



## ***Public Competition Assessment***

*28 April 2010*

### ***Agilent Technologies Inc - proposed acquisition of Varian Inc***

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#### **Introduction**

1. On 31 March 2010, the Australian Competition and Consumer Commission (ACCC) announced its decision not to oppose the proposed acquisition of Varian Inc (**Varian**) by Agilent Technologies Inc (**Agilent**) (the **proposed acquisition**), subject to a court enforceable undertaking pursuant to section 87B of the *Trade Practices Act 1974 (Cth)* (the **Act**), accepted by the ACCC on 31 March 2010 (the **undertaking**). The ACCC formed the view that the proposed acquisition, in conjunction with the undertaking, would be unlikely to have the effect of substantially lessening competition in the national markets for the supply of:
  - laboratory gas chromatographs (**lab GCs**),
  - micro/portable gas chromatographs (**micro/portable GCs**),
  - triple quadrupole gas chromatography mass spectrometers (**triple quad GC-MS**), and
  - inductively coupled plasma mass spectrometers (**ICP-MSs**),in Australia in contravention of section 50 of the Act.
2. The ACCC made its decision on the basis of the information provided by the merger parties and information arising from its market inquiries. This Public Competition Assessment outlines the basis on which the ACCC has reached its decision on the proposed acquisition, subject to confidentiality considerations.

#### **Public Competition Assessment**

3. To provide an enhanced level of transparency and procedural fairness in its decision making process, the ACCC issues a Public Competition Assessment for all transaction proposals where:
  - a merger is opposed;
  - a merger is subject to enforceable undertakings;

- the merger parties seek such disclosure; or
  - a merger is not opposed but raises important issues that the ACCC considers should be made public.
4. This Public Competition Assessment has been issued because Agilent's proposed acquisition of Varian is subject to a court enforceable undertaking.
  5. By issuing Public Competition Assessments, the ACCC aims to provide the public with a better understanding of the ACCC's analysis of various markets and the associated merger and competition issues. It also alerts the public to the circumstances where the ACCC's assessment of the competition conditions in particular markets is changing, or likely to change.
  6. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC. While some transaction proposals may involve the same or related markets, it should not be assumed that the analysis and decision outlined in one Public Competition Assessment will be conclusive of the ACCC's view in respect of other transaction proposals, as each matter will be considered on its own merits.
  7. Many of the ACCC's decisions will involve consideration of both non-confidential and confidential information provided by the merger parties and market participants. In order to maintain the confidentiality of particular information, Public Competition Assessments do not contain any confidential information or its sources. While the ACCC aims to provide an appropriately detailed explanation of the basis for the ACCC decision, where this is not possible, maintaining confidentiality will be the ACCC's paramount concern, and accordingly a Public Competition Assessment may not definitively explain all issues and the ACCC's analysis of such issues.

## **The merger parties**

### *The acquirer – Agilent Technologies Inc*

8. Agilent is a global firm headquartered in the United States and is listed on the New York Stock Exchange (**NYSE**). Agilent employs around 17,000 employees worldwide and operates in 110 countries, including in Australia.
9. Agilent does not operate any research and development (**R&D**) or manufacturing facilities in Australia. All products supplied to Australian customers are imported from its manufacturing facilities located primarily in China, Germany, Japan and the United States.
10. In Australia, Agilent operates two main business divisions, electronic measurement and bio-analytical measurement (including analytical and life science instruments). The merger parties overlap in relation to the bio-analytical divisions of their respective businesses.

11. Agilent's bio-analytical measurement business manufactures and supplies scientific instrumentation, associated consumables, accessories (including software) and services that enable customers to identify, quantify and analyse the physical and biological properties of substances – typically in laboratory settings. Products supplied by this business include lab GCs, micro/portable GCs, triple quadrupole GC-MSs and ICP-MSs, which are typically used in detection and measurement research, testing and quality control applications.

