Getting the global deal done amid the COVID-19 crisis

Perspectives on key FIRB and ACCC issues impacting global and multinational transactions with an Australian dimension

April 2020

Snapshot

The COVID-19 pandemic is having immediate and longer term impacts on the global economy and M&A activity. The crisis has resulted in important changes to the policies, rules and processes to be applied by many foreign investment and competition regulators including Australia's Foreign Investment Review Board (FIRB) and the Australian Competition and Consumer Commission (ACCC).

This briefing examines the key COVID-19 related changes to Australian foreign investment and merger control policies, rules and processes applicable to both direct inbound investments as well as offshore transactions which involve changes of indirect interests in Australian companies or assets located in Australia. Here we explore:

Tightening of FIRB screening

The impacts of the blanket tightening of Australia's foreign investment screening on foreign investors, including what it means for offshore deals

Comparing Australia's FIRB regime

How Australia's foreign investment regime compares internationally

Understanding the connection between FIRB and ACCC

How the temporary changes to Australia's foreign investment regime will increase the need for engagement with the ACCC, and delay timelines

COVID-19 & merger control processes in Australia

The impacts of COVID-19 on the ACCC's merger review process, including key factors to take into account in deal structuring and expectations

Failing firms subject close ACCC scrutiny

The ACCC's likely approach to reviewing transactions involving distressed or 'failing' firms and assets

Insights from history…

Key take-aways from the ACCC's past approach to 'failing firm' transactions, including in the last global financial crisis

Tightening of Australia’s foreign investment screening thresholds

Temporary changes to Australia’s foreign investment regime have been implemented by Government with the stated aim to ‘protect Australia’s national interest as we deal with the economic implications arising from the spread of the coronavirus’.

Changes to the FIRB regime include temporarily reducing monetary screening thresholds for foreign investments to $0 for all captured transactions and up to a six month extension on the FIRB decision making period.

All offshore transactions with downstream Australian companies/businesses may now be subject to the FIRB regime

Before the temporary $0 threshold for foreign investment, offshore investments by private foreign investors of 20% or more were potentially only subject to a voluntary notification process if there were downstream Australian assets. Offshore deals involving an acquisition of a 'direct interest' (generally 10% or more) by foreign government investors (FGIs) required mandatory FIRB clearance where there were downstream Australian assets, unless the ‘de minimis’ exemption applied. The 'de minimis' exemption was available to FGIs where the offshore transaction was an acquisition of shares or units only, where the Australian assets were valued at less than A$55 million and 5% of the total asset value of the entity, and the Australia assets were not ‘sensitive business’ assets. However, as the screening thresholds are now lowered to $0 any indirect acquisition of a substantial interest (generally 20% or more) of an Australian entity by foreign government investors will also require FIRB clearance, regardless of value. The de minimis exemption does not apply to acquisitions of a substantial interest. In any case, all offshore transactions may now be subject to the voluntary FIRB filing regime. Nearly all acquisitions by foreign government investors where there are any downstream Australian assets are now subject of the mandatory notification requirements. In addition, if any of the Australian subsidiaries hold more than 50% of their assets as interests in land (including leases and licences of 5 years or more including option terms), then a mandatory notification regime applies as well. Special rules also apply in the media and agribusiness sectors.

Impact of a voluntary filing regime

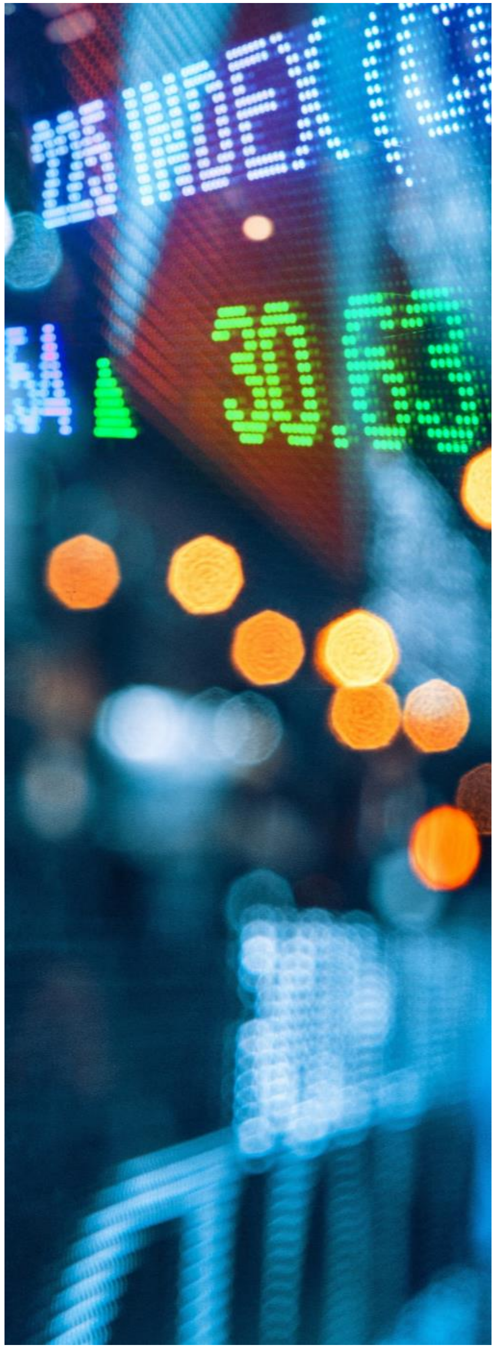
Australia’s foreign investment rules apply such that either mandatory notification is required or a voluntary filing may be made. If a mandatory notification is required and is not made, then this is an offence under the rules and can result in criminal and civil penalties. If a transaction is subject only to the voluntary filing regime, then the transaction may proceed without prior approval. However, if the Australian Treasurer subsequently forms the view that the deal was contrary to Australia's national interest, then there are powers to make blocking and disposal orders.

