

# An overview of Australian merger control clearance

This brief outline of Australia's merger control regime is relevant to anyone planning to make a direct or indirect acquisition of shares or assets that would be likely to substantially lessen competition in a particular market in Australia.

## Overview

Competition law in Australia is regulated by the Competition and Consumer Act 2010 (Cth) (CCA) and is administered by the Australian Consumer and Competition Commission (ACCC).

The CCA prohibits direct and indirect acquisitions that have the effect, or would be likely to have the effect, of substantially lessening competition in a market in Australia. In addition to injunctions and penalties, divestiture orders can be made for acquisitions that have the prohibited effect on competition in a relevant market.

Unlike some other jurisdictions, formal competition filings are not required in advance of an acquisition of shares or assets although, for an acquisition that may raise competition concerns, it is common to approach the ACCC informally in advance of any public announcement to discuss its likely attitude to the proposed acquisition.

## What is the substantive test for merger clearance?

Acquisitions of shares or assets which have the effect, or would be likely to have the effect, of substantially lessening competition in a market in Australia are prohibited. The focus of the prohibition is therefore on how the

proposed acquisition will affect competition in the market, rather than the concept of control.

As such, be aware that any acquisition of shares is potentially subject to the prohibition irrespective of the level of shareholding acquired and even the acquisition of a minority shareholding may attract competition review in certain circumstances.

For example, the following may have anticompetitive effects even if shareholding is below a level which would deliver control:

- horizontal acquisitions may increase interdependence between rivals and lead to muted competition or coordinated conduct;
- vertical or conglomerate acquisitions may increase the acquirer's incentive to foreclose rival suppliers;
- acquisitions may provide access to commercially sensitive information on competitors; and
- acquisitions may block potentially pro-competitive mergers and rationalisation.

In particular, parties are encouraged to notify the ACCC well in advance of completing an acquisition where both of the following apply:

## Key issues

- It is common to notify the ACCC through the informal merger review process.
- The focus of prohibition is how the proposed acquisition will affect competition in the market rather than shareholding control.
- the products of the parties are either substitutes or complements; and
- there will be a post-acquisition market share of greater than 20% in the relevant markets.

## What is the notification regime?

While there are no formal antitrust filings required in advance of an acquisition, it is usual for proposed transactions to be implemented after clearance is obtained. There are three paths to having a proposed transaction cleared or authorised:

- informal merger review;
- formal clearance; or
- authorisation.

## Informal merger review

The informal merger review process is flexible in terms of timeframes, confidentiality and information requirements. Informal reviews may be confidential or public - a review may begin as a confidential review and become a public review once the acquisition becomes public. The ACCC can also initiate a review if it becomes aware of a proposed acquisition.

There are no prescribed information requirements when seeking an informal merger review. However, the ACCC encourages the following information to be supplied with a submission:

- background information about the parties and relevant company details;
- market structure and definition (including information about other market participants);
- commercial rationale for the acquisition; and
- details about, and an analysis of the acquisition and any other relevant factors relating to competitive implications.

## Formal clearance

A party can also seek clearance from the ACCC on a formal basis. If a formal clearance is sought, the applicant is required to give a court-enforceable undertaking not to complete the acquisition while it is being considered by the ACCC. If formal clearance is granted, it provides the parties with legal protection from court action.

The formal clearance process has mandated timeframes, information and transparency requirements.

In practice, applications for formal clearance are relatively rare.

## Authorisation

In cases in which an acquisition is likely to reduce competition in an Australian market (and therefore be unlikely to be cleared) such an acquisition may still be in the public interest.

If the public benefit would outweigh the anti-competitive detriment, then an application can be made to the Australian Competition Tribunal.

The Tribunal will not grant an authorisation relating to a proposed acquisition unless it is satisfied that the proposed acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.

A determination will be made by the Tribunal within three months of an application being made, unless otherwise extended.

## ACCC guidance

The ACCC has also issued merger guideline notes which are useful. These can be found on the ACCC website at [www.accc.gov.au](http://www.accc.gov.au).

## Further information

For further information, please contact any of the Clifford Chance contacts listed on this briefing.

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