*The target – Varian Inc*

12. Varian is a global firm headquarters in the United States and is listed on the NASDAQ. Varian employs around 3,600 employees worldwide and operates manufacturing facilities in Australia, France, Italy, the Netherlands, Poland, the United Kingdom and the United States.
13. Varian operates a facility in Melbourne, which conducts R&D in relation to, and manufactures, ICP-MS instruments. All other instruments supplied by Varian (including lab GCs, triple quadrupole GC-MSs and ICP-MSs) are imported from its manufacturing facilities overseas.
14. In Australia, Varian operates two main business divisions, bio-analytical measurement (including analytical and life science instruments) and vacuum products (including a broad range of products used to create, control, measure and test vacuum environments).

**Other industry participants**

15. A number of other significant manufacturers and suppliers of scientific instruments used for bio-analytical measurement applications and already represented in Australia are briefly outlined below.

*Perkin Elmer Inc*

16. Perkin Elmer Inc (**Perkin Elmer**) is a public company listed on the NYSE and headquartered in the United States. It is a major supplier of scientific instruments globally with sales in over 125 countries, including Australia. Globally, Perkin Elmer manufactures and supplies a portfolio of products, including lab GCs and triple quadrupole GC-MSs, both of which it supplies in Australia.

*Shimadzu Corporation*

17. Shimadzu Corporation (**Shimadzu**) is a public company listed on the Tokyo Stock Exchange and headquartered in Japan. It is a major supplier of scientific instruments globally, (including Australia). Globally, Shimadzu manufactures and supplies a portfolio of products, including lab GCs, which it supplies in Australia, and ICP-MSs, which it currently does not supply in Australia.

### *Thermo Fisher Scientific*

18. Thermo Fisher Scientific (**Thermo**) is a public company listed on the NYSE and headquartered in the United States. It is a major supplier of scientific instruments globally, including in Australia. Globally, Thermo manufactures and supplies a portfolio of products, including lab GCs, triple quadrupole GC-MSs and ICP-MSs, all of which it supplies in Australia.
19. Thermo recently acquired the Australian operations of the Biolab Group, which supplies a range of scientific equipment and consumables. This acquisition has provided Thermo with an enhanced Australian base for the distribution and after-sales service and support of its instrument products.

### *Waters Corporation*

20. Waters Corporation (**Waters**) is a public company listed on the NYSE and headquartered in the United States. It is a major supplier of scientific instruments globally and has sales in 27 countries, including Australia. Globally, Waters manufactures and supplies a portfolio of products, with a focus on mass spectrometry products, including triple quadrupole GC-MSs, which it supplies in Australia.

### **The proposed acquisition**

21. On 27 July 2009, Agilent and Varian signed a definitive sale agreement for the acquisition by Agilent of all the issued shares in Varian for a total consideration of US\$1.5 billion. On 16 October 2009, Agilent made a submission to the ACCC seeking clearance of the proposed acquisition in Australia.

### **Timing**

22. The following table outlines the timeline of key events in this matter.

16 <sup>th</sup> October 2009	ACCC received submission from the merger parties.
26 <sup>th</sup> October 2009	ACCC requested information from the merger parties.
29 <sup>th</sup> October 2009	ACCC commenced review under the Merger Review Process Guidelines. Market inquiries commenced.
4 <sup>th</sup> November 2009	ACCC received further information from the merger parties.
16 <sup>th</sup> November 2009	Closing date for submissions from interested parties.
25 <sup>th</sup> November 2009	ACCC requested further information from the merger parties. ACCC timeline suspended.
2 <sup>nd</sup> December 2009	ACCC requested further information from the merger parties.
4 <sup>th</sup> December 2009	ACCC received further information from the merger parties, in response to the ACCC's request of 25 November 2009. ACCC timeline remains suspended, pending receipt of the parties' response to the ACCC's request of 2 December 2009.
16 <sup>th</sup> December 2009	Former proposed date for announcement of ACCC's findings,

