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Australian Merger Control: Change in uncertain times
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Introduction
Welcome ›

Welcome to Australian Merger Control: Change in uncertain times.

We are living in uncertain times. The past 18 months has challenged policy makers, regulators, business and individuals. Antitrust regulators globally, including the Australian Competition and Consumer Commission (ACCC), have had to respond to unique and changing circumstances created by the COVID-19 pandemic, including by facilitating conduct that would in normal circumstances breach competition laws. At the same time, they have had to manage business as usual efforts, including merger reviews and enforcement.

As we adjust to the COVID-19 'new normal', global and Australian markets are experiencing a new wave of M&A activity. In that context, it is important to take stock of the evolving approach of regulators to merger control as well as likely changes on the horizon. In Australia, a number of different forces and pressures are intersecting, resulting in change amid a continued time of great uncertainty.

In *Australian Merger Control: Change in uncertain times* we explore current key themes in the Australian merger control landscape. We look at:

- Key trends and patterns in the ACCC's review of transactions over the past 24 months
- The approach to mergers in the digital economy
- The ACCC's attempt to leverage its poor track record in contested merger cases to prompt law reform
- International cooperation and steps to increase consistency in merger reviews
- Reforms to merger control in Australia that are likely to be on the cards
- Hardening attitudes toward the use of remedies and undertakings
- The significant engagement between the ACCC and Australia's Foreign Investment Review Board (FIRB).

"Change is in the air for Australia's merger clearance regime. Following a year of disruption, stagnation and evolution, rhetoric from Australia's competition regulator indicates that competition law reform is imminent."

Miranda Noble, Partner

Key takeaways

Big tech is a big target

Regulators have increasingly focused on the interplay between competition law and the digital economy in both their enforcement and merger control functions. After early work testing the intersection between competition, consumer and privacy regimes, the ACCC continues to lead in this area. Transactions involving platforms, big tech and rich data sets can expect to be subject to close scrutiny. Merger reforms are also likely to target specific issues arising from tech related deals.

ACCC losses pave the path to reform

The ACCC has not succeeded in blocking a merger in a court or tribunal for more than 20 years. This track record is seeing the ACCC lay the groundwork to prompt substantive changes to Australia's merger regime.

International cooperation encourages convergence

Moves that cement greater cooperation between regulators and regime convergence include a recent joint statement by the ACCC and regulators in the United Kingdom and Germany. This highlighted a need for a tougher approach, through more rigorous and effective merger review, including enforcement action, around the globe.

The ACCC pushes for reform

ACCC Chair Rod Sims has been a vocal champion on the need to change Australia's merger control regime and the powers of the ACCC. This has included concerns that courts favour 'biased' evidence from executives of the merger parties and has flagged deficiencies in the ACCC's powers to interrogate the acquisition of nascent competitors. The ACCC will shortly release its proposals to government regarding changes to Australia's merger control regime.

Behavioural remedies and undertakings remain unpopular

The ACCC's preference for structural remedies (as opposed to behavioural) when considering how to address concerns in relation to complex mergers has remained as strong as ever over the past 12 months. The ACCC has refused to accept undertakings that it viewed as containing 'behavioural' features.

Foreign investment review is increasing ACCC oversight

As of 1 January 2021, new foreign investment rules were introduced in Australia, including changes requiring clearance for offshore transactions not previously caught by the rules. FIRB will not issue a 'no objection' notification until the ACCC confirms it does not have concerns. In practice, this means the ACCC is seeing many more deals – all transactions notified to FIRB will also be scrutinised by the ACCC.

Merger control by numbers

** Data is based on the financial year the deal commenced*

ACCC Public Reviews

Fewer transactions were taken to public review in FY21

- **In FY21, the ACCC commenced public reviews into only 20 transactions (7 reviews remained ongoing into FY22). This represented a 35% decrease compared to the number of public reviews commenced in FY20**
- **In FY20, the ACCC confidentially pre-assessed almost 90% of transactions notified to it and commenced 31 public reviews**

'Phase 2' Reviews

In FY21 the ACCC reviewed several complex deals. However, to date, there has been a significant decrease in the number of Statements of Issues (SOIs) (Phase 2 reviews) released for reviews commenced in FY21 compared to FY20

- **To July 2021, the ACCC has released only 3 SOIs in respect of public reviews commenced in FY21 (which contained less than 5 red and 5 orange lights)**
- **For reviews commenced in FY20, the ACCC published 13 SOIs (containing at least 10 red and 10 orange lights)**

