



Competition Review: Merger reform

Productivity Commission submission

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The Productivity Commission

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The Productivity Commission (the Commission) provides this submission in response to a request by the Competition Taskforce.¹ The Commission has not attempted to address all the questions and issues raised by the Taskforce, but has focussed on the economic issues around the design of the merger clearance regime, particularly in relation to the design of a merger regime that provides incentives for parties to reveal relevant information and limits strategic manipulation ('gaming') by the parties involved in the clearance.

The existing merger clearance regime

A merger is illegal if it breaches section 50 of the *Competition and Consumer Act 2010* (CCA) because it 'would have the effect, or be likely to have the effect, of substantially lessening competition in any market'.

There are currently three ways for a merger to be 'cleared' under the CCA.²

Informal clearance by the ACCC

Almost all mergers are assessed through the 'informal process'.³ This process allows the ACCC to consider a proposed merger outside any legislated inquiry process. The informal clearance process is highly flexible but depends on the 'goodwill' of the merger parties and the ACCC to function effectively. For example:

- There are no specified time frames or requirements on the merger parties to provide information to the ACCC and no timelines for the ACCC to reach a decision.
- Information is largely provided to the ACCC at the discretion of the merging parties. The ACCC may be able to use its information gathering powers under s155 of the CCA to gain documents or testimony under oath. However, the ACCC often is unsure of what documents or evidence are useful and a broad request by the ACCC under s155 risks the ACCC being flooded with largely irrelevant material.

If the ACCC refuses to clear a merger under the informal process and seeks an injunction under sections 80(1) and 80(1A) of the CCA, it bears the onus of proof before the Federal Court, and the analysis is limited to competitive effects.

Merger Authorisation

A merger party can apply to have the merger authorised by the ACCC under section 88 of the CCA. Under section 90(7) of the CCA, the ACCC can only authorise a merger if it 'is satisfied in all the circumstances' that the merger will not be anti-competitive or that, if it is likely to substantially lessen competition, there are public benefits that outweigh the public detriment from the anti-competitive merger.⁴

¹ The Treasury (2023) *Merger reform*, Consultation paper, Australian Government, November.

² As is clear from the international comparison provided in Appendix D of the 'Merger reform, Consultation paper' (*op. cit.* note 1) Australia is unusual compared to other developed countries by having multiple ways to 'clear' a merger rather than a single process.

³ For example, the ACCC/AER 2022/23 annual report states that in 2022/23 there were 305 mergers assessed through the informal process with 284 finalised without a public review. In the same year the ACCC commenced three merger authorisation assessments. There do not appear to have been any direct clearance decisions by the Federal Court (including appeals) in 2022/23.

⁴ The current authorisation process was introduced in 2017, combining a prior formal merger clearance process and a separate authorisation process. Since 2017, the ACCC has received and determined seven applications for merger authorisation. See ACCC, *Merger Authorisations Register*, <https://www.accc.gov.au/public-registers/mergers->

Under authorisation, the merger parties bear the onus to 'satisfy' the ACCC (and, on appeal, the Australian Competition Tribunal). There is a 90 day time period for an authorisation decision, however this can be extended. If the ACCC does not make a decision within the relevant timeframe then the authorisation is taken to be refused. An authorisation decision can be appealed to the Tribunal for a 'limited merits review' based on the information before the ACCC.⁵

Direct Federal Court clearance

Under section 163A(1) of the CCA, a merger party can seek to have the Federal Court 'hear and determine proceedings ... [for] a declaration' that their merger does not violate section 50 of the CCA. If a merger party seeks a declaration it bears the onus of proof before the Federal Court, and the analysis is limited to competitive effects.

What is the strength of the existing merger clearance regime?

Currently almost all mergers are formally cleared (with or without 'undertakings') through the informal process. For most mergers, this process is both quick and low cost, benefitting the merger parties and the regulator. It is only for the small number of potentially illegal mergers that are investigated each year by the ACCC that problems arise.

What are the problems with the existing merger clearance regime?

