Australian Competition & Consumer Commission

Public Competition Assessment

3 December 2013

Perpetual Limited - proposed acquisition of The Trust Company Limited

Introduction

1. On 19 September 2013, the Australian Competition and Consumer Commission (**ACCC**) announced its decision not to oppose the proposed acquisition by Perpetual Limited (**Perpetual**) of The Trust Company Limited (**The Trust Company**) (the **proposed acquisition**), subject to undertakings (the **undertakings**) pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) (the **Act**). The ACCC decided that the proposed acquisition, in conjunction with the undertakings, would be unlikely to have the effect of substantially lessening competition in any relevant market in contravention of section 50 of the Act.
2. The ACCC made its decision on the basis of the information provided by the parties to the acquisition (the **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 in its decision making process, the ACCC issues a Public Competition Assessment for all proposals where:
   - an acquisition is opposed
   - an acquisition is subject to enforceable undertakings
   - the parties to the acquisition seek such disclosure or
   - an acquisition is not opposed but raises important issues that the ACCC considers should be made public.
4. This Public Competition Assessment has been issued because Perpetual's proposed acquisition of The Trust Company is subject to court enforceable undertakings.
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 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 a case-by-case basis.

7. Public Competition Assessments outline the ACCC's principal reasons for forming views on a proposed acquisition at the time the decision was made. As such, Public Competition Assessments may not definitively identify and explain all issues that the ACCC considers arise from a proposed acquisition. Further, the ACCC's decisions generally involve consideration of both non-confidential and confidential information provided by the 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.

The parties and other industry participants

The acquirer: Perpetual

8. Perpetual is an Australian Securities Exchange (ASX) listed financial services company that provides specialised investment management, wealth advice and corporate fiduciary services to individuals, families, financial advisors and institutions.

9. For the purposes of this Public Competition Assessment, Perpetual's relevant activities include the following:

   - *Corporate Trust Services* to the financial services industry. These services include responsible entity services, custodial services, trustee services for unregistered funds, and trustee services for debt capital market products. Key customers of these services include fund managers, ASX listed corporations engaged in market transactions, banks and finance companies.

   - *Private Trust Services* are provided to clients including individuals, families and small businesses. These services include acting as a trustee for disability and testamentary trusts, native title trusts, compensation trusts for assistance in the event of personal injury and philanthropic trusts.

10. Perpetual offers other products and services to corporate and private clients. These include investment fund management, superannuation fund management, financial planning and wealth management products and services for individuals, advisors and institutions.

11. These other products and services are largely irrelevant to the competition analysis of the proposed transaction due to the lack of overlap with The Trust Company, strong and ongoing competition from other parties, or both.

The target: The Trust Company

12. The Trust Company is an ASX-listed company that provides a range of financial services across the personal wealth management, corporate and philanthropic sectors.

13. Most relevantly for the purposes of this competition assessment, The Trust Company, like Perpetual, provides a range of corporate trust services to the financial services industry and private trust services to individuals and families.

14. The Trust Company's other operations are less significant than those of Perpetual and are not relevant for the purposes of this Public Competition Assessment. They include financial planning, wealth management, and financial services related to health and personal injury.

15. The Trust Company has a 13.4 per cent interest in Equity Trustees Limited (**Equity Trustees**), a competitor in both corporate and private trust services markets, making it the largest shareholder in Equity Trustees.

Other current industry participants

16. The following are major alternative providers of corporate and/or private trust services:

    - **Equity Trustees Limited** (**Equity Trustees**), an ASX-listed company that provides a range of corporate and private trustee services.
    - **IOOF Holdings Limited** (**IOOF**), an ASX-listed company. IOOF's wholly owned subsidiary Australian Executor Trustees Limited (**AET**) provides a range of corporate and private trustee services.
    - **BNY Mellon** is the Australian arm of a US bank, and is a global provider of corporate trust services.
    - **One Investment Group** is a new and growing provider of corporate (but not private) trust services, having commenced offering a limited range of services in 2009 and expanding its offer over the last four years.

17. The ACCC's market inquiries also identified a number of other relatively smaller[1] providers for each relevant service. These 'minor' alternative providers are set out in Table 1.

The proposed transaction

18. On 7 May 2013, Perpetual announced a proposal to acquire the entire share capital of The Trust Company by way of a scheme of arrangement. The proposed acquisition is subject to a condition precedent which requires informal merger clearance from the ACCC.

19. At the time of the ACCC's review, Perpetual was not the only bidder for The Trust Company. On 21 February 2013, Equity Trustees announced an offer to acquire The Trust Company and on 3 September 2013 IOOF announced an offer to acquire The Trust Company.

Industry Background and Areas of Overlap

20. A glossary of key terms is provided at page 19.

21. A trust company administers trusts. A trust is a legal construct by which one person owns or holds property for the benefit of another person. In a trust, property (whether real estate, shares or other types of property) is registered in the name of the trustee but is held by the trustee for the benefit of another person. Trust services can be provided to corporate (**corporate trust services**) or private (**private trust services**) clients.

22. Corporate trust service clients include participants in the financial services industry such as banks, fund managers and asset managers. The ACCC's market inquiries indicated that corporate trust services can broadly be categorised into three types of service, which are described briefly below and in more detail in the Glossary:

    - trustee services (acting in a fiduciary capacity for investors in a particular investment product or transaction)
    - responsible entity (RE) services (a trustee and manager of a managed investment scheme) and
    - custodial services (holding of property for another person who is the beneficial owner).