	amended to allow for provision of further information by the merger parties.
3 <sup>rd</sup> February 2010	ACCC received further information from the merger parties, in response to the ACCC's request of 2 December 2009. ACCC timeline recommenced.
4 <sup>th</sup> March 2010	ACCC received a further submission from the merger parties.
10 <sup>th</sup> March 2010	Former proposed date for announcement of ACCC's findings, amended to allow the ACCC to consider the further submission provided by the merger parties on 4 March 2010.
31 <sup>st</sup> March 2010	ACCC announced it would not oppose the proposed acquisition, subject to a court enforceable undertaking offered by the merger parties.
31 <sup>st</sup> March 2010	Section 87B undertaking accepted by ACCC.

### **Market inquiries**

23. The ACCC conducted market inquiries with a range of industry participants, including actual and potential competitors, purchasers of scientific instruments (including laboratories, mining companies, government agencies, academic institutions and other purchasers), third party distributors and service and support contractors, and other interested parties.
24. The ACCC also liaised closely with other competition regulators in overseas jurisdictions during the course of its review, in particular the European Commission (EC) and Federal Trade Commission in the United States.

### **Industry background**

25. The bio-analytical measurement industry, which includes analytical and life science instruments, involves the development, manufacture and supply of scientific instruments, consumables, accessories (including associated software) and services used for the analysis of elements by a wide range of customer sectors. These customer sectors include (but are not limited to) laboratories, mining companies, universities and research institutions, government agencies and other manufacturers in a range of industries.
26. An overview of each of the relevant instrument categories considered by the ACCC in the course of its review is provided below. The ACCC noted that consumables and accessories (including associated software) are necessary components which need to be used in conjunction with each of instruments described.

### *Gas chromatography*

27. Gas chromatography (**GC**) instruments are used to separate volatile samples (which do not disintegrate when heated) into their individual components to enable the user to detect and quantify those components. These instruments are only able to be used with known compounds and are not suited for use with unknown compounds.
28. Both lab GCs and micro/portable GCs fall into this instrument category.

### *Mass spectrometry*

29. Mass spectrometry (**MS**) instruments are generally used to identify the chemical composition of samples based on the mass-to-charge ratio of the charged particles contained in those samples. GC-MS instruments are a combination of GC and MS instruments and are used for the separation and identification of volatile compounds at a molecular level. These instruments are able to be used with both known and unknown compounds.
30. Triple quad GC-MSs fall into this instrument category.

### *Atomic spectroscopy*

31. Atomic spectroscopy (**AS**) instruments are used to determine the composition of samples for analysis at the atomic level. In other words, AS instruments are able to determine which elements from the periodic table are present in a given sample.
32. ICP-MSs fall into this instrument category.

### **Areas of overlap and market definition**

33. In Australia, Agilent and Varian both supply scientific instruments, including consumables, accessories (including associated software) and services to the bio-analytical measurement industry. In particular, the ACCC found that the merger parties each supply the following scientific instruments on a national basis:

- lab GCs,
- micro-portable GCs,
- triple quad GC-MSs, and
- ICP-MSs

(collectively referred to as the **overlapping products**).

34. The ACCC noted that the merger parties' operations also overlap in relation to a small range of other products in Australia, such as liquid chromatography instruments. However, the ACCC formed the view that competition concerns would be unlikely to arise in relation to those other product areas, mainly due to the relatively limited level of overlap in the respective operations of the merger parties for the supply of those products.

*Product dimension*

35. On the demand-side, market inquiries indicated that there were no close substitutes for each of the overlapping products. The ACCC formed the view that the functional and technical applications associated with other alternative types of instruments were sufficiently different that customers were unlikely to switch to alternative types of instruments, even in the event of a small but significant non-transitory increase in prices or reduction of service levels.
36. On the supply-side, market inquiries indicated that the technology associated with supplying other instruments was sufficiently different that manufacturers of those other products were unlikely to be able to switch to the supply of any of the overlapping products without significant investment and time, even in the event of a small but significant non-transitory increase in prices or reduction of service levels.

