

An analysis of current and future trends in the Australian informal merger review process

Introduction

Over the next few months the Australian Government is understood to be releasing Exposure Draft Legislation for changes to the Australian Competition and Consumer Act (CCA), which will include proposed changes to the formal merger and merger authorisation processes.

The Government has also noted that the more commonly used "informal" merger clearance process that is undertaken by the Australian Competition and Consumer Commission (ACCC) continues to largely operate well in the view of the business community. However, the Government noted that issues of timeliness and transparency are arising when dealing with the more complex and contentious matters. The Government, recognising that this informal merger review process is a creature of the ACCC and not statute (it is essentially a "no action" letter from the ACCC), has recommended to the ACCC that the informal process could benefit from increased consultation and discussion with the business community to address these issues.

By first considering any current or past trends that can be identified from the relevant ACCC data, this briefing then considers the likely changes to the ACCC's informal merger review process and what that means for businesses and their advisers in terms of the operation of the ACCC's informal clearance process and the "pre-assessment" process.

Pre-Assessments

Pre-assessed clearances are increasing

Pre-assessed clearances are those clearances where the ACCC believes it has sufficient knowledge of an industry sector so as to provide a "no action letter" without undertaking market inquiries (or at least undertaking very limited and targeted market inquiries where the merger is in the public arena). The ACCC's 'no action' letters in these cases are based on the ACCC's own assessment of the material provided by the merger parties and its own industry knowledge. This process is used for those mergers for which there are no substantive competition concerns and enable a speedier clearance than under the usual informal merger review process.

Recent data released by the ACCC shows that the percentage of mergers cleared at the pre-assessment stage has increased by 4% in 2015/16 on the past year and they have in fact been increasing significantly each year since the

Key issues

- The clear majority of ACCC merger reviews (close to 90%), are being cleared at pre-assessment stage. This number has increased significantly on the previous years.
- Given increased use of this process, it will be important for the ACCC to refine the pre-assessment process to identify which types of matters are capable of being pre-assessed and to refine timelines, processes and transparency for the outcome and analysis of these mergers assessments.
- More complex mergers account for approximately 5-10% of total mergers reviewed by the ACCC. While there has been some criticism for the length of time for these reviews, the ACCC has responded that delays are quite often of the parties making as the parties re-shape mergers to address ACCC concerns, or provide additional information to seek to address issues.
- The ACCC has signalled a tougher stance and will no longer be so accommodating of parties asking for clocks to be stopped and will deliver adverse decisions unless parties withdraw mergers rather than it being said mergers take too long.
- However, the statistics emphasise the need for an effective, timely and practical judicial review process for complex merger decisions where the merger parties do not agree with the ACCC's decision. After investing over 12 weeks with the ACCC in the informal review process, parties will only engage in further appeal steps if those steps are commercially timely. See our client briefing relating to the [merger authorisation reforms](#).
- The changes to the ACCC's own merger review and pre-assessment processes increase the importance of preparing merger submissions which address likely issues

introduction of the system in 2010. This is a positive statistic for the ACCC in terms of supporting the overall view that the ACCC merger control regime is a relatively straightforward and timely regime that does not require large submissions and complex reviews.

	2015/2016	2014/2015	2013/2014	2012/2013	2011/2012	2010/11	2009/10
Total	319	322	297	289	340	377	321
Pre-assessed¹	288 (90%)	278 (86%)	242 (81%)	213 (74%)	250 (74%)	236 (63%)	153 (48%)
Reviewed	31 (10%)	44 (14%)	55 (19%)	76 (26%)	90 (26%)	141 (37%)	168 (52%)

Implications for the future

While the ACCC should be commended for efforts to streamline merger processes and decrease the number of mergers undergoing complex reviews, in any refinements of the process it will be helpful for the ACCC to provide as much certainty as possible as to what reviews may be capable of being the subject of pre-assessments. It is accepted that this will, in many respects, depend on a number of factors. These factors include the extent and comprehensive nature of the merger parties' submissions to the ACCC and whether the merger is likely to be within an area of knowledge or expertise of the ACCC (a matter that may not be known to the merger parties before an approach to the ACCC), so as to provide the ACCC with comfort in assessing the matter "on the papers" only, without making market inquiries or at least limited inquiries. It may also depend on the ACCC's views on the overall level of public interest in a matter or industry sector, i.e. whether the ACCC considers the merger review should involve a broader and more public process.

The public interest in merger reviews also appears to be a key driver for the ACCC's increased transparency efforts in relation to its pre-assessment decisions. It appears, in this respect, that the ACCC will publish additional material on what decisions it has pre-assessed. However, this additional information will inevitably see calls for increased transparency as to the ACCC's actual analysis on pre-assessed mergers such as by providing decision summaries similar to those which go up on the ACCC's informal merger clearances register.

