of these cases are still in the comment phase. The competitive effects theories employed at the FTC and the DOJ for the specific matters challenged, as articulated in the complaints and competitive impact statements, are predominantly unilateral effects cases where the allegation is that the merging parties were two of a few or the only incumbent suppliers of the specific product in a given geography.

Some of these merger cases involved more localized geographic markets, where it was alleged that the parties were two of a relatively few firms. These included:

- The FTC required that Agrium Inc. divest certain assets in order to acquire CF Industries to alleviate competitive concerns over the distribution and sale of anhydrous ammonia fertilizer in the Pacific Northwest and Illinois. Among the assets to be divested were terminals and marketing rights for anhydrous ammonia at a specific plant. In this instance, as in several FTC cases, a specific buyer was identified for the divested terminals.⁵
- In evaluating a proposed acquisition by Stericycle of MedServe, the DOJ (along with two states) claimed that the companies were two large incumbent competitors in more localized markets (in the central part of the U.S.) involving infectious waste collection and treatment for customers generating large quantities. The DOJ required divestiture of assets relevant to serving affected customers in particular geographic areas.⁶

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- In a pending litigation matter, the DOJ challenged the 2009 acquisition by Dean Foods of Foremost Farms USA, companies which operated in the dairy industry. The DOJ alleged that the parties had high shares of fluid milk sales in sections of north central U.S. (e.g., Wisconsin and the Upper Peninsula of Michigan), and that the transaction would result in unilateral or coordinated effects in fluid milk. In its filings, the DOJ seeks divestiture of dairy processing plants as a remedy to the alleged competitive effects.⁷
- DOJ approved the AT&T acquisition of Centennial Communications subject to divestitures in specific areas in Louisiana and Mississippi, and alleged that absent these divestitures there would be a reduction in competition for wireless telecommunications services. The action was taken with the state of Louisiana (Attorney General).⁸

Several of the FTC cases involved pharmaceutical products, both in animal health and human health; some but not all involved remedies to address specific product overlap and competitive concerns. Among the remedies required were divestiture of assets, licensing, customer contracts, and supporting services to the entity acquiring the assets, as well as identification of the purchaser. The most extensive of these investigations as well as statements on the competitive effects theories investigated is the Pfizer-Wyeth transaction:

- The Pfizer-Wyeth merger raised competitive issues in several different animal health products including both pharmaceutical and vaccine products, but ultimately not in human health issues. With regard to the former, the transaction allegedly would have reduced the number of suppliers sufficiently that veterinarians and other consumers of the products would likely face price increases.⁹ The Commission also claimed that entry would not be timely, likely or sufficient and required the divestiture of business assets, including vaccines, intellectual property, customer contracts, and required that support be provided to the specific entity to which the assets would be divested to support its entry into the market. The Commission's statement details the competitive effects theories that it tested on the human pharmaceutical products and provides insight into the competitive effects framework for pharmaceutical matters: (1) assessment of overlapping products – the Commission concluded that many product areas were complementary and overlap products were not close substitutes, (2) assessment of theories of potential competition in development of competing pharmaceuticals, (3) assessment of whether the merged company could engage in anticompetitive bundling, tying, or merger-related patents thickets. It is noted that these practices (e.g., bundling) can result in competitive benefits, and (4) the effects on innovation, and research and development in new pharmaceuticals.¹⁰
- In order to resolve competitive concerns raised in a proposed combination of two generic drug manufacturers (Watson and Arrow), the FTC required the divestiture of two generics (cabergoline tablets and generic dronabinol tablets) via the sale of assets to a specified buyer (Impax) for one product and structural change and provision of marketing rights for

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the other product. In these two products, the FTC claimed that one of the merging parties was a current supplier and the other a likely entrant, either already having obtained FDA approval or in the process of developing the product with entry plans.¹¹

- The review of competitive effects of the Schering-Plough-Merck merger focused on the companies' provision of animal health products as well as some human drugs (NK-1 receptor antagonists). Using a comparable theory to the generic drug manufacturer merger (Watson), the FTC alleged that Merck was already an incumbent supplier and Schering a potential competitor, and that the company would have reduced incentive post merger to continue with the Schering initiatives. To address the alleged competitive concerns, the FTC required that Merck divest its interest in its animal health joint venture with Sanofi-Aventis and that Schering divest itself of NK-1 receptor antagonist assets.¹²

Mergers outside of the pharmaceutical area also involved licensing of technologies as remedy for alleged competitive effects from a transaction. For example:

- Danaher Corporation-MDS Analytical Technologies: FTC alleged that the companies were two of only a few providers of laser micro-dissection devices in a North American market and that there were not sufficiently close alternative technologies or sufficient or timely entry to address the alleged competitive concerns. The proposed remedy involved the sale of MDS' devices (its Arcturus brand) to a specific entity (Life Technologies Corp.), along with relevant IP and access to personnel.¹³
- Ticketmaster-Live Nation: The DOJ (with 17 states) alleged that the combination of Ticketmaster and Live Nation would adversely affect competition in "primary ticketing." Ticketmaster was the largest concert promoter with owned venues and Live Nation had recently entered ticketing. In discussing the proposed resolution, DOJ also addressed competition for venue management and concert promotion. Resolution of the competitive concerns required divestiture and licensing of assets, including licensing of Ticketmaster's software to a specific company (Anschutz Entertainment Group or AEG), and sale of its Paciolan Inc to a specific buyer (or alternatively to an acceptable one). In addition to the structural relief, this matter represents an instance of imposition of behavioral remedies, including "anti-retaliatory" provisions on certain practices such as bundling and use of customer information.¹⁴
- The FTC allowed Panasonic's acquisition of Sanyo subject to a divestiture of assets related to one of Sanyo's battery lines, the portable nickel metal hydride (NiMH) battery product, to a pre-determined buyer. The FTC had evaluated other product lines, such as car batteries, and concluded that there was sufficient competition in these lines. With regard to the NiMH batteries, the FTC alleged that the companies' batteries were the closest substitutes, and that there were certain applications where alternatives did not serve as close substitutes. Entry and repositioning were deemed to be unlikely

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or too costly. This merger also was reviewed by the EC (with comparable relief) and MOFCOM, which required additional divestitures in car batteries.¹⁵

Combinations short of merger, such as international airline alliances, were also the subject of review and comment by the DOJ, with filings by the DOJ before the U.S. Department of Transportation (DOT):

- In December, the DOJ filed comments with DOT concerning the competitive effects of the oneworld alliance's application for antitrust immunity for proposed agreements. DOJ raised concerns about potential competitive effects on six transatlantic routes involving London, including potential pricing effects, and recommended that DOT impose slot or other divestitures if it were to grant the immunity application. <http://www.justice.gov/atr/public/comments/253575.pdf>. In early February, DOT issued its preliminary recommendation granting immunity, and seeking specific slot divestitures.¹⁶

Finally, the agencies continue their announced interest in areas such as pharmaceuticals, intellectual property, and single firm conduct with a variety of actions, investigations, and policy statements.¹⁷

Review of the Merger Guidelines – Changes in Merger Policy Statements?

Commencing in September 2009, the DOJ and FTC initiated a review of the 1992 *Horizontal Merger Guidelines* by announcing a series of workshops and hearings which concluded in late January.¹⁸ The process has included specific questions on key topics, submissions by numerous parties, and workshop panels on selected topics such as market definition, concentration, unilateral and coordinated effects, and entry, among others. The stated focus of the review and process has been on aligning the *Guidelines* with actual agency practice and assessment of the implications of economic analysis for updating and enhancing the articulation of competitive effects theories and the overall framework for assessing merger effects.

Substantively, the workshop panels and commentaries have covered a considerable breadth of potential areas for revisions. Review of the transcripts, written submissions, and recent speeches¹⁹ shows clear consensus on some topics. For example, most participants agree that the HHI levels in the *Guidelines* appear to be at lower thresholds than those evidenced in enforcement actions over the last decade and many have recommended some upward revision to reflect actual policy. Similarly, most participants have emphasized the enduring value of an overall framework and the importance of having a guidelines framework separate from commentary or specific tools on the specific applications of competitive effects analyses to specific cases. In addition, there is substantial discussion in the workshops on which tools and evidence (e.g., win-loss data) best inform the competitive effects analyses or the weight to be given to them. Most participants have also stressed the importance of integrated competitive effects analyses.

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Areas of somewhat more divergent views include whether there should be more express inclusion of direct effects evidence into the guidelines framework as part of the competitive effects analyses, or whether such evidence/analyses could supplant market definition.²⁰ In addition, treatment of supply response and entry in the *Guidelines* and in practice (e.g., analysis of repositioning in unilateral effects analyses), and how best to incorporate entry/expansion analyses from competitors with low sunk costs has received considerable attention in written submissions and in the workshops.²¹

Notes

¹ For example, in a recent address on enforcement policies, Assistant Attorney General Varney emphasized the role of divestitures and remedies in merger policy: "Devising effective remedies for anticompetitive mergers and conduct is a critical element of successful antitrust enforcement." Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice "Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency," Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference (February 15, 2010), at <http://www.justice.gov/atr/public/speeches/255189.htm#16>. For example, Table 2.1.1. of the Federal Trade Commission Performance and Accountability Report Fiscal Year 2009, indicates a total of 13 merger enforcement actions at the time of issuance of that report, available at <http://www.ftc.gov/opp/gpra/2009parreport.pdf>.