National interest factors

The factors that will be taken into consideration in determining whether a transaction is contrary to Australia’s national interest include the impact on national security, competition, Australian Government policies (including tax) and the economy and the community. It also takes into account the character of the investor.

Impact on global transactions

The changes are having an impact on global transactions. For example, Louis Vuitton’s A$26 billion acquisition of Tiffany is currently being delayed due to the recent changes to the FIRB rules. The deal was meant to be finalised in mid-2020, however FIRB has requested a six month extension to statutory review deadline to October 2020.



Australia's FIRB regime: How does this compare internationally?

Australia is not the only country that has recently increased focus on sovereign capability. Pre-COVID-19, a number of countries including Japan, China, the UK and the US had been strengthening their existing foreign investment regimes (adopting many measures that were similar to Australia's existing broad screening regime).

COVID-19 has accelerated the trend of focusing on local supply. Countries including Spain, Germany, France and Italy have, or are proposing to bolster their foreign investment screening mechanisms to protect critical infrastructure and companies from predatory behaviour of certain foreign investors. This trend is likely to continue past the current pandemic with countries considering what investments will be in their countries' national interests when the next global challenge arises.

Increased focus on sovereign capability

It is becoming evident that with COVID-19 sweeping the globe, the greater a country's sovereignty capability and the more self-sufficient its national markets, the more likely its chances of weathering (or at least slowing) the current crisis. The current changes to Australia's foreign investment rules focus on the prevention of value destruction in Australia's economy and in the future will likely take factors such as sovereign capability and protection of critical supply chains into account. This is consistent with the trends in a number of other countries at the moment. We see these trends in other countries likely to become factors for Australia's foreign investment rules as well.

EU Guidance to member states on FDI

On 25 March 2020, the European Commission published a guidance to EU member states concerning foreign direct investment (FDI) and free movement of capital from third countries. The Guidelines focus on protecting healthcare-related assets from foreign investors. It calls on all EU member states to implement FDI screening mechanisms that protect critical health infrastructures and other critical sectors. A number of EU member states have followed these guidelines.

Spain's foreign investment regime changes

The Spanish Government announced on 17 March 2020 a new temporary requirement for pre-approval for non-EU direct and indirect investments above €1 million in certain sectors including critical infrastructure, critical technologies, energy, raw materials and foods and media.

Germany's foreign investment regime changes

The German government has proposed restrictions on the acquisition of medical companies by non-EU or EFTA entities and further scrutiny on foreign investment in critical sectors eg, biotechnology. It is also proposed that the scope of review be lowered from investments that are an 'actual risk' to public order and security to investments that cause 'probably impairment'.

France's foreign investment regime changes

The changes to France's foreign investment regime were announced pre-COVID-19, however, came into effect on 1 April 2020. The French Government has indicated it will use the strengthened regime to protection national companies from foreign takeover.

The regime includes prior authorisation of foreign investments occurring in 'strategic' or 'sensitive' sectors in France, including R&D, press and agriculture.

US' foreign investment regime changes

Changes to the US foreign investment regime were not as a direct result of COVID-19, rather as a response to fears of increased Chinese investment in American technology companies. The changes, implemented on 13 February 2020 include: increased scope of transactions under The Committee on Foreign Investment in the United States (CFIUS) purview including non-passive investment in critical industry or technologies, allowing CFIUS to discriminate among foreign investors by country of origin, and mandatory filing for businesses in 'critical technology' industries.

How changed FIRB rules trigger ACCC engagement

Due to the breadth of the FIRB rules, the removal of higher monetary screening thresholds means that many more M&A and other transactions with an Australian dimension will now be caught by the regime.

This has follow on ACCC implications.

Interaction between FIRB and ACCC

The FIRB application process involves mandatory engagement with relevant Federal Government agencies, including the ACCC. FIRB will not issue a no objection notification for a proposed transaction unless and until it is confirmed that the ACCC (and other agencies) do not have any concerns.

