

# General Principles of Merger Remedies

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# Structural vs. behavioural merger remedies

- Merger remedies are commonly classified as ‘structural’ or ‘behavioural’
  - A **structural** remedy generally involves a change to the structure of the merged firm through a divestiture of one or more of its businesses/assets.
  - A **behavioural** remedy generally refers to an ongoing remedy designed to modify or constrain the behaviour of the merged firm.
- Strong preference for structural merger remedies (divestiture of assets to address competitive harm)

# General principles of merger remedies

- Effectiveness
- Enforceability
- Proportionality
- Burden and costs
- Transparency and consistency

# Effectiveness of merger remedies

- The remedy must address the potential harm which flows from the concerns identified
- The remedy must be customised to the particular nature of the relevant merger
- Consultation with relevant parties as to effectiveness of proposed remedy

# Enforceability of merger remedies

- Before accepting a merger remedy it is important to ensure that the remedy will be implemented