NEXT

MERGER REFORM

WHAT HAPPENS NOW?

Tidal Marks 1 by Marilyn Wallace-Mitchell

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2024 is shaping up as a significant year for potential reform of Australia's merger regime, as the ACCC ramps up its campaign for wholesale changes to the competition merger control laws.

While the reform options proposed in the consultation paper released by Treasury in late 2023 were high level ideas (with details to follow), the proposals would be likely to give the ACCC more scope to block proposed transactions and could limit the avenues for merger parties to appeal. This is a significant shift.

We lay out the state of play, next steps and analyse what they could mean for everyone involved in – or considering – an M&A deal.

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STATE OF PLAY

An overhaul of Australia's merger regime has been high on the agenda of Australia's competition watchdog for more than 2 years. Former ACCC Chair, Rod Sims, began the push for a mandatory approval merger regime back in 2021, arguing that the existing voluntary system did not allow the regulator to effectively scrutinise prospective deals' impact on competition. Following her appointment in early 2022, Sims' successor, Gina Cass-Gottlieb has continued to press for change. Then, with the support of the newly-minted Competition Taskforce (**Taskforce**) in November 2023 the Treasury released a consultation paper which outlined several high-level options for potential change to Australia's merger regime.

As we begin 2024, the ACCC continues to publicly press its case for reform by focusing on the need for a 'mandatory' notification regime to ensure deals are brought before it and to bring Australia into line with other jurisdictions. But the options in the Treasury paper show that the proposed changes would involve much more than just a procedural switch to mandatory notification.

AUSTRALIA'S CURRENT REGIME

Seeking ACCC approval is currently voluntary (although if a mandatory foreign investment filing is required, Foreign Investment Review Board (**FIRB**) will not recommend the Treasurer approve a deal unless and until, the ACCC confirms the transaction doesn't raise competition concerns). In addition, the ACCC cannot block a deal that it considers anti-competitive without commencing proceedings in the Federal Court.

There are also no penalties for completing a transaction before the ACCC reviews it. But the ACCC can investigate a transaction after closing; and can bring Court proceedings against merger parties if it believes the transaction will (or is likely to) 'substantially lessen competition' (**SLC**) in a market..

This contrasts with many overseas merger control regimes which are 'mandatory and suspensory' - meaning transactions which meet specified thresholds must be notified to the regulator; and cannot be completed until clearance is received.

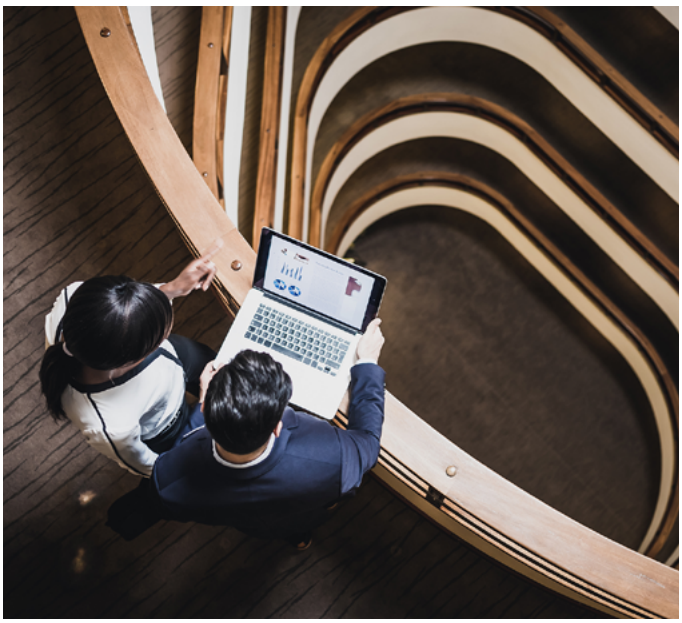
Informal clearance vs authorisation

Currently in Australia, merger parties voluntarily seeking clearance (or requiring it, if FIRB is involved) can take one of two pathways: (1) seek informal merger clearance from the ACCC; or (2) apply for merger authorisation.

The informal merger clearance process is a non-statutory, administrative process which involves the ACCC providing its view of whether a merger would (or would be 'likely' to) SLC. There are no formal timelines or filing requirements under the informal process and clearance is also not legally binding. Nevertheless, the vast majority of transactions use informal clearance in Australia and the process is generally considered to work well.

By contrast, merger authorisation involves a formal statutory and public approval process with specific timeframes, prescribed information requirements and filing fees. An applicant for authorisation must undertake not to complete a transaction until clearance is received (i.e., the regime is suspensory), and the legal test changes so that clearance may only be granted if the ACCC is satisfied that either the merger would not (or would not be likely to) SLC, or the public benefits of the transaction outweigh its detriments.