Review Outcomes

While there has continued to be a mix of outcomes, the ACCC did not oppose any deals where a public review was commenced in FY21

- **Of the public reviews commenced in FY21, 50% were not opposed and 20% were withdrawn by the parties (the remainder remain ongoing into FY22)**
- **Of the reviews commenced in FY20, almost 60% were not opposed, around 10% were approved subject to undertakings, 25% were withdrawn, and the ACCC opposed one transaction outright**

Review timelines

Review timelines continue to vary significantly and depend on factors including the complexity of the transaction and the issues, whether it is multi-jurisdictional, and the extent of public consultation required (including about potential remedies)

- **For public reviews commenced in FY21, the time required for review ranged from around 20 to almost 180 business days (noting some are ongoing)**
- **In FY20, the time for review spanned from only 6 to around 230 business days**

Times are impacted by 'clock stoppers' where the ACCC is awaiting information.

Big tech is a big target

Regulators have increasingly focused on the interplay between competition law and the digital economy in both their enforcement and merger control functions. After early work testing the intersection between competition, consumer and privacy regimes, the ACCC continues to lead in this area.

The ACCC was an early adopter in applying a multidisciplinary approach to explore challenges presented by digital platforms. That work has involved assessing perceived shortcomings in Australia's competition, consumer and privacy regimes, including:

- The 2019 landmark Digital Platforms Inquiry report.
- A subsequent mandate by the Australian Government to test various issues relating to digital platforms, including the supply of digital platform services, the distribution of mobile apps, and consumer choice in selecting web browser services. This is to take place over a five year period.
- The development of a world-leading news media bargaining code designed to address bargaining power asymmetries between Google and Facebook and Australian news media operators.

While the ACCC has also actively pursued enforcement action, in doing so it has deployed an unusual strategy. The ACCC has continued to highlight traditional antitrust issues (ie. abuse of dominance). However, enforcement action targeting platforms has, to date, been confined to tightly framed consumer law action:

- Action against Facebook alleging misrepresentations regarding data protection and use in the context of VPN services.
- Actions against Google alleging:
  - misleading conduct regarding consent to aggregate data sets
  - misleading collection and use of location data (an ACCC win).

The ACCC's focus on digital platforms and big tech has not been limited to enforcement activities and sector-specific regulatory reforms. We have also seen the ACCC grappling with transactions that raise issues regarding customer data and the significance of nascent competitors including:

- Google's now completed acquisition of Fitbit.
- National Australia Bank's acquisition of neobank 86400.

The challenges facing the ACCC are not unique to Australia, with many regulators around the world calling for an overhaul of existing merger control regimes to better address challenges around assessing transactions in the digital economy.

The ACCC has slowly built a case for reforms to Australia's merger control regime which will come to a head this year. In part, the ACCC's proposals are expected to address perceived issues with transactions in the digital economy, including recognition of the relevance of aggregating data sets. However, that will be only a part of broader reforms which may radically shift merger control in Australia.

"The ACCC's interest in big tech and the digital economy is set to grow this year, with the ACCC specifically flagging issues relating to digital platforms as one of its key enforcement priorities."

Haydn Flack, Partner

ACCC losses pave the path to reform

Australia currently operates a dual track merger regime. Most commonly, parties elect to voluntarily notify transactions which are then managed through the ACCC's information merger review process. Alternatively, a formal ACCC authorisation process is also available.

Under the ACCC's informal merger review regime, in the handful of cases where the ACCC ultimately opposes the transaction, parties can approach the Federal Court of Australia to seek a declaration that the transaction will not breach Australia's competition law.

While contested merger cases are infrequent, the ACCC has a consistent record of losing these cases.

The ACCC has not succeeded in blocking a merger in a court or tribunal for more than 20 years. However, its consistent record of losing cases does not mean that all transactions are ultimately approved.

Transactions are regularly not pursued or withdrawn from the ACCC process in circumstances where the parties and their advisors 'see the writing on the wall'. However, the ACCC has sought to leverage its court record to advocate for reforms to the merger regime.

"While the ACCC is a sophisticated regulator, its record of failure to block deals in court is unblemished. We now see the ACCC leveraging that record to support the need for law reform."

