Article Information

Authors: Andrew Rankin, Tom Griffith, Alexander Hamam
Service: Competition & Trade, Mergers & Acquisitions

"No longer fit for purpose": The ACCC's proposal for a new Australian merger control regime

The Australian Competition and Consumer Commission (ACCC) has put forward proposed changes to the current merger control regime and the Competition and Consumer Act 2010 (Cth) (CCA), which if adopted by the Federal Government, will have widespread impacts on mergers and acquisitions within Australia.

It's been more than a year since the ACCC provided its initial proposal for changes to the existing merger control regime. On 12 April 2023, ACCC Chair Ms Gina Cass-Gottlieb put forward the ACCC's revised proposal for changes to Australia's merger control regime, including proposed changes to the CCA.

These newly proposed changes have been informed by stakeholder feedback and come following a period of global economic turbulence, with Ms Cass-Gottlieb describing the process of competition as "*more important than it ever has been before*".

The Current Regime

The current regime is best described by the ACCC as a "*voluntary and enforcement-based*" model.

There is presently no requirement for merger parties to notify the ACCC of proposed mergers or to wait for clearance before they can complete the merger process. There are also no up-front requirements for an informal review, which according to the ACCC has resulted in merger parties increasingly providing late, incomplete or incorrect information.

Currently, if the ACCC perceives that there is a risk of competitive harm from a merger it must prove to a court that a merger is likely to have the effect of "*substantially lessening competition in any market*".

The Proposed Regime

The newly proposed merger control regime will steer away from a voluntary enforcement model and towards a formal clearance model where merger parties have the burden of demonstrating "*to the satisfaction of the ACCC that their transaction is not likely to substantially lessen competition before they can proceed*".

The ACCC has proposed the following measures as part of its merger control regime:

1. a mandatory requirement for the ACCC to be notified of mergers above specified thresholds;
2. a requirement for transactions to be suspended from completion without ACCC clearance; and
3. upfront information requirements.

The ACCC did not provide specific thresholds, however much like the rest of the proposed regime, the ACCC suggested that Australia should consider international merger regimes, where thresholds are based on the size of the proposed transaction, the size of the business being acquired or a combination of those factors.

Importantly, the ACCC's proposal includes a discretionary power to formally assess a transaction in circumstances where a transaction does not meet the notification threshold(s) but nevertheless still raises competition concerns.

Exceptions / waivers

Under the proposed regime, merger parties could apply for merger clearance on "public benefit grounds" if the merger parties are unable to first satisfy the ACCC that a transaction could be cleared on competition grounds. This would provide flexibility to approve certain transactions where a merger may substantially lessen competition, "*but would nonetheless provide real, verifiable and significant public benefits*".

Merger parties could also apply for a waiver of mandatory notification requirements under the proposed regime, if a merger is considered to be a "non-contentious transaction". The ACCC indicated that this would act in a similar way to its existing assessment triage process as part of the current regime, and that "*the overwhelming majority of proposed transactions*" could be expeditiously dealt with in this manner. It is not known however what will be deemed to be a "non-contentious transaction".

Review of decisions by the ACCC

The ACCC considers that if it becomes necessary for a decision by the ACCC as part of the proposed merger control regime to be reviewed or appealed, the Australian Competition Tribunal would be the most appropriate body to undertake this role.

Applications for declaration and judicial review would still be heard by the Federal Court of Australia under the proposed regime.

Proposed Amendments to the CCA

Following feedback from its initial proposal in late 2021, the ACCC has proposed that new amendments be made to the CCA which would make clear that the substantial lessening of competition test as set out at section 50 of the CAA, include "*entrenching, materially increasing or materially extending a position of substantial market power*".

The ACCC also supported a change to section 50(3) of the CAA which sets out various factors that courts must take into account when determining whether a transaction is likely to substantially lessen competition. This includes adding the following factors, in addition to those already set out at section 50(3):

1. the impacts on the height of barriers to entry;
2. the loss of actual or potential competitive rivalry;
3. increased access to, or control of data, technology or other significant assets;
4. whether the acquisition is part of a series of relevant acquisitions; and
5. whether the acquisition entrenches or extends a position of substantial market power.

The ACCC has consulted with the Federal Government as to its views on merger law reform and proposed legislative amendments to the CCA. While it will be a matter for the Federal Government to implement any merger law reforms, the ACCC appears intent on pushing for such reform, so watch this space.