Allens

In alliance with Linklaters

Key issues in designing a mandatory merger regime for a modern economy

By Jacqueline Downes, Felicity McMahon, Kirsty van den Bergh, Angelica Sorn, Bella Cameron, Emily McLennan and Max Stella

The case for reform – or not

The ACCC has called for Australia's current informal and voluntary merger review regime to be replaced with a mandatory one. This would require parties to apply for and secure approval from the regulator before implementing a transaction, and they would face penalties for failing to do so. Currently, parties have the option of an informal clearance or a formal authorisation, which provides considerable flexibility and choice for them in managing the merger control risks associated with their acquisitions. Therefore, the release of reform proposals is likely to generate significant debate among and interest from the business community. In this *Insight*, we examine what the ACCC has put forward so far and the implications, drawing on the experience and architecture of regimes overseas.

Key takeaways

- We don't believe there is a compelling case to replace the current regime with a mandatory and suspensory merger review regime.
- There is solid evidence that the current regime is respected and works well – it is both efficient and effective, and offers a great deal of flexibility to the ACCC and merging parties, which will be lost with the introduction of a mandatory regime.
- The ACCC appears to be 'catching' undesirable mergers under the current scheme, and there is a risk the introduction of a mandatory regime will ultimately result in dramatic 'over capture'. This is not theoretical – there are practical consequences, given the increased demand (and costs) involved in the ACCC appropriately staffing the review of mergers to ensure timely approval.
- The current regime gives the ACCC wide powers and the ability to direct its efforts in a targeted way, by focusing on reviewing transactions that are likely to have the most impact on competition, without regard to thresholds or 'control' principles. This means that enforcement efforts (and funds) can be appropriately targeted and spent.
- The regulator could be underestimating the work required to establish such a regime, particularly as significant and material points of detail still need to be resolved – eg how it would be funded.
- Australia is already a heavily regulated market, particularly considering its size, and a mandatory regime could put business investment at risk. Arguably, the ACCC currently enjoys wider powers to review minority transactions than foreign agencies with mandatory regimes.
- The ACCC, in consultation with government, competition law specialists and the business community, will clearly be giving further consideration to the design of a mandatory merger regime in Australia in the months to come. We look forward to contributing to that conversation.

1 Key features of the current Australian regime

The design of a mandatory merger regime for a modern economy involves a number of elements and decision points, and the foreign jurisdictions' experiences are useful in understanding what might change . First, though, let's take a look at the current regime:

- Filing is **not mandatory** in Australia. If parties choose not to notify a transaction, they do so at their own risk. To prevent a transaction from closing, the ACCC must apply to court for an order restraining implementation, or for penalties or divestiture orders.

- If a court finds the proposed transaction to lead to a likely substantial lessening of competition (***SLC***), consequences may include injunctive relief, penalties, divestiture orders or follow-on damages.
- There are options available to parties to obtain comfort that their transaction is not likely to lead to an SLC and that the ACCC will not take action, including informal review, formal merger authorisation or potentially seeking a declaration from the Federal Court.
- There are no minimum asset or turnover thresholds to determine whether parties should pursue these options – rather, it is a question for them to consider whether, in substance, the transaction is likely to lead to an SLC.
- In the ACCC's Merger Guidelines, the regulator recommends that parties notify it when the merger parties' activities overlap in Australia, and the merged entity would have a post-merger market share of greater than 20% as to products or services supplied in Australia. Other factors may also influence if the ACCC conducts an 'own initiative' review of a transaction, including whether a Foreign Investment Review Board filing is made, media reporting, third party complaints, and interactions with overseas regulators that are also reviewing the deal.

2 What has been proposed for Australia so far?

No precise model for a mandatory filing regime has yet been proposed in Australia. The story so far is as follows.

In 2021, former Chair Rod Sims raised the ACCC's concerns that Australia's current merger laws are not 'fit for purpose' and that the current merger review regime is 'skewed towards clearance'. Sims indicated that he was initiating debate and called for a mandatory regime with limited appeal rights, among other changes.

