

Australia

Nick McHugh, Norton Rose Fulbright

1. REGULATORY FRAMEWORK

1.1 What is the applicable legislation and who enforces it?

Anti-competitive mergers are regulated under the Competition and Consumer Act 2010 (Cth) (CCA). The CCA regulates anti-competitive practices as well as a range of fair-trading laws.

The Australian Competition and Consumer Commission (ACCC) has jurisdiction over merger control and enforcement. The ACCC has issued Merger Review Guidelines (Merger Guidelines), which explain the ACCC's approach to assessing mergers, including outlining voluntary merger notification thresholds and setting out processes and timeframes.

1.2 What types of mergers and joint ventures (JVs) are caught?



Both direct and indirect acquisitions of shares or assets are covered by the prohibition of anti-competitive mergers under the CCA.

The relevant provisions therefore apply to a wide range of mergers and acquisitions, including JVs where the parties each acquire shares in a form of incorporated joint venture. All such transactions are prohibited by the CCA where they are likely to give rise to a substantial lessening of competition in a market.

JVs that do not comprise an acquisition of shares or assets must be considered under the general CCA framework regulating cartels and anti-competitive arrangements.

2. FILING

2.1 What are the thresholds for notification, how clear are they, and are there circumstances in which the authorities may investigate a merger falling outside such thresholds?



Merger parties are not obliged by law to notify the ACCC of mergers or to seek prior clearance or authorisation.

However, failing to do so may result in the ACCC independently investigating the merger, which can be disruptive to the transaction. If the ACCC ultimately has concerns, it can take legal action to obtain a court order to block or unwind it. For this reason, where a merger or acquisition could have competition law implications in Australia, the usual course is for parties to apply for informal merger clearance from the ACCC prior to completion.

The Merger Guidelines provide a voluntary notification threshold where both: (i) the products of the merger parties are either substitutes or complements; and (ii) the merged firm will have a post-merger market share of greater than 20% in the relevant markets.

This threshold provides a good indication as to whether the parties should notify the ACCC of the proposed acquisition. However, the ACCC may investigate any merger or acquisition, whether or not it falls within this threshold. Certain acquisitions that do not fall within the threshold may still benefit from notification due to the nature of the industry or prominence of the transaction.

2.2 Are there circumstances in which a foreign-to-foreign merger may require notification, and is a local effect required to give the authority jurisdiction?



Foreign-to-foreign mergers may require clearance in Australia, depending on the circumstances. Each of the following types of transaction is potentially caught by the relevant provisions of the CCA:

- acquisitions occurring outside Australia which give the acquirer a controlling interest in any company, by reason of which the acquirer also obtains a controlling interest in one or more Australian corporations;
- acquisitions of property within Australia, including: shares in Australian companies; Australian businesses; local intellectual property such as trade marks and local plant and equipment; and
- acquisitions of property wherever situated, if the acquirer: is incorporated in Australia; carries on business in Australia; is an Australian citizen or is ordinarily resident in Australia.

However, the ACCC would only wish to review the transaction if there was likely to be an anti-competitive impact on a market in Australia.

2.3 Is filing mandatory or voluntary and must closing be suspended pending clearance? Are there any sanctions for non-compliance, and are these applied in practice?



Filing is voluntary in Australia, but highly recommended (and generally expected by the ACCC) where the thresholds (outlined in question 4) are met. If clearance is not obtained first, there is no legal bar on the transaction completing. However, the ACCC may obtain an injunction from the Federal Court to prevent closing pending the outcome of its investigation if it has serious concerns that the transaction could substantially lessen competition. If the transaction has already closed, the ACCC may obtain an order compelling the parties to unwind it if it can demonstrate to the court that the transaction has caused a substantial lessening of competition.

Also, the Federal Court may impose a penalty for a contravention of the merger control provisions of up to \$500,000 for an individual and, for a corporation, the greater of: \$10 million; three times the value of the contravention; or, 10% of the corporation's annual turnover.

Given the necessity of proving in court that a substantial lessening of competition is likely to occur, and given a generally compliant business community, such actions are rare.

2.4 Who is responsible for filing and what, if any filing fee applies? What are the filing requirements and how onerous are these?



There are three key avenues for obtaining merger clearance in Australia. However, only the informal clearance regime is used regularly.

For informal clearance, the process involves the consideration by the ACCC of the proposed acquisition on an informal basis, seeking a statement from the ACCC that it has no objection to an acquisition. Either or both

parties (jointly) may file, but it is conventionally undertaken by the acquirer. Filing requires the preparation and lodgement of a submission addressing the factors the ACCC has identified as being relevant to a merger assessment in the Merger Guidelines. The purpose of the submission is to persuade the ACCC that the transaction is not likely to result in a substantial lessening of competition. Such submissions generally contain significant detail about the transaction, the industry and the relevant markets. No filing fees apply for the informal clearance process. The practical effect of informal clearance is receipt of a non-binding letter of comfort from the ACCC. In practice, merger parties are generally satisfied with the level of comfort obtained through the informal clearance process in Australia.

In formal clearance, the ACCC may also grant clearance to a proposed acquisition, which confers immunity under the CCA from prosecution by both the ACCC and third parties. However, this avenue has never been used. Formal clearance is subject to the same test as informal clearance and a similar submission must therefore be prepared. Strict timelines apply; the ACCC must determine a formal clearance application within 40 business days of receiving the application (although this timeframe may be extended if the applicant agrees). Formal applications for merger clearance must be made by the acquiring party. The fee for formal merger clearance is \$25,000.

