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Insights

FASTER, STRONGER, AND SIMPLER? AUSTRALIA'S NEW MERGER CONTROL REGIME

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SUMMARY

On 10 April 2024, Australia's Federal Government announced far-reaching reforms to its merger control regime, most notably the introduction of a new single, mandatory and suspensory, merger control system. The reform package is due to come into effect from 1 January 2026 and will align Australia's regime for reviewing M&A transactions from a competition perspective with the majority of other merger control regimes globally.

AUSTRALIA'S CURRENT MERGER REVIEW REGIME

Australia currently operates a 'voluntary' system, and there no obligation to seek clearance or authorisation from the Australian competition authority (the Australian Competition and Consumer Commission or "ACCC") before completing a transaction. While voluntary notifications can be made to the ACCC, which has powers to review transactions that are not notified, it is common particularly in international transactions for merger parties not to voluntarily engage with the ACCC. The current voluntary system is complex, with three existing routes that can be used in different circumstances: an informal merger review, a formal merger authorisation process, or Federal Court proceedings.

The Government's announcement follows a three-year long campaign by the ACCC for a shift to a mandatory administrative model, with the Treasurer agreeing that Australia's current voluntary system "isn't properly equipped to detect and act against anti-competitive mergers", noting that there have been increases in market concentration in certain industries and new anti-competitive dynamics.

KEY ASPECTS OF AUSTRALIA'S PROPOSED NEW REGIME

MANDATORY AND SUSPENSORY MERGER CONTROL

While the precise scope of the new merger control regime will be consulted on over the coming months, it is clear that a new mandatory and suspensory merger control regime will be implemented. Key aspects of the new regime that will become clearer over the coming year include:

- **Scope of application:** Majority acquisitions will clearly be caught by the new regime. However, it is currently unclear whether (and to what extent) minority acquisitions that may provide de facto control or the ability to materially influence the target business will be covered under the applicable control test.

- **Mandatory Notification Thresholds:** While the details of the notification thresholds are yet to be determined, the Treasury has indicated that they will be both monetary and share of supply or market-share-based, and will be set by reference to a combination of business metrics such as turnover, profitability and transaction value. In practice, the introduction of a market share test may give the ACCC material discretion to review transactions it regards as raising concerns, particularly where strategic or trade purchasers are party to the transaction.

- **Suspensory review:** the merger parties will be prohibited from completing a notifiable transaction until clearance has been granted by the ACCC. We await detail as to how the suspension obligation will interplay with rules applying to public bids.

- **Upfront information requirements:** whilst the ACCC is to consult on the precise form of notification to be required in 2025, parties will need to comply with the upfront information requirements in order to commence review, and start the statutory clock running. 'Simple' short notification forms will be used for mergers that are unlikely to raise competition concerns, and longer forms for other mergers.

- **Filing fees:** it is expected that there will be a filing fee of between A$50,000-A$100,000 for all mergers notified to the ACCC, with additional fees for a public benefit review and Tribunal review, and a fee exemption for small businesses.

- **Timelines:** the Treasury has indicated that, as is the case with most merger control regimes, a two phase review procedure will be adopted. The ACCC will have 30 working days to issue a determination for 'Phase I' reviews, with an ability to issue a fast-track determination after at least 15 working days if no competition concerns are identified. 'Phase II' reviews will have a determination at day 120. There will likely be some ability to "stop the clock" or extend the review periods in specified circumstances. Where the ACCC does not make a determination within the relevant review period, the parties can proceed with the merger.

- **Creeping acquisitions:** in response to concerns regarding 'serial' or 'creeping' acquisitions, all mergers of the parties within the previous three years will be aggregated for the purposes of assessing whether the notification thresholds are met, and whether the merger is likely to

substantially lessen competition irrespective of whether those mergers were individually notifiable.

- **Transparency:** with the aim of enhancing transparency and accountability, the ACCC will be required to maintain a public register including details of all notified mergers and written reasons for determinations. This increased body of precedent will help to better understand the ACCC's analysis and decisions, although the ACCC does not appear to be required to disclose the underlying evidence or data on which its decisions are based. It will also no longer be possible to obtain informal clearance on a completely confidential basis.
- **Gun jumping:** failure to notify a notifiable merger, or closing prior to ACCC approval will subject the merger parties and executives or officers to substantial penalties, and any merger, contract, arrangement or understanding related to the merger, purportedly implemented without approval, will be void. Additional penalties will apply for providing false or misleading information, including potential divestiture of the shares or assets acquired.

OTHER CHANGES

In addition to the introduction of a new mandatory and suspensory merger control regime, the proposals include various other consequential changes to the Australian regime. These include, for example, confirmation that the ACCC will be the primary decision maker (removing the ability to obtain a declaration that a transaction does not substantially lessen competition directly from the Federal Court). Decisions of the ACCC will be required to clear transactions unless it reasonably believes that a transaction will have the effect of substantially lessening competition. The ACCC's decision will be subject to review in the Competition Tribunal or Federal Court.

Notably, the proposal confirms that the ACCC will not have a "call-in" power to review transactions that fall below its notification thresholds.

KEY IMPLICATIONS FOR MERGER PARTIES

Whilst the ACCC welcomes the reforms with ACCC Chair Gina Cass-Gottlieb stating that the new rules will "benefit Australian consumers and businesses of all sizes, as well as the wider economy", the reforms will significantly impact the effort, time and costs required for merger parties to complete transactions involving Australia companies or businesses. It also adds another potential filing obligation in global transactions. Some key implications to consider include:

- **More deals notifiable in Australia:** A greater number of transactions will be subject to the ACCC merger regime, even in cases where competition issues are minimal or non-existent. Whereas under the current regime, Australia is often not closely considered by merging parties, under the new regime, it will be crucial, in every acquisition, to conduct an assessment of whether a mandatory filing may be triggered, and if so, to include a corresponding condition precedent.

- **Increased efforts, resources and costs:** as the new regime requires merger parties to submit extensive upfront information and the review periods will only start to run once a "complete notification" has been received by the ACCC, this will result in an increase in efforts, resources and costs for merger parties. Given the limited appeal rights to the Australian Competition Tribunal, merger parties will need more time to prepare their submissions to the ACCC to ensure that all information is provided at the outset. Under the new regime, transacting parties might also want to consider the 'pre-notification' engagement process with the ACCC before lodging a filing to ensure that the required information is submitted.
- **Increased uncertainty and gun-jumping risks:** due to the proposed sweeping reforms to the current regime and further consultation to take place, including on the notification thresholds, there is likely to be regulatory and business uncertainty following the adoption of the regime. In light of this uncertainty, and as mergers will have to wait for approval from the ACCC before completion, businesses will need to be more alive to gun-jumping and associated risks in Australia. Even before adoption, given the transitional arrangements are yet to be settled, and the ACCC's analysis of any mergers post-2026 will likely consider the cumulative effect of any 'creeping' completed transactions in the three years prior to the review, businesses should carefully monitor any further developments regarding the reforms and consider the potential impact on any acquisitions prior to January 2026.

NEXT STEPS

The Treasury will hold consultations on the reforms throughout the year with draft legislation expected towards the end of 2024, at which the point the precise scope of the new mandatory regime should become clearer. The expected commencement date for the regime is 1 January 2026.

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