More transactions pulled into ACCC process

With the temporary FIRB changes, transactions which previously may have escaped ACCC scrutiny will now be pulled into an ACCC initiated review prior to completion – regardless of whether or not it is directly notified by the parties and regardless of whether the transaction exceeds the ACCC's voluntary guidelines or raises any competition concerns. Given that it is not possible to close without FIRB approval, a transaction cannot close without ACCC approval in these circumstances.

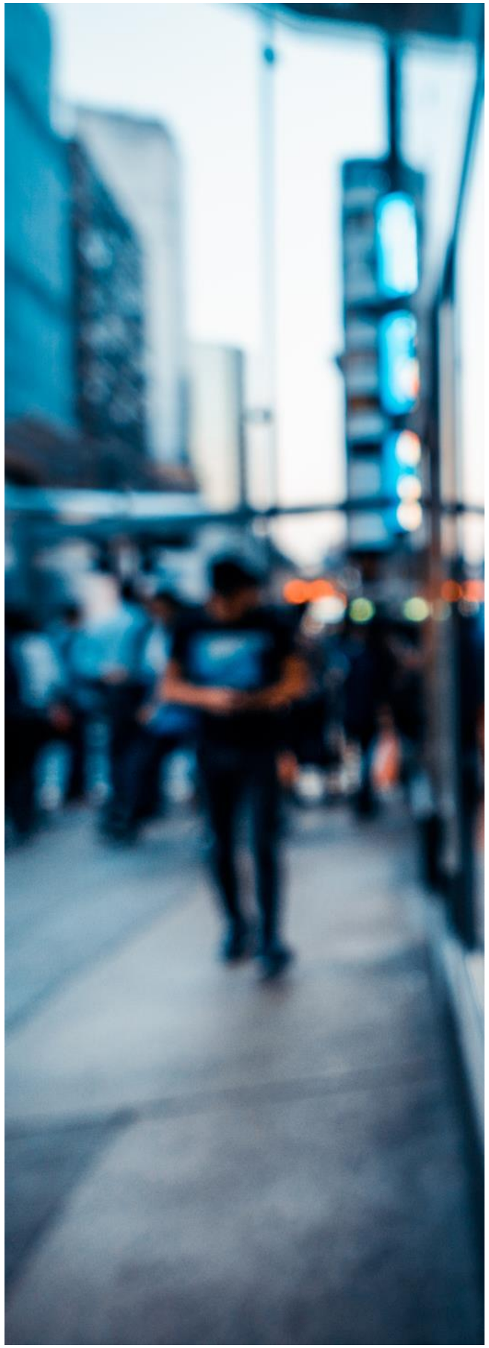
Coordinated approach to regulatory approvals recommended

In this context, parties to a potential transaction should seek advice about the best way to manage the intersection of these two regulatory processes. In many cases, the prudent approach will be to proactively approach the ACCC to seek clearance, typically by way of application for confidential pre-assessment. This approach mitigates the risk of completion being delayed by the ACCC initiating a review late in the process, after being notified by FIRB.

We also recommend that clients consider competition (and tax / structuring matters) prior to lodgement of the FIRB application, as we find that this results in a smoother application process, due to a reduction in requests for information and allows applicants to best present their position on tax and competition matters relevant to the proposed transaction.

Timing

In terms of timing, we expect that FIRB’s engagement with the ACCC may also delay the FIRB application process further, having regard to the likely slowing of or delays in ACCC's timelines, as set out above.



Overview of merger clearance in Australia

Merger control in Australia is governed by the Competition and Consumer Act 2010 (Cth) (**CCA**).

Section 50 of the CCA prohibits a person or corporation from acquiring shares or assets where that acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.

This covers all acquisitions of shares or assets (including minority stakes) and joint ventures. Foreign-to-foreign transactions are also subject to Australia's merger control regime, under s50A.

- Pre-merger notification or antitrust regulatory approval is **not** mandatory in Australia. There are no formal sanctions for a failure to notify the ACCC of a proposed merger. Rather, the risk associated with not notifying the ACCC arises from the ACCC's ability to investigate, bring proceedings and seek a range of orders (including penalties) from the Federal Court where a breach of the CCA has occurred.
- There are currently two voluntary filing procedures. The vast majority of parties seek "**informal clearance**" from the ACCC. (Seeking merger "authorisation" from the ACCC is also possible but this process has a number of practical and strategic differences to the informal clearance route).
- The focus of Australia's merger control provisions is on the competitive effects of the acquisition, irrespective of its size. Accordingly, there is **no** threshold test for notification based on "turnover", or control. Instead, merger parties are encouraged to notify the ACCC in advance of completion where the products of the parties are either substitutes or complements, and the merged firm will have a post-merger market share **exceeding 20%** in the relevant market/s in Australia. This is an indicative threshold only.
- Even where the parties do **not** voluntarily seek clearance, the ACCC can commence a review of its own accord if it becomes aware of a merger through FIRB or as a result of e.g. complaints, media, stock exchange announcements, or foreign competition regulators. Late interest or involvement from the ACCC can cause delays to commercial timetables.
- If parties fail to notify the ACCC of a merger and proceed to complete, the ACCC (if it chooses to review the acquisition) will treat the matter as a **completed merger** and subject it a different (and longer) process, specifically, as an "investigation" of potential breaches that have occurred. At the conclusion of its investigation, the ACCC may proceed to seek orders as may be appropriate regarding a substantive breach of the CCA, including divestment and penalties.