For Australian Competition Tribunal (ACT) formal authorisation, the ACT may grant an authorisation for a merger if it is satisfied that it would result in or be likely to result in a benefit to the public that outweighs its anti-competitive detriment. Only one case has ever been completed using this process. Either party may apply for formal authorisation. The fee for the lodgement of a document with the ACT is \$1 per page. The process can be onerous and is only used when competition issues are evident but arguments in favour of public benefits can be presented. Like formal clearance, authorisation confers immunity under the CCA.

3. CLEARANCE

3.1 What is the standard timetable for clearance and is there a fast-track process? Can the authority extend or delay this process?



The ACCC is not subject to any binding obligations to complete an informal merger review within a specified period. The timing for each stage of this process varies depending on the extent of the competition issues raised. The ACCC is sympathetic, to some extent, to timing imperatives of a transaction and may be able to fast-track consideration somewhat.

Pre-assessment takes two weeks. If the ACCC receives adequate information at the outset and forms the view that an acquisition poses a low risk of substantially lessening competition, a transaction may be pre-assessed, which takes around two to four weeks and avoids the need for a full public review.

Confidential review takes two to four weeks. Where a merger is confidential and cannot be pre-assessed, the merger parties can request a confidential review. If possible, the ACCC will provide a conditional view to the acquirer in two to four weeks.

Clearance without a statement of issues (SOI) takes six to 12 weeks after pre-assessment. The Phase 1 timeline applies where no significant competition issues arise, or where the parties are able to address the ACCC's concerns relatively quickly. Following consideration of such information obtained through market inquiries, the ACCC will either publish a final decision clearing the transaction, or, where it has concerns about potential harm to competition, publish an SOI.

A further six to 12 weeks is needed post-SOI (Phase 2). If an SOI is published, a second round of public consultation will be conducted. During this period, the ACCC may also seek undertakings from the parties to ad-

dress any concerns. The ACCC will typically not publish its final decision for a further six to 12 weeks after the SOI is published.

3.2 What is the substantive test for clearance, and to what extent does the authority consider efficiencies arguments, or non-competition factors such as industrial policy or the public interest, in reaching its decisions?



The substantive test for clearance is whether or not the merger or acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. In making this assessment, the ACCC considers so-called merger factors, of which a non-exhaustive list is set out in the CCA, as follows: the actual and potential level of import competition in the market; the height of barriers to entry to the market; the level of concentration in the market; the degree of countervailing power in the market; the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins; the extent to which substitutes are available in the market or are likely to be available in the market; the dynamic characteristics of the market, including growth, innovation and product differentiation; the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and the nature and extent of vertical integration in the market.

Efficiencies arguments are not specifically taken into account by the ACCC as part of merger review, although these may have some influence if compelling. Non-competition factors such as the public interest are not considered in either the formal or informal review process. However, in the case of an application for authorisation to the ACT, the substantive test is whether or not any anti-competitive detriments are outweighed by the public interest in allowing the transaction to proceed. Accordingly, public benefits are considered in this forum.

3.3 Are remedies available to alleviate competition concerns? Please comment on the authority's approach to acceptance and implementation of remedies.



Remedies are available and are often used to alleviate competition concerns associated with a merger. In almost all cases, remedies take the form of a court-enforceable undertaking provided by one or both merger parties to implement structural, behavioural or other measures to alleviate identified competition issues. The ACCC prefers structural remedies (which change the structure of the merged firm or the market, typically through divestiture) to behavioural remedies (which modify or constrain the behaviour of the merged firm, for example by mandating price or output of the merged firm's goods or services).

If the ACCC is satisfied that a remedy will address the concerns identified, it will generally require the remedy to be formalised in an undertaking before allowing the merger to proceed.

If a merger party breaches a term of an undertaking, the ACCC may request the Federal Court of Australia to make a range of enforcement orders, including orders to comply with the undertaking, orders to pay to the Commonwealth an amount up to the amount of any financial benefit the person obtained from the breach, and compensation payments to any person who has suffered loss or damage.

4. RIGHTS OF APPEAL

4.1 Please describe the parties' ability to appeal merger control decisions – how successful have such challenges been?



There is no appeals process for informal clearance decisions by the ACCC. However, the informal merger clearance process is just that. An ACCC opposition in itself has no legal force and does not prevent a transaction proceeding. Of course, if the ACCC is of the view that the transaction would be likely to substantially lessen competition, the implications outlined in question 5 are a clear deterrent to proceeding.

There are other avenues that may be pursued by a party which receives an opposition and which still has an appetite to proceed, but desires comfort before doing so. It may apply to the ACT to authorise the transaction. This process permits an assessment of the transaction on a broader set of criteria – the Tribunal must consider the net public benefit of the transaction when weighed against the anti-competitive detriment. As already mentioned, this alternative has only been pursued to fruition once.

Further, the party may seek a declaration from the Federal Court of Australia that the transaction is not likely to substantially lessen competition and therefore will not contravene the CCA. This course has also rarely been taken up but has been successfully adopted.

Each of these alternatives is available to a party even if they have not been through the informal clearance process. However, it is uncommon for parties to opt for a far more involved and potentially lengthy process instead of the ACCC informal process, unless the circumstances of the transaction are unique.



Nick McHugh

Head of antitrust and competition,
Norton Rose Fulbright

Sydney, Australia

T: +61 2 9330 8028

E: nick.mchugh@nortonrosefulbright.com

W: <http://www.nortonrosefulbright.com>

About the author

Nick McHugh is head of antitrust and competition at Norton Rose Fulbright Australia and advises utilities, corporate clients and regulators such as the ACCC and the Australian Energy Regulator. He has particular experience in advising on domestic and cross-border merger clearances and recently acted in global mergers involving Life Technologies/Thermo Fisher, Reckitt Benckiser/K-Y and Penguin/Random House.