Kluwer Competition Law Blog

Australia Mandatory Merger Clearance: Government Decides on Thresholds

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In Brief

On 10 October 2024, the Australian Government introduced a bill into Parliament for Australia to enact a mandatory and suspensory competition merger clearance regime.

The regime will commence on 1 January 2026, although parties can voluntarily seek clearance under the new regime from 1 July 2025.

The thresholds for mandatory merger clearance[1] are more straightforward than previously envisaged. There will be a number of monetary thresholds (the Government decided not to proceed with market share thresholds), beyond which an acquisition will require mandatory pre-merger clearance, which in brief are as follows:

- The combined Australian turnover of the parties (including the acquirer group) is at least AU$200 million, AND either of:
- The Australian turnover is at least AU$50 million for at least two of the merger parties; or
- The global transaction value is at east AU$250 million.
- A lower monetary threshold for acquisitions by very large acquirers, being those where the acquirer's Australian turnover (again including the acquirer group) is at least AU$500 million, AND
- The Australian turnover for each of the target or at least two of the merger parties is at least AU$10 million.
- 'Serial' or 'creeping' acquisitions:

For medium to large acquirers:

- The combined Australian turnover of the parties (including the acquirer group) is at least AU$200 million; AND
- The cumulative Australian turnover from acquisitions involving the same or substitutable goods or services is at least AU$50 million; or

For very large acquirers:

- The combined Australian turnover of the parties (including the acquirer group) is at least

AU$500 million; AND
- The cumulative Australian turnover from acquisitions involving the same or substitutable goods or services is at least AU$10 million.

At the same time as the introduction of the bill, the Australian Competition and Consumer Commission (ACCC) published a *Statement of Goals for Merger Reform Implementation*, providing its initial high-level approach in delivering the Government's 'merger reforms (Statement).

In more detail (apart from restating the above thresholds)

On 10 October 2024, the Australian Government introduced the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (Bill)[2]. The Bill seeks to comprehensively change merger clearance in Australia by requiring mandatory pre-merger clearance where the proposed acquisition crosses the above thresholds.

If passed, the new regime will materially change the approach that parties (and their advisers) will need to take, as well as the time frames to which they have regard, when seeking to effect mergers and acquisitions in Australia.

We will provide additional detail in time, particularly as more detailed analysis of the finalised legislation occurs, as well as when we learn more from the ACCC once it publishes its upcoming analytical and process guidelines.

What Is an Acquisition

In brief, an acquisition for the purposes of these provisions is defined quite broadly. It includes acquisitions of:

- Shares in the capital of a body corporate (including, relevantly, 'partial' acquisitions that may take the voting power from below 20% to above 20%);
- Any assets of a person or corporation, including of:
- Any kind of property;
- A legal or equitable right that is not property (e.g., options for land, intellectual property rights, contractual rights in leases);
- Goodwill or an interest in it;
- Interests in the assets of a partnership; and
- Acquisitions of units in unit trusts or interests in managed investment schemes.

There is proposed to be an 'ordinary course of business' exception, so long as it does not involve an acquisition of land or patents.

The Government has however announced that there will be an exemption for 'simple' land acquisitions involving residential property development, or by a business that is primarily engaged in buying, selling, or leasing property and does not intend to operate a commercial business (other than leasing) on the land. The precise terms of these exemptions have not yet been released.

Clearance Process and Timing and Notification Waivers

Again in brief, the proposed timeframes for the clearance processes are as follows:

Phase 1

- Clearance within 30 business days[3] (or 15 business days under the fast track or early determination process).

The ACCC has reiterated in the Statement that it *"expect[s] to make a determination for around 80% of mergers in 15 to 20 business days via an early Phase 1 determination or the notification waiver process"* (which we refer to further below).

Phase 2

- An in-depth review of the proposed acquisition in 90 business days (following the Phase 1 timeline above for a total of 120 business days).

Phase 3

- In the event that the proposed acquisition is disallowed on the basis that the proposed acquisition is likely to result in a substantial lessening of competition (in a market in Australia) (SLC), a further application may be made under the Public Benefit Phase.

Such an application will aim to have the ACCC assess whether the net public benefits resulting from the proposed acquisition will be such as to outweigh the SLC or anticompetitive detriments of the transaction.

Phase 3 will have a further 50 business day timeline.

A number of additional important issues relating to the clearance process are as follows:

- The ACCC has also identified a 'need' and has encouraged parties to enter into 'pre-notification' discussions to assist in streamlining the above process.

