Merger Reform in Australia: Snapshot of the reform package

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MinterEllison.

Snapshot of proposed reform package

	POSITION UNDER CURRENT INFORMAL REGIME	POSITION UNDER REFORMS ANNOUNCED BY TREASURER
PROCESS CHANGES		
Notification	Voluntary. Australia is one of only three OECD countries where seeking merger clearance is 'voluntary'. ACCC clearance is (practically) required if FIRB approval is needed, and ACCC notification is recommended if the merged firm would have a post-merger share of greater than 20% in the relevant market/s. In addition to the 'informal clearance' process, parties can also make use of the formal merger authorisation process, which also enables the ACCC to have regard to the public benefits of a deal (weighed against any detrimental impact).	**Mandatory.** A single merger control pathway will be created under which notifying and obtaining ACCC approval would be mandatory if the proposed transaction meets certain thresholds. The thresholds remain a key area for further consultation, but at this stage the government has indicated: ■ Thresholds will be based on international best practice and will include **monetary value** (turnover, profitability and deal value) as well as thresholds based on **market concentration metrics** (share of supply or market share), the latter is intended to ensure that mergers below the monetary thresholds, but that may otherwise present risks to competition, will be notified. ■ Additional, targeted notification obligations may be introduced in cases involving particular high-risk mergers that raise evidence-based concerns. ■ Notification requirements aimed at capturing **creeping acquisitions** or **roll up strategies** will require parties to aggregate transactions over the **past 3 years** (both the buyer and the target) for the purpose of assessing whether the thresholds are met (regardless of whether each of those mergers was individually notifiable). ■ Anti avoidance measures will be put in place to prevent merger parties from evading merger control obligations. ■ Mergers below the thresholds may also be voluntarily notified to the ACCC.
Suspensory effect	**No suspensory effect.** Except in cases where FIRB (FDI) approval is required, there is nothing to prevent parties from completing or threatening to complete before the ACCC completes its review. In order to block completion, the ACCC is required to obtain an injunction from the Federal Court to prevent completion.	**Suspensory: Cannot complete until cleared.** For transactions requiring notification, the regime will be suspensory. Merger parties will be unable to put a transaction into effect until the ACCC has determined that it may be (with or without conditions). A failure to notify or proceed with a merger ahead of the ACCC's determination will expose the company and executives and officers responsible for the merger to **substantial penalties** which may be sought by the ACCC in the Federal Court. A merger, or contract, arrangement or understanding related to a merger, which has proceeded other than in accordance with the ACCC's determination will be **void**.

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Transparency	**Can clear confidentially.** The informal clearance process permits many transactions (where appropriate) to be cleared by the ACCC on a confidential basis without that notification being made public. The vast majority of deals are confidentially cleared on this basis. The ACCC can, however, in some cases, seek to conduct targeted market enquiries (i.e., with customers or suppliers) prior to opening a formal public (Phase 1) review.	**All notified deals to be public.** All deals notified to the ACCC will be placed on a public register and reasons for determinations will also be published. Parties will be able to engage in confidential pre-notification discussions in relation to the information that is to be provided to the ACCC, but there will be no ability to seek informal confidential clearance.
Filing requirements	**No set filing requirements.** The informal clearance process is a highly flexible process. Parties and advisors determine the extent of detail required to demonstrate why no concerns arise and the ACCC also adopts a flexible approach for RFIs. The current merger authorisation process is different and requires detailed upfront information and documents.	**Set filing requirements.** Parties will be required to submit a notification form (a 'simple' form for mergers 'unlikely to raise competition concerns' and a longer form for 'more complex' transactions). Senior executives or directors will be required to attest to a filings accuracy and completeness (with civil and criminal penalties applying, including director disqualification). The form of notification will be the subject of further consultation.
Fee	**No fee.** There is no fee for informal clearance processes. An application for merger authorisation involves a lodgement fee of $25,000.	**Fee applies.** Under the new regime, a filing fee would be required to be paid for all merger notifications, which will be scaled to reflect the complexity and risk level of the merger. The government has suggested that this would be in the range of A$50,000 - A$100,000, which is consistent with comparable overseas jurisdictions. Tribunal review will incur additional fees. Filing fees would not apply for deals proceeding through the fast track system, and the government has indicated that an exception from fees would be available for small businesses.
Timeframes	**No formal timeframes.** There are no formal timeframes under the informal clearance process. While time taken for initial pre-assessments has not significantly changed over time, the timelines for public reviews of more complex matters has increased. Merger authorisation is a statutory process with specific timeframes (90 days), however, in practice this is extended at the ACCC's request.	**Set timeframes.** Clear and defined review and decision-making timelines will be specified to provide greater certainty and predictability: ■ Shorter timelines for transactions that do not raise competition concerns will be decided within a 30 working day 'Phase I' review period (with 'fast track' decisions available in as little as 15 days if no competition concerns are identified by the ACCC). ■ An in-depth 'Phase II' review with a 90 working day review period will apply for deals where the ACCC determines it has a reasonable basis to consider the merger raises competition concerns, with the opportunity to extend if required (e.g., if remedies are offered).