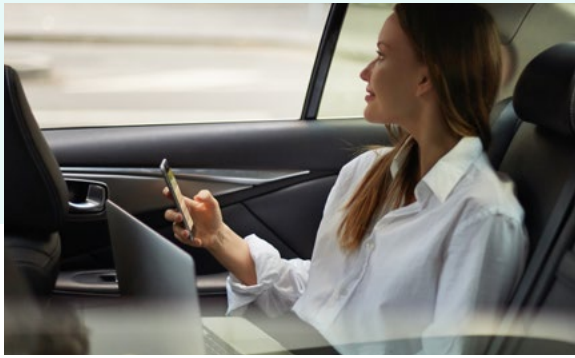
Paul Schoff, Partner

Recent cases have cemented the ACCC's record

While the ACCC has a long record of losing contested merger litigation, it has faced a series of recent defeats that have seen it progressively harden its calls regarding the need for reform.

In recent years, the Australian Competition Tribunal and the Federal Court found against the ACCC regarding the mergers of Toll / Seaswift and Tabcorp / Tatts. Those outcomes were followed by further defeats regarding the proposed mergers of TPG / Vodafone and Pacific National / Aurizon:

- In Pacific National / Aurizon, the ACCC opposed the deal before the Federal Court on the basis that the acquisition of Aurizon's Acacia Ridge Terminal would substantially lessen competition for the supply of intermodal rail services. While the Court agreed that the deal would have had the effect of lessening competition, it accepted an undertaking (which the ACCC had previously rejected). The ACCC appealed on the basis that the Court should not have accepted the undertaking. The Full Court found against the ACCC in all respects – not only was the Court entitled to accept the undertaking, but the merger (even without the undertaking) would not have substantially lessened competition.
- In TPG / Vodadone the ACCC opposed the transaction on the basis that, absent the merger, TPG was likely to continue to roll out its own mobile network and become an innovative and disruptive competitor to the three existing mobile network operators. The Court disagreed, even suggesting that the merged entity would be in a position to compete more vigorously with the two leading networks. The ACCC elected not to appeal.



ACCC losses pave the path to reform

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'In the instances where we [the ACCC] have ended up in litigation the reality is that we haven't won outright in a contested merger case since the current substantial lessening of competition test was introduced in 1992."

Rod Sims, ACCC Chair

Ratcheting up the rhetoric

The ACCC recently sought to leverage the outcome in the TPG / Vodafone litigation to promote the need for law reform through a media release focusing on its perceptions of the impact of the merger.

In that release the ACCC:

- Pointed to apparent mobile plan price increases and other changes in terms offered to customers and indicated that 'the behaviour of the three big telcos would suggest they are not concerned about losing customers to rivals'.
- Referred to its opposition to the TPG / Vodafone transaction and, in effect, suggested changes in price / service were due to the deal having been cleared.

The response from the market was swift, with suggestions that the ACCC's media release was misleading and criticism of the methodology that had been applied by the regulator.

Whatever the shortcomings or criticisms of the ACCC's approach, this significant escalation in rhetoric indicates the regulator is preparing to advocate for substantive changes to Australia's merger control regime.

International cooperation encourages convergence

Increasingly the ACCC has been working with other regulators around the world in the context of merger reviews. This includes:

- Seeking waivers from merger parties to facilitate materials being shared directly between regulators in different countries, including submissions and primary documents.
- Testing and comparing remedies offered up by merger parties in other jurisdictions.

Cementing greater cooperation and convergence

In April 2021, a joint statement by the ACCC and regulators in the United Kingdom (CMA) and Germany (Bundeskartellamt) cemented incremental steps over many years to improve cooperation between key competition agencies.

In essence, the statement was designed to draw a line in the sand – to reinforce to businesses, lawyers, courts and politicians the need for a tougher approach through rigorous and effective merger reviews, including enforcement action.

The joint statement emphasises a number of issues of general concern to regulators:

- Dynamic and fast-paced markets, including in the tech sector, present challenges for regulators, particularly around future uncertainty. When faced with uncertainty, regulators must be willing to challenge the view that mergers are efficiency enhancing.
- It is suggested that merging firms and their advisors overstate the benefits of transactions. Regulators (and courts) need to take care in relying on the views put forward by merger parties when there are other stakeholders, including consumers, who are not represented.
- Where there is uncertainty, strong merger enforcement should weigh in favour of competition and the needs of consumers rather than the profits of the merging firms.