*Geographic dimension – all relevant markets*

37. The ACCC found that the merger parties both supply each of the overlapping products on a national basis. While the majority of the overlapping products are imported for supply in Australia, the ACCC's inquiries indicated that, for most of the overlapping products, a local Australian supplier presence was generally required by customers, mainly due to the requirement for an established and trusted brand in Australia and direct after-sales service and support networks for instruments.
38. Market inquiries indicated that customers for each of the overlapping products were unlikely to switch to an overseas supplier that did not have an established and trusted brand in Australia, particularly given that the purchase of such instruments were relatively expensive and infrequent (e.g. instruments are designed to last up to 10 years). Additionally, the significant time and cost required to develop an established and trusted brand in Australia was likely to significantly limit the extent to which an overseas supplier without such a brand would be able to competitively constrain a small but significant increase in prices or reduction of service levels.
39. Market inquiries further indicated that the provision of direct after-sales service and support by the original manufacturer was a critical factor in the purchasing decisions of most customers. Trusted and timely after-sales service and support within 24-48 hours was considered of very high importance to customers, whose purchasing decisions reflected a strong preference for instruments supplied by firms with their own direct service and support networks in Australia.

40. Notwithstanding the above, the ACCC's market inquiries suggested that the supply of the relatively less complex lab GC and micro/portable GC instruments via the established third party distributors of suppliers without a local Australian presence was considered a more viable source of supply. For the relatively complex triple quadrupole GC-MS and ICP-MS instruments, a local Australian presence was generally considered by customers to be necessary.
41. Accordingly, the ACCC concluded that the proposed acquisition should be considered in the context of national markets for each of the overlapping products. The ACCC noted that the relevant national markets identified comprised both:
- suppliers with a direct Australian presence consisting of established local distribution and after-sales service and support networks for the products supplied to Australian customers; and
  - overseas suppliers without a direct Australian presence and that employ local Australian third party distributors and after-sales service and support providers for the products supplied to Australian customers.

#### *Functional dimension*

42. The ACCC recognised that, whilst the supply of after-sales service and support, consumables and accessories (including associated software) are critical elements of participation in the relevant instruments markets, these products and services are also supplied in Australia by non-integrated distributors. However, for the purpose of assessing the proposed acquisition, the ACCC did not consider it necessary to identify a separate market/s for the supply of after-sales service and support, consumables and accessories (including associated software) for use with instruments.

#### **Competition analysis**

43. The ACCC considered that, absent the undertaking, if the proposed acquisition was to proceed the merged firm would be able to unilaterally increase prices for instruments in each of the relevant markets or reduce the quality of its services, by a significant extent, without being effectively constrained in Australia by alternative suppliers represented in Australia or overseas.

#### *Market concentration*

44. In relation to each of the relevant markets, the proposed acquisition would result in the removal of a significant competitor and in the merged firm possessing the largest share of sales, both globally and in Australia. In particular, information obtained by the ACCC indicated that for:
- lab GCs – the merged firm would possess the largest share of Australian sales (by volume) and, post-acquisition, only two significant competitors (Shimadzu and Perkin Elmer) would remain, with a much smaller share of Australian sales;



- micro/portable GCs – the proposed acquisition would result in the merged firm being the only remaining significant supplier of these instruments and possessing the most recognised and trusted product available, both globally and in Australia;
  - triple quad GC-MSs – the merged firm would possess the largest share of Australian sales (by volume) and, post-acquisition, only two significant competitors (Thermo and Waters) would remain, with a much smaller share of Australian sales; and
  - ICP-MSs – the merged firm would possess the largest share of Australian sales (by volume) and, post-acquisition, only two remaining significant competitors (Perkin Elmer and Thermo) would remain, with a smaller share of Australian sales.
45. Market inquiries indicated that Agilent and Varian frequently compete in tenders and supply negotiations conducted by customers in each of the relevant product markets, with customers identifying the merger parties as two of a very small range of reputable suppliers represented in Australia that they consider when sourcing new instruments. Importantly, a number of major customers considered the merger parties to be each others' closest competitor for the supply of particular instruments, with a high degree of substitution occurring between the respective products of the two firms.
46. Accordingly, the proposed acquisition would result in a significant increase in concentration in all of the relevant markets through the merger of two close competitors in those markets and, post-acquisition, the merged firm would have the largest share of Australian sales in each of the relevant markets.