While such engagement, including the possibility of consideration of draft applications by the ACCC, will no doubt streamline the formal part of the process, it will also lengthen the effective period of engagement with the ACCC, particularly in respect of complex acquisitions.[4]

- The Bill also proposes a notification waiver system or scope for the merger parties to request an exemption from the ACCC from the notification requirements.
- At this stage, it is not clear how this process will actually work. We expect that the ACCC will provide additional detail about this process in its upcoming guidelines.
- The Bill provides for a limited merits review of the ACCC decisions by the Australian Competition Tribunal (the review is de novo but 'on the papers'). There will no longer be scope

for applications to the Federal Court by the ACCC or the parties in respect of the substantive decision of the ACCC.

The Substantive SLC Test

The legal test for clearance, save for the Public Benefit Phase, is whether the proposed acquisition is likely to result in a SLC.

The Bill provides that the assessment of SLC may include "creating, strengthening or extending substantial market power".

A concern was raised during the consultation process that the wording, which does not appear in any other section of the *Competition and Consumer Act 2010* (Cth) (CCA), extends the meaning of SLC in respect of all the competition provisions of the CCA. However, the Bill explicitly states that this change or potential extension to the meaning of SLC does not affect the meaning of that term outside of the merger clearance provisions.

The existing merger clearance provision in the CCA provides a set of factors that the ACCC may have regard to when considering whether a proposed acquisition may result in an SLC. The Bill does not follow the same approach such that it does not explicitly set out such factors.

However, the Explanatory Memorandum to the Bill does set out the *"Economic factors to which the [ACCC] could be expected to have regard in assessing the risks to competition [of a proposed acquisition]…"*, which include:

- The market position of the parties to the acquisition and their economic and financial power;
- Whether the acquisition would result in the removal of a vigorous and effective competitor;
- The nature of competition, including potential competition, in the market;
- The structural or other conditions affecting competition, including the level of concentration in the market;
- The conditions or barriers to entry and expansion to the market and the impact of the acquisition on those barriers;
- The nature and strength of competitive constraints, whether within or outside the market, including the potential for the acquisition to give rise to increases in prices or profit margins;
- The degree of product or service differentiation in the market;
- The degree of dynamism, whether through innovation or otherwise, in the market; and
- The degree of countervailing power in the market.

Serial or Creeping Acquisitions

As per the above monetary thresholds, the Bill provides that the ACCC has regard to the cumulative effect of acquisitions in the three years prior to the notification date of the acquisition being assessed.

The ACCC can examine the cumulative effect of acquisitions by the parties (including the acquirer group) that involve the same or substitutable goods or services, or goods or services that are

otherwise competitive with the goods or services supplied by the target.

Filing Fees for Applications for Clearance

We will have to wait for clarity about fees as the Bill does not set out the filing fees for applications to the ACCC.

The Government has previously stated that the fees will range from AU$50,000-AU$100,000 depending on the monetary value of the acquisition. It also indicated that there are likely to be exemptions in certain circumstances for small business. Query also whether there will be lower fees in circumstances where considerations of proposed acquisitions are processed under the fast track or early determination process.

Transitional Arrangements

The Bill provides that from 1 July 2025:

- Parties will no longer be able to seek merger authorisation under the present merger clearance regime—for the reason that such a process may not be completed before 31 December 2025 or the new regime is in place; and
- Parties can voluntarily notify under the new regime. This is likely to be taken up by applicants whose clearance is unlikely to be completed by 31 December 2025 either due to its complexity or because the application is being made closer to the end of 2025in order to avoid the need to 'reapply' after 1 January 2026.

Further, any clearance that occurs under the existing regime in the period July-December 2025 will be exempt from notification under the new regime as long as completion of the acquisition occurs within 12 months of clearance.

Transparency

The Bill requires that all notified acquisitions will be published (essentially immediately) on the ACCC's merger public register, save for still confidential surprise hostile takeovers, which will only be published on the register 17 business days after being notified.

The Government and the ACCC contend that this will materially enhance transparency in that:

- It will ensure that all industry participants become aware of and have the ability to provide comment on proposed acquisitions, particularly in respect of reviews that proceed into Phase 2 where notices of competition concerns will be made public; as well as
- Reasons for final determinations will be published in respect of all acquisitions giving all interested persons greater clarity regarding the ACCC's considerations of the markets affected by proposed acquisitions and relevant market dynamics.

ACCC Chair Gina Cass-Gottlieb contrasted the above with the current regime where 93% of

mergers that are notified to the ACCC are assessed and cleared by the ACCC under the confidential pre-assessment process without visibility to market participants or interested persons.

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[1] The thresholds are not set out in the legislation—they will be in separate subordinate legislation.

[2] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7257

[3] Please note that all of the abovementioned timelines are subject to the 'stopping of the clock' by the ACCC in the event of material lags by any of the parties' in their responses to ACCC requests for information or documents.

[4] By way of example, the European Commission clearance process provides for a 30 day phase 1 period. However, in practice, many merger parties informally engage with the European Commission for many months prior to the formal application being lodged.

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