The problems with the current merger clearance system in Australia are that:

1. The core informal clearance process is opaque, has no timelines, has no requirements for information to be provided by either the merger parties or the ACCC, and leads to uncertain outcomes (in that it does not protect the merging parties from future action). It can be gamed by merger parties (e.g. through the strategic withholding of information) and the ACCC (e.g. through repeatedly asking for more information and creating delays, to increase their comfort with the decision).
2. There are multiple inconsistent ways to have a merger cleared and these involve different institutions, different standards of proof and different levels of economic sophistication by the decision maker. These inconsistencies create incentives for merger parties to strategically choose the approach to clearance that will provide them with the greatest chance of success at the least cost:⁶

[registers/merger-authorisations-register](#). The previous formal merger clearance process was introduced in 2007 but never used. The previous separate mergers authorisation process was rarely used. See Harper I, Anderson P, McCluskey S and O'Bryan M, *Competition Policy Review* (Commonwealth of Australia, March 2015) at pp. 327-328, https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report_online.pdf.

⁵ For more details, see ACCC, *Merger Authorisation Guidelines* (October 2018),

<https://www.accc.gov.au/system/files/Merger%20Authorisation%20Guidelines%20-%20October%202018.pdf>.

⁶ Allowing merger parties to choose between different approaches to clearance can result in inconsistencies in merger decisions and create a 'bias for clearance' in the law when parties strategically choose the approach most likely to result in clearance for their particular merger.

- a. Federal Court clearance requires the merger parties to show that ‘on the balance of probabilities’ a merger that has not occurred will not (or will not likely) substantially lessen competition in the future. The court requires ‘positive evidence’ but given the predictive nature of merger analysis and lack of economic expertise among the judiciary, it is far from clear that the Court can appropriately deal with this analysis.⁷
 - b. The formal process requires the merger parties to ‘satisfy in all the circumstances’ the ACCC and, on appeal, the Tribunal, that the merger will not (or is not likely to) substantially lessen competition. The Tribunal has three members including a federal court judge and, in most situations, a person with expertise in industry, commerce or economics.
 - c. Under the informal process, if the ACCC wishes to prevent a merger then it has to show the Federal Court that ‘on the balance of probabilities’ a merger that has not occurred will not (or will not likely) substantially lessen competition in the future. This has all the issues of a Federal Court clearance albeit the onus of proof is on the ACCC.
3. The tests for merger clearance differ depending on the approach taken. Under formal authorisation, there is a ‘cost-benefit’ analysis that does not exist under the alternatives.
 4. The informal process creates poor incentives for merger parties to reveal relevant information to the ACCC. The merging parties necessarily have more information than the ACCC about the anti-competitive effects of a merger but lack incentives to reveal relevant information to the ACCC when the ACCC bears the onus of proof in any injunction proceedings. Modern regulatory design focusses on providing incentives for parties to reveal information to facilitate clear, socially desirable decision making.⁸ These incentives do not exist under the informal process leaving the ACCC open to gaming by the strategic provision of information from the merging parties who have incentives to understate any competitive harm created by the merger and withhold information that indicates this harm. This means that the ACCC must often decide which mergers to clear and which to pursue in depth based on partial information that has been largely selected by the merger parties themselves.

Productivity Commission’s recommendations

A well-designed regulatory process for merger clearance would retain a quick and simple path to clearance for the large number of mergers that create no legal issue under the CCA. It would limit the ability of any party to strategically manipulate the clearance process and would provide strong incentives for the merger parties to provide the information that is needed for the regulatory decision.

A single two-stage approach to merger clearance

The Commission recommends moving to a single ‘path’ for merger clearance. This will limit the potential for merger parties to ‘cherry pick’ between clearance approaches and will increase certainty for all parties by having a consistent process.

The single approach should involve two stages.⁹ When notified of a prospective merger, the ACCC would be able to quickly either consider and clear the acquisition (as per the current informal process) or require a

⁷ Ray Finkelstein, a former Federal Court judge noted this failure of the Court to deal with mergers in ‘What is wrong with mergers in the Federal Court?’, (2020) 27 CCLJ 79.

⁸ The economics literature on the importance of regulatory systems to facilitate information revelation goes back to at least Baron, DP and Myerson, RB 1982, ‘Regulating a monopolist with unknown costs’, *Econometrica*, vol. 50, no. 4, pp. 911–930.

⁹ As the Taskforce notes at Appendix D, a two-stage approach for merger clearance is standard in all overseas jurisdictions it considers, including the EU, UK, New Zealand, Canada and the US.

more formal process of investigation. There should be clear (statutory) timelines for each stage that can only be extended with the agreement of the merger parties and a clear process to move between stages to avoid any regulatory obfuscation.

Having a single path for merger clearance would mean that merger parties could not avoid ACCC scrutiny by applying for a direct federal court clearance.