COVID-19 impacts on the ACCC's merger review process

Parties to a potential transaction should recognise a number of COVID-19 related impacts on the ACCC's merger review process and timelines.

Key considerations include:

- Timing and potential delays
- Postponement of non urgent matters
- Keeping the ACCC updated
- Deals involving distressed or failing businesses and assets will be closely scrutinised

Timing - Expect delays:

The ACCC's guidance outlining how the COVID-19 pandemic has and will continue to impact their operational response to the merger clearance process (ACCC COVID19 merger guidance) confirms that, while some merger reviews will need to be conducted on an urgent basis:

- Timelines for some reviews (including those with statutory timeframes under the merger authorisation process) may need to be extended if there are challenges in conducting and completing the necessary inquiries with merger parties and market participants due to COVID-19;
- Certain matters may need to be prioritised if the situation worsens and parties should be responsive to potential requests by the ACCC.

Considering delaying non urgent or early stage deals:

The ACCC COVID19 merger guidance highlights that while it is not requesting parties delay merger clearance applications, it is encouraging parties to consider postponing non-urgent applications, particularly for mergers which are more speculative or at a very early stage with no sale agreements in place.

ACCC expects updates on likelihood / timing of deals:

The ACCC COVID19 merger guidance requests that merger parties provide regular updates to the ACCC regarding changes in the commercial timing or likelihood of pending deals with a view of present market conditions. For example, this is the case where a merger is dependent on obtaining funding and this funding is unlikely in the current market environment or the merger parties have decided to go-slow on a transaction. This highlights that the ACCC expects to be kept apprised of any developments or doubts about a deal proceeding.

Distressed assets / businesses will not be rubber stamped:

The ACCC has stressed that it will carefully scrutinise any 'failing firm' argument applicants rely on to justify potentially anticompetitive mergers (discussed further in this briefing).

COVID-19 impacts on the ACCC's merger review process

Other considerations include how COVID-19 will impact:

- the substance and timing of remedies
- the substantive assessment of competitive effects (in the factual vs the counterfactual)

Remedies:

Merger parties will need to consider how the COVID-19 pandemic may impact the substance, timing and acceptability of remedy packages. For example:

- The uncertainty being created by the pandemic is likely to lead to an even stronger preference by the ACCC for fix it first type undertakings, leading to pressure to find an acceptable buyer of divestment assets early in the transaction timetable.
- Fix it later undertakings (ie the traditional hold separate / divestment undertaking given during or at the end of merger review) are likely to be subject to greater scrutiny in terms of the viability and effectiveness of the remedy package and the availability and financial position of suitable purchasers.
- Solvency issues may in some cases necessitate seeking fast-track approval to complete prior to the ACCC finalising its merger review, but in such cases approval is only likely to be given subject to very onerous hold separate and divestment conditions.

Substantive issues:

A key unknown is how the uncertainty of the current COVID-19 crisis and its economic impacts will flow into the competitive effects analysis that needs to be undertaken for each transaction. This applies for both business as usual and ‘failing firm’ scenarios.

With the pandemic making it harder to predict the future competitive landscape, the challenge for the ACCC (and other competition regulators) will be to assess the number and strength of competitors and other competitive constraints in the factual and counterfactual, and over the short and longer term.

Merger parties will need to address questions such as whether the capabilities and activities of merger parties and their competitors should be assessed by reference to their position pre COVID-19, during COVID-19 or post COVID-19?

Failing firm transactions will not fly through

COVID-19 is set to cause a deep and long global recession. The immediate and longer term reduction in economic output and consumer demand will have ripple effects on the financial position of a wide range of businesses, putting many into the 'flailing' and potentially 'failing' category.

This is likely to see a significant upswing in potential M&A activity involve failing, flailing and distressed businesses and assets, including those in various forms of external administration.

How will the ACCC approach these deals?

The ACCC has poured cold water on suggestions that a light touch approach will be taken to 'failing firm' type arguments. It has reiterated that it will carefully scrutinise any 'failing firm' argument applicants rely on to justify potentially anticompetitive mergers. It has emphasised that its approach will involve assessment of each transaction on a case-by-case basis with consideration of the longer term impact on competition of any market structure changes beyond the present impact of the crisis on profits and share value of merger parties.