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		■ Merger parties may offer remedies or commitments to address competition concerns in either Phase I, if the concerns are identifiable and can be easily remedied, or during Phase II. ■ Appeals to the Australian Competition Tribunal (Tribunal) will be subject to a 90 calendar day (approximately 60 working day) time period, which may be extended where necessary. ■ Timeframes seek to ensure that mergers considered by the ACCC and the Tribunal on review can be expected to complete in around 12 months. One area to watch is the prospect of 'clock stopping' techniques that have the potential to slow down processes (which will be the subject of consultation).
Call-in power	**No formal call-in power.** Transactions of all sizes are potentially capable of raising competition concerns. While the ACCC does not have a formal 'call in' power to look at deals outside applicable informal thresholds, it does have discretionary power to review / investigate any transaction even if it has not been notified.	**No formal call-in power will continue.** While the government has not accepted the ACCC's proposal for a formal call-in power: ■ If a market share trigger is adopted as part of the notification threshold, this may provide scope for the ACCC to target certain deals depending on its view of the relevant market involved. ■ The government has proposed a fall back mechanism that will allow further regulations to be made for specific notification requirements if required.

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SUBSTANTIVE CHANGES		
Test and burden of proof	Under the informal merger clearance process, the ACCC is required to establish the transaction would be likely to have the effect of substantially lessening competition including by reference to a number of merger factors set out in the legislation. For merger authorisation, the ACCC can grant an authorisation only when it is satisfied that the deal is not likely to substantially lessen competition or is likely to result in a net public benefit.	**Test amended, but burden of proof unchanged.** The ACCC must permit a merger to proceed unless it reasonably believes that it will likely substantially lessen competition, including if it **"creates, strengthens or entrenches substantial market power in any market".** If a decision is not made by the ACCC within the specified timeframe, then the deal will be regarded as having been approved. The current merger factors will be replaced with principles that the ACCC must consider, which focus on the need to maintain and develop effective competition within markets and the market position of the relevant businesses. Additionally, to address concerns relating to **creeping acquisitions** and **roll-up strategies**, the ACCC will be able to consider **any merger activity by involved companies over the previous 3 years.** Merger parties that are subject to a 'Phase II' public review will receive a notice of competition concerns providing the material facts, evidence and other information which explains the ACCC's analysis of potential harms. The ACCC will continue to be able to provide clearance on public benefit grounds. However, this will only be available after the ACCC issues its Phase II determination and may only be granted if the ACCC is satisfied the merger will result in a ***substantial*** benefit to the public which outweighs the anti-competitive detriment of the merger (an apparent increase to the threshold for the public benefits test under the status quo).

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APPEAL RIGHTS		
Right to appeal	**No automatic appeal right in Tribunal.** There is no formal ability to review an ACCC decision under the informal clearance process in the Australian Competition Tribunal (only via the Federal Court). If the ACCC opposes a deal through the informal clearance process, parties can (in effect) challenge the decision by seeking a declaration from the Federal Court that the deal would not substantially lessen competition or breach s 50 or it could complete the deal in the face of ACCC opposition (in which case, the ACCC would apply to the Federal Court for an injunction). Under the merger authorisation process, however, parties can seek limited merits review of the ACCC's merger authorisation decision in the Tribunal.	**Right to appeal to Tribunal.** The new regime will have the ACCC as the first instance decision maker and allow for a limited right for merits review by the Tribunal. Parties would not be able to challenge the ACCC's decision on the merits in the Federal Court. The scope of merits review will be limited, including because the Tribunal will be limited to material before the ACCC. However, the Tribunal will be given power to request new clarifying information or evidence from the parties. Parties will have the option to seek a fast-track review by the Tribunal, which would be based only on the material before the ACCC. In such cases, the Tribunal would be bound by the ACCC's findings of fact. The Tribunal's review will be subject to a 90 calendar day (approximately 60 working day) time period, which may be extended by a further 90 calendar days where necessary. The fast track procedure will be subject to a 60 calendar day review period. Decisions of the Tribunal will be subject to judicial review by the Federal Court.

MINTERELLISON PARTNER CONTACTS

Partner

Partner

Partner

Partner

Partner

MinterEllison.