A single standard for clearance that incorporates a ‘cost benefit’ exemption

The Commission considers that the current standard for merger clearance is appropriate: that ‘on the balance of probabilities’ the merger will not or is not likely to substantially lessen competition.

The Commission considers that the cost-benefit exemption that exists under the current authorisation process should be extended to all mergers. Such an exemption provides flexibility for the merger clearance regime to clear mergers that are economically desirable despite being potentially anticompetitive.

Merger parties face strong incentives to reveal information

Merger clearance should create incentives for the merger parties to reveal relevant information to the regulatory decision makers. These incentives will minimise the risk of regulatory error and lead to more rapid and less socially costly merger clearance.

The existing merger authorisation process creates these incentives. It requires that the regulatory decision maker is ‘satisfied’ that the merger will not or is not likely to substantially lessen competition. This creates incentives for merging parties to provide accurate, relevant and timely information.

The Commission recommends that the existing authorisation approach is extended to all merger clearance so that the relevant legal test requires that a merger can only be cleared if the relevant decision maker is ‘satisfied’ on the balance of probabilities that the merger will not or is not likely to substantially lessen competition.

The Commission recognises that there are other (potentially complementary) changes to the merger clearance process that could improve the incentives for the merger parties to reveal relevant information. For example, having a merger deemed as ‘not-approved’ if the ACCC has not made a decision by the end of any statutory timelines would place an onus on merger parties to provide relevant information in a timely way. This would particularly be the case if there were strong limits on the introduction of new material in any appeal process.

Appeals are considered by a body with economic expertise

The Commission recommends that appeals to the ACCC’s decisions should be considered by the Australian Competition Tribunal. The Tribunal has relevant expertise among its panel members to bring economic and business expertise to bear on merger decisions, guided by the Tribunal President who is a federal court judge.

The Tribunal requires access to appropriate information during the appeals process. Often, this will go beyond the papers and other material before the ACCC. For example, the Tribunal should be able to examine relevant experts who have provided reports to the ACCC, to clarify those reports and weigh up alternative expert views. The Tribunal, at its discretion, should also be able to call in third-party witnesses or material where the ACCC has been notified about this material, but has not accessed it, prior to making its decision. At the same time, there should be strong limits on the material available to the Tribunal on appeal to ensure that merger parties have incentives to provide this information up-front to the ACCC.

Compulsory notification

Australia currently does not require any mergers to be notified to the ACCC prior to completion.¹⁰ The Taskforce has asked (question 13) whether Australia should “introduce a mandatory notification regime, and what would be the key considerations for designing notification thresholds?”

Compulsory notification of prospective mergers can be used to limit the ability of merger parties to choose alternative approaches to clearance. For a merger that meets notification thresholds, merger parties would be unable to bypass the ACCC and seek a Federal Court clearance before completing a merger.

Compulsory notification, unless accompanied by significant penalties for non-notification, is unlikely to prevent parties seeking to complete a merger that would likely breach s50 of the CCA without ACCC awareness or scrutiny. If merging parties are intentionally acting in violation of s50 of the CCA, they will not be deterred by a simple notification ‘requirement’ with small penalties for non-compliance. Further, the risk of unnotified mergers may be increasing particularly in areas of technology and data where anticompetitive gains from merger cannot be ‘undone’ by, say, ex post divestiture.¹¹ To deter such ‘under the radar’ mergers there would need to be large penalties for non-notification or, equivalently, large penalties for breaching s.50 of the CCA.

To be effective, a mandatory notification process would need to be clear and the thresholds for notification should be based on non-manipulable metrics like revenue rather than arguable metrics such as market share, which may lead to legal disputes. Given that most mergers do not breach s50 of the CCA, any requirement for mandatory notification and ACCC clearance should not create an excessive financial or administrative cost on merger parties. In particular, fees for mandatory notification should not be used to create a burdensome ‘merger tax’.

¹⁰ Although as the Taskforce notes ‘[a] significant proportion of mergers considered by the ACCC annually are effectively already subject to a mandatory notification and suspensory framework, as they involve foreign investment and are therefore subject to Australian foreign investment approval processes’. *Op. cit* note 1 at p. 7.

¹¹ For an example see the discussion of the ‘Objective Corporation Limited/Master Business Systems Limited’ merger in New Zealand Commerce Commission (2022) *Investigations show Commission’s commitment to acting on non-notified mergers*, August 9, available at: <https://comcom.govt.nz/news-and-media/media-releases/2022/investigations-show-commissions-commitment-to-acting-on-non-notified-mergers>.