Businesses should therefore understand that, with respect to deal opportunities arising as a result of the COVID19 crisis, the bar to competition clearance has not been lowered and failing firms arguments will be carefully scrutinised and tested by the ACCC.

ACCC's general approach to 'failing firm' arguments

When the ACCC considers whether to grant merger clearance, it assesses whether the proposed merger or acquisition is likely to substantially lessen competition in any market in Australia. It makes its assessment by comparing two likely future states: the future with the merger, and the future without the merger (referred to as the "counterfactual"). To assess the "counterfactual", the ACCC considers what is likely to happen to each party if the proposed transaction does not proceed.

Do not expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anti-competitive increases in market power, or the rise of so-called 'national champions'.

ACCC Chair, Rod Sims, 30 March 2020

Failing firm transactions will not fly through (Cont'd)

How are 'failing firm' scenarios assessed?

Australia's merger control regime does not have a formal 'failing firm' defence.

In practice, under a 'failing firm' scenario, the submission typically put to the ACCC is that, without the merger, one of the firms is likely to exit and not be sold as a going concern to another buyer, and it will not continue to independently compete - irrespective of the ACCC's decision. The comparison should thereby involve a factual in which the firm exits and a counterfactual in which the firm exits, with the result that the proposed transaction does not give rise to any substantial lessening of competition.

Even if the merger parties can show that the target is in fact a failing firm, clearance is not assured.

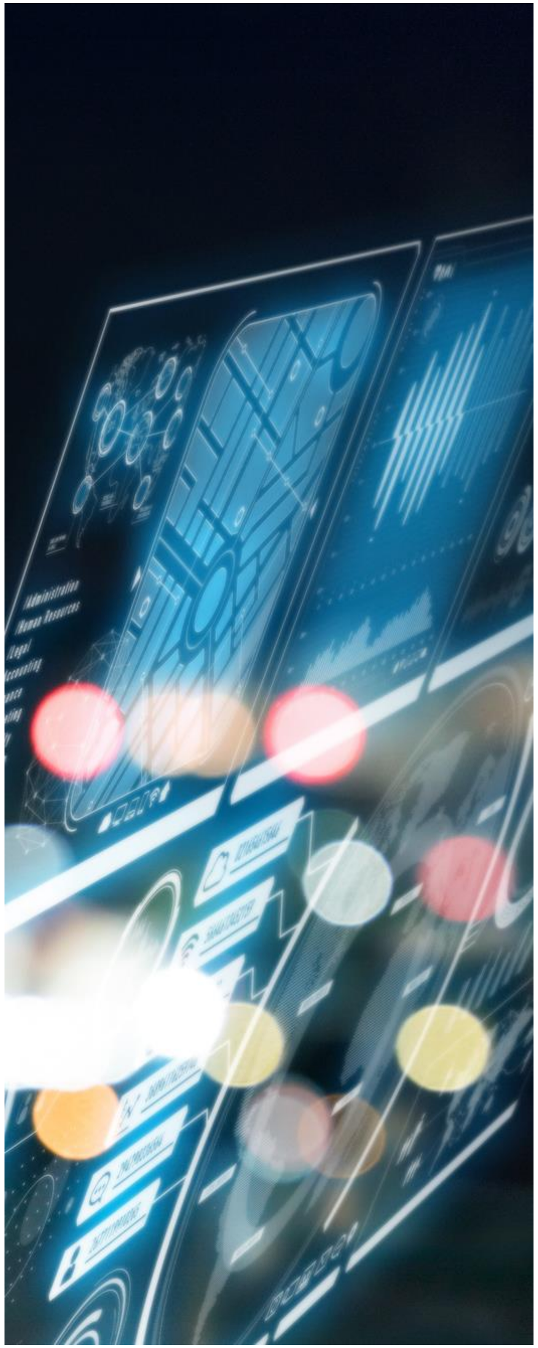
The ACCC's **scepticism** of failing firm arguments is well established, and it will consider a range of factors. In particular, it will still consider whether the market would be substantially more competitive if the remaining firms competed for the failed firm's customers, as compared to a scenario where the failing firm's customer base and assets are acquired by a single competitor.

The ACCC's standard approach

It is important to understand that ACCC is prepared to let a firm fail, where it considers this is a preferable competitive outcome.

The ACCC's standard approach to 'failing firm' type arguments (as set out in it's Merger Guidelines) is as follows:

- Mere **speculation** that the target firm will exit in the near future or evidence of a recent decline in profitability is insufficient to establish that an absence of competition between the merger parties is the counterfactual;
- The failing firm must be in **imminent danger of failure** and is unlikely to be successfully restructured without the merger;
- Absent the merger, the failing firms and its assets would **leave** the industry; and
- The likely state of competition with the merger would **not** be substantially **less** than the likely state of competition after the target has exited and the target's customers have moved their business to alternative sources of supply.