Because of the onerous and public nature of the application process, formal authorisation has been only sparingly used since it was introduced (there have only been 7 merger authorisation applications since July 2019), but there has been a spike in applications recently including for high-profile transactions such as ANZ's proposed acquisition of Suncorp and the proposed acquisition of Origin by Brookfield.



PROPOSALS FOR REFORM

The ACCC has argued that Australia's merger clearance regime is a global outlier and that reform is needed to - at least - bring Australia into line with other equivalent jurisdictions.

The Treasury consultation paper released late last year lays out 3 options for replacing the existing informal regime. Significantly, all of the options would involve legislative change and the prospect of retaining the existing informal regime is not even canvassed in the paper.

Each of the options would involve moving to a 'suspensory' regime with mandatory types of information that applicants seeking clearance would need to provide the ACCC. Each option would also prescribe the legal test to be applied for clearance and the appeal rights available for parties. And 2 of the options – including the ACCC's preferred path – would introduce mandatory notification requirements (although the "threshold" tests that would trigger notification are yet to be specified).

A visual overview is a helpful way to break down the options and how they compare to existing rules:

	EXISTING INFORMAL REGIME (VOLUNTARY NOTICATION)	OPTION 1 (VOLUNTARY CLEARANCE)	OPTION 2 (MANDATORY NOTIFICATION)	OPTION 3 (MANDATORY CLEARANCE)
NOTIFICATION	Voluntary. Merger parties are not required to seek ACCC clearance. The ACCC can initiate its own review at any time.	Voluntary. Merger parties not required to seek ACCC clearance. The ACCC would have 'call in powers' to review mergers and there would be 'procedural features' to encourage notification.	Mandatory. Mergers above specified thresholds would need to be notified to the ACCC. The ACCC would have 'call in powers' to review mergers below the specified thresholds.	Mandatory. Mergers above specified thresholds would need to be notified to the ACCC. The ACCC would have 'call in powers' to review mergers below the specified thresholds.
NOTIFICATION REQUIREMENTS	No prescribed information requirements for notifications.	Prescribed information requirements for notifications.	Prescribed information requirements for notifications.	Prescribed information requirements for notifications.
SUSPENSION	Non-suspensory. Merger parties are not prohibited from completing acquisition while ACCC completes review.	Suspensory. If merger parties apply for clearance, the acquisition cannot be completed until the ACCC review is completed.	Suspensory. If the thresholds are met, the acquisition cannot be completed until the ACCC review is completed.	Suspensory. If the thresholds are met, the acquisition cannot be completed until the ACCC review is completed.
TEST	Prohibited if likely to substantially lessen competition.	Clearance granted if satisfied that the merger is not likely to substantially lessen competition.	Prohibited if likely to substantially lessen competition.	Clearance granted if satisfied that the merger is not likely to substantially lessen competition or the merger is likely to result in net public benefits.
PRIMARY DECISION	ACCC indicates its views on whether it considers a merger would breach the legal test.	ACCC either grants or refuses clearance.	ACCC indicates its views on whether it considers a merger would breach the legal test.	ACCC either grants or refuses clearance.
EFFECT OF PRIMARY DECISION	No binding legal effect (ACCC or parties need to apply to the Federal Court).	If clearance granted, merger parties receive legal immunity. If clearance denied, merger parties can appeal (see below) or seek to complete the acquisition without ACCC clearance (in which case the ACCC can apply to the Federal Court for an injunction).	No binding legal effect (ACCC or parties need to apply to the Federal Court).	If clearance granted, merger parties receive legal immunity. If clearance denied, the merger is prohibited (subject to appeal rights).
APPEAL RIGHTS	Federal Court. If the ACCC indicates opposition to a merger, parties can either seek a declaration from the Federal Court or seek to complete the acquisition without ACCC clearance (in which case the ACCC can apply to the Federal Court for an injunction).	Australian Competition Tribunal or Federal Court. An ACCC decision to grant or deny clearance would be subject to review by the Australian Competition Tribunal. If clearance was denied, the merger could only be prohibited by a decision of the Federal Court.	Federal Court. If the ACCC indicates opposition to a merger, parties can either seek a declaration from the Federal Court or seek to complete the acquisition without ACCC clearance (in which case the ACCC can apply to the Federal Court for an injunction).	Australian Competition Tribunal. An ACCC decision to grant or deny clearance would be subject to review by the Australian Competition Tribunal.