The other area that will be important to consider in any refinements is the need for clarity around the timeframes in which the ACCC conducts pre-assessments. This is currently difficult to estimate for merger parties because the merger review is undertaken internally within the ACCC and the ACCC does not publish an anticipated timeframe as it does with informal merger clearances.

While the ACCC appears to be focussed on increasing transparency in its merger assessments, including in relation to informal clearances with an increased focus on issuing detailed public competition assessments, the important element for merger parties is the timeframe of the merger assessment and the ACCC's underlying analytical approach. These elements are paramount in any merger control regime and indeed many jurisdictions, such as the United States, provide very limited public competition assessments.

Unconditional clearances and timeframes for complex mergers

Unconditional clearances increased on the last reported year

The percentage of unconditional clearances of reviewed mergers (i.e. excluding pre-assessed mergers) which did not involve undertakings increased significantly in 2014/2015 to 80% compared to 65% in 2013/2014. However, from a look back over the full 5 year period, it appears that no specific trend can be gleaned from this as the percentages of clearances appear to fluctuate from year to year.

¹ It is unclear how many of these were applications from merger parties themselves or referrals from the Foreign Investment Review Board.

Financial Year	14/15	13/14	12/13	11/12	10/11	09/10
Percentage of unconditional clearances (exc pre-assessments)	80%	65%	77%	67%	78%	78%

See the Schedule for a more detailed overview of the various types of ACCC decisions from October 2014 to 1 August 2016.

Complex mergers remain a small proportion of mergers reviewed

The ACCC has noted that most merger reviews without substantive competition concerns are decided within eight weeks. However, mergers that involve complex or contentious issues can extend well beyond this timeframe. Complex mergers usually necessitate reviews that extend beyond the initial four to eight week period after conducting market inquiries, or "second phase" reviews conducted after the ACCC issues a public Statement of Issues raising possible issues in relation to the proposed transaction to which the parties can respond and make further submissions.

The ACCC statistics highlight, consistent with what is typically seen in overseas jurisdictions, that only 5-10% of merger reviews in Australia are of the more problematic nature which necessitate longer review periods than 8 weeks, or a second phase review.

Merger assessments taking longer than 8 weeks

Year	% of merger assessments that were public merger reviews taking longer than 8 weeks to consider
14-15	5%
13-14	8%
12-13	7%
11-12	8%

An analysis of these more problematic reviews in Australia is interesting in that, excluding time suspended, i.e. the period in which the ACCC 'stops the clock' while parties gather and provide to the ACCC further information (which is averaging 24 business days), these more complex merger reviews are taking an average of 12 weeks (three months) to complete, with a total of approximately 17 weeks or 4 months.

Implications for the future

The ACCC is mindful of those statistics and is appearing to be less accommodating of merger parties seeking to stop merger processes while they restructure a transaction to avoid the ACCC formally opposing the matter. The ACCC is advising the merger parties it will issue a statement opposing the transaction rather than indefinitely waiting and now prefers the merger parties to withdraw the merger rather than it continue in its current form.

Nonetheless, such time periods are of themselves not overly lengthy when compared with overseas jurisdictions. The perhaps more relevant question (as discussed in our separate briefing relating to [proposed merger authorisation reforms](#)) is the situation where merger parties having gone through lengthy informal merger review processes such as in AGL/Loy Yang, Murray Goulburn/Warrnambool Cheese and Butter and Sea Swift/Toll Marine, wish to contest the ACCC's analytical approach in those matters either at a Statement of Issues stage or when the ACCC advises it wishes to oppose the matter. The key issue is that while the informal merger review process generally provides timely merger reviews and the flexibility to

resolve merger concerns through undertakings, where the merger parties fundamentally disagree with the ACCC's analysis or the ACCC decides to oppose the merger, it is important to ensure that there is a process and mechanism to allow the merger parties to challenge the ACCC's reasoning in a commercially timely way which allows a proper process for both the merger parties and the ACCC.

Implications for merger participants of changes to the ACCC's merger processes

In many respects the key issue remains in putting together merger submissions which appropriately address likely issues and issues that have arisen in overseas jurisdictions if the merger is a global merger. Ensuring submissions are prepared in this comprehensive manner will assist in obtaining pre-assessments even for larger transactions. It will also minimise the risk of the ACCC 'stopping the clock' to ask for more information or requesting parties to withdraw the transaction and start again.

A similar approach also applies to considering well thought through remedies to address competition concerns at an early stage. That is not to say that merger submissions should not take into account local Australian issues and ascertain the level of competition issues, but it is not the most efficient approach to not address clear issues until the last minute where adverse case theories have been drawn which may lead to larger remedies and divestments being required by the ACCC.

