



QUAY INSIGHTS

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Opportunity for merger process reform in Australia to improve transparency and certainty in timelines

This Quay Insight considers reforms that may increase merger process transparency and also looks at competition issues that exist in sectors that are subject to high levels of regulation.

The touchstones for best practice in merger review by antitrust agencies are commercial timeliness (i.e., completion of the merger review within a reasonable time period) and effective, efficient, transparent and predictable merger investigations.

Reform of the ACCC's merger processes would improve transparency and certainty in timelines for merger reviews, without increasing the burden on merger parties or radically changing Australia's merger control regime.

Recently, the Chair of the Australian Competition & Consumer Commission (**ACCC**) called for the introduction of a mandatory merger notification regime and also for changes to the substantive legal merger test, relating to the likely effect of a merger and associated onus of proof, as well as a new provision regarding entrenching a position of substantial power in a market.

The current ACCC informal clearance processes for mergers were put in place under the guidance of then ACCC Chair Graeme Samuel in 2004. While there have been some updates to those processes since then, recent merger reviews in relation to proposed acquisitions by Australian Clinical Labs and Transurban highlight opportunities for the ACCC's merger review processes to be updated – without the need for legislative reform – to allow increased transparency and faster timelines, for the benefit of all stakeholders.

Opportunities to increase transparency without increasing regulatory burden

A good example of how transparency could be improved, without creating an increased burden on the merger parties or the ACCC, involves the recent public informal clearance review of the proposed acquisition by Australian Clinical Labs Limited (**ACL**) of its competitor, Healius Limited (**Healius**). Both Healius and ACL provide human pathology services to out-patients and in-patients (at public and private hospitals) and to commercial and government customers, as well as veterinary pathology services. Healius also provides diagnostic imaging services.

The ACCC issued a market inquiry letter, available on its website, seeking views on how close the parties are as competitors, the impact of the proposed acquisition on price (including bulk billing

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policies) and quality or service levels, as well as whether the threat of new entry will constrain the merged entity.

In issuing a market inquiry letter, best practice suggests that the competition agency should issue a balanced, neutral information request to seek the views of market participants, including suppliers, competitors and customers. The ACCC market inquiry letter – though very vanilla – fitted that bill.

This proposed merger however has been unusual in that Healius made an application to the Australian Government Takeovers Panel that the bidder's statement and restrictions in the bid were overly restrictive and burdensome during the unusually long offer period of 6 months. Such a long offer period is due, in part, to the bidder's (that is, ACL's) desire to allow time to work through any competition issues with the ACCC. While the Takeovers Panel declined to review the bid, ACL did issue a new bidder's statement and that bidder's statement is quite forthcoming on its reasoning as to why it considers it has good prospects of securing ACCC clearance. These reasons, set out in section 10.1 of the revised bidder's statement, reflect ACL's view that there have been increased bulk billing rates for federally funded pathology services with private billing said to be 0.03% of pathology services, the increased number of smaller providers who have and could enter and expand to operate in competition with the merged firm, as well as growth in public providers.

The level of detail provided by ACL in its revised bidder's statement as to the competition issues arising from the merger and its arguments regarding why the merger would not be anticompetitive would have been very helpful context if this had been included in the ACCC's market inquiry letter. Including that level of detail would have provided transparency of the bidder's arguments. Stakeholders would have been able to directly consider those arguments in responding to the letter, providing more useful input to the ACCC. Given that ACL included that detail in its public bidder's statement, it is clear that it did not consider the information to be confidential and accordingly there appears to be no reason why ACL would have rejected a request from the ACCC to include that detail in the ACCC's letter.

Transparency of key merger arguments also assists the public in understanding the practical constraints imposed on the ACCC and the role of Government in highly regulated sectors

A merger referenced on the ACCC public register which raises the question of whether competition analysis is relevant in heavily regulated sectors is the Transurban proposed acquisition of a majority interest in Horizon Roads. Horizon Roads has a concession from the State of Victoria to operate the Eastlink toll road. It would seem from public commentary, such as John Durie's column in *The Australian*, that Transurban's primary argument to the ACCC to seek to persuade it to waive through the acquisition is that competition will not be impacted because the concession is subject to State Government regulation (though submissions have also been made that the toll roads of the parties do not compete and, in any event, there are alternative options).

The ACCC market inquiry letter for that acquisition is also vanilla, but perhaps the provision of greater context for stakeholders would have been helpful, particularly having regard to toll road privatisations in New South Wales. Transurban operates all of Sydney's toll roads except the Harbour Bridge and Tunnel. In 2018, the then ACCC Chair Rod Sims looked closely at the unsolicited bid by the Sydney Transport Partners consortium, led by Transurban, to acquire a majority interest in the WestConnex project. Ultimately the ACCC did not oppose the acquisition as the ACCC accepted an undertaking by Transurban to provide data to competing bids for other toll roads (if they were available for acquisition). The ACCC found the NSW Government had the means at its disposal to promote competition for toll road concessions if it so wished. This suggests the ACCC's view was that State Governments should ensure competition for specific assets, and that competition *between* toll roads is a consideration which should be given less weight as the sector is heavily regulated.

In the ACCC's decision to clear the merger and accept the undertaking from Transurban, the ACCC noted:

Importantly for drivers the statement of issues also raised the issue of whether there is potential road on road competition that would be diminished if Transurban obtains WestConnex. To investigate this issue, the ACCC considered a range of traffic models and took into account the NSW Government's price caps for tolls...

We've concluded that an alternative bidder for WestConnex would be unlikely to set tolls below the price caps as only a small number of road users would be likely to switch between current Transurban toll roads and the WestConnex toll roads...

This was one of the more difficult decisions we've made, but we are confident of where we have landed.

The ACCC considers that State governments should only award new toll road concessions through a competitive bid process, and not following an unsolicited proposal, unless there is a truly compelling reason. Accepting unsolicited proposals for new toll road concessions generally leads to higher costs to taxpayers, drivers or both.

It might well be that the outcome of the ACCC merger reviews of acquisition of toll road concessions such as the Transurban/Horizon Roads acquisition leaves the ACCC with limited options on whether to approve or not. Nonetheless, increased transparency as to the arguments being put by merger parties may assist in assessing the overall impact of the merger and provide clarity in the analysis. Any merger proposal relying on arguments to the ACCC that pricing or service are not affected by consolidation because of Government regulation gives rise to important factual and policy considerations. Addressing these issues early, and in a more upfront manner, will promote transparency and explain increased or shorter timeframes for merger assessments.

The new Labor Government in NSW recently hired previous ACCC Chair Professor Allan Fels and previous ACCC Commissioner David Cousins, to oversee a review of the State's tolling systems – it will be interesting to see if that review comments on the ACCC's approach to mergers in this sector.

Conclusion - increased transparency of merger parties' arguments for clearance should allow earlier assessment of their merits and improved clarity of timeliness of merger assessments

The ACCC requesting merger parties to provide reasons why they believe there should be no substantial lessening of competition in informal clearance merger reviews should not be burdensome on merger parties as quite often those arguments are made publicly in any event or are included in other public assessment processes. Disclosure should assist in ensuring attention is focussed on key issues earlier in the merger process.

If the arguments from merger parties are compelling, this will allow faster determinations to be made by the ACCC and therefore facilitate creating improved certainty in timelines that would assist merger parties and stakeholders.

We will have more to say on reform of Australia's merger regime in later editions of Quay Insights.

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