TREASURY CONSULTS ON MERGER REFORMS IN AUSTRALIA

The Australian Competition and Consumer Commission (**ACCC**) supports the introduction of a mandatory suspensory merger control regime and changes to the substantive competition test. This proposal is being tested alongside two other policy options presented in a merger control consultation paper issued by Treasury on 20 November 2023 (**Consultation Paper**). The consultation on the proposed merger control regime (**Consultation**) is a step towards the most significant change proposed to Australian merger control laws in recent years. Interested parties should use this process to make submissions to the Treasury's Competition Taskforce (**Taskforce**) by **19 January 2024**.

Emerging concerns about mergers

Productivity growth has slowed down in Australia and a range of competition indicators – including a rise in industry concentration, incumbency and firm mark-ups – suggest there has been an overall deterioration in competition in Australia since the early 2000s. Consistent with trends in many advanced economies, there are concerns that a factor may be merger rules being too permissive. Specifically, concerns have been raised that the anti-competitive effects of certain types of acquisitions by large firms, including creeping or serial acquisitions, acquisitions of nascent competitors and expansions into relevant markets (including digital platforms), are not adequately captured by current competition laws in Australia and the voluntary merger notification regime.

Consultation process

Against this backdrop, Treasury released a Consultation Paper seeking feedback and views from interested parties on options for modernising Australia's merger regulation. As part of the Consultation, a Taskforce comprised of competition law and economic experts will be engaging in targeted stakeholder engagement and meetings to gather a diversity of perspectives representing consumers, businesses and industry experts. Consultation will inform the advice the Taskforce provides to Federal Government about the proposed changes to Australia's merger regime. Notably, the former Chair of the ACCC, Rod Sims, has been appointed to sit on the Taskforce's panel to oversee the consultation process and advise Treasury on possible changes. Mr Sims was the original proponent of merger reform in Australia while Chair of the ACCC.

Policy options

The Consultation Paper outlines **three policy options**. The ACCC proposes and supports the implementation of a mandatory formal suspensory merger control regime in which transactions above certain thresholds must be notified to the ACCC (**Option 3**). Importantly, the ACCC's proposal includes a reversal of burden of proof whereby, to obtain clearance, parties would need to demonstrate and the ACCC would need to be positively satisfied that the merger was not likely to substantially lessen competition (**SLC**) or it has net public benefit. The ACCC's policy option also gives greater focus to the effect of a transaction on market structure by updating and modernising s.50(3) merger factors. For more details on the ACCC's proposal, please see our briefings dated **26 July 2023** and **4 July 2023**.

There are two alternative options also proposed. The first is a voluntary formal clearance regime similar to the voluntary clearance process that operated in Australia between 2007-17, and currently adopted in New Zealand and the UK (**Option 1**). Under this option, notified transactions would be suspended pending ACCC's assessment and would include upfront notification requirements. The second is a mandatory notification and suspensory regime, broadly based on the judicial enforcement models adopted in the US and Canada (**Option 2**). For more details, please see the attached **infographic** summarising the key points addressed in the Consultation Paper and including comparisons of the current regime in Australia vis-à-vis the three policy options.

Submissions

The Competition Review is **seeking feedback** on three main issues relating to current voluntary merger assessment process in Australia: (1) the process of notification of a merger by business; (2) how a merger is assessed; and (3) who makes a decision about the merger's effect on competition. Key questions are posed about whether notification should be mandatory or remain voluntary; the level of materiality thresholds; whether transactions should be suspended pending clearance; what test should be applied to assess mergers (including any modifications to current merger factors); if public benefits should be considered; whether the ACCC or Courts should be the primary decision maker; and the availability of review process and/or appeals. Interested parties should use the Consultation process to make submissions to the Taskforce by **19 January 2024**. For full details please see **Treasury website**.

WHY IS THE COMPETITION REVIEW LOOKING AT MERGERS?

- Mergers that are **anti-competitive** lead to higher prices, lower quality, and less choice for consumers. Less competition can limit innovation, reduce the range and quality of products and services, and impact wages.
- In Australia, productivity growth has slowed down over a long period, and most measures of dynamism have declined. A range of competition indicators, including the rise in industry concentration, incumbency, and firm mark-ups, suggest a **decline in competition in Australia**. Consistent with trends in many advanced economies, international evidence suggests a factor may be merger rules being too permissive.
- The Competition Review (**Review**) is looking at laws, policies, and **potential reforms** with a focus on increasing productivity, reducing cost of living and boosting wages.
- The Review has released a **Consultation Paper** on Australia's merger rules and processes, which contains a detailed discussion of a variety of issues and potential changes.
- The Review is seeking feedback on the proposed option to inform advice to Government on potential reform by **19 January 2024** and interested parties should use this process to make **submissions**.

WHAT ARE THE ACCC'S KEY EMERGING CONCERNS?

