Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2026)19

Unclassified English - Or. English

5 November 2026

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

New Developments in Merger Remedies – Contribution from Australia

- Session II -

10 December 2026

This contribution is submitted by Australia under Session II of the Global Forum on Competition to be held to be held on 10-11 December 2026.

More documentation related to this discussion can be found at: oe.cd/gfc26.

Mr Antonio Capobianco [Antonio.Capobianco@oecd.org]

JT03597439

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Australia

1. Introduction

1. Australia's new mandatory and suspensory merger control regime has changed the way mergers are assessed, and merger remedies are offered, negotiated and accepted. Prior to 2026, mergers were notified informally under a voluntary process, remedies were typically developed through iterative negotiations between the parties and the ACCC, and the ACCC was required to commence court proceedings to prevent mergers that would substantially lessen competition. The new regime has strict timeframes, enforceable conditions, and outcomes that require the merger party to seek review in the Tribunal if they do not agree with an ACCC decision. The strict timeframes under the new regime and shift in approach to negotiating remedies means that merger parties are highly incentivised to submit their best offer, and to do so as early as possible.

2. For as long as the ACCC has been assessing mergers, remedies have been a key element of the successful regulation of mergers. The ACCC maintains a dedicated remedies unit, which utilises its specialist knowledge to design, negotiate, implement and monitor accepted remedies. In this paper, we outline the challenges relating to remedies in both the informal and administrative merger regimes, our views on best practices when assessing merger remedies, and the ACCC's strong preference for structural over behavioural remedies.

2. Remedial challenges in the ACCC's former merger regime

3. Until recently, the ACCC's principal merger regime was informal, voluntary, and non-suspensory. Under this system, there was no obligation on merger parties to notify the ACCC of a merger transaction. Despite this, many mergers were notified to the ACCC for confidential pre-assessment or public assessment. If a merger was assessed publicly, at the conclusion of the assessment, the ACCC would either issue an informal letter noting the merger was unlikely to substantially lessen competition or that it raised competition issues. If the latter, parties would either abandon the transaction or would seek to contest the ACCC's view by seeking a declaration in court or the ACCC would seek to challenge the transaction in court.

4. Over time, the informal regime's shortcomings became apparent. Competitively significant transactions went unnotified or were notified with inadequate information; the absence of fixed timeframes created procedural uncertainty; and the informal nature of the process did not facilitate transparency. The informal regime skewed the default outcome towards clearance when there was any uncertainty. This weakened the agency's ability to engage in robust discussions about potential remedies with parties, because the alternative was expensive, uncertain litigation. In addition, as the regime was non-suspensory, parties' threats to complete put pressure on the timing of the review, leaving the ACCC negotiating with merger parties to obtain an undertaking not to complete and/or more time to conduct the review so that it could obtain sufficient information to conduct its assessment. The challenges of the informal system were compounded in global deals, where merger parties gave priority to complying with mandatory and suspensory regimes, leaving the ACCC in a difficult position and often lacking adequate information and time to make an informed decision. In short, the system was out of step with modern merger control frameworks.

5. An attempt to resolve these issues was made with the introduction of the merger authorisations framework in 2017. The merger authorisations framework was an alternative to the informal regime, which included mandated timeframes and transparency requirements. Merger parties would also provide an undertaking not to complete the transaction until the assessment was finalised. The scheme was voluntary, so merger parties retained discretion whether they sought assessment under the informal regime, merger authorisations framework, or to not be assessed at all.

6. The current regime was implemented by the Australian Parliament at the end of 2024, and became mandatory in January 2026. These reforms marked a turning point in Australian competition law, representing the most significant strengthening of the merger control framework in more than fifty years. At the heart of the reform is the adoption of a mandatory and suspensory administrative regime for mergers. Acquisitions that meet the relevant thresholds are required to be notified to the ACCC, or parties can seek a notification waiver for transactions that have a low risk of raising competition concerns or where there is uncertainty regarding the need to notify. The ACCC retains the ability to litigate completed acquisitions under section 50 of the CCA if it considers that the acquisitions will substantially lessen competition.

