



COMPETITION & REGULATION UPDATE

AUSTRALIAN MERGER CLEARANCE REFORM

Australia may see a more streamlined merger clearance process in the future after the Government decided to support the recommendations of the Harper Review's Final Report in relation to competition merger law. The Government has committed to developing exposure draft legislation for public consultation on changes to the formal merger review process and has noted its expectations of the Australian Competition and Consumer Commission (ACCC) in relation to the informal merger review process.

Changes to merger laws are likely to impact businesses in the following key ways:

1. Merger parties may receive merger clearance decisions more quickly.
2. Merger parties will have less options to choose from when considering which form of merger clearance they will seek.
3. All merger clearances will initially need to be sought from the ACCC as the option of obtaining merger authorisation by the Australian Competition Tribunal (Tribunal) in the first instance will no longer exist.

WHY IS CHANGE REQUIRED?

The final Harper Report noted that there was wide support for retaining the informal merger review process but that strong concerns had been expressed about the timeliness and transparency of the process. The Panel saw scope for further consultation between the ACCC and business representatives regarding the informal review process. The Panel's view was that concerns about timeliness and transparency of merger reviews could also be addressed through a more streamlined formal review process. The Tribunal noted that the current formal processes were excessively complex and prescriptive, and that this had deterred the use of those mechanisms and fuelled complaints about the way the informal process was applied to large mergers involving contested facts and issues.

The diagram below shows how the Government’s proposed process may differ to the current merger clearance process:

CURRENT PROCESS INFORMAL PROCESS

Stage 1

- Process = informal merger clearance
- Decision maker = ACCC
- Legal test = merger must not have the effect or likely effect of substantially lessening competition (SLC) in a market
- Timing for making decision = no set time frame

PROPOSED PROCESS INFORMAL PROCESS

Stage 1

- Process = informal merger clearance
- Decision maker = ACCC
- Legal test = merger must not have the effect or likely effect of SLC in a market
- Timing for making decision = no set time frame. However, the Government has recommended consultation occur between the ACCC and business representatives with the objective of delivering more timely decisions

FORMAL PROCESS

Stage 1

- Process = formal merger clearance
- Decision maker = ACCC
- Legal test = clearance must not be granted unless the ACCC is satisfied that the merger does not SLC
- Timing for making decision = strict 3 month time period with option to extend for a further 3 months



Stage 2

- Process = review of the ACCC’s decision
- Decision maker = Australian Competition Tribunal
- Grounds = applicant must outline how it is dissatisfied with the ACCC’s decision
- Scope of review largely limited to the material that was before the ACCC

OR

Stage 1

- Process = merger authorisation
- Decision maker = Australian Competition Tribunal
- Legal test = authorisation must not be granted unless the merger would result, or would be likely to result, in such a public benefit that the merger should be allowed
- Timing for making decision = strict 3 month time period with option to extend for a further 3 months



Stage 2

- Process = review of the Tribunal’s decision
- Decision maker = Federal Court of Australia
- Grounds = limited grounds of review (no right of appeal in respect of the merits of the decision)

FORMAL PROCESS

Stage 1

- Process = formal merger clearance or merger authorisation
- Decision maker = ACCC
- Legal test = authorisation permitted if ACCC satisfied that:
 - the merger does not SLC; or
 - the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment
- Timing for making decision = strict timelines that cannot be extended except with the consent of the merger parties



Stage 2

- Process = review of the ACCC’s decision
- Decision maker = Australian Competition Tribunal
- Scope of review:
 - Review based on material that was before the ACCC
 - Tribunal to have discretion to allow a party to adduce further evidence, or to call and question a witness, if satisfied there is sufficient reason

Post-merger evaluations

- Evaluating party = potentially the Australian Council of Competition Policy
- Process = evaluating previous merger decisions to determine whether the ACCC’s processes were effective and its assessment borne out by events

TIMELINE FOR MAKING INFORMAL MERGER CLEARANCE DECISIONS

The Government's view that consultation should occur between the ACCC and business representatives with the objective of delivering more timely informal merger decisions is a sound one. However, the lack of any statutory framework underlying the informal merger review process means that merger parties may not ultimately see any change in the time taken for decisions to be made under this process. Merger parties should keep in mind that the benefit of flexibility, which they enjoy under this process, is one reason why the informal review process may take longer than expected. Therefore, parties requiring a quick decision above anything else may want to consider whether the formal process is a more preferable option for them.

To learn more about these reforms please feel free to contact a member of our competition law team.



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