- **Rising industry concentration** which can reduce competition, raise prices and limit opportunities for new businesses.
- The current voluntary regime means businesses can try to **avoid assessment** of whether a merger may substantially lessen competition (**SLC**).
- Growth in **creeping acquisitions**, where many smaller mergers and purchases cumulatively have a similar outcome to a merger that SLC.
- Large firms **acquiring nascent firms** who are not yet considered a competitor in the industry, whose growth can be hard to predict, but play a vital role in competition and innovation.
- Current merger regime features a **forward-looking test** for whether a merger will SLC – concerns this approach favours clearance, must contend with limited evidence, and creates substantial public cost and resource demands.
- Concerns have also been raised in relation to a **lack of accurate information**, e.g., merger parties presenting distorted information to the ACCC or omitted information.
- The ACCC's ability to conduct **post-merger evaluation** is limited largely to public information.

WHAT ARE THE MAIN ISSUES THE COMPETITION REVIEW IS SEEKING FEEDBACK ON?

Notification

Whether notification should be mandatory (similar to the US or EU) or remain voluntary? If mandatory, then:

- What is the level of thresholds - based on turnover, level of control?
- Should there be upfront information requirements, who should set them up, and whether the ACCC has power to issue guidance, publish form, or set out requirements in regulation?
- Should filing fees be charged for notifying and if yes, how they should be calculated - charged uniform flat rate or based on specific metrics (turnover, transaction/asset value, market share, complexity or quantity of service required)?

What ability should exist for the ACCC to deal with non-notified mergers?

- Should the ACCC have call-in powers and on what grounds?

Whether mergers should be suspended for a period of time to allow the ACCC to assess (similar to the rules in the US/EU)? If suspension, then:

- How suspension is implemented (e.g., parties legislatively prohibited from completing transaction)?
- When it should commence (e.g., when information requirements are satisfied)?
- How long mergers should be suspended for (e.g., 2 phases)?
- Should there be level of flexibility for extensions and what happens when period expires (approved like in the EU or denied)?
- What penalties should be imposed for breach?

Assessment

What test should be applied / if any modifications should be made to current SLC test?

- Whether to keep SLC test or introduce 'satisfaction test' (for merger authorisation)?
- Whether the ACCC or parties bear the burden of proof (positively satisfy / disprove)?
- Should more factors be considered when assessing mergers (e.g., the effect of a merger on market structure or pattern of transaction) or remove merger factors altogether (not prescribing competition criteria for more flexible approach)?

Should related agreements affecting suppliers or competition (e.g., non-compete clauses) be considered as part of assessing whether a merger will SLC?

How can assessment be streamlined for low-risk mergers?

- Should there be a separate waiver application and if so, what should be its scope/application?

Should public benefits be considered?

- Whether merger authorisation should be retained as separate approach or abolished?
- If abolished, then whether public benefits should be retained as second stage for transactions not cleared on competition grounds?

Decision and Enforcement

Whether the ACCC or Courts (e.g., FCA) should be the primary decision maker?

- Whether judicial enforcement or administrative model, or a combination of the two, should be adopted?
- If administrative, then what level of procedural fairness mechanisms:
  - Public process or summary only?
  - Opportunity to respond (e.g., draft decision)?
  - What evidence could be accessed and by whom?
  - Published reasons or only provided to parties?
  - Protections of confidential information?

What role should the Australian Competition Tribunal (ACT) have (for administrative decisions)?

- Whether merger clearance decisions should be limited to merits review only as for merger authorizations, without new evidence presented?
- Should the limited scope of the merits review be expanded so that parties can test evidence before the ACT or allow full merits review?

Penalties and remedies

- Whether new penalties should be introduced (e.g., breach of notification requirement or gun-jumping)?
- Whether parties should continue to be able to offer remedies to address competition issues and what are the requirements for remedies?
- Whether the ACCC should continue to be required to seek divestiture through courts?

Should merger parties be required to report on the outcomes of mergers and provide data so that competition claims can be assessed?