CHANGES TO THE COMPETITION ASSESSMENT

Aside from the wholesale process reforms, the Treasury consultation paper also includes 3 options to amend the legal test for assessing whether a merger would lead to competitive concerns. Briefly summarised, the options are:

- Option A (Amend the merger factors): Modernise or remove the list of matters that the ACCC may and the court must, consider when assessing the impact of mergers on competition (known as the 'merger factors' in the *Competition and Consumer Act 2010* (Cth).
- Option B (Expand the prohibition): Expand the legal SLC test to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.
- Option C (Include related agreements in assessment): Allow consideration of related agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) to be considered as part of the consideration of the effect of the merger on competition.

All of these options are expected to give the ACCC more grounds to oppose a deal than it can under the current SLC test.

POTENTIAL IMPACTS

These are significant reforms

Each of the proposed reform options would fundamentally change Australia's merger control regime.

To varying degrees, each option would increase the number of mergers that need to be notified (potentially by a great deal under either mandatory option). Each option will also increase the amount of information that clearance applicants need to provide and formally prevent applicants from closing unless and until clearance has been received.

But more fundamentally than just the process changes – in combination with the proposed changes to the assessment of SLC – each of the options would give the ACCC more scope to block proposed transactions, while at the same time limiting the avenues for merger parties to appeal.

How small a deal would have to notify?

The move to a mandatory and suspensory regime would certainly address the ACCC's public concerns about deals not being notified. The question becomes which transactions should be caught up in the regime, which is essentially a question about thresholds that we have not yet seen (see below).

The Assistant Minister for Competition, the Hon Dr Andrew Leigh MP, recently cited research by the Taskforce that analysed 'microdata' which indicated that potentially only 1 in every 3 or 4 mergers in Australia are notified to the ACCC each year.

This is thoughtful research but it should not be surprising or controversial, given the number of small M&A transactions every year that would have no impact on competition. It might even suggest the law works. However, the Minister's citation of this data in the context of merger reform does raise a question about where the line for notification might be drawn under a new regime.

What about broader implications?

There are critical questions about the impact these reforms could have on the level of M&A activity in Australia, to say nothing of the inevitable increase in transaction costs from such deals that will flow from a more regimented regime – especially for transactions that could otherwise self-assess against the need for merger clearance.

Perhaps more importantly though, it is unclear why a new merger control law is the type of microeconomic reform needed to address any of the key issues in the Australian economy at the moment.

KEY DETAILS ARE STILL MISSING

The Treasury consultation paper is the clearest articulation of the potential options for reform that has been released so far, but there is still a lack of important detail about what might be implemented. Looking at mandatory and suspensory clearance regimes overseas, this detail includes:

- The prescribed thresholds for the options with mandatory and suspensory regimes. Typically in overseas jurisdictions, these thresholds are based on the merger parties' turnover/assets and/or the value of the transaction. The actual value of such thresholds – if adopted in Australia – will have a material impact on the number of transactions caught by the new regime.
- What circumstances the ACCC can use any 'call-in powers', which will determine what certainty (if any) merger parties will have in relation to possible ACCC reviews.
- The prescribed timelines for ACCC review, including the consequences if the ACCC fails to make a decision within a timeline and the ability for timelines to be paused or extended.
- The type of information required in a notification and the extent to which the ACCC can reject a notification as incomplete (thereby delaying review timeframes).
- Any simplified procedures for mergers that meet prescribed thresholds but are unlikely to have any competitive effects.
- The level of transparency that will be afforded to submissions to the ACCC (by merger parties and third parties) and to ACCC decisions to grant or deny clearance.
- The extent of appeal processes, including the role of the Australian Competition Tribunal and the ability to rely on new evidence during a review by the Tribunal.

WHAT HAPPENS NEXT?

Treasury is currently reviewing submissions made in response to its consultation paper. The submissions are expected to inform the advice that the recently established Taskforce will provide to Government on whether any changes should be made to Australia's merger rules and processes.