The key elements of Sims' proposal were to:

- make merger clearances **mandatory**: ie replace Australia's current voluntary 'informal' merger review process with a mandatory formal clearance process;
- make it **easier** for the ACCC to **oppose mergers** by:
  - requiring merger parties to 'satisfy' it that the proposed acquisition is not likely to have the effect of substantially lessening competition;
  - lowering the standard of proof for finding that a merger is likely to substantially lessen competition; and
  - deeming mergers that entrench, materially increase or materially extend a party's substantial market power illegal;
- **curtail the role of the court** and limit parties' ability to challenge the ACCC's decision to a 'limited merits review'; and
- **establish a specific regime to apply to big tech**, with separate jurisdictional thresholds and a lower legal threshold for opposing mergers.

(These proposals were covered in more detail in our previous *Insights*, 'ACCC seeks overhaul of Australia's merger regime: what you need to know' and 'Is Australia's merger control regime really broken and is such significant change required?'.)

Since these proposals were put forward, the new ACCC Chair, Gina Cass-Gottlieb, has continued to echo Sims' sentiments about the need for reform, reiterating on a number of occasions that the regime is not 'fit for purpose' and 'presents real challenges', and calling specifically for a mandatory and suspensory filing regime in Australia.[1] Cass-Gottlieb highlighted the challenges the ACCC faces in reviewing multi-jurisdictional transactions, noting that *'in global transactions because Australia is one of a small number of regimes that does not have mandatory notifications, in some instances [the ACCC is] not notified at all', or [the ACCC] can hear partially or hear late and that really disadvantages Australia in order to determine if a transaction has an impact in Australia'.*[2]

ACCC Commissioner Stephen Ridgeway cited similar concerns as a keynote panellist at *Mergermarket's* annual M&A Forum in Sydney on 16 March 2023, noting that merger filings made to the ACCC are often not as fulsome as those filed by parties in other jurisdictions. In that forum, Ridgeway provided a significant update on the proposed reforms, explaining that the ACCC continues to be of the view that the current regime is not fit for purpose and is out of kilter with mandatory regimes overseas, and that change is needed. However, some of the ACCC's previous proposals may feature less in its reform plans.

Reflecting on Sims' 2021 proposals, Ridgeway noted his personal views that:

- the ACCC remains **keen to replace** Australia's informal regime with a **mandatory and suspensory regime**;
- there will **not likely be any changes** to the **'substantial lessening of competition'** test as initially proposed. Ridgeway noted that the courts have provided some clarity around this, with 'likely' now generally understood to mean 'real chance';
- it was **less likely (but a real chance remained)** that **'deeming provisions'** around acquisitions by firms with **market power** would be introduced. Ridgeway flagged that issues with this proposal had been raised during public consultations;
- a specific regime applying to big tech was **still necessary**, with this industry needing 'special rules'; and
- there is still **support for proposals** to **limit the ACCC's merger decisions** to review by the **Competition Tribunal** (as opposed to the courts), noting that court processes consume its time and finite resources. This is a very significant reform, which would remove an important check and balance, as we outlined previously.

Some of these changes would be welcome. Nonetheless, discussions about the introduction or design of a mandatory and suspensory regime for Australia are by no means settled, with Ridgeway noting that it ultimately falls to Treasury and government to progress the reforms. The ACCC does not have any insight into the Federal Government's thinking or proposed timelines, but has flagged that a lot of the detail still needs to be worked through before reform could be introduced.

One of the most significant aspects of the reform proposals is the introduction of a mandatory merger filing regime.

We now take a look at overseas regimes to understand the main elements of a mandatory regime (as depicted in the diagram below):

(1) At what level of interest could the regime apply?

(2) What thresholds could apply?

(3) How long could a review take and what process options would be made available, particularly for transactions raising no significant competition issues?