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[1] These providers are relatively smaller in terms of their provision of these services (despite in some cases being very large companies overall).

23. Private trust services include acting as a trustee for disability and testamentary trusts, native title trusts, compensation trusts for assistance in the event of personal injury and philanthropic trusts. Clients include individuals, families and small businesses.

24. Perpetual and The Trust Company currently overlap in the supply of the following services:

- corporate trustee services for certain debt capital market products (namely, corporate bonds)
- corporate trustee services for wholesale unregistered funds
- corporate responsible entity services to registered funds
- corporate custodial services and
- private trust services.

25. In addition to current overlap, the ACCC recognised and had regard to the potential for overlap in other services to develop between the merger parties in the future without the acquisition as part of its competition analysis. In particular, the ACCC considered as part of its competition analysis the potential for The Trust Company to provide trustee services for debt capital market products other than corporate bonds (e.g. syndicated bank loans, PPP-type deals, securitisation, and covered bonds), in competition with Perpetual.

Review timeline

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

Date	Event
16 May 2013	ACCC commenced review under the Merger Review Process Guidelines.
7 June 2013	Closing date for submissions from interested parties.
2 July 2013	ACCC timeline suspended to allow Perpetual to provide further information. Former proposed decision date of 11 July 2013 delayed.
15 July 2013	ACCC received further information from Perpetual.
1 August 2013	ACCC published a Statement of Issues outlining preliminary competition concerns.
15 August 2013	Closing date for submissions relating to Statement of Issues.
19 September 2013	ACCC announced it would not oppose the proposed acquisition, subject to a section 87B undertaking accepted by ACCC.

Market Inquiries and Statement of Issues

27. The ACCC conducted thorough and extensive market inquiries before and after it published its Statement of Issues (**SOI**), consulting a range of industry participants including competitors, potential competitors, customers, industry professionals, industry bodies, regulators and other interested parties.

28. Initial responses to the ACCC's market inquiries identified preliminary concerns that the proposed acquisition may result in overall harm to competition. In this respect,

concerns were expressed that the position of Perpetual in the supply of at least some corporate trust services would be strengthened by the elimination of actual or potential competitive constraint between the merger parties.

29. To further test its preliminary concerns, the ACCC published an SOI on 1 August 2013. On releasing the SOI, the ACCC sought submissions from customers, competitors and others about the proposed transaction and the ACCC's preliminary views.

30. In particular, the SOI sought further submissions as to whether the proposed acquisition would be likely to give rise to one or both of the following forms of harm to competition:

- *Unilateral effects* - the acquisition may result in overall harm to competition by further strengthening Perpetual's ability and incentive to raise price or reduce service in the supply of at least some corporate trust services (namely, the supply of trustee services for debt capital market products (Market C1) and the supply of custodial services (Market C4)).[2]

- *Coordinated effects* – the acquisition may result in an increased risk of coordination between the remaining competitors in the supply of certain corporate trust services, particularly the supply of trustee services for debt capital market products (Market C1).

31. The SOI also identified several relevant markets (which are described in more detail in the Competition Analysis section below) in which the ACCC considered the proposed acquisition unlikely to raise concerns, namely the markets for the supply of RE services for managed funds (Market C2), the supply of trustee services to wholesale unregistered funds (Market C3), and the supply of private trust services (Market P1). Key reasons for these conclusions included:

- For Market C2 and Market C3, the ACCC's initial market inquiries indicated that there are many other providers offering services to parties that wish to outsource these roles (Table 1 sets out these providers). The ACCC's market inquiries also indicated that there is further competitive constraint on providers of service in these markets because many customers have the ability to provide services in-house.

- For Market P1, the ACCC's initial market inquiries indicated that the merger parties face competition from a number of other trust corporations, including subsidiaries of several banks. Further, parties other than trust companies are able to provide private trust services. The provision of private trust services by family members, solicitors, financial advisors and accountants is widespread and accounts for the majority of private trust appointments. Although their offer and focus may differ to that of trust companies, public trustees also provide a competitive constraint as they account for a significant share of private trust services provided in Australia.

32. The ACCC conducted further extensive market inquiries following the release of the SOI, including contacting a large number of customers of trust services. The results of those inquiries are reflected in the competition analysis later in this paper.

33. The SOI is available on the ACCC's website.

The forward-looking nature of the Competition Test

34. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the

2 The ACCC notes that Market C4 was defined in the SOI as "custodial services (with a focus on bare custodial services)". Following further market inquiries the ACCC has instead defined Market C4 as "custodial services (other than custodial services for listed securities)" for the purposes of this competition assessment.

effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the “with” position) to the likely future competitive environment if the acquisition does not proceed (the “without” position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.

35. The ACCC considered that absent the proposed acquisition, The Trust Company would be likely to:

- continue to operate as an independent, viable and effective competitor, through its current and potential future services, in the supply of corporate and private trust services (the status quo)
- be acquired by Equity Trustees or
- be acquired by IOOF.