3. Remedies in the ACCC's new merger regime

7. The new regime addresses the challenges associated with the informal regime. In particular, the mandatory and suspensory administrative regime means that mergers that meet certain thresholds must be notified and once notified, must be assessed within strict legislative timeframes. Under the new regime, the ACCC is the decision maker and can approve a merger with conditions. Key elements of the new regime are:

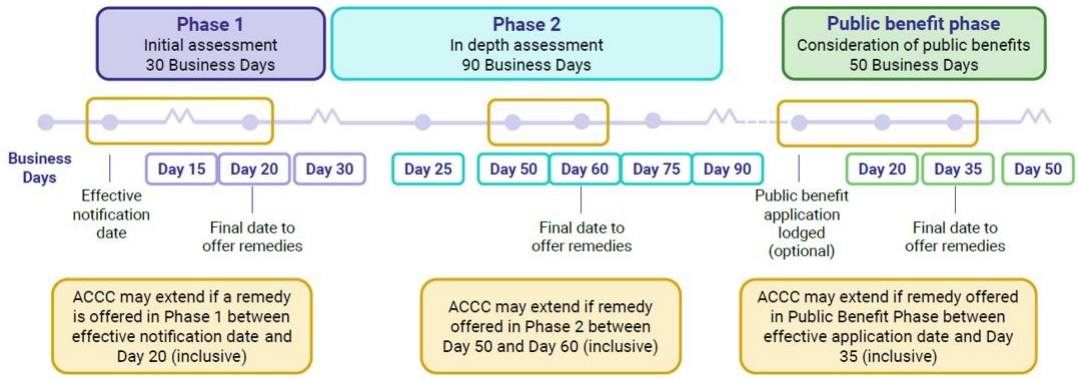
- **Administrative nature**. The ACCC's merger regime has shifted from a judicial enforcement model to a primarily administrative model. Merger parties must notify proposed acquisitions where they meet certain thresholds, and must only complete after the ACCC has determined that the deal will not substantially lessen competition. If the merger party disagrees with the ACCC's decision, they may seek review of the decision in the Australian Competition Tribunal. Previously, merger parties could seek the ACCC's view on the acquisition to reduce the risk of legal action, however, this was optional. When the ACCC considered that an acquisition would substantially lessen competition, and the merger parties didn't amend or abandon their proposal, the ACCC was required to commence court action to prevent or unwind the acquisition.
- **Enforceable conditions**. The new law gives the ACCC broad powers to determine the nature, form, and scope of any conditions as the primary method by which the ACCC will accept a remedy. The ACCC can include a condition in its determination when it is satisfied that, absent the condition, the merger could be likely to substantially lessen competition. This marks a shift from the informal regime, where parties could voluntarily offer undertakings to the ACCC, but the ACCC lacked the power to require such commitments. Failure to comply with any of the conditions is a contravention of the Act which attracts very substantial penalties and other serious consequences.
- **Suspension**. Transactions that meet notification thresholds are not allowed to complete without approval from the ACCC. The suspensory nature of the regime incentivises parties to provide a large amount of information upfront and to respond to subsequent information requests in a timely fashion.

- **Increased transparency**: Under the new merger regime, the ACCC publishes an overview of all notified acquisitions on a public register, including substantive updates, and decisions relating to the acquisition. The register also includes all notification waiver determinations. This increased transparency means that the reasons behind the ACCC's decisions are now made public, which is a change from the old regime where mergers that were pre-assessed did not appear on the public register and only the mergers that were subject to a full assessment were put on the public register.
- **Fixed assessment times and remedy windows instead of open-ended bargaining**. Under the Phase 1 reviews are to be completed in 30 business days, Phase 2 reviews in 90 business days, public benefit reviews in 50 Business Days, and waivers in 25 business days. Remedies deadlines are also set by statute: in Phase 1, remedies must be offered by Business Day 20, in Phase 2, the cut-off is Business Day 60, and in the public benefit phase it is Business Day 35, after which time the ACCC must not have regard to a remedy offered.

4. Timing: Early and Best

8. The ACCC's new merger regime is subject to strict review periods, and the ACCC's discretion to extend these timelines is limited. The offer of commitments or undertakings can impact the assessment timeline, with the potential impact on the timeline dependent on when the commitments or undertakings are offered (see figure below).

Figure 1.



9. Given the length of the prescribed review periods, a significant change from the informal regime is that the ACCC are unlikely to be able to engage with parties on proposed commitments or undertakings in an extended, iterative process. Instead, the ACCC will provide feedback on any proposed remedies but expects that parties will put their best proposal forward as early as possible.

10. Parties may choose to offer commitments or undertakings in Phase 1 to address the agency's competition concerns to avoid a more in-depth competition assessment in Phase 2. Given the short timeline in Phase 1 this means:

1. Parties should raise any remedy proposals early in Phase 1 to allow the ACCC to review, consult with market participants on relevant aspects of the proposed remedy, and provide feedback to merger parties.
2. Phase 1 resolution is more likely to arise when the commitment or undertaking offered contains a simple remedy: for example, the sale of an entire business to an upfront purchaser.