[1] Law Council Competition and Consumer Law Workshop opening address (9 September 2022); https://www.afr.com/policy/economy/the-courts-seem-naive-rod-sims-reignites-accc-merger-laws-debate-20230202-p5chil
[2] https://www.afr.com/policy/economy/the-courts-seem-naive-rod-sims-reignites-accc-merger-laws-debate-20230202-p5chil; see also https://globalcompetitionreview.com/article/qa-gina-cass-gottlieb?utm_source=EU%2Braids%2BRed%2BBull&utm_medium=email&utm_campaign=GCR%2BAlerts

Allens

3 What are the main features of a mandatory regime?

3.1 What ownership threshold should apply?

One of the first questions that mandatory filing regimes define is the level of interest acquired by the purchaser in the asset, business or entity for the regime to apply.

Currently, under Australia's laws, section 50 of the *Competition and Consumer Act 2010* (Cth) prohibits *any acquisition of shares or assets which have the effect or likely effect of SLC.* Section 50 therefore has the potential to capture the acquisition of any level of interest (ie there is no minimum shareholding or asset size required to trigger the prohibition). This means that the ACCC has powers to review acquisitions of minority interests if it has concerns that the transaction could raise competition issues resulting in an SLC.

Foreign jurisdictions with mandatory merger control regimes have a range of approaches for defining the type of interest required to trigger a notification requirement. However, they have sought to widen their jurisdictions to review competition issues raised by acquisitions of **minority interests** and **cross-shareholdings**, which, as noted above, the ACCC currently has the power to review.

In Europe, the European Union (the ***EU***) Merger Regulation applies only to acquisitions that result in a lasting '**change of control'**. The 'control' threshold does not apply to minority interests falling short of 'control'. The European Commission (the ***EC***) has considered introducing a system to review **non-controlling minority shareholdings** that create a **'competitively sensitive link'**[3] (ie in a competitor or vertically related company, with shares of between 5 and 20% and some additional rights).

In the **UK**, the relevant consideration is whether the transaction will result in the acquisition of a **'material interest'**. Although this threshold is lower than the EU 'control' test, the UK is also considering whether its merger control regime should be widened to better capture minority interests.[4]

In the **US**, which effectively requires an interest of 50% or more, the Federal Trade Commission (the ***FTC)*** previously **proposed changes to its merger notification rules** that would have captured acquisitions of over 1% of voting securities in a competitor. These amendments were not ultimately implemented, but the FTC is now considering the adequacy of the existing approach to common ownership via minority interests, in a refresh of its merger guidelines, which were expected to be released at the end of 2022.[5]

Arguably, the ACCC currently enjoys wider powers to review minority transactions than foreign agencies with mandatory regimes.

If Australia were to introduce a mandatory merger regime, the level of interest acquired would need to be defined above the current level; otherwise, the ACCC would be inundated with filings it would not have the time or resources to review. The Chair recently flagged that the ACCC is considering and refining its thinking around mergers involving commonly held and/or managed minority interests, the extent to which concerns are raised about control and influence across rival firms, and the risk of concerted practices (see our *Insight*). It will be interesting to see how these concerns play out, if at all, in the ACCC's proposed architecture of a mandatory merger control regime in Australia.

[3] European Commission, 'White Paper – Towards more effective EU merger control' (2014)

[4] A 'competitively sensitive link' would require:

- an acquisition of a minority shareholding in a **competitor** or **vertically related company**; and
- the competitive link would be considered significant if the acquired shareholding is 1) around **20%**; or 2) **between 5% and 20%** but accompanied by **additional factors** such as rights that give the acquirer a **'de-facto' blocking minority**, a **seat on the board** of directors or **access to commercially sensitive information** of the target.

