

# > 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:

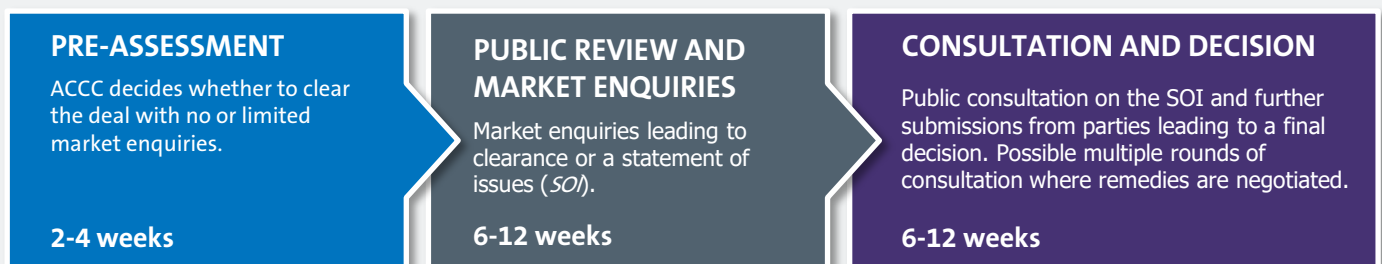
- diligently monitors merger activity; and
- liaises closely with the Foreign Investment Review Board (*FIRB*) and overseas competition authorities.

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:



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 2021 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\$1,216m
Target carrying on a sensitive business	A\$281m
Other investors (who are not foreign government investors)	
Target not carrying on a national security business	A\$281m

## What happened in 2020?

### Deals proceeding to public review: statistics from 2018 to 2020

	2020		2019		2018	
	Number	%	Number	%	Number	%
Total reviewed*	30	-	26	-	26	-
Phase 1	22	73%	16	62%	21	81%
Phase 2	8	27%	10	38%	5	19%
Cleared unconditionally	17	56%	15	58%	17	66%
Cleared conditionally	3	10%	5	19%	4	15%
Blocked	0	0%	2	8%	1	4%
Withdrawn	8	27%	3	11%	4	15%
No decision*	2	7%	1	4%	0	0%
Average time period for ACCC's review of deals <sup>#</sup>	64		57		50	

\* 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 FY2019/20 (ending 30 June 2020), 288 mergers were reviewed of which 257 (89%) were cleared in pre-assessment.

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

<sup>#</sup> 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).

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### Key deals Allens advised on in 2020

- Salesforce/ Slack
- Mylan N.V. / Upjohn Inc
- Elanco / Bayer's Animal Health business
- Veolia / Suez

### Allens is ranked:



#### BAND 1

Competition/Antitrust – Australia  
*Chambers Asia-Pacific 2021*

#### TIER 1

Competition and Trade – Australia  
*The Legal 500 Asia Pacific 2021*

#### TOP TIER

'Elite' ranking – Australia  
*Global Competition Review, GCR100 2021*

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