36. The ACCC’s *Merger Guidelines November 2008*[3] note that the likely future state of competition without the merger will generally be similar to the state of competition prevailing at the time of the merger. However, this is not true in every circumstance. The ACCC recognises that in some cases taking the state of competition prevailing at the time of the merger as the benchmark for the analysis could risk attributing a change in the level of competition to a merger, when the real cause is some other development that is unrelated to the merger and likely to occur regardless. Alternatively, focussing on the state of competition prevailing at the time of the merger in some cases may disguise a substantial lessening of competition in situations where a merger hinders or prevents competition that would otherwise have emerged.

37. In this particular case the ACCC noted the existence of two other bids, raising the possibility that it may be appropriate to assess the competition effects of the proposed acquisition against a future state of competition without the merger that differs materially from the status quo.

38. However, based on the information before it, the ACCC considered that even if The Trust Company were acquired by either Equity Trustees or IOOF (if the acquisition by Perpetual did not proceed), the state of competition would be unlikely to be substantially different from the status quo. Accordingly, the ACCC’s assessment is that the state of competition prevailing at the time of the merger was an appropriate benchmark for the competition assessment.

Competition analysis

Markets relevant to the ACCC’s competition assessment

39. A market is the product and geographic space in which rivalry and competition take place. The ACCC’s approach to market definition is purposive, identifying those sellers and buyers that may potentially constrain the commercial decisions of the merger parties and the merged firm and those participants, particularly customers, that may be affected if the merger lessens competition. It is informed by the areas of actual and potential overlap between the parties, and the availability of substitutes in these areas of overlap.

40. Adopting this approach, the ACCC identified for the purpose of its competition assessment, the following relevant markets (with ‘C’ designating corporate trust services and ‘P’ designating private trust services):

[3] Australian Competition and Consumer Commission, *Merger Guidelines November 2008*, page 13.

- **Market C1** – the supply of trustee services for debt capital market products (although the ACCC also examined competition for the provision of services in relation to specific types of debt capital market products, including corporate bonds, syndicated bank loans, PPP-type deals, kangaroo bonds, securitisation, and covered bonds)
- **Market C2** – the supply of trustee services for wholesale unregistered funds
- **Market C3** – the supply of responsible entity services to registered funds
- **Market C4** – the supply of custodial services (other than custodial services for listed securities) and
- **Market P1** – the supply of private trust services.

41. In relation to Market C4, the ACCC's market inquiries indicated that, in the case of provision of services for listed securities, the custodial services are more complex and require a different level of skill, resources and reputation. Neither Perpetual nor The Trust Company provides custodial services for listed securities. Accordingly the ACCC excluded custodial services for listed securities from market C4.

Market shares and positions

42. The ACCC's review indicated that there is a lack of market share information in a form that would reliably inform an assessment of competitive effects in the relevant markets. This arises partly because details of contracts and/or fees are not disclosed in many cases. Further, responses to the ACCC's market inquiries did not provide a consensus view as to the boundaries of the relevant markets. While suppliers provided some market share estimates, there was disagreement as to the appropriate grouping of the services that make up those markets, resulting in an inability to compare and verify market share information for corporate trust services.

43. Additionally, while several market participants submitted market share estimates to the ACCC, these typically were based on metrics such as 'funds under management', 'funds under supervision', or 'funds under administration'. Such metrics do not necessarily reflect a service provider's market position because they reflect the customer's revenue base rather than the value or quantity of services provided to them. Further, the terms of remuneration for services provided vary and are often based, for example, on a fixed fee or basis points subject to a cap, meaning that these measures may not be closely correlated with the provider's share of fees charged in a given market.

44. Notwithstanding the lack of reliable market share information, during the course of its market inquiries, the ACCC identified relevant providers of the various corporate and private trust services offered by the merger parties (see Table 1 below).

45. These have been divided into 'major' and 'minor' alternative providers. 'Major' providers are those that market inquiries indicated are likely to pose the closest competitive constraint on the merged entity in the supply of the identified service. 'Minor' alternative providers are those that market inquiries indicated are likely to impose a weaker constraint on the merger parties due to their having a more limited presence in the offer of the relevant service. In some cases these minor alternative providers are very small competitors or provide the relevant service only as an adjunct to their main business. In other cases they are very large global organisations whose primary focus is on other activities such that they have only very limited involvement in the provision of these services.

Table 1: Major and minor alternative providers for each relevant market (Markets C1 to C4)

Market	Major Providers	Minor Alternative Providers
C1 **Trustee services for debt capital market products**	• Perpetual • The Trust Company • BNY Mellon • AET	• Equity Trustees • One Investment Group • BNP Paribas (wholesale only) • Citigroup • Deutsche • HSBC Bank • Macquarie Bank/MIM • NAB Asset Servicing/NAB Invest/NAB • Northern Trust • Primary Securities • Sandhurst
C2 **Trustee services for wholesale unregistered funds**	• Perpetual • The Trust Company • AET • BNY Mellon • Equity Trustees	• One Investment Group • Sandhurst • Columbus Investment Services (which is owned by One Investment Group) • Deutsche Bank • FundHost • Ironbark • Macquarie Bank/MIM • NAB Asset servicing/NAB Invest/NAB • Primary Securities Ltd • The Huntley Group • Total/Select Fund Services • Trustees Australia • Valuestream Investment Management • Wilson HTM • Zurich
C3 **RE services for registered funds**	• Perpetual • The Trust Company • AET • Equity Trustees • One Investment Group	• Columbus Investment Services (owned by One Investment Group) • Deutsche Bank • FundHost • Ironbark • Macquarie Bank/MIM • NAB Asset Servicing/NAB Invest/NAB • Primary Securities Ltd • Sandhurst • The Huntley Group • Total/Select Fund Services • Trustees Australia • Valuestream Investment Management • Wilson HTM • Zurich