Failing firm transactions will not fly through (Cont'd)

Supporting evidence needed

Compelling evidence of imminent failure.

The ACCC will expect to see detailed and extensive supporting material in relation to the financial position of the firm, including administrators reports, financial statements, forecasts, board papers considering the issue and evidence of a thorough failed search for buyers. The ACCC may appoint a forensic accountant to assess veracity of assertions as to the continued viability of the failing firms' operations, adopting this approach for example in its 2015 consideration of VIP Steel's acquisition of National Can Industries (which involved a 2:1 horizontal merger involving a failing firm).

Comprehensive efforts to restructure the business.

The ACCC will expect to see evidence that a firm's performance is unlikely to be improved by its current owner or other potential shareholders if the proposed acquisition does not proceed. This was, for example, an influential factor in the ACCC's consideration of Virgin Australia's acquisition of 60% of Tiger Airways Australia in 2013.

A thorough failed search for alternative buyers that might raise fewer competition concerns.

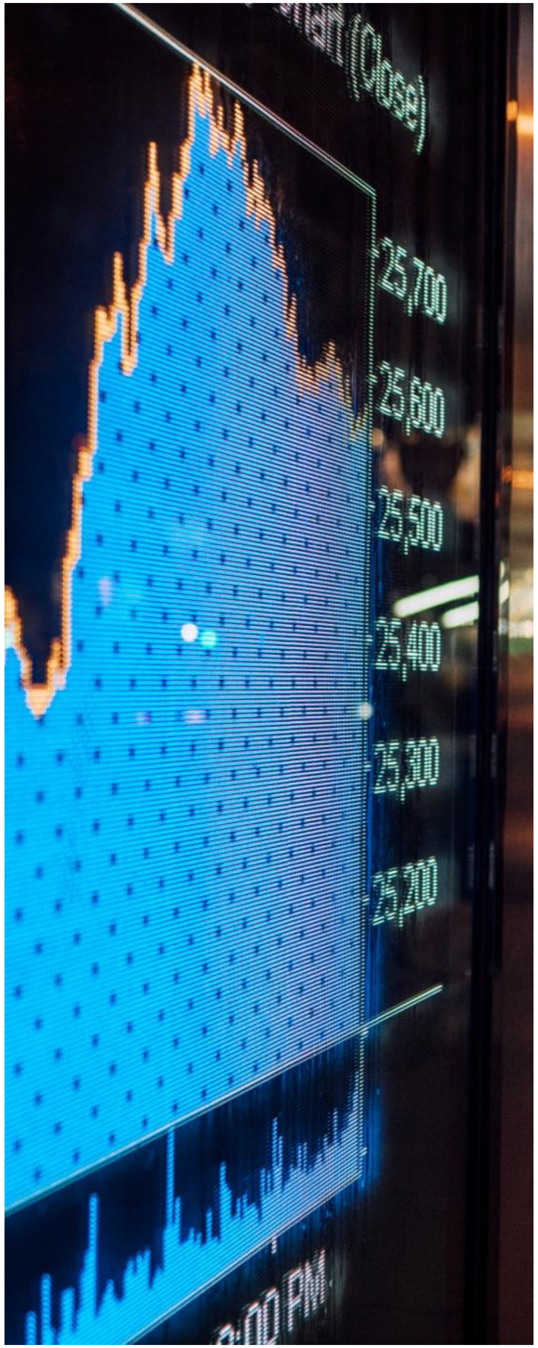
Even when a business is clearly failing, a failing firm argument can be derailed by the presence of another potential buyer for some or all of the business or assets, even at a lower price.

The ACCC will let a firm fail

It is important to understand that ACCC is prepared to let a firm fail, where it considers this is a preferable competitive outcome.

Case study 1: In assessing a proposed merger between West Australian Newspapers and Daily News, the ACCC concluded that it was preferable to permit the target to fail rather than to be acquired by its sole competitor. From the ACCC's perspective, an acquisition of Daily News assets would have entrenched West Australian Newspapers dominant position and would make competitive entry for a new metropolitan daily newspaper difficult by virtue of the barriers created.

Case study 2: In opposing Sea Swift's proposed acquisition of Toll's marine freight business, the ACCC dismissed submissions that Toll would shut down the relevant businesses in any event. In the ACCC's view, even if Toll was to shut, this would provide opportunities for new competitors to enter, for example, by buying Toll's vessels or taking its customers and competing with Sea Swift – by contrast, a sale to Sea Swift would mean there would be no chance for anyone else to acquire the assets, and it would be harder for new competitors to enter. While opposed by the ACCC, the transaction was subsequently authorised by the Australian Competition Tribunal, who rejected the ACCC's contention that, absent authorisation, Toll's wind up would provide a 'unique opportunity' for alternative providers to gain access to TML's customer contracts or vessels, saying this could not be considered a 'realistic proposition'.



Failing firm transactions will not fly through (Cont'd)

Transactions involving companies in external administration are not exempt from clearance

No special rules apply.

