

## "NO LONGER FIT FOR PURPOSE": ACCC CONTINUES PUSH FOR MERGER REGIME REFORMS

The Australian Competition and Consumer Commission (ACCC) continues to support reform of the Australian merger review regime. The proposed reforms, which include the introduction of a mandatory and suspensory model as well as changes to the substantive merger test, are currently under consultation with the Federal Government.

### KEY REGULATORY CONCERNS AND PROPOSED MERGER REFORMS

In an address to the National Press Club on 12 April 2023, the ACCC's Chair Ms Cass-Gottlieb [reiterated](#) that the current merger review regime is no longer "fit for purpose". The key regulatory concerns are that the voluntary informal clearance process is vulnerable to a lack of cooperation / prioritisation by merger parties as compared to mandatory regimes, together with difficulties in preventing anti-competitive mergers. The proposed reforms broadly align with the core elements initially voiced in 2021 by then ACCC Chair Rod Sims, with recalibration of certain elements to take into account the ACCC's recent experience with formal merger authorisations and stakeholder feedback.

The proposed reforms have several key elements:

- the introduction of a new mandatory and suspensory merger notification regime including notification thresholds, prescriptive upfront information requirements, and a "notification waiver" system for straightforward transactions;
- that the ACCC be positively satisfied that the proposed transaction would not have the effect or be likely to have the effect of substantially lessening competition (SLC) in any Australian market(s). If the ACCC is not satisfied, the parties may then apply for clearance on public benefit grounds; and
- changes to the substantive merger test in section 50 of the *Competition and Consumer Act 2010* (Cth) (CCA), potentially making it easier for the ACCC to oppose mergers.

#### Key issues

- Since the unveiling of proposed reforms to the Australian merger review regime in August 2021, the ACCC has maintained its support for a shift to a mandatory and suspensory merger review model.
- Under the proposed mandatory merger review regime, the merger parties would be required to notify the ACCC of transactions over certain thresholds (to be determined), file certain information upfront and obtain clearance before completing the transaction. For non-contentious mergers, a "notification waiver" system will be available to merger parties.
- The proposed reforms also expand the application of the current merger test to capture transactions that enhance merger parties' dominant position(s) in a market and/or amount to a creeping acquisition and include additional merger factors relevant to the assessment. To obtain clearance, the parties would need to "positively satisfy" the ACCC that the transaction would not breach the CCA (i.e., shifting the onus of proof onto merger parties).
- Proposed reforms are currently being considered by the Federal Government. Key elements such as the filing thresholds will need to be carefully considered by the Federal Government before the proposed reforms are legislated.

## **Mandatory regime and "notification waiver" system**

The proposed reforms would introduce a mandatory, suspensory notification regime. Merger parties would be required to notify the ACCC of transactions over certain prescribed thresholds, provide certain information upfront at the time of filing, and not complete until clearance is granted. Consistent with the current ACCC authorisation process, the onus would be on the parties to positively satisfy the ACCC that the proposed transaction would not have the effect or be likely to have the effect of SLC. While the proposed thresholds have not yet been publicly advised, these will likely be based on the size of the proposed transaction, the size of the acquired business globally and/or within Australia, or a combination of these factors. For transactions below the thresholds that "still raise competition concerns", the ACCC wants a "call in" power. Looking ahead, merger parties may need to more stringently assess the likely degree of regulatory intervention and scrutiny. It appears to be in contemplation that merger parties will be able to challenge decisions in respect of mergers that meet the notification thresholds or are "called in", to the Australian Competition Tribunal (**ACT**). The Federal Court would only consider acquisitions that fall outside the mandatory merger regime (for example, merger enforcement matters / investigations), as well as declaration or injunction applications and judicial review.

## **Changes to substantive merger test**

The ACCC asserts that changes to the substantive merger test and factors are necessary to enable it to more appropriately deal with dynamic and modern markets, including in relation to digital platforms and related market(s). The suggested reforms propose a second-stage public benefits-based test in addition to the SLC test: merger parties will have the option of applying for clearance on public benefits grounds if they are not able to first satisfy the ACCC or the ACT that a transaction would not have the effect or be likely to have the effect of SLC. Rather than considering the incremental impacts on competition that arises from an acquisition, the proposed changes look to focus on the competitive impact of the acquisition, changes to the structural conditions of a market due to the merger and any overall enhancement of parties' dominant positions in the market.

In particular, the proposed reforms seek to amend the merger factors to expressly include:

- the loss of actual or potential competitive rivalry as a result of the merger;
- increased access to, or control of data, technology or other significant assets;
- whether the acquisition is part of a series, the regulatory concern being in respect of creeping acquisitions that individually would not have the effect or be likely to have the effect of SLC; and
- whether the acquisition entrenches or extends a position of substantial market power.

## **WHAT HAPPENS NEXT?**

The Federal Government has expressed broad support of the ACCC's proposal, and we expect further announcements and consultation to occur in the coming months. Certain key elements including the notification thresholds, the duration of the suspensory review period, and how the second-stage public benefits test will apply in practice are presently unclear. The proposals are presently in the hands of the Federal Government for consideration.

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