CHANGES TO MERGER CONTROL PROCESS	Current regime in Australia	Treasury Option 1	Treasury Option 2	ACCC proposal (Treasury Option 3)
	Voluntary informal merger regime	**Voluntary formal clearance regime**	**Mandatory notification and suspensory regime**	**Administrative mandatory formal clearance regime**
Mandatory notification based on materiality thresholds	**No – Voluntary** Parties are encouraged to notify ACCC where parties' products are substitutes or complements and merged entity will have 20% market share.	**No – Voluntary** This option is similar to the voluntary formal clearance process that operated in Australia between 2007-17, and the current process in New Zealand and the UK.	**Yes – Mandatory** Broadly based on the approach taken in the US and Canada.	**Yes – Mandatory** In initial proposal put to Treasury, companies with a turnover threshold of AUD 400m or global transaction value threshold of AUD 35m would trigger the mandatory notification requirements.
Suspensory clearance model	**No**	**Yes – Suspensory (for notified transactions)**	**Yes – Suspensory** Transactions would be suspended for a period of time while ACCC conducts its assessment.	**Yes – Suspensory** Transactions would be suspended for a period of time while ACCC conducts its assessment. Proposed statutory timeframe for ACCC's decision has not yet been released.
Upfront notification requirements	**No** Parties put in submission with information parties assess should be required by ACCC. Voluntary information requests during ACCC's review depend on issues raised. Informal Merger Review Process Guidelines list information ACCC would initially require.	**Yes (for notified transactions)**	**Yes** Merger filings would only be valid if parties provide all required information to ACCC.	**Yes** Parties will need to provide complete information upfront. Type of information and prescribed form yet to be determined.
Discretionary "call-in" powers	**No** ACCC may issue a letter requesting information about the transaction.	**Potentially** Consultation Paper notes that if this option were adopted, it would need to be supplemented with additional procedural features to encourage notification, such as call-in powers.	**Yes** ACCC would not be precluded from investigating mergers below the threshold(s).	**Yes** Where a transaction does not meet the relevant notification threshold(s), ACCC would have power to call-in the transaction for formal review where it considers it may raise competition concerns.
Streamlined notification waiver process for non-contentious transactions	**Yes** Recently introduced pre-assessment process.	**Potentially** Consultation Paper notes that if this option were adopted, it would need to be supplemented with additional procedural features to encourage notification.	**Potentially** If this option is based on the US approach, parties might be able to apply for a shortened decision period if merger is unlikely to raise competition issues. If based on Canadian approach, there may be statutory exemptions/waivers for specific transactions that otherwise satisfy thresholds.	**Yes** Parties to non-contentious transactions would be able to apply for ***notification waivers*** to be exempt from making a full formal application. ACCC expects most mergers would be dealt with via waiver, similarly to the pre-assessment stage of the current informal regime.
Primary decision maker	**FCA** Judicial enforcement model – if ACCC has concerns that transaction raises competition concerns, ACCC must commence FCA court proceedings.	**ACCC (for notified transactions)** Hybrid model but primarily administrative. ACCC is primary decision maker for notified transaction and where businesses choose to notify, ACCC could grant legal immunity from FCA court action. However, if parties do not notify and ACCC is concerned that merger raises competition concerns and proceed despite ACCC's concerns, then FCA judicial enforcement would be required.	**FCA** Judicial enforcement model – at the end of the mandatory notification process, if ACCC has concerns and parties proceed with the merger, ACCC would need to commence court proceedings seeking an injunction preventing parties from going ahead with the merger.	**ACCC** Administrative model – transactions will require ACCC approval before they can proceed.
Evidentiary burden of proof (BOP) and test	**ACCC** ACCC must establish the merger is likely to SLC (s.50 test).	**Parties (for notified transactions)** BOP reversal for notified transactions – parties will need to demonstrate and ACCC must be positively satisfied that the merger is not likely SLC. If ACCC instigates FCA proceedings, ACCC would be obliged to prove to FCA that proposed merger is likely to SLC.	**ACCC** ACCC must establish the merger is likely to SLC (s.50 test).	**Parties** BOP reversal. To obtain clearance, parties will need to demonstrate and ACCC must be positively satisfied that the merger is not likely SLC or it has net public benefit (two limb authorisation test).
Appeals and review	**No** Parties cannot appeal ACCC's decision. Parties can make a formal application to the FCA for a declaration that the proposed transaction does not violate the law.	**Yes** ACCC denials of merger clearance would be reviewable by the Australian Competition Tribunal (**ACT**).	**Potentially** If this option is based on the US approach, parties may be able to appeal.	**Yes** ACCC denials of merger clearance would be reviewable by the ACT as is currently the case for merger authorisation decisions. ACT's review is not a re-hearing. ACT will not consider new material.

CHANGES TO MERGER CONTROL TEST	Option A	Option B	Option C
Current competition assessment	**FCA must have regard to the merger factors in section 50(3) of the CCA.**	**Prohibition against mergers that "*would have the effect, or be likely to have the effect of SLC.*"**	**Excludes consideration of related agreements.**
Possible change	Update and modernise merger factors ACCC may and FCA must take into account when assessing mergers, either: • **ADD**: creeping acquisitions, loss of potential competition, access to or control of data and other significant assets, market power, interlocking directorships; or • **AMEND**: expressly refer to the changes in market features resulting from a merger; or • **REMOVE**: omit the merger factors, simplifying to a SLC test.	**ADD**: "*including through entrenching materially increasing or materially extending a position of substantial market power.*"	**ADD**: related agreements.
ACCC's proposed options	☑	☑	☑
	ACCC's proposal for merger reform is to adopt Option 3 (see above), as well as giving greater focus to the effect of a transaction on market structure – that is **Option 3 & Option A, Option B and Option C**.		

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