² Even in just the last half of 2009 and first part of 2010, there have been a number of mergers or transactions that the agencies threatened to be challenged absent remedies, and that were resolved with divestitures of relevant assets. A few additional mergers have had complaints filed and litigation commenced (e.g., Dean Foods-Foremost Farms USA). A summary of the key cases is provided below for DOJ and FTC actions. In addition, a specific listing of all FTC merger enforcement actions can be found at <http://www.ftc.gov/open/>, which also includes counts of merger filings per month and links to major enforcement actions.

³ For example, there were two cases where assets acquired in the past were required to be divested (FTC settlement with Carilion to divest clinics that it had acquired: <http://www.ftc.gov/opa/2009/10/carilion.shtm> and a DOJ settlement with Cameron International Corp. in the context of a new transaction that required it to sell desalter assets it had previously purchased from a different company: Cameron International Corp. NATCO Group, http://www.justice.gov/atr/public/press_releases/2009/252077.htm).

⁴ Dean Foods-Foremost Farms USA represents an example where the DOJ challenged an acquisition of dairy processing plants by a dairy cooperative alleging competitive harm in sale of fluid milk to among other customers, school milk. In addition, the DOJ recently announced joint hearings with the U.S. Department of Agriculture to commence in March 2010 and continue over the year on competition and other issues in the dairy and broader agricultural industries. See, e.g., http://www.justice.gov/atr/public/press_releases/2009/248797.htm.

⁵ See, <http://www.ftc.gov/opa/2009/12/agrium.shtm>.

⁶ See, <http://www.justice.gov/atr/cases/stericycle.htm>.

⁷ See, <http://www.justice.gov/atr/cases/f254400/254455.pdf>.

⁸ See, http://www.usdoj.gov/atr/public/press_releases/2009/250897.htm.

⁹ The theory alleged was that the merging parties had high shares of specific products in markets with 4 incumbent players, and that the transaction would reduce the number of competitors in a market with few players, resulting in possible price increases. See, <http://www.ftc.gov/os/caselist/0910053/091014pwyethanal.pdf>.

¹⁰ See, <http://www.ftc.gov/opa/2009/10/pfizer.shtm>; and <http://www.ftc.gov/os/caselist/0910053/091014pwyethstml.pdf>.

¹¹ See, <http://www.ftc.gov/opa/2009/12/watsonarrow.shtm>.

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¹² See, <http://www.ftc.gov/opa/2009/10/merck.shtm>.

¹³ See, <http://www.ftc.gov/opa/2010/01/danaher.shtm>.

¹⁴ See, <http://www.justice.gov/atr/cases/ticket.htm>, and Remarks of AAG Varney, January 25, 2010.

¹⁵ See, <http://www.ftc.gov/opa/2009/11/sanyo.shtm>.

¹⁶ The DOT tentatively concluded in its show-cause order that the alliance would immunity for oneworld alliance would yield benefits in the form of fares, services, improved schedules and increase competition with other alliances, but risk harm to competition on specific routes. As a result, "[a]s a condition of approval, the Department is proposing in its show-cause order that the applicants make four pairs of slots available to competitors for new U.S.-Heathrow service. The Department also would require changes to the agreement to ensure capacity growth, and require the carriers to submit traffic data and implement the proposed alliance within 18 months of a final decision."

¹⁷ See, e.g. FTC actions against Intel, <http://www.ftc.gov/opa/2009/12/intel.shtm> and DOJ Statement of Interest in Google Books settlement, <http://www.justice.gov/atr/cases/f255000/255012.pdf>.

¹⁸ Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop (January 26, 2010) <http://www.justice.gov/atr/public/speeches/254577.htm>. See also AAG Varney's speech at: <http://www.usdoj.gov/atr/public/speeches/250238.htm>; FTC Chairman Leibowitz's: <http://www.ftc.gov/speeches/leibowitz/090922mergerguideleibowitzremarks.pdf> and for workshop agenda, materials and transcripts: <http://www.ftc.gov/bc/workshops/hmg/index.shtml>.

¹⁹ Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop (January 26, 2010) <http://www.justice.gov/atr/public/speeches/254577.htm>. See also Carl Shapiro, Deputy Assistant Attorney General, "Updating the Merger Guidelines: Issues for the Upcoming Workshops" November 2009.

²⁰ See, for example, submissions and transcript for December 3, 2009 workshop, <http://www.ftc.gov/bc/workshops/hmg/index.shtml>.

²¹ See, for example, Carl Shapiro, *supra* note 19, and <http://www.ftc.gov/bc/workshops/hmg/index.shtml>.