[5] In 2022, the FTC, in conjunction with the Department of Justice, issued a public request for information about merger enforcement, including a request for comments about the current approach to common ownership. See https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers

3.2 Thresholds: turnover, size of parties, market share tests, size of transaction tests?

Mandatory regimes overseas usually contain 'thresholds' to determine whether a transaction must be notified. There are challenges in calibrating thresholds, including inadvertent over or under capture, and them being sufficiently clear and easy to apply to assist deal and contractual certainty.

Broadly, there are three types of notification thresholds used globally: (1) turnover / size of parties; (2) market share; and (3) transaction size. However, there is also a trend towards industry-specific thresholds or considerations to combat unique competition issues that arise in certain markets. Indeed, the ACCC has considered this approach in the context of digital platforms.[6] As noted above, Commissioner Stephen Ridgeway flagged that the ACCC is still pursuing a digital platform-specific merger test.

One common theme that led overseas agencies to seek reforms to their own regimes in recent years is that turnover and market share thresholds may 'under capture' potentially harmful transactions. Because revenue is typically used as a proxy for market size, overseas regulators have articulated concerns that this creates the potential for so-called 'killer acquisitions' to 'fly under the radar' when one party has no or little revenue.[7] This was highlighted by regulators in relation to acquisitions by various digital platforms in the 2010s. For example, Facebook's acquisition of Instagram did not satisfy the turnover tests in the EU, as Instagram had no revenue at the time of the acquisition.

Accordingly, a range of overseas jurisdictions have sought to introduce additional tests to capture these types of transactions, including instituting 'size of transaction' thresholds (in addition to existing turnover thresholds)[8] or expanding existing 'call-in' powers.[9]

In the EU, there has been a rise in the use of existing powers that permit member states to refer to the EC mergers that affect trade between and within EU member states,[10] and other jurisdictions have created industry-specific or player-specific merger rules. This approach has been adopted in Norway, where specified firms must notify the regulator of all mergers. Similar regimes have been proposed in France, Italy and the Netherlands.[11]

Gina Cass-Gottlieb has indicated that careful consideration is needed to ensure that the thresholds are appropriately calibrated to ensure the ACCC has the ability to review transactions in smaller markets. At the Standing Committee on Economics, she noted the following, on the question of the thresholds to apply:[12]

> *'while [the ACCC] want[s] to make sure that, apart from aspects of the amount of business product supplied within Australia, so in terms of impact in the Australian economy, there [are] some sectors where the services are so critical or a repeat—for instance, an acquirer that already has a significant presence and market power in a market, so though a transaction may be small*

[6] In February 2022, the ACCC published a Digital Platform Services Inquiry Discussion Paper that considered potential reforms to merger laws relating to digital platforms, including the introduction of specific merger notification requirements for acquisitions by large digital platforms.
[7] As the OCED notes, a turnover threshold 'can be a useful filter to ensure that transactions that might reduce existing competition in reasonably important markets are examined by competition agencies'; however, 'a loss of potential competition might not be captured by such a filter': https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf, [170].
[8] This occurred in Germany and Austria. The OECD recognises that one benefit of a transaction value threshold is that it 'would enable high value low turnover transactions that might pose a threat to potential competition to be investigated': https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf, [169].
[9] The EC can now call in transactions that were previously not reportable under the referral mechanism under Article 22 of the EU Merger Regulation: https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/april/european-commission-new-guidance-on-merger-referral-policy-to-catch-non-reportable-deals.
[10] Article 22 of the EU Merger Regulation permits member states to refer to the EC mergers that affect trade between and within member states. Historically, the EC has tended to discourage referral requests under Article 22 where the referring member state lacked *original jurisdiction* to review the merger itself, based on national review thresholds (typically, turnover related). However, the EC now has a policy of encouraging and accepting referral requests from member states under Article 22 (provided the conditions are met), even if the merger is not notifiable at a national level. This revised policy position was observed in the Illumina / GRAIL merger in April 2021, for which Article 22 was invoked: see: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5364.
[11] https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf, [181]-[184].
[12] Standing Committee on Economics, 11 October 2022.

the effect may be substantial. So we are giving some quite careful thought on the threshold question because there are not simple quantitative thresholds alone'.