Market	Major Providers	Minor Alternative Providers
C4 **Custodial services (excluding services to listed securities)**	• The Trust Company • Perpetual • AET	• Equity Trustees • One Investment Group • NAB/BNY Mellon (through a joint domestic/global arrangement) • NAB Asset Servicing • Sandhurst • The Huntley Group • Trustees Australia • Primary Securities Ltd • FundHost • Valuestream Investment Management

Trustee services for debt capital market products (Market C1): unilateral effects

46. The ACCC considered whether the proposed acquisition would have the potential to result in overall harm to competition through unilateral effects. Mergers have unilateral effects when they remove or weaken competitive constraints in such a way that the merged firm's unilateral market power is increased. That is, as a result of the merger the merged firm has an enhanced ability and incentive to raise prices (fees) and/or reduce service levels.

47. In undertaking its competition assessment, the ACCC considered whether, by eliminating the actual or potential competitive constraint between the merger parties and further strengthening the position of the merged entity in the supply of trustee services for debt capital market products, the proposed acquisition would result in unilateral effects.

48. Trustee services are provided in respect of a range of debt capital market products or 'transaction types', including syndicated bank loans, PPP-type deals, securitisation, corporate bonds (wholesale and retail), kangaroo bonds, and covered bond transactions. The ACCC's competition analysis considered the competition effects of the proposed acquisition in respect of trustee services provided to debt capital market products as a whole (i.e. broadly across all transaction types) as well as in respect of each separate transaction type.

Constraint from existing providers

49. The ACCC's market inquiries confirmed that the merger parties overlap in the provision of trustee services for debt capital market products. As outlined in Table 1 above, existing major providers of trustee services for debt capital market products include Perpetual, The Trust Company, BNY Mellon and AET. A degree of competitive constraint, albeit weaker, is also provided by the minor alternative providers listed in Table 1.

50. The ACCC's market inquiries also indicated that the relative position of each provider of trustee services varies according to the transaction type for which the trustee service is being provided. In this respect, Perpetual and The Trust Company currently overlap in the provision of trustee services for retail and wholesale corporate bonds. BNY Mellon and AET also currently provide trustee services for these transaction types. Constraint from these existing providers expanding their service offering for this transaction type will remain following the acquisition.

51. As noted above, the ACCC also considered the loss of potential competition between the merger parties, since it is possible that without the merger one or both of the parties may have expanded their service offering in competition with one another. However, based on its market inquiries, and taking into account the undertaking in relation to Equity Trustees (discussed below at paragraphs 93 - 96), the ACCC considered that the merged entity would be constrained by both the current service offering of existing competitors as well as their potential to expand their offerings in the event of an attempted price increase by the merged entity (as discussed in more detail in the next section).

Threat of entry by new providers and/or expansion by existing providers

52. The ACCC considered whether the merged firm would be constrained by the threat of new entry by a provider not currently providing services in Market C1, as well as by the threat of a party currently providing trustee services in respect of some debt capital market products expanding to provide services in respect to other debt capital market products.

53. Based on the information received during its market inquiries, the ACCC recognised a number of factors that may reduce the likelihood of new entry and/or expansion from existing providers. These include:

- The relatively small proportion of a customer's total costs made up by the trustee service fees, which diminishes the incentive to seek a new provider in the event that the merged entity were to raise price or reduce the level of service.
- The infrequent nature of new contracts for these services and the difficulties in obtaining the necessary approvals to change providers once a provider is chosen.
- Customers' preference for a reputation for stability, reliability and longevity and a "proven track record" in dealing with particular asset types.

54. In relation to the need for a strong reputation as a potential barrier to entry, the ACCC's market inquiries indicated that a reputation for providing trustee services for one debt capital market transaction type, and in some cases corporate trust services outside of Market C1, is likely to assist in building (or may obviate the need for) a reputation in respect of other trust services. Further, market inquiries also indicated that reputation can attach to individual staff providing the service rather than resting solely with the provider and that, as such, it is possible for that reputation to follow an individual who moves to a competing service provider.

55. The recent entry of One Investment Group is an example of new entry. It commenced providing corporate trust services in 2009 and has more recently expanded its service offering to include trustee services for debt capital market products, including through employing staff with a reputation for providing these services.

56. The ACCC ultimately considered that existing rivals (taking into account the undertaking in relation to Equity Trustees) are the key source of constraint on the merged entity's price and service decisions. In addition to the constraint from their existing operations, there is a reasonable prospect of timely expansion by existing providers if the merged entity were to significantly raise price or reduce service levels. While there is also a possibility that such conduct would trigger new entry, it is not clear that any such entry would be timely and sufficient to capture sales and replace competition lost due to the merger.

Loss of potential competition from The Trust Company

57. The ACCC also considered whether the proposed transaction may remove potential competition to Perpetual from The Trust Company in providing services for those debt capital market transaction types where The Trust Company does not presently compete.