These issues reflect other global events that are unfolding. In particular, in July 2021 President Biden signed a broad reaching Executive Order regarding competition policy which included a policy of greater scrutiny of mergers. In response, the Federal Trade Commission and the Department of Justice have announced reviews into current merger guidelines to determine whether they apply 'the skepticism the law demands' or if, at present, they are 'overly permissive'.

From this, we see an attempt to move the dial

We see several key themes emerging from the joint statement:

- A sense of regret about some past deals that were cleared.
- A shift so that the default position should be about competition, not clearance.
- A highly structuralist view of markets, including strong views focusing on the number of existing players (ie. three to two deals).

International cooperation encourages convergence

Robust but without the rigour?

We have seen the ACCC criticise court-based decisions where deals opposed by the ACCC have been allowed to proceed. Most recently, this has involved the ACCC suggesting that consummating the TPG / Vodafone transaction has led to higher prices for end consumers.

However, what we have not seen is any particular rigour or published work scrutinising those views. In particular:

- In other jurisdictions regulators conduct detailed retrospective studies to assess whether their past decisions were correct. Most recently, the European Commission announced that it will initiate a review into around two dozen deals from 2012 – 2018 to be published in 2023.
- At this stage, the ACCC has no formal approach to assess its past decisions and whether its assessment about the future was correct.

Looking inwards can be challenging. However, there would inevitably be important lessons that would come from a close assessment of selected decisions to determine whether the ACCC got it right or wrong, and how its work in the future could be improved based on those learnings.

The ACCC pushes for reform

ACCC Chair Rod Sims has, in recent years, been a vocal champion on the need to change Australia's merger control regime and the powers of the ACCC. In particular, he has raised concerns that courts favour 'biased' evidence from executives of the merger parties. He has also flagged limitations in the ACCC's powers to interrogate the acquisition of nascent competitors.

The ACCC will shortly release its proposals for changes to Australia's merger control regime. Regulatory reforms will ultimately need to get the green light from government and go through the Parliamentary process.

For now, we can only speculate about the changes that may be on the table. The potential options can be set out on a spectrum:

- At one end, procedural reforms or changes designed to, in effect, codify matters that the ACCC must take into account, which the regime already permits the ACCC to consider.
- At the other end, a complete overhaul of the core test that the ACCC applies in reviewing deals.

Possible options on the table

In terms of procedural changes, options may include:

- Moving from a voluntary to a mandatory merger notification regime. (As noted below, the ACCC has 'got a taste' of more deals through its engagement with FIRB, so we see this as a possibility).
- Alternatively, mandatory notification requirements in relation to some key sectors (ie. digital platforms).
- Limiting rights of review or appeal.

However, more substantive reforms to the underlying merger review test could include:

- Additional matters listed among the merger factors that the ACCC must have regard to (ie. data sets).
- Shifting the onus (ie. requiring the parties to positively demonstrate that the transaction will not substantially lessen competition).
- Adjusting the threshold (ie. lowering the bar from 'substantially' to 'materially' lessens competition).

"The ACCC Chair is signalling reforms which have the potential to fundamentally shift the approach to merger control in Australia."

Katrina Groshinski, Partner

The ACCC pushes for reform

It is difficult to identify which path(s) the ACCC may pursue. However, business should be under no illusion about some of these options. In particular, shifting the onus onto the merger parties (to show that the deal would not substantially lessen competition) would have a significant impact.

Behavioural remedies and undertakings remain unpopular

The ACCC's preference for structural remedies (as opposed to behavioural) when considering how to address concerns in relation to complex mergers has remained as strong as ever.

Over the past 12 months the ACCC has refused to accept undertakings on a number of occasions that it viewed as containing 'behavioural' features.

The ACCC increasingly avoids behavioural undertakings

The ACCC continues to resist behavioural undertakings from merger parties. In particular:

- This pattern has continued over the last 12 months, with the ACCC 'not opposing' four deals subject to structural undertakings. However, during that period the ACCC did not accept any behavioural remedies – in fact, on a number of occasions it rejected undertakings offered up in complex reviews in circumstances where it ultimately gave those deals the 'green light'.
  - In Woolworths / PFD, Woolworths offered an undertaking that contained temporary measures to maintain separate supplier arrangements and preserve market dynamics. While the ACCC ultimately approved the deal, it did so on the basis that the undertaking was not required.
  - In Google / FitBit, in response to the ACCC's concerns, Google offered an undertaking in respect of its behaviour towards rival wearable manufacturers. For example, it offered to not use health data for advertising and, in certain cases, would give competitors access to various health and fitness data. The ACCC rejected the undertaking. In response, Google elected to close the deal, which is now being considered as an enforcement matter.

