

> Allens

MERGER CONTROL IN AUSTRALIA

When to notify

- The Australian Competition and Consumer Commission (ACCC) encourages merger parties to notify when there are overlaps and the merged firm will have a post-merger market share of >20% in the relevant market(s). The ACCC may also be interested where a merger involves vertical overlaps.
- But the 20% threshold is not a safe harbour. Given the relatively small size of markets in Australia, even low value deals or deals involving parties with low turnover can raise substantive issues.
- Notifications can be made without a concluded formal agreement. The ACCC often receives notifications before a deal is signed including during competitive bidding processes.
- Confidential notifications can be made, however, the ACCC can be reluctant to grant clearance without conducting market enquiries.

Merger process options

- Most mergers are notified under the well-established 'informal review' procedure for which there are no statutory deadlines and no application fee. The ACCC considers whether the merger would have the likely effect of substantially lessening competition in any market in Australia.
- Alternatively, parties can seek formal merger authorisation from the ACCC. This is a statutory process which involves:
 - application form and fee of A\$25,000
 - statutory deadlines (see below)
 - the ACCC may grant authorisation if the merger is not likely to have the effect of substantially lessening competition in any market in Australia, or the public benefits of the merger outweigh the public detriments.
 - limited merits review of the ACCC's decision by the Australian Competition Tribunal.

Key concepts

Test is substantive

- Acquisitions of shares or assets that would have the likely effect of substantially lessening competition in any market in Australia are prohibited. Parties may seek clearance from the ACCC under the 'informal review' process or the new merger authorisation process.
- Arrangements such as joint ventures and licensing agreements can be caught.

Acquisitions of minority interests

- There are no turnover or de minimis thresholds.
- Acquisitions of minority interests may be reviewable, particularly if they confer some influence and alter the incentives of the parties.

What are the risks of not notifying?

Although notifying is not mandatory, the ACCC routinely reviews deals on its own initiative as it:

- diligently monitors merger activity; and
- liaises closely with the Foreign Investment Review Board (*FIRB*) and overseas competition authorities.

The ACCC can take the merger parties to court seeking:

- injunctions to prevent the deal from proceeding;
- divestment orders to unwind completed deals; and
- penalties – A\$10m or 10% of Australian turnover (corporations)/A\$500k (individuals, including directors).

How long will the review process take?

Most mergers are notified under the 'informal review' procedure for which there are no statutory deadlines. The process can take 2 weeks to around 12 months depending on the complexity of the competition issues, complexity of the products / services offered by the parties, sensitivity of the sector and the degree of opposition during market enquiries. The ACCC's guidelines provide an indicative timetable for informal review, but reviews take longer in more complicated cases:

PRE-ASSESSMENT

ACCC decides whether to clear the deal with no or limited market enquiries.

2-4 weeks

PUBLIC REVIEW AND MARKET ENQUIRIES

Market enquiries leading to clearance or a statement of issues (*SOI*).

6-12 weeks

CONSULTATION AND DECISION

Public consultation on the *SOI* and further submissions from parties leading to a final decision. Possible multiple rounds of consultation where remedies are negotiated.

6-12 weeks

For authorisation, the statutory deadline is 30 days (overseas mergers) and 90 days (all other mergers). These statutory deadlines can be extended. The ACCC is deemed to have refused the authorisation if it does not make a decision within the time period. Appeals to the Tribunal must be determined within 60 days (overseas mergers) or within 90 days (all other mergers), subject to extensions.

Is the deal caught under the foreign investment (FIRB) rules?

Australia's FIRB rules are complicated and determining whether a deal is caught requires expert advice. In general: (i) acquisitions by foreign persons of 20% or more of Australian corporations are notifiable (and can only occur if FIRB approval is obtained) where the target is valued above specified thresholds; (ii) acquisitions by foreign persons of 10% or more of Australian corporations which carry on a national security business are notifiable (and can only occur if FIRB approval is obtained) irrespective of value; (iii) acquisitions by foreign persons who are also foreign government investors of 10% or more of Australian corporations are notifiable (and can only occur if FIRB approval is obtained) irrespective of value.

*These thresholds apply for 2022 calendar year. Separate thresholds apply to land-rich entities and targets in particular sectors. .

Investor	Thresholds*
Investors (who are not foreign government investors) from Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, United States or Vietnam.	
* Target not carrying on a sensitive or national security business	A\$1,250m
* Target carrying on a sensitive business and not carrying on a national security business	A\$289m
Other investors (who are not foreign government investors)	
* Target not carrying on a national security business	A\$289m

What happened in 2021?

Deals proceeding to public review: statistics from 2019 to 2021

	2021		2020		2019	
	Number	%	Number	%	Number	%
Total reviewed*	24	-	30	-	26	-
Phase 1	18	75%	22	73%	16	62%
Phase 2	6	15%	8	27%	10	38%
Cleared unconditionally	18	75%	17	56%	15	58%
Cleared conditionally	2	8%	3	10%	5	19%
Blocked	0	0%	0	0%	2	8%
Withdrawn	2	8%	8	27%	3	11%
No decision*	2	8%	2	7%	1	4%
Average time period for ACCC's review of deals [#]	72		64		57	

* Does not include deals cleared at pre-assessment (ie, where the ACCC does not launch a public review) as these are not published. ACCC reported that for CY2020/21 (ending 31 December 2021), 424 mergers were reviewed of which 402 (95%) were cleared in pre-assessment.

+ 'No decision' includes post-completion reviews where the ACCC closed its investigation without opposing the deal.

[#]As published by the ACCC (total business days excluding (a) pre-assessment; (b) public holidays; and (c) any days during which the review was suspended).

Proposed merger reforms

The ACCC has outlined proposals to reform Australia's merger regime, which are summarised below. For more information, visit Allens' website tracking key updates and developments on the proposed reforms: <https://www.allens.com.au/insights-news/insights/2021/09/ACCCs-proposals-to-overhaul-Australias-merger-control-regime/>

	Current Process	Proposed Reform
Clearance Process	Voluntary / non-suspensory. ACCC must go to court to stop a merger.	Formal mandatory / suspensory* Mandatory notification thresholds and residual 'call in' power.
Legal Test	Balance of probabilities whether there is a real commercial likelihood of SLC.	ACCC must be satisfied that there is no 'possibility that is not remote' that the transaction would SLC.
Substantial Market Power	Same test applies to parties that have market power.	An acquisition will be deemed to SLC where it entrenches, materially increases or materially extends substantial market power.
Court intervention	ACCC / parties can seek declaration from Federal Court (and under merger authorisation process limited review by Australian Competition Tribunal from formal merger authorisation).	Ability to challenge an ACCC decision confined to merits review by the Australian Competition Tribunal and evidence confined to that before ACCC.
Digital platforms	No sector-specific rules.	Specified digital platforms subject to jurisdictional and legal thresholds.

*There is an existing formal merger authorisation regime, however, it has only been used three times since its introduction in 2017

An Australian team with global experience

We have longstanding experience advising on **significant global transactions** with complex competition issues.

We **speak your language**. Many members of our team have practised in overseas jurisdictions as competition lawyers, managing global competition filings.

Our team **understands** what is important in securing an international merger including:

- The challenges you face in **coordinating** advice from many jurisdictions, often with short timeframes.
- We can provide you with **simple, clear and timely** responses that are easily understood by global clients.
- **Communicating** matters to you in a way that helps you appropriately counsel your client.
- Appreciating that timing can be critical to you and your client and we will **meet the pace that you set**.

Excellent relationship with the Australian Competition and Consumer Commission (ACCC)

We **understand the key regulator** and can provide you with the localised knowledge you need to navigate the path to securing clearance in Australia.

We maintain **close links with the ACCC and its senior staff**. Our partners are engaged closely with the peak legal body (the Law Council of Australia) with whom the ACCC consults closely on changes to laws, practice and guidelines.

Our global deals

Our **Band 1 (Chambers Asia Pacific – Competition/Antitrust)** competition team is at the forefront of M&A clearances in Australia.

We regularly act on the largest and most complex clearances for domestic and global transactions across all industry sectors, including agribusiness, banks & financial institutions, broadcasting, ecommerce, energy, entertainment, food & beverage, funds, hospitals and healthcare, insurance, manufacturing, media, mining & natural resources, music, pharmaceuticals, private equity, retail, technology, telecoms and transport.

The below matters are a sample of international merger deals our team has advised on.

- Amadeus / Navitaire
- Amcor / Alcon
- Amcor / Aperio Group
- Amcor / Detmold Flexibles
- ANZCO / Bovogen / Moregate Biotech (ongoing)
- Bayer animal health / Elanco
- Baxter / Gambro
- BDT Capital / Culligan / Waterlogic (ongoing)
- BHP Billiton / Rio Tinto (aborted)
- BHP Billiton / Rio Tinto / WAIO JV
- Booking.com / Getaroom
- Brambles / Pallecon
- Bristol-Myers Squibb / Celgene
- Cargill / AWB
- Cargotec / Konecranes (aborted)
- Covestro / Royal DSM R&FM business
- CPPIB / bclMC / Glencore Agriculture
- Dow / DuPont
- HG Capital / Litera / DocsCorp
- iHeart Media / Triton Digital
- Ingenico / Bambora
- JBS / Rivalea
- JCDecaux / APNO
- Johnson & Johnson / Synthes
- KKR & Co / Arnott's
- Merck & Co / Schering-Plough Corporation
- Mondelez / Cadbury
- Nestle / Pfizer infant nutrition
- NortonLifeLock / Avast
- Oracle / Sun Microsystems
- Oracle / PeopleSoft
- Oracle / Siebel
- Pfizer / Mylan
- Pfizer / Upjohn
- Pfizer / GSK / JV
- Pfizer / Mylan
- PepsiCo / Suntory Holdings
- Rio Tinto / Alcan
- Salesforce / Slack
- Sanofi / Merck & Co / animal health JV
- Shell / BG Group
- Takeda / Shire
- Telus / AFT Technologies
- Thermo Fisher Scientific / Qiagen (aborted)
- Thoma Bravo / Symantec
- Thoma Bravo / Imperva Inc
- Thoma Bravo / Connectwise
- Thoma Bravo / Nintex
- Triton / ADIA / IFCO
- Veolia / Suez
- Western Digital / Hitachi

> Allens

YOUR CONTACTS



Fiona Crosbie Chair

T +61 2 9230 4383
M +61 404 042 879
Fiona.Crosbie@allens.com.au



Jacqueline Downes Practice Leader

T +61 2 9230 4850
M +61 411 498 505
Jacqueline.Downes@allens.com.au



Carolyn Oddie Partner

T +61 2 9230 4203
M +61 404 074 203
Carolyn.Oddie@allens.com.au



Ted Hill Partner

T +61 3 9613 8588
M +61 411 646 761
Ted.Hill@allens.com.au



John Hedge Partner

T +61 7 3334 3171
M +61 421 545 794
John.Hedge@allens.com.au



Rosannah Healy Partner

T +61 3 9613 8421
M +61 411 776 662
Rosannah.Healy@allens.com.au



Robert Walker Partner

T +61 3 9613 8879
M +61 478 527 188
Robert.Walker@allens.com.au



Felicity McMahon Partner

T +61 2 9230 5242
M +61 450 123 681
Felicity.McMahon@allens.com.au

Key deals Allens advised on in 2021

- Salesforce / Slack
- Veolia / Suez
- BSC / Lumenis
- JBS / Rivalea
- NortonLifeLock / Avast

Allens is ranked:



BAND 1

Competition/Antitrust – Australia
Chambers Asia-Pacific 2022

TIER 1

Competition and Trade – Australia
The Legal 500 Asia Pacific 2022

TOP TIER

‘Elite’ ranking – Australia
Global Competition Review, GCR100 2021

For more thought leadership on Australian competition law, and information about our practice, visit our [website](#).