58. In particular, the ACCC noted that The Trust Company has previously supplied trustee services for securitisation (one of the transaction types identified at paragraph 48 above) by way of a joint venture (which ended in 2008) with BNY Mellon. The ACCC considered whether this previous experience and reputation in this segment, albeit several years ago, may distinguish The Trust Company from other potential suppliers as being more likely to be able to expand to provide trustee services for securitisation.

59. However, information obtained by the ACCC indicated uncertainty as to the whether The Trust Company would be likely to commence provision of trustee services for securitisation if the proposed acquisition did not proceed. Further, market inquiries indicated that The Trust Company is not uniquely placed as a likely new entrant to the supply of trustee services for securitisation; rather, there are a number of other potential suppliers of trustee services for securitisation which customers considered to be equally or more likely to supply these services in the future. In addition, One Investment Group recently commenced supplying these services.

60. The ACCC considered that while, in the future without the proposed acquisition, The Trust Company may expand its current service offering to provide trustee services for more transaction types, it is not substantially better placed to do so than any other major or “minor alternative” provider. The ACCC also considered that possible barriers to timely and sufficient entry or expansion into Market C1 are not so high as to prevent new entry in the event of significant increase in price or reduction in service levels.

Impact on potential competition from Equity Trustees

61. Market inquiries indicated that Equity Trustees may potentially expand its range of corporate trust services for debt capital market products. As noted in paragraph15 above, the Trust Company holds a 13.4 per cent shareholding in Equity Trustees, which would be transferred to Perpetual as part of the proposed acquisition. In response to competition concerns identified arising from this shareholding, Perpetual offered a divestiture undertaking which as accepted by the ACCC (discussed below at paragraphs 93 - 96). The ACCC was satisfied that the undertaking addresses the competition concerns by removing any incentive Perpetual may otherwise have had to compete less vigorously against Equity Trustees and ensuring that it could not use the shareholding to influence or affect Equity Trustees business strategy or operations, including expansion to supply other debt capital market products.

Countervailing power

62. The ACCC’s market inquiries indicated that customers for trustee services for debt capital market products may be less likely to provide these services in-house due to the complexity of some of the transaction types and a stakeholder preference for independence in the trustee service provider.

63. However, the ACCC’s notes that many of the customers for trustee services for debt capital market products are large, sophisticated financial companies. Should the merged entity seek to increase prices or lower service standards in trustee services for any transaction type, it is likely that some of these customers would have a commercial incentive to support existing providers in Market C1 to expand their services (as One Investment Group has recently done), or to sponsor a new entrant from outside Market C1 to enter.

64. Based on the information available to it, the ACCC considered that the level of countervailing power held by customers in relation to Market C1 is likely to be more limited than in respect of other corporate trust services, and in particular in relation to Market C4. However, it is considered sufficient to provide a constraint on the merged entity.

Conclusion on Market C1: unilateral effects

65. The ACCC considers that the merged entity's ability to unilaterally raise price or reduce service in relation to trustee services for Market C1 is sufficiently constrained by a combination of:

- competition from existing major and minor competitors, taking into account the undertaking
- the possibility of timely new entry and the threat of expansion by incumbents (including existing providers expanding to provide trustee services for additional debt capital market products/transaction types) in the event that the merged entity were to raise price or reduce service and
- countervailing power of customers, many of whom are in a position to credibly threaten to switch to an alternate provider, bring the relevant services in-house and/or sponsor new entry.

66. Accordingly, the ACCC formed the view that the proposed transaction, taking into account the divestiture undertaking, is not likely to materially enhance the ability and incentive of Perpetual to increase price (fees) or reduce service levels in relation to the provision of trustee services for debt capital market products.

Coordinated effects: supply of certain corporate trust services, particularly trustee services for debt capital market products (Market C1)

67. Mergers have 'coordinated effects' when they assist firms in the relevant markets in explicitly or implicitly coordinating their pricing, output or related commercial decisions. This may lessen competition in a number of ways, including by an increase in the prices of the relevant goods or services.

68. When assessing whether a merger is likely to increase the likelihood of coordinated effects the ACCC takes into account whether:

- the markets under consideration have characteristics that are conducive to coordinated conduct (e.g. small number of firms, high degree of price transparency and information sharing, firms have similar operations and cost structures, and firms interact repeatedly in a number of markets)
- there are market characteristics that are likely to disrupt or undermine coordinated conduct (e.g. whether there is a credible threat of new entry or if there is an aggressive 'maverick'[4] competitor in the market) and
- the merger weakens the constraints on market players successfully coordinating their pricing, output or related commercial decisions (e.g. by removing a maverick from the market).

69. The ACCC considered whether the proposed acquisition, by removing The Trust Company as an independent competitor and transferring to Perpetual a 13.4 per cent shareholding in Equity Trustees, would increase the likelihood of coordinated effects in the supply of corporate trust services, particularly trustee services for debt capital market products. In this respect, the ACCC noted that the proposed acquisition would reduce the number of major providers (under the ACCC's definition) from four to three.

70. Information obtained through the ACCC's market inquiries indicated that many of the factors conducive to coordinated conduct are not present in Market C1 and/or the broader market for corporate trust services:

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4 A 'maverick' firm acts in a manner likely to disrupt coordination (e.g. through pursuing an aggressive and independent pricing strategy).