11. Most of the remedies accepted so far were provided to the ACCC in draft form during pre-notification, which allowed the remedies unit to review and provide feedback to the merger parties before they formally notified. This was integral to the ACCC accepting the remedy during Phase 1 and is consistent with our practice of not engaging in iterative back-and-forth engagement with merger parties over drafting in proposed remedies once the matter has been notified. The ACCC's early experience is that the strict timelines, the Phase 2 fee, and the new approach to negotiating remedies have had a positive impact on incentivising merger parties to submit their best offer early, to address clear competition concerns.

5. Structural versus behavioural remedies

12. The ACCC's approach to considering the substance of a remedy will depend on the facts, merits and circumstances of each matter, and has not changed substantively in the new regime. When considering if a particular remedy, or any remedy, could be appropriate, the ACCC will test the likely effectiveness of a remedy to address the concerns, including:

- how difficult a remedy will be to administer
- the ability of the businesses to deliver the required outcomes
- monitoring and compliance costs
- any risks associated with the implementation of a remedy (or failure to do so).

5.1. Preference for structural remedies

13. When seeking to address concerns, the ACCC has a strong preference for structural remedies.[1] Behavioural remedies are problematic for a range of reasons, including that they do not address the underlying structural competition concern, that they may be difficult to enforce due to information asymmetry between the merged firm and the regulator, and the cost of monitoring compliance. These issues are discussed further below.

14. A merger creates a new incentive structure: the combined firm now internalises profits and losses across what were previously two competitors, and a structural remedy removes **the source** of that changed incentive by separating assets. A behavioural remedy does not change the merged firm's underlying incentive to exercise market power, but rather looks to constrain how that incentive expresses itself (whether through supply obligations, non-discrimination commitments, etc.). Further, behavioural remedies do not address dynamic or innovation effects because they cannot impact the merged entity's

[1] This position is shared by other OECD members. See, eg, OECD Recommendation on Merger Review, adopted June 2025 under the legal instrument reference OECD/LEGAL/0333 (C/MIN(2025)9/FINAL). https://one.oecd.org/document/C/MIN(2025)9/FINAL/en/pdf "Adherents should: . . . Prioritise structural remedies over behavioural ones and, for structural remedies, prioritise the divestiture of standalone businesses."

reduced incentive to invest, innovate, or compete, outside the commitment. Because the remedy doesn't target the underlying incentives, the merger entity will optimise around the letter of the commitment, as opposed to the spirit. Behavioural remedies are therefore often highly bespoke and require a broad scope and high level of specificity in drafting the obligations.

15. Moreover, with behavioural remedies, the agency must detect breaches after the fact in an environment of information asymmetry. Structural remedies avoid this because the constraint is self-enforcing: it is easily observable whether assets are divested. The cost of monitoring remains on the ACCC and the merger parties (in terms of funding the appointees) for as long as the behavioural commitment is in place. A *s*tructural change, on the other hand, preserves independent decision-making across the full range of competitive variables and is less likely to involve ongoing monitoring and compliance activities.

16. While the ACCC does not generally accept behavioural remedies, behavioural obligations can be important to support the successful implementation of structural remedies. This includes transitional agreements to allow the purchaser of the divested asset to establish themselves in the business. These behavioural obligations are generally time-limited as they are intended to support the establishment of the structural change effected by the remedy itself.

17. The introduction of the new merger control regime with its strict timeframes has not changed the ACCC's preference for structural remedies. Under the new regime, the ACCC has accepted five remedies (four in Phase 1, and 1 in Phase 2) up to 30 September 2026, which have all been structural divestitures. The ACCC has not accepted any behavioural remedies, and furthermore, has opposed two matters in Phase 2 where behavioural remedies were offered by the merger parties, including in relation to one matter because "a behavioural and time-limited remedy would not sufficiently replicate the structural competitive constraint provided by an independent competitor".[2]

18. The issues outlined above regarding behavioural remedies are even more difficult to overcome or resolve in the tight timeframes associated with a Phase 1 review, and still very difficult in Phase 2. The monitoring burden required with behavioural obligations is also unsuitable for the new merger control regime, which is relatively resource-intensive give the high volumes of notifications and waivers the ACCC is receiving.

5.2. Challenges with designing and implementing structural remedies

19. Even with the ACCC's preference for structural remedies, challenges can arise in the effectiveness of divestitures. The ACCC continues to explore and implement new ways to address these risks, including through more in-depth market consultation, better remedy design, and greater scrutiny of purchasers. Key areas remedies staff consider when assessing a remedy proposal include:

- **Availability of suitable purchasers:** It is critical for the success of any structural remedy that there are suitable purchasers of the divestiture business to ensure it will be maintained as a viable, effective, independent competitor post-acquisition. Assessing whether a suitable purchaser is likely to emerge is an important aspect of the ACCC's assessment of a proposed remedy, and the simplest avenue for

[2] Australian Competition and Consumer Commission (2026), "Microstar-Kovoy - Phase 2 Statement of Reasons". Available at: https://www.accc.gov.au/public-registers/acquisitions-and-mergers-registers/acquisitions-register/microstar-logistics-konvoy

merger parties is to propose an upfront purchaser that can be approved alongside acceptance of any remedy.