Schedule

Recent ACCC merger reviews to 1 August 2016

Matter	Matter Name	Duration of review 2	Duration of review 3	Business days suspended	Comments
1	Mayborn Group Limited- proposed acquisition of certain assets of Jackel Pty Ltd	42	42	0	Not opposed- 26 November 2014 to 28 January 2015
2	GlaxoSmithKline plc- proposed acquisition of human vaccines business of Novartis AG	35	78	43	Not opposed subject to undertakings- 8 October 2014 to 29 January 2015
3	JBS USA Holdings Inc- proposed acquisition of Australian Consolidated Food Investments Pty Ltd (Primo Smallgoods)	34	50	16	Not opposed- 25 November 2014 to 6 February 2015.
4	Novartis AG- proposed acquisition of oncology products from GlaxoSmithLine plc	33	98	65	Not opposed- 1 October 2014 to 20 February 2015
5	Macquarie Radio Network Limited (MRN)- proposed acquisition of the radio assets of Fairfax Media Limited (FML) and FML's proposed acquisition of 54.5% of MRN	33	33	0	Not opposed- 13 January 2015 to 27 February 2015
6	Channel 7 and Foxtel proposed joint venture	50	52	2	Not opposed- 15 December 2014 to 2 March 2015
7	Woodside Energy Limited- proposed acquisition of Apache Corporation's interests in the Wheatstone, Balnaves	44	48	4	Not opposed- 24 December 2014 to 5 March 2015

² total business days excluding public holidays and suspended time periods

³ total business days excluding public holidays but including suspended time periods

Matter	Matter Name	Duration of review 2	Duration of review 3	Business days suspended	Comments
	and Kitimat Projects				
8	Origin Energy LPG Ltd- proposed acquisition of Bulwer Island Gas Terminal assets	21	28	7	Not opposed- 2 February 2015 to 11 March 2015
9	Greencross Ltd- proposed acquisition of My Pet Warehouse store in South Yarra, Victoria	9	23	14	Not opposed- 11 February 2015 to 13 March 2015
10	Denki Kagaku Kogyo Kabushiki Kaisha and Mitsui & Co Ltd- proposed acquisition of chloroprene rubber business of E.I. du Pont de Nemours and Company	31	39	8	Not opposed- 28 January 2015 to 23 March 2015
11	Victoria Quay International RoRo Terminal Pty Ltd- proposed acquisition of Automotive and Ro-Ro Terminal at the Port of Fremantle	68	69	1	Not opposed subject to undertakings- 23 December 2014 to 2 April 2015 Former proposed decision date of 26 February 2015 delayed at the request of VQIRT on 20 February 2015.
12	Domestic Group AB- acquisition of Atwood Investment Holdings LLC	131	134	3	Not opposed- 26 September 2014 to 10 April 2015
13	Australian Amalgamated Terminals Pty Ltd (AAT) proposed acquisition of Automotive and Ro-Ro Terminal at the Port of Fremantle	80	82	2	Not opposed subject to undertakings- 23 December 2014 to 23 April 2015
14	VIP Steel Packaging Pty Ltd- proposed acquisition of certain steel drum assets from National Can Industries Pty Ltd	18	19	1	Not opposed- 1 April 2015 to 30 April 2015
15	Federation Centres and Novion Property Group- proposed merger	62	74	12	Not opposed subject to undertakings- 4 February 2015 to 21 May 2015
16	Proposed joint venture between Patrick Container Ports Pty Ltd and Australian Container Freight Services Pty Ltd	47	49	2	Not opposed- 16 April 2015 to 25 June 2015
17	Coles- proposed acquisition of a supermarket lease in Lakelands Western Australia	40	40	0	Not opposed subject to undertakings- 7 May 2015 to 2 July 2015
18	Sea Swift Pty Ltd- proposed acquisition of Toll Marine Logistics	81	145	64	Opposed- 9 December 2014 to