The ACCC's approach is reflected in its joint statement with UK and German regulators. In effect:

- Competition agencies must favour structural over behavioural remedies.
- Behavioural remedies are viewed as complex, hard to monitor, and risk becoming outdated.

Behavioural remedies and undertakings remain unpopular

Strategy and what this means for merger parties

We know of other examples where undertakings have been offered confidentially to the ACCC and rejected. This includes situations where a deal was ultimately cleared by the ACCC on the basis that it did not substantially lessen competition without the ACCC accepting an undertaking that was offered up.

This is an evolving situation which requires careful assessment about if and when an undertaking should be offered and what it should contain. It is an increasingly complex area where decisions need to be made in the context of broader strategic considerations about getting a deal cleared.

"The increasingly strict approach favouring only structuralist remedies must be taken into account in approaching the clearance process and engaging with the ACCC."

Geoff Carter

Recently accepted structural remedies:

Asahi / CUB – Asahi undertook to divest part of its cider business (trading under the Bonamy's, Little Green Cider and Strongbow brands) and part of its beer business (in respect of its Stella Artois and Beck's brands).

Mylan / Upjohn – the parties undertook to divest three off-patent branded pharmaceuticals, one used to treat cardiovascular conditions and the other two used to treat glaucoma. Aspen was approved by the ACCC as an up-front buyer.

Elanco / Bayer – Elanco undertook to divest its sheep lice business trading under the Avenge and Avenge+Fly brands and its Drontal Dog, Drontal Cat, profender and Droncit gastrointestinal worming treatment products.

Foreign investment review is increasing ACCC oversight

As of 1 January 2021, Australia introduced new foreign investment rules, including bringing changes that require clearance for offshore transactions not previously caught by the rules.

Under Australian law, foreign investors taking a:

- 'notifiable action' (including acquiring an interest in 10% or more of an Australian entity or acquiring at least 5% in an Australian media business) or
- 'notifiable national security action' (including acquiring an interest of 10% or more in a national security business or an interest in national security land)

must apply to the FIRB for approval.

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

The interaction between FIRB and the ACCC means that, in practice, all transactions notified to FIRB will also be scrutinised by the ACCC (even if the deal would not otherwise have been notified to the ACCC).

The ACCC is becoming used to reviewing deals through FIRB's processes that may not otherwise have been notified to it. As a result, mandatory notification may be an increasingly attractive option among the suite of potential reforms that are currently being considered.

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The recent changes have been some of the most significant reforms to the Australian foreign investment rules since their introduction in 1975."

David Moore, Partner

New national security business rules

A new national security test has been introduced. This means that any acquisition of 10% or more in a 'national security business' or of any 'national security land' will require FIRB approval - regardless of value or the characterisation of the investor. Previously, only foreign government investors had $0 thresholds for non-real estate transactions.

'National security business' is a broad concept that covers:

- Critical infrastructure under the Security of Critical Infrastructure Act.
- Carriers or carriage service providers under the Telecommunications Act.
- Critical goods, technology or services used / with intended use for military or intelligence.
- Businesses that store or access security classified information.
- Businesses that store or maintain or have access to personal information collected by defence or national security agencies.

New call in and last resort powers

Under the new rules, the Treasurer is able to call in and review transactions that have not been cleared by FIRB for a period of up to 10 years, even after they have completed. The effect is that investors will, in practice, need to make 'voluntary' applications to exclude the risk of a transaction being called in and subsequently unwound later on.

The Treasurer also has new last resort powers to deal with national security risks even where a transaction has been given clearance in the event that:

- False or misleading information was provided to FIRB.
- There has been a material change to the business, structure or organisation of an applicant.
- There has been a material change to the market since the transaction occurred.

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Navigate the complexities

The ACCC's activities and rhetoric from the last 12 months are strong indicators that change is on its way for Australia's merger control regime. With increasing focus on dynamic markets, robust enforcement action and growing international collaboration among regulators, Australian competition law is increasingly complex. Our team can help you navigate complexities. Contact us for more information.

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