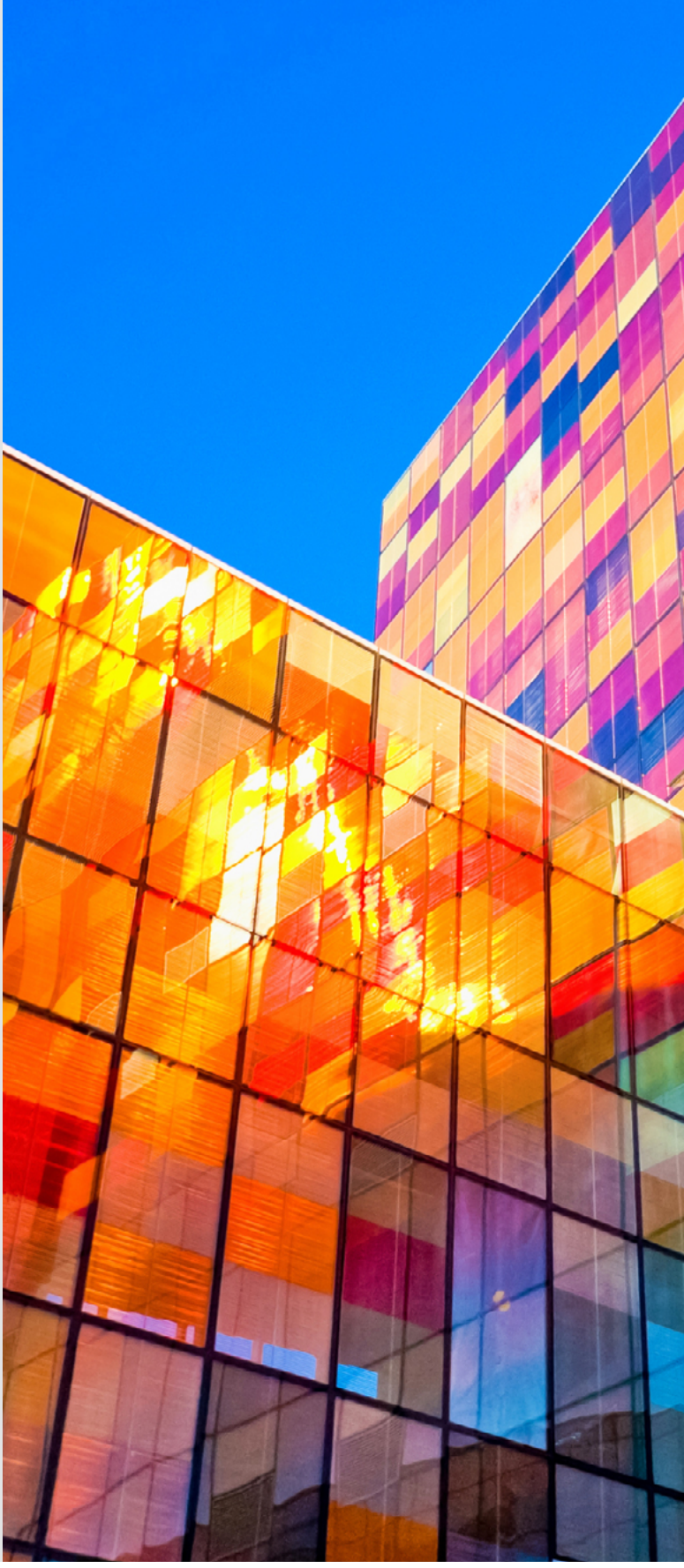
In formulating this advice, the Taskforce will receive detailed input from the Expert Panel that the Government appointed to assist the Taskforce with competition policy reforms over the next 2 years. The Expert Panel is chaired by Dr Kerry Schott and also comprises Productivity Commission Chair Danielle Wood, former UK Office of Fair Trading Chief John Fingleton, antitrust economist John Asker, former ACCC chair Rod Sims, business leader David Gonski and competition lawyer Sharon Henrick.

More generally, the speed and significance of legal change will ultimately come to rest on the Albanese Government's prioritisation of merger reform among the many issues competing for legislative priority.

In announcing the Taskforce, the Federal Treasurer, Dr Jim Chalmers MP, noted that existing competition laws are 'holding Australia back'. But if that is the Government's view, then almost certainly more pressing competition law reforms than a new merger regime are required.

In this context, it is worth noting that issues linked to the cost of living pressures in Australia have continued to dominate the headlines in 2024, with concerns about costs ranging from housing, energy, childcare and even food prices. Such was the concern about the latter that the Government recently announced it has directed the ACCC to conduct a new year-long inquiry into pricing and competition in the supermarket sector. To the extent there are competition (or other) policy reforms that can be explored to address these cost of living issues, it is unlikely that merger reform would (or should) top the list of options.

That said, the case for merger reform seems to be gaining momentum amongst some stakeholders, even with key details yet to be fleshed out and it is fair to expect the questions 'what?', 'when?' and 'why?' to continue to emanate from the competition community, dealmakers and the public. However, what is evident already is that any of the options currently on the table would involve some of the most significant changes ever made to Australia's merger control regime and herald a new clearance landscape for dealmakers and advisors to navigate.



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