- There is not a high degree of price transparency or information sharing between firms.
- Firms do not have highly similar operations or cost structures.
- There is a realistic prospect of expansion by existing competitors and a possibility of new entry in the event of increased prices or a reduction in service levels.
- Neither of Perpetual nor The Trust Company is considered to act as a maverick, for example by pursuing an aggressive and independent pricing strategy, to disrupt coordination.

71. Further, on the information before the ACCC, and taking into account the undertaking offered by Perpetual, there is no evidence that the proposed acquisition would materially weaken the constraints on successful coordination between competitors in this Market C1.

72. On the basis of the above, the ACCC formed the view that the proposed acquisition would not significantly increase the risk of coordination between the remaining competitors in the supply of trustee services for debt capital market products.

Trustee services for wholesale unregistered funds (Market C2) & RE services for registered funds (Market C3)

73. For the reasons outlined at paragraph 31, particularly the constraint from existing competitors and the countervailing power of customers, the ACCC formed the preliminary view, as set out in its SOI, that the proposed acquisition would be unlikely to raise competition concerns in the provision of trustee services for wholesale unregistered funds (Market C2) or the provision of RE services for registered funds (Market C3).

74. The SOI invited market participants with a contrary view to provide submissions. In particular, the ACCC invited submissions on the extent of competitive constraint imposed by alternative suppliers of services in Markets C2 and C3. No information to contradict the preliminary view outlined in the SOI was provided during these further market inquiries. The ACCC concluded that the proposed acquisition would not be likely to result in a substantial lessening of competition in either Market C2 or Market C3.

Custodial services (excluding custodial services to listed securities) (Market C4): unilateral effects

75. The ACCC considered whether the proposed acquisition had the potential to result in overall harm to competition for the provision of the custodial services that make up this market through unilateral effects. As noted at paragraph 46 above, mergers have unilateral effects when they remove or weaken competitive constraints in such a way that the merged firm's unilateral market power is increased, giving the merged firm an enhanced ability and incentive to raise prices (fees) and/or reduce service levels.

76. Similar to trustee services provided for debt capital market products, the ACCC's inquiries indicated that some providers of custodial services in Market C4 hold a larger market share in relation to services for particular asset types than others. In particular, market inquiries indicated that The Trust Company is the major provider of custodial services for direct property assets in Australia, with Perpetual the next most significant provider.

Constraint from existing providers

77. The ACCC's market inquiries confirmed the merger parties overlap in the provision of custodial services for assets excluding listed securities. As with other corporate trust services, precise market shares held by each competitor are not available in Market

C4. However, the ACCC's market inquiries indicated that there are at least eleven alternative providers of these services, including those listed in Table 1 above.

78. The ACCC's market inquiries confirmed that most customers considered that they had a sufficient choice of providers of custodial services and were likely to be able to switch to an alternative provider in the event that the merged entity sought to increase fees.

79. Based on the information available to it, ACCC's view is that competition from existing providers would be expected to continue to act as a constraint on the merged entity.

Threat of entry by new providers and/or expansion by existing providers

80. The ACCC's market inquiries indicated that supply of custodial services (excluding services for listed securities) is generally less complex than the supply of trustee services for debt capital market products. The ACCC understands that custodial services provided for listed securities require a greater level of investment in technology and a higher level of staff expertise. Conversely, some market participants described custodial services excluding those provided to listed securities as having become 'commoditised'.

81. Based on the information received during its market inquiries, the ACCC recognised that customers' preference for service providers to have established credibility in the provision of these services and the need to ensure compliance with certain regulatory requirements may constitute barriers to new entry and/or expansion from existing providers in Market C4.

82. However, based on information obtained as a result of its market inquiries, the ACCC formed the view that these factors were unlikely to prevent timely and sufficient entry in the event of a sustained and significant increase in price.

83. The ACCC also formed the view that the merged entity would face constraint from the threat of existing providers expanding custodial services across different asset classes. In this respect, the ACCC notes the large number of major and alternative providers identified in Table 1 above.

84. The ACCC notes that this conclusion does not rely on global providers such as BNP Paribas, Citigroup, Deutsche Bank, HSBC Bank, JP Morgan, Macquarie Bank/MIM, Northern Trust, State Street, and Zurich, providing a close competitive constraint in relation to custodial services (excluding services provided for listed securities). While it is possible that these providers will compete more closely in the provision of custodial services for assets other than listed securities in the future should the merged entity seek to raise prices or lower service levels, the ACCC's assessment, taking into account the views of customers, is that the level of current competitive constraint from these global providers is weaker due to their focus on other asset classes and/or customers.

Countervailing power

85. As noted above, the ACCC received information indicating that the provision of custodial services for assets other than listed securities is less complex than for listed securities, and also less complex than the supply of trustee services for debt capital market products. Many (but not all) customers have the ability to provide some custodial services in-house. In this respect, the ACCC was provided with examples of some customers in Market C4 moving the supply of the custodial services for assets other than listed securities in-house.

86. Custodial services provided for direct property assets in Australia, the asset class for which The Trust Company and Perpetual are the most significant providers, is characterised by a higher proportion (around 50 per cent) of in-house provision when compared to other asset types. Further, some customers of custodial services for direct property assets expressed the intention to provide more of their custodial service

requirements in-house, particularly if the merged entity sought to increase its fees or reduce service.

87. The ACCC formed the view that the ability of customers, particularly larger customers, to move services in Market C4 in-house does and will continue to provide a competitive constraint on the merged entity.