- **Third party consents:** Divestitures typically require third party consents, such as regulatory or landlord consents, to be obtained post-acceptance of the remedy, which risks frustrating full divestiture of any agreed package if not obtained (an example of this was an accepted remedy where approximately 25% of consents were not obtained and those sites were ultimately not divested). The ACCC considers the likelihood of obtaining consents as part of its consideration of the effectiveness of a remedy and to minimise consents-risk, including by requesting upfront in-principle consents be provided by the parties.
- **Long transitional arrangements:** While the ACCC generally requires completion of the divestiture to occur within as short a timeframe as practicable, some previously accepted transitional supply arrangements have run for 5 years and longer. This can make the purchaser reliant on the favourable terms offered by the merger party and the incentive to compete strongly can therefore be weakened.
- **Divestitures of brands or parts of a business:** Where the divestiture package includes individual brands or parts of a business, instead of a stand-alone business, there can be a greater risk of the divestiture package not performing as it once did in the hands of the original owner. In one accepted remedy involving a set of brands, those brands had a reduced presence in the market following integration into the purchaser's portfolio of products.

20. These experiences reinforce the ACCC's preference for a simple divestiture of a stand-alone business, with divestiture occurring within as short a timeframe as possible, and minimal ongoing links between the purchaser and the merger party.

6. Institutional arrangements: a dedicated remedies unit

21. The ACCC's dedicated remedies unit performs a critical role in the effective implementation of Australia's merger regulation framework. Team members in the remedies unit are involved in the design, implementation, and monitoring of remedies accepted by the ACCC. Critically, the remedies unit monitors implementation and takes action to ensure that key obligations are complied with. Through the remedies unit, the ACCC has developed an established practice and body of knowledge which results in efficient and effective remedy design and consistency of approach to remedies.

22. With the new strict timeframes and conditions power, the benefits of a dedicated remedies unit are even more pronounced in the new merger control regime. The remedies unit works with mergers assessment teams on a matter, typically from as soon as competition concerns are identified or a remedy is proposed by the merger parties. The remedies unit leverages its specialist knowledge and experience with remedy design, as well as analysing the common risks associated with implementation of remedies to negotiate the most suitable remedy to address the ACCC's identified competition concerns. This results in more effectively drafted remedies. With the remedies unit taking the lead on the remedy negotiation and analysis, the merger assessments team can focus on assessing competition concerns and complying with strict process requirements. The remedies unit and the mergers assessment team work collaboratively to bring recommendations before decision-makers. In this way, the dedicated remedies unit brings efficiencies to the most complex matters in the new merger control regime.

23. Importantly, once a remedy has been accepted by the ACCC, the remedies team members that were assigned to the merger are responsible for implementing and monitoring the remedy. The remedies unit has the experience and standardised processes required to administer appointments/approvals required under a remedy, which can include appointing independent auditors and independent managers, and approving proposed purchasers (where the remedy requires divestiture). This process of ensuring appointees are independent and suitable to fulfil their functions is critical for the ACCC's monitoring functions to be effective. Remedies unit staff actively engage with, and if necessary direct independent auditors and managers regarding the implementation of the remedy and any issues that arise. This active monitoring role means the remedies unit can critically analyse issues that arise, learn from any common errors in drafting or implementation, and utilise this knowledge in future remedy negotiations, bringing benefits to the new merger control regime.

7. Conclusion

24. Australia's new mergers assessment regime is an administrative, mandatory, suspensory regime with strict timeframes and enforceable conditions. The strict timeframes under the new regime and the shift in the ACCC's approach to negotiating remedies means that merger parties are highly incentivised to submit their best offer, and to do so as early as possible. So far under the new regime, the ACCC has only accepted structural remedies, which is consistent with its preference for structural over behavioural remedies. Even with the ACCC's preference for structural remedies, challenges exist to effectively design and implement remedies. The ACCC has long maintain a dedicated remedies unit, which helps address these challenges and brings wider benefits to the merger control regime. A dedicated remedies unit allows the ACCC to utilise specialist knowledge to design and negotiate effective remedies under tight timeframes, as well as implement, monitor and learn from accepted remedies.