Matter	Matter Name	Duration of review 2	Duration of review 3	Business days suspended	Comments
	Australia				9 July 2015
19	Health Care Corporation Pty Ltd (Ramsay)- proposed acquisition of Wollongong Day Surgery	85	100	15	Withdrawn- 16 March 2015- 6 August 2015
20	Staples Inc- proposed acquisition of Office Depot Inc (trading as OfficeMax)	60	78	18	Not opposed- 24 April 2015 to 13 August 2015
21	Pfizer Inc- proposed acquisition of Hospira Inc	57	57	0	Not opposed- 26 May 2015 to 13 August 2015
22	TPG Telecom Limited- proposed acquisition of iiNet Limited	73	97	24	Not opposed- 2 April 2015 to 20 August 2015
23	NBN Co Limited- proposed acquisition of Certain HFC assets of Singtel Optus Pty Ltd	20	136	116	Not opposed- 12 February 2015 to 28 August 2015
24	Macquarie Bank Limited- proposed acquisition of Esanda Dealer Finance business	43	43	0	Not opposed- 21 July 2015 to 17 September 2015
25	APA Group- proposed acquisition of EnergyAustralia's Iona Gas Plant	38	39	1	Withdrawn- 14 August 2015 to 8 October 2015
26	Foxtel- proposed acquisition arrangements with Ten Network Holdings Ltd	84	84	0	Not opposed- 25 June 2015 to 22 October 2015
27	Paiperlek Investments SAS (owner of ADB Airfield Solutions)- proposed acquisition of Safegate International AB	40	41	1	Not opposed- 22 September 2015 to 18 November 2015
28	Royal Dutch Shell plc- proposed acquisition of BG Group plc	93	115	22	Not opposed- 11 June 2015 to 19 November 2015
29	Moonshadow Cruises and Tamboi Queen Cruises- proposed merger	28	164	136	Not opposed- 2 April 2015 to 24 November 2015
30	Transurban consortium- proposed acquisition of BrisConnections including the AirportLinkM7 toll road in Brisbane	30	30	0	Not opposed- 16 October 2015 to 26 November 2015
31	FedEx Corporation- proposed acquisition of TNT Express	60	80	20	Not opposed- 6 August 2015 to 26 November 2015

Matter	Matter Name	Duration of review 2	Duration of review 3	Business days suspended	Comments
32	GPC Asia Pacific Pty Ltd- proposed acquisition of Cova Parts from Automotive Holdings Group Limited	74	81	7	Opposed- 26 August 2015 to 17 December 2015. AHG provided a draft s87B undertaking to the ACCC on 8 February 2016. ACCC announced on 18 February 2016 that it would not oppose the revised proposed acquisition, subject to the s87B undertaking accepted by ACCC.
33	Nordic Capital Fund VII- proposed acquisition of Max-Inf Holdings Limited	27	27	0	Not opposed subject to undertakings- 12 November 2015 to 18 December 2015
34	Pact Group Pty Ltd- proposed acquisition of Power Plastics Pty Ltd	30	45	15	Not opposed- 14 December 2015 to 18 February 2016
35	Coles- proposed acquisition of 9 Supabarn supermarkets	62	184	122	Not opposed- 22 June 2015 to 10 March 2016
36	A consortium comprising Qube Holdings Limited, Global Infrastructure Management, LLC, Canada Pension Plan Investment Board and CIC Capital Corporation- proposed acquisition of Asciano Limited	79	84	5	No decision- 13 November 2015 to 15 March 2016
37	Brookfield consortium- proposed acquisition of Asciano Limited	152	154	2	No decision- 6 August 2015 to 15 March 2016
38	Iron Mountain Incorporated- proposed acquisition of Recall Holdings Limited	59	151	92	Not opposed subject to undertakings- 25 August 2015 to 31 March 2016
39	Proposed merger between Pfizer Inc and Allergan plc	10	11	1	Withdrawn- 22 March 2016 to 7 April 2016
40	Halliburton Company- proposed acquisition of Baker Hughes Incorporated	93	259	166	Withdrawn- 21 April 2015 to 2 May 2016
41	Anheuser-Busch InBev- proposed acquisition of SABMiller plc	47	75	28	Not opposed- 18 January 2016 to 5 May 2016

Matter	Matter Name	Duration of review 2	Duration of review 3	Business days suspended	Comments
42	Tullett Prebon Plc- proposed acquisition of ICAP Plc's global hybrid voice broking business	32	32	0	Not opposed- 5 April 2016 to 19 May 2016
43	Metal Manufactures Limited (MML)- proposed acquisition of Cetnaj Pty Ltd business and assets	26	38	12	Not opposed- 11 April 2016 to 2 June 2016
44	Sonic Healthcare Limited- completed acquisition of Adelaide Pathology Partners (APP)	144	146	2	Not opposed- 9 November 2015 to 8 June 2016
45	Primary Health Care Limited- acquisition of pathology assets previously operated by Healthscope in Queensland	332	336	4	Not opposed subject to undertakings- 13 February 2015 to 16 June 2016
46	DYWIDAG- Systems International Group- proposed acquisition of Jennmar Australia	50	99	49	Withdrawn- 29 February 2016 to 20 July 2016
47	Metcash Ltd- proposed acquisition of Home Timber and Hardware Group	34	54	20	Not opposed subject to undertakings- 6 May 2016 to 21 July 2016
48	Consortium comprising Brookfield, Qube & Others- proposed acquisition of Asciano Limited	79	80	1	Not opposed- 30 March 2016 to 21 July 2016

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