Smaller customers may also be able to move services in-house and the ACCC's inquiries indicated that they may be more willing than a large customer to use AET, One Investment Group, or one of the other alternative providers.

Conclusion on Market C4: unilateral effects

88. The ACCC considers that the merged entity's ability to unilaterally raise price or reduce service in relation to custodial services for Market C4 is sufficiently constrained by a combination of:

- Competition from existing major and minor competitors, taking into account the impact of the undertaking
- The credible threat of timely new entry and expansion by incumbents (including existing providers expanding to provide custodial services for direct property assets) in the event the merged entity were to raise price or reduce service and
- Countervailing power of customers, many of whom are in a position to credibly threaten to sponsor a new provider or bring the relevant services in-house.

89. Taking into account these constraints, the ACCC's view is that the proposed transaction is unlikely to substantially lessen competition in relation to the provision of custodial services (excluding custodial services for listed securities).

Private trust services (Market P1)

90. For the reasons outlined at paragraph 31, the ACCC formed the preliminary view, as set out in its SOI, that the proposed acquisition is unlikely to raise competition concerns in relation to the supply of private trust services (Market P1) due to the constraint imposed by other trust corporations, the ability of parties other than trust corporations to provide these services, as well as the presence of public trustees.

91. The SOI invited market participants with a contrary view to provide submissions. In particular, the ACCC invited submissions on the extent of competitive constraint imposed by alternative suppliers of services in Market P1. Further submissions were received from interested parties in response to the SOI. In particular, concerns were raised as to the difficulty of replacing a trustee (e.g. of a charitable trust) once it has been appointed. However, the ACCC considered that this issue would exist with or without the proposed acquisition and is not likely to be exacerbated by the proposed acquisition.

92. After careful consideration of the information before it, the ACCC concluded that the proposed acquisition is unlikely to substantially lessen competition for the supply of private trust services.

Undertaking

93. As noted at paragraph 15, The Trust Company owns a 13.4 per cent shareholding in Equity Trustees, making it the largest shareholder. Equity Trustees provides a range of corporate and private trust services. The ACCC considered the merged entity's 13.4 per cent interest in Equity Trustees would weaken the constraint that Equity Trustees would be able to exercise on the merged entity post acquisition. The ACCC was particularly concerned that this shareholding may increase the ability and incentive for the merged entity to unilaterally raise prices in the relevant markets since the merged

entity would be able to recoup part of any lost profit from any customer lost to Equity Trustees through the earnings the merged entity would receive as a shareholder.

94. The ACCC was also concerned that the proposed acquisition, absent the undertaking, may result in the merged entity having the ability to influence or gain insight into the operations of Equity Trustees, such as by using the shareholding to seek board representation. Given the importance of the constraint from competitors, including Equity Trustees, to the ACCC's competition assessment, such a shareholding raised concerns.

95. In response to these concerns, Perpetual offered and the ACCC accepted a court enforceable undertaking pursuant to section 87B of the Act (the **Undertaking**). The Undertaking requires Perpetual to:

- divest the13.4 per cent interest in Equity Trustees (either to IOOF, on-Market, or otherwise to another purchaser approved by the ACCC) within a defined timeframe
- maintain the independence of Equity Trustees before it disposes of the shareholding in Equity Trustees, including by requiring that Perpetual does not seek representation on the board of Equity Trustees or appoint any common directors and does not use or disclose any confidential information that it may obtain through the ownership or management of the shareholding (with limited exceptions) and
- provide monthly reports to the ACCC to confirm its compliance with the Undertaking.

96. The ACCC considered that the proposed undertaking was sufficient to address its competition concerns, and accordingly it accepted the Undertaking. Perpetual requested the ACCC's approval of IOOF as a potential purchaser of the 13.4 per cent shareholding. The ACCC granted this approval on the basis that the transfer would meet the objectives of the Undertaking and not raise any competition concerns.

Conclusion

97. On the basis of the above, and taking into account the Undertaking offered by Perpetual and accepted by the ACCC, the ACCC formed the view that the proposed acquisition of The Trust Company would not have the effect or be likely to have the effect of substantially lessening competition in any relevant market in contravention of section 50 of the Act.

Glossary

Term	Explanation
Australian Financial Services License (**AFSL**)	An Australian financial services licence or AFSL authorises licensees to: ▪ provide financial product advice to clients ▪ deal in a financial product ▪ make a market for a financial product ▪ operate a registered scheme ▪ provide a custodial or depository service ▪ provide traditional trustee company services ('traditional trustee company services' include performing estate management functions, preparing a will, a trust instrument, a power of attorney or an agency arrangement, applying for probate of a will or establishing and operating common funds). An AFSL is required to conduct a financial services business. ASIC assesses applications for AFSLs as part of its role as regulator of the financial services industry. When it assesses a licence application it considers whether the applicant: ▪ is competent to carry on the kind of financial services business specified in the application ▪ has sufficient financial resources to carry on the proposed business — unless regulated by the Australian Prudential Regulation Authority (APRA) and ▪ can meet the other obligations of an AFS licensee.[5]
Covered bond	Covered bonds are debt instruments secured by a cover pool of mortgage loans (property as collateral) or public-sector debt to which investors have a preferential claim in the event of default.[6]
Custodial services	A custodian is responsible for the holding of property for another person who is the beneficial owner. A custodian holds the legal title and the client has an equitable interest. While the custodial industry commonly refers to the role of custodian as a 'bare' trustee, ultimately the nature of the relationship between the parties is determined by the substance of the obligations entered into, rather than the name. Except in limited circumstances, such as a potential breach of law, the custodian is usually required to act on all authorised instructions of the client.
Debt capital market	Australian debt capital markets comprise: ▪ direct loans from banks (e.g. syndicated loans) ▪ debt issuance by corporates into retail (regulated

[5] Australian Securities and Investments Commission, *AFS Licensing*, ASIC, Canberra.
[6] European Covered Bond Council, *Introducing Covered Bonds*, European Mortgage Federation, Brussels, Belgium.

