FINANCIAL REVIEW

— Opinion

Merger law overhaul risks killing company rescues

The extra costs and time it will take to get ACCC clearance or waiver will make it harder to save struggling companies, particularly active trading companies.

Genevieve Sexton *Restructuring and insolvency lawyer*

Radical changes to Australia's merger clearance laws that come into effect on January 1 pose a real and deeply problematic impediment to the effectiveness of turnaround and restructuring in Australia.

For decades, our formal restructuring regime has prioritised the rejuvenation of insolvent companies (or as much of them as can be saved) by legislating for swift and decisive processes.

The Australian Competition and Consumer Commission chair Gina Cass-Gottlieb. The commission has reported receiving twice as many merger notifications as expected during the first four months of the current transition period. **Edwina Pickles**

Recent corporate law reform has introduced concepts such as safe harbour protections for directors, which are designed to give troubled company directors the runway to turn around and restructure. Distressed and insolvent companies are encouraged to renew and revive, leading to better outcomes for creditors, employees and other stakeholders.

It's not perfect but, at its core, the regime supports the objective of an insolvent company being administered in a way that maximises the chances of the company, or as much as possible of the company, to continue in existence.

In the context of Australia's competition landscape, we're now moving from a voluntary, informal clearance system to a mandatory notification clearance system (where certain monetary or control thresholds are met). The key underlying prohibition to protect competition remains the same – a person or corporation cannot acquire shares or assets if the acquisition would have the effect or likely effect of substantially lessening competition.

That said, these reforms fundamentally change how people engage with, and get clearance from, the ACCC. And if you're required to notify the ACCC and get clearance, and you don't, the transaction is legally void.

Although Australian courts remain the key overseer in the context of restructuring and insolvency, they have been effectively removed from merger assessment process under the new laws. Merger parties who exceed the notification thresholds will no longer have the option of seeking sanction of a transaction from the Federal Court – the avenue for a purchaser will be via the ACCC and then a limited merits review by the Australian Competition Tribunal.

But the central problem is an even simpler one: mandatory notification costs time and money, each of which is in short supply in the restructuring landscape.

The time frames to get clearance are protracted. For a straightforward waiver application, it is more than 10 business days, with most expected within 20 business days. For a notification, consideration by the ACCC is at minimum 15 business days, followed by two weeks in which someone might challenge the ACCC's decision.

The whole process could take more than a year, encompassing pre-notification, early engagement, formal notification, phase 1 assessment, and potentially phase 2 assessment, public benefit assessment and then recourse to the Australian Competition Tribunal.

The ACCC is going to be much busier than it ever was. As noted in *The Australian Financial Review*, before the new regime even comes into effect, the commission has reported receiving twice as many merger notifications as expected during the first four months of the current transition period.

Administrators, receivers and liquidators do not have that luxury of time. Unless they get a court's extension (which also costs money), administrators need to hold their second creditors' meeting within 25 to 30 business days of their appointment. By that date, they need to have a recommendation to put to creditors.

If the time frames are to be adhered to, an administrator would need to have been appointed, convened a first creditors' meeting, run a sale process, and documented the sale, all within no more than 10 business days. That's not commercially feasible – particularly when complying with their legal duty to exercise reasonable care to obtain market price or the best price available.

"The irony is that competition also suffers if a company cannot continue to trade."

What's more, administrators and receivers are personally liable for debts incurred by the company during the period of their appointment. Accordingly, the longer it takes to identify and finalise a transaction, the

more funding an administrator or receiver will need and the greater the risk that they will have no choice but to cease trading the business.

The costs of clearance are also high – they range from $8300 for a waiver up to $56,800 for a phase 1 notification. From there, it ratchets up quickly and can reach between $500,000 and $2 million or more, depending on the transaction size, if it proceeds to phase 2 and a public benefit assessment.

And these are just the ACCC application costs. They do not include those incurred by the applicant (or the external administrators) in preparing and progressing an application, which can separately run to millions.

As applicants will factor those costs into what they are prepared to pay for the relevant company's assets, all these expenses will ultimately be borne by the creditors of the distressed company. With less available for creditors, the financial burden may also result in increased failure and additional claims on the federal entitlement guarantee – the scheme that guarantees unpaid employee entitlements when a company enters liquidation.

Ultimately, the combined effect of additional costs and the length of time it will take to get ACCC clearance or waiver (even where no underlying competition issue exists) make it harder to rescue struggling companies, particularly active trading companies.

The irony is that competition also suffers if a company cannot continue to trade. Nothing affects competition as much as the total removal of a competitor from the market.

Two relatively simple amendments could be made to avoid potentially devastating consequences.

1. To include an exemption to the notification regime where no underlying competition issue is raised and where the assets or business are being sold by an external administrator or under a safe harbour plan.

2. To allow fast-tracking of an application where a business or assets are being acquired from an external administrator or under a safe harbour plan.

As much as the government wants to encourage active competition, the objective would be more effectively achieved in balance with the aims of Australia's restructuring laws, rather than in contest with them.

Complete corporate failure necessarily lessens competition, which is a double blow to creditors and consumers alike.

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