In any circumstance where the proposed transaction requires FIRB approval or would raise potential competition issues, ACCC clearance is required or recommended, regardless of:

- The monetary value of the deal;
- The size of the businesses; or
- The fact the target company is in external administration.

The recent Jewel Fine Foods / B&J City Kitchen transaction (which was opposed by the ACCC) saw the ACCC express concerns with B&J City Kitchen's failure to seek clearance from the ACCC, explaining it is 'critical that company executives understand that attempting to sell businesses or assets to a competitor, particularly a close competitor, is likely to attract the attention of the ACCC.'

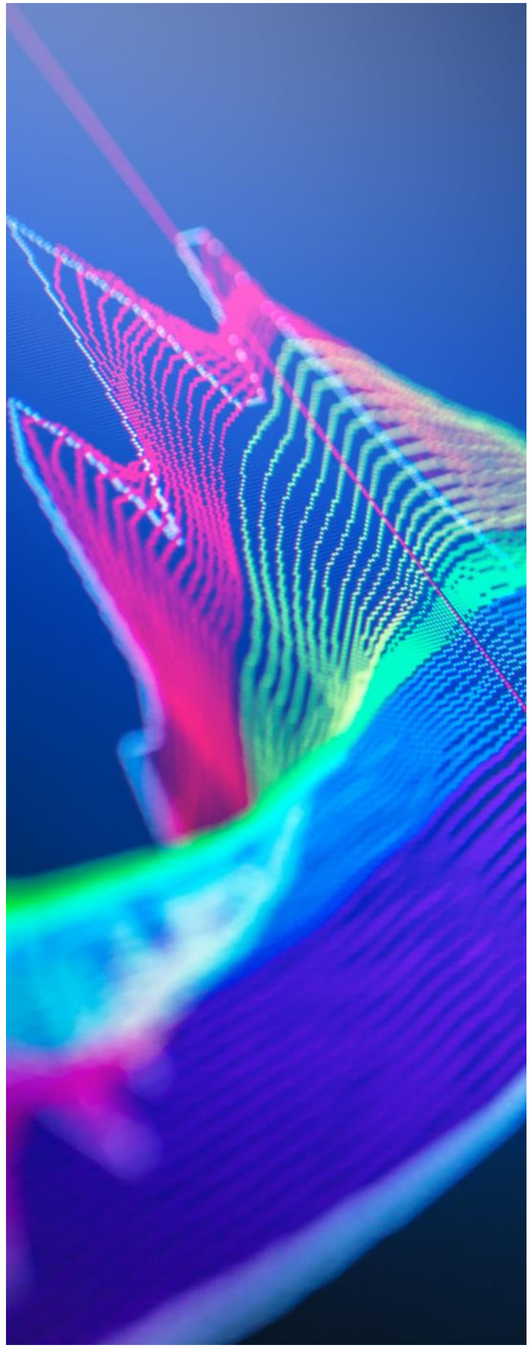
The ACCC highlighted that this remains the case, even where a target is in administration or financial distress, noting that administrators also have a responsibility to ensure that a potential buyer notifies the ACCC at the earliest opportunity.

The ACCC will conduct reviews on an expedited timeframe in appropriate cases

The ACCC is generally accommodating of genuine commercial timing imperatives, and the ACCC COVID19 merger guidance confirms that some merger reviews will need to be conducted on an urgent basis.

The proposed acquisition of Jewel Fine Foods by B&J City Kitchen for example, was conducted in a truncated public review over 5 weeks due to Jewel being in administration. This is considerably shorter than the usual Phase I review period of 12 weeks, and notable because the ACCC reached a final decision to oppose the transaction without issuing a Statement of Issues and commencing a Phase II review.

The ACCC conducted an even shorter public review of Coles acquisition of Jewel Fine Foods in 2020, clearing it in a public review of only 6 days duration.



> *"In short, the Commission's position on the global financial crisis is that its primary responsibility remains unchanged – and that is to protect competition, not only in the short term, but for the longer term. Reverting to protectionism in any form because of the current financial downturn is not the answer. And what we do today will have far lasting consequences for the future.*
>
> *In the current climate there is a school of thought that merger regulation should be relaxed, regardless of the anti-competitive consequences. The ACCC does not share this view. Merger regulation is not part of the current problem and any attempt to ease merger regulation may instead worsen the problem by maintaining inefficient companies and delaying the recovery."*
>
> *ACCC Commissioner, Sarah Court, 2009*

Failing firm transactions will not fly through (Cont'd)

Lessons from the last global financial crisis

In this context, there are insights to be gleaned from the ACCC's approach to merger control in the global financial crisis. During that period, for example, the ACCC highlighted that Australia's merger control regime should not be relaxed, and that a focus on the longer term effects of competition was paramount.