Term	Explanation
	bonds/debentures) and wholesale markets (unregulated bonds/debentures) ▪ debt issuance by foreign corporates (kangaroo bonds) ▪ debt finance of project deals and ▪ structured debt finance (including securitisation and covered bonds).
Funds under management (**FUM**)	The total amount of money investors have allocated to a fund manager to invest across all their investment products. Other commonly cited measures include **Funds Under Supervision** (**FUS**) and **Funds Under Administration** (**FUA**).
Kangaroo bond	A kangaroo bond is an Australian dollar denominated bond issued in the Australian capital market by foreign corporates.
Managed investments or registered funds	Managed investment schemes are also known as 'registered funds', 'managed funds', 'pooled investments' or 'collective investments'. Generally in a managed investment scheme: ▪ people are brought together to contribute money to acquire an interest in the scheme ('interests' in a scheme are a type of 'financial product' and are regulated by the *Corporations Act 2001*) ▪ money is pooled together with other investors or used in a common enterprise ▪ a 'responsible entity' (see below) operates the scheme. Investors do not have day-to-day control over the operation of the scheme.[7]
Public-private partnerships or PPP-type deals	Public-private partnerships or PPP type-deals are defined by Infrastructure Australia as having the following characteristics: ▪ the private sector provides public infrastructure and any related services and ▪ there is private investment or financing.[8] PPPs often involves multiple lenders / funding sources, which generally necessitates the appointment of a trustee.
Public trustee	Public Trustees (or State Trustees) are established by state/territory statute to provide trustee services.
Responsible entity (RE)	A licensed entity or body that operates a registered fund or managed investment scheme. An RE has the dual role of a trustee and manager of a managed investment scheme. An RE must be an Australian public company,with certain levels of net tangible assets (depending on the value of the scheme's assets), and hold an AFSL. RE services are provided for ASIC-registered managed

[7] Australia Securities and Investment Commission, *Managed Investment Schemes*.
[8] Infrastructure Australia, *National Public Private Partnership Policy and Guidelines*, Infrastructure Australia, December 2008.

Term	Explanation
	investment schemes. An RE can either be owned by the same group as the fund manager (an internal RE) or be separate from the fund manager (an external RE). If the managed investment scheme has an external RE, there is typically a management agreement between the RE and fund manager.
Corporate bond	Corporate bonds are issued to investors by companies in return for cash. Interest is paid to the investors over the life of the bond, with the payment terms dependent on the details of the issue. By definition, a **retail corporate bond** is issued to investors which includes 'retail clients' (as defined in the *Corporations Act* 2001); this excludes businesses that are not small businesses (in contrast to **wholesale corporate bond** issues which exclude 'retail clients').
Securities	A financial instrument which represents a claim over real assets or a future income stream. Such instruments are usually tradable. Examples of securities include bonds, bills of exchange, promissory notes, certificates of deposit and shares. **Listed securities** are officially listed on a stock exchange (e.g. ASX) for public trading.
Securitisation	Asset securitisation is the process of converting a pool of illiquid assets, such as residential mortgages, into tradeable securities. A securitisation arrangement typically involves a complex set of structured finance transactions where a number of entities are often established for the purpose of the transaction.[9]
Scheme of arrangement	Schemes of arrangement are regulated under Part 5.1 of the *Corporations Act 2001* and are binding, court-approved agreements that allow the reorganisation of the rights and liabilities of members and creditors of a company.[10]
Syndicated loan	Loans which are arranged as syndicates, with the funds jointly provided by two or more lenders.
Trustee services (including for debt capital market products)	Trustee services involve acting in a fiduciary capacity for investors in a particular investment product or transaction. They are provided in relation to wholesale unregistered funds and debt capital market products. A trustee will be required (or involved) where the debt product requires note holder representation or otherwise involves security being taken over an asset or over the balance sheet of the 'issuing' corporate. For different products, this role may have a different name (e.g. trustee, note trustee, issuer trustee and security trustee). Only specific kinds of entities can provide trustee services, although there are a large number of entities that meet the requirements. These include the public

[9] Reserve Bank of Australia, *Asset Securitisation in Australia*, September 2004.
[10] Australian Securities and Investments Commission, *Regulatory Guide 60: Schemes of Arrangement*, December 2009.

Term	Explanation
	trustee of any state or territory, a licensed trustee company, an Australian authorised deposit-taking institution, and a body corporate approved by ASIC, such as an Australian Financial Services Licence (AFSL) holder.
Wholesale unregistered funds	These funds are directed at wholesale and institutional clients and do not require ASIC registration.