#### *Direct imports*

47. The ACCC recognised that all of the products supplied in each of the relevant markets are currently imported by manufacturers from their respective overseas production sites, with the exception of the ICP-MSs of Varian, which it manufactures and supplies from its facility in Melbourne.
48. However, given that an established Australian brand and local presence for after-sales service and support was generally considered to be critical by customers, the ACCC considered that the importation of instruments merely forms an input into the overall supply of the relevant instruments in Australia. Market inquiries supported this finding, with customers indicating that instruments are rarely (if ever) sourced via direct imports as opposed to imports distributed via suppliers represented in Australia or their established third party distributors. On this basis, the ACCC considered that direct imports were only likely to account for a very small proportion of existing sales and would be unlikely to provide an effective competitive constraint on the merged firm.
49. Accordingly, only imported products supplied via suppliers represented in Australia or their established third party distributors were considered by the ACCC as part of the relevant national supply markets in its competition analysis.

### *Availability of substitutes*

50. In relation to micro/portable GCs, no significant Australian competitors would have remained post-acquisition.
51. In relation to lab GCs, triple quad GC-MSs and ICP-MSs, although alternative Australian suppliers would remain post-acquisition, market inquiries indicated that those available substitutes (including substitute products made available in Australia via third party distributors) would likely be limited in their ability to provide an effective competitive constraint on the merged firm. The factors informing this conclusion are addressed below.
52. Firstly, although market inquiries suggested that customer switching may be feasible on a purely financial cost basis, customers indicated that there were significant risks involved in switching suppliers, particularly given instrument purchases are relatively expensive and infrequent in nature and the instruments typically constitute an essential input in the respective businesses of customers. Customers indicated that the local brand of the supplier, on the basis of perceived quality and reliability, was a key factor in purchasing decisions.
53. Secondly, the availability of reliable and timely after-sales service and support directly from the original manufacturer was considered to be a critical factor in customer purchasing decisions. Post-acquisition, the merged firm would have the most extensive direct after-sales service and support network of any single supplier represented in Australia.
54. Lastly, market inquiries indicated that third party distribution in relation to the relatively more complex triple quadrupole GC-MS and ICP-MS instruments was likely to be a less effective means of competing in the relevant markets, particularly in cases where a lower level of after-sales service and support was available from such vendors. The difficulties faced by third party distributors in competing effectively were reflected in the very limited use of third party distributors by the major suppliers in the relevant markets and the relatively small share of Australian sales comprised by supply via this distribution model. In any event, the ACCC did not identify any significant global suppliers which could commence Australian supply, either directly or via third party distributors, that were not already represented in Australia.

### *Barriers to entry*

55. The ACCC considered barriers to entry on three distinct bases, including greenfields new entry, new entry by an incumbent overseas supplier of related products, and new entry by an incumbent overseas supplier of a relevant product who has no presence in Australia. Each of these three types of new entry is addressed below.