The ACCC's recent messaging in relation to the COVID-19 pandemic is consistent with its position in 2009. Whilst the short term is relevant, it will continue to consider the longer term impact on competition of any change in the structure of markets. Its assessment goes beyond the short run impact on profits and shareholder value.

Is it possible to just close?

There are a range of considerations relevant to a decision to complete without notice to the ACCC or prior to the ACCC concluding its review:

- For transactions subject to FIRB approval: where a mandatory FIRB notification is required, it will be an offence subject to civil and criminal penalties to close early; where only the voluntary regime applies, the transaction may proceed to closing but the Treasurer retains power to order disposal if he forms the view that the transaction was contrary to Australia's national interest.
- For all transactions, proceeding without ACCC clearance risks the potential for significant pecuniary penalties and potential divestiture. Even if enforcement action is not ultimately taken, closing without ACCC approval carries the risk of a long, uncertain and expensive investigation by the ACCC, including the possibility of hold separate undertakings being required.

Case studies: insights from history

Jewel Fine Food

In 2019, the ACCC opposed B&J City Kitchen's proposed acquisition of Jewel Fine Foods, a company in administration who was B&J City's main competitor in the manufacture and wholesale supply of chilled ready meals. The ACCC expected, absent the transaction, another buyer would step forward. Several months later, in 2020, the ACCC was approached to clear a proposed acquisition of Jewel by Coles.

In clearing the acquisition, the ACCC's assessment turned upon an absence of any other potential buyers:

"The ACCC also took into account the circumstances of Jewel being in voluntary administration. The ACCC's assessment is that the likely alternative to the proposed acquisition would be liquidation of the Jewel assets. The ACCC considered that liquidation would not be likely to result in more competitively beneficial outcomes than the proposed acquisition. Under the proposed acquisition, Jewel will remain a major competitor in the supply of chilled ready meals."

Key takeaway:

Whether or not there is a reasonable prospect of another buyer with no or fewer competition concerns is an important factor in the ACCC's assessment

CBA / Bank West

In the heat of the global financial crisis, the ACCC cleared CBA's acquisition of BankWest. In Australia's relatively concentrated banking sector, BankWest was (at the time) an aggressive competitor that had been rapidly expanding in Australia. However, its UK parent HBOS encountered funding difficulties, causing BankWest to significantly scale back its expansion plans in Australia. The ACCC concluded that no other party would be likely to acquire and fund BankWest's continued expansion in the funding environment at the time.

The then Chair of the ACCC, Graeme Samuel, acknowledged that financial instability caused by the GFC was influential in the ACCC's decision. He said that in the absence of the global financial crisis and the funding difficulties faced by BankWest's parent company, the ACCC's conclusion may have been different. However, given the global turmoil in financial markets, BankWest could no longer continue to act as the aggressive competitor it has previously been and the deal was permitted.

Key takeaway:

For failing firm arguments to carry weight, the ACCC must be convinced that the firm cannot be successfully reorganised and there is no other viable buyer that raises less of a competition concern.

Case studies: insights from history

Primo / Hans

The ACCC cleared Primo's acquisition of Hans Smallgoods in 2009, on the basis that:

- Hans, which had entered voluntary administration after a lengthy and unsuccessful sales process, would be likely to cease trading imminently and be liquidated by the administrator in the absence of the proposed acquisition.
- Primo was the only likely purchaser of Hans, and (despite a further sales process undertaken once administrators were appointed) there were no alternative bids for the Hans business capable of being finalised prior to the administrator being required to take steps to close the business.
- In considering the likely effect on competition if the administrator were to close the business and auction its assets in order to determine whether this would be a less anti-competitive outcome, the ACCC concluded that there was only limited interest in the assets, and a likelihood that many of the assets would be lost to the industry permanently if sold at auction. Those which did remain would likely be offline for an extended period before they could be redeployed, affecting their efficacy as a competitive constraint.

Key takeaway:

The ACCC will examine whether there a been a thorough search for alternative buyers and whether, absent the transaction, the assets of the business would permanently exit the market.

VIP Steel / National Can Industries

In clearing NCI's acquisition of VIP Steel in 2015, the ACCC concluded that there would be no anti-competitive effects by reason that:

- NCI's large steel drum operations had failed to achieve profitability and that, with or without VIP Steel's proposed acquisition, there would only be one supplier of new large steel drums remaining in the market.
- NCI's large steel drum operations had been unprofitable since they were acquired from the receivers appointed three years earlier. NCI had experienced declining overall demand for large steel drums from customers, in a market with significant excess capacity. NCI had attempted to restructure its large steel drum operations, including by closing its Queensland plant.
- The ACCC appointed a forensic accountant who concluded that NCI's large steel drum operations were not viable, either historically or in future.
- There was no alternative acquirer of these assets in Australia and the assets would leave the market in the absence of the proposed acquisition.

Key takeaway:

The ACCC will test claims of unprofitability and the potential for restructuring of the business to improve viability.

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