Based on this, it is therefore possible that the ACCC may propose thresholds combining various elements.

However, tiered and alternative thresholds can create complexity and uncertainty, and also significantly risk 'over capture'. Regimes that rely on market share thresholds can be difficult and uncertain, as they require common ground on the definition of the market – in relation to which 'reasonable minds can differ' and can be difficult to define in new and nascent markets – thereby creating significant uncertainty.

'Over capture' is not just a theoretical risk – it has practical consequences in terms of the increased demands (and costs) involved in the ACCC appropriately staffing merger review to ensure approval in a timely and predictable manner. The thresholds would therefore need to be appropriately calibrated to avoid over capture, to ensure the regime is correctly targeted and does not unnecessarily raise ACCC (and taxpayer) costs.

3.3 Process and timing

The current ACCC regime for filing mergers provides a degree of choice and flexibility. Australia currently has two main ACCC merger review processes from which parties can choose.[13] (For more information on processes, see our guide.)

- The ACCC **informal merger clearance process** is flexible, and has no prescriptive time periods or requirements around the extent and type of information that needs to be submitted to the regulator, although there is ACCC guidance on both timing and content. Parties tend to submit a freehand 'letter' to the ACCC, which may then request additional information it considers necessary for its review.
- The ACCC **formal authorisation process** is more prescriptive, requiring the submission of a public application addressing certain specified categories of information. There is technically a 90-day statutory review period but, in practice, and as has been observable in recent authorisation matters, the period can be extended by agreement with the applicant(s). Parties must provide a court enforceable undertaking not to complete the transaction while the review is underway. If the statutory review period expires without a positive ACCC authorisation decision, the merger is deemed to be prohibited. However, a positive ACCC authorisation decision gives the merger parties statutory immunity. There has been a rise in the popularity of the formal authorisation process, with three applications lodged with the ACCC in 2022 alone (before which only three had been lodged since 2018, when the process was first introduced).

There is a question as to the timeframes that would be prescribed in any mandatory regime in Australia, given how different the two current regimes are. On the one hand, the informal regime provides complete flexibility for the ACCC; whereas the formal authorisation regime has a prescriptive period, which has evolved to be more flexible in practice, albeit with the applicants' consent.

Mandatory filing forms, simplified processes for straightforward mergers, and review periods

A number of overseas jurisdictions, including the EU, US and UK, have merger filing forms that prescribe what information and documents must be provided to the regulator as part of the merger notification.[14] Some regulators do not start considering the proposed transaction until a merger filing is complete (ie all prescribed information and documents have been provided), giving them considerable discretion to

[13] Parties can also seek comfort via a third route but seeking a declaration from the Federal Court.

[14] For example, in the EU, 'Form CO' must be submitted to the EC. This requires the parties to set out information including a description of the merger, information about the parties, details of ownership and control, turnover for each of the parties, copies of transaction documents, copies of minutes from board and shareholder meetings in which the proposed transaction was discussed, including related analyses, studies, presentations, etc., information about the relevant markets, and information about any efficiencies arising from the transaction.

require additional information and prevent the statutory period from commencing. Preparing a merger filing in some jurisdictions can be very burdensome for parties, with them spending a considerable amount of time in 'pre-notification' or 'pre-filing' discussions with foreign agencies. While these regimes have the benefit of statutory timetables for review, in reality parties are often held up in lengthy pre-notification discussions (some of which can last for months), which creates additional uncertainty. Moreover, increasing uses of 'stop the clock' notices once the statutory review period has commenced have further undermined the certainty associated with statutory review periods.

