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Articles

This article discusses the recent Australian Competition and Consumer Commission ('ACCC') proposals to reform the merger provisions of the Competition and Consumer Act. It contends that there is a strong case for Australia to follow the competition policy of nearly all OECD countries and large non-OECD countries in requiring compulsory, pre-merger notification of larger mergers. A mandatory and suspensory regime would enable the ACCC to be appropriately informed in a timely manner about and review all significant mergers, including international mergers. It would also reduce reliance on burdensome and less effective ex post enforcement of post-merger anticompetitive behaviour. An additional advantage is that the new merger regime would require the advance notification of all relevant information needed for ACCC decisions. A challenge with the present merger regime is that merger parties determine whether and when a merger is notified to the ACCC and what information is provided. This presents the opportunity for merger parties to engage in tactical or strategic behaviour, much of which threatens good ACCC decision making and is costly to the public purse. The costs of reform of the merger regime are not likely to be high, as many merger parties already pre-notify. Moreover, the authors contend that the public benefits in creating an efficient and effective merger control regime are likely to outweigh the costs of reform. This article also discusses recent ACCC proposals to alter the statutory criteria by which mergers are judged. The authors contend that the adoption in 1992 of a substantial lessening of competition test was correct in principle. However, in practice, the test has been interpreted to emphasise the behavioural or conduct outcomes in the future which necessitates a degree of prediction or forecast, rather than more immediate, tangible, structural changes as a result of the merger. This has made the ACCC's task in proving the likely harm to competition more difficult.

The extension of the unfair contract terms regime in the Australian Consumer Law to small businesses has been robustly enforced by the ACCC and ASIC. The terms targeted by the regulators mirror those that have been found to be unfair in standard form contracts with consumers, including unfettered unilateral variation clauses, rigid renewal clauses and overly broad termination for default clauses. However, the justifications for these terms in business transactions may differ from consumer contracts, possibly making some such terms 'reasonably necessary to protect the legitimate interests' of the party relying on it. Nonetheless, most judgments on the regime involve declarations by agreement between the parties, meaning there is little judicial consideration of these possible nuances. The recent introduction of civil penalties for unfair contract terms makes addressing these issues of interpretation and application of the unfair contract terms regime to business-to-business standard form contracts critically important.

Book Review