56. The ACCC considered that new entry on a greenfields basis would not be likely to provide an effective competitive constraint on the merged firm, mainly due to the substantial sunk costs and lead time necessary for the requisite R&D of a new product; establishing sufficient manufacturing capacity; developing a reputable Australian brand for the supply of the relevant instruments; establishing effective sales and after-sales service and support networks; as well as the insufficient financial incentive for such an overseas supplier to make the required investment given the small size of demand in the relevant markets.
57. The ACCC considered that new entry by an incumbent overseas supplier of related products would not be likely to provide an effective competitive constraint on the merged firm mainly due to the substantial sunk costs and lead time necessary for the requisite R&D of a new product; establishing sufficient manufacturing capacity; developing a reputable Australian brand for the supply of the relevant instruments; as well as the insufficient financial incentive for such an overseas supplier to make the required investment given the small size of demand in the relevant markets
58. The ACCC considered that new entry by an incumbent overseas supplier would not be likely to constrain the merged firm, given that the ACCC did not identify any significant incumbent overseas supplier not already represented in Australia that could commence supply in the relevant markets.

#### *Conclusion – competition analysis*

59. Therefore, on the basis of market inquiries and other information before it, the ACCC formed the view that the proposed acquisition would be likely to result in a substantial lessening of competition in each of the relevant markets.

#### **Undertakings**

60. On 30 March 2010 the merger parties offered, and the ACCC accepted, a court enforceable undertaking pursuant to section 87B of the Act. The undertaking was offered by the merger parties to address the ACCC's competition concerns arising from the proposed acquisition in the Australian context and incorporates commitments provided by the merger parties to the EC.
61. In this regard, the EC announced its decision on the 20 January 2010 not to oppose the proposed acquisition, subject to commitments by the merger parties to divest certain assets and businesses on a global basis where competition concerns were identified by the EC (the **EC commitments**). The businesses for divestiture included:
- Varian's global lab GC business,
  - Agilent's global micro/portable GC business,
  - Varian's global triple quad GC-MS business, and
  - Varian's global ICP-MS business

(collectively referred to as the **divestiture businesses**).

62. In summary, the divestiture businesses are to comprise all tangible and intangible assets necessary to ensure the viability and competitiveness of those businesses on a stand-alone basis, with hold separate arrangements to apply to those divestiture businesses from the date of the EC's decision.
63. Under the EC commitments, the merger parties are prohibited from completing the proposed acquisition until they have obtained EC approval for the purchasers of the divestiture businesses and final sale agreements between the merger parties and the relevant proposed purchasers have been signed.
64. The ACCC considered that compliance with the EC commitments was necessary to address the competition concerns identified by the ACCC in the Australian context. Accordingly, under the undertaking offered by the merger parties and accepted by the ACCC, the merger parties have undertaken to comply with their EC commitments in their entirety and to submit to the jurisdiction of the Federal Court of Australia.
65. The undertaking also requires the merger parties to seek the ACCC's pre-approval of the proposed purchasers for the divestiture businesses. The undertaking provides for ACCC pre-approval of:
  - Inficon Inc (**Inficon**) as the proposed purchaser of Agilent's global micro/portable GC business; and
  - Bruker Corporation (**Bruker**) as the proposed purchaser of Varian's global lab GC, triple quad GC-MS and ICP-MS businesses.
66. The ACCC concluded that the divestment of the divestiture businesses by Agilent and Varian to Inficon and Bruker, both of which have established and effective distribution arrangements in Australia, would create viable, effective, independent and long-term competitors to the merged firm and thereby address the ACCC's competition concerns. In the event that the merger parties fail to complete the divestment of the divestiture businesses to Inficon and Bruker, the undertaking requires the merger parties to obtain ACCC approval for any alternative purchasers.

*Conclusion – the section 87B undertakings*

67. The ACCC considered that the undertakings offered by the merger parties and accepted by the ACCC, complement the EC commitments while giving the ACCC the ability to enforce those commitments and satisfactorily addresses the ACCC's competition concerns in the relevant national markets.
68. A copy of the undertaking is available on the ACCC's website at the Undertakings Register ([www.accc.gov.au](http://www.accc.gov.au) following the link to public registers).

## **Conclusion**

69. On the basis of the above, including taking into account the undertaking, the ACCC formed the view that the proposed acquisition of Varian by Agilent would not be likely to result in a substantial lessening of competition in any relevant market in contravention of section 50 of the Act.