When examining jurisdictions overseas, we see it is not uncommon for merger regimes also to provide for a simplified or short form process for mergers that are unlikely to raise any competition concerns.[15] For example, the EC has adopted a simplified procedure,[16] whereby parties disclose limited information by way of a 'Short Form CO', and the EC provides a clearance decision within 25 working days from the date of notification where there are no overlaps or the parties' combined shares fall below certain thresholds.[17]

Statutory time periods and review phases

Jurisdictions with mandatory merger control regimes tend to have statutory timeframes in place during which the regulator must make a decision or the transaction will be deemed unconditionally ***approved*** (as in the EU). This is the opposite of the position under Australia's formal merger authorisation process, whereby applications are deemed to be refused if no decision is taken by the time the statutory period has lapsed (s90(10B)). There is often flexibility built into those time periods for overseas regulators, with the regulator able to 'stop the clock' while waiting for responses to requests for information, or if insufficient / incomplete information has been provided to it.

In Australia, there is currently no formal distinction in review periods in each of the informal and authorisation regimes, processes or forms for transactions raising less or more complicated competition issues, although in practice the quantity of information submitted is less, and reviews take less time, for more straightforward matters. Ultimately, an ideal regime will provide deal parties with certainty as to timing and minimise information-gathering burdens.

Transparency and access to the file

Overseas regimes vary in the level of disclosure and transparency they provide to parties in relation to materials submitted by third parties and the decision-making of the agency. For example, the UK Competition and Markets Authority (the ***CMA***) publishes all the submissions of merger parties and third parties, as well as CMA decision-making. The EC publishes comparatively less, but does publish its decisions, and offers parties, including interested complaints, 'access to the file'. Under the current processes available in Australia, the level of transparency varies depending on the process chosen. In the current formal merger authorisation regime, all materials submitted by applicants and third parties, as well as ACCC decisions, are published on the ACCC's website, subject to commercially sensitive material being redacted. In contrast, the ACCC's informal regime provides very limited transparency. Less transparency can materially hinder parties' ability to understand precisely the reasoning and evidence on which the regulator relies when identifying concerns about transactions. However, it also places an increased onus on the regulator to process and publish third party material, as well as produce its own

[15] In May 2022, the EC launched a public consultation into further proposed simplification of its merger procedures,[15] having found that around 93% of all mergers notified to the EC each year did not raise competition concerns. The proposal includes introducing 'super-simplified' treatment for certain mergers (eg where there are no horizontal overlaps or vertical relationships between the parties). The new rules are expected to take effect in 2023. See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214(02)&from=EN, p 5.

[16] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214(02)&from=EN

[17] Broadly speaking, the simplified procedure applies in circumstances including where: there are no horizontal overlaps or vertical relationships between the parties; or combined market shares of all the parties that engage in overlapping activities is less than 20%, and none of the individual or combined market shares of the parties engaged in activities in an upstream or downstream market from another party is 30% or more; or where a party proposes to acquire sole control of another party over which it already has joint control.

decisions. The precedential value of the ACCC's reasoning may, as well, assist parties in future transactions.

Gun jumping

Based on the experience of overseas regimes, the corollary of introducing a mandatory merger regime is that businesses need to be a lot more careful about gun-jumping risks, which carry significant penalties and tend to be fairly aggressively enforced by foreign agencies. Under a mandatory regime, until a proposed transaction has been approved by the regulator, parties are at a heightened risk of pre-implementation (ie implementing a merger without clearance) and the cartel risks associated with this (especially if the merging parties are competitors). To date, there was only been one case in which the ACCC has taken enforcement action for gun-jumping risk relating to cartel conduct (ie *ACCC v Cryosite* in 2019 – see our *Insight*. A mandatory regime could introduce additional enforcement risk for pre-implementation conduct.

4 Next steps

The ACCC, in consultation with government, competition law specialists and the business community, will clearly be giving further consideration to the design of a mandatory merger regime in Australia in the months to come. We look forward to contributing to that conversation.

We hope this *Insight* helps our clients approach the debate around any proposed new regime from an informed perspective. We will be closely monitoring developments in this space and considering the implications of the reforms in detail once they are released.

Visit our homepage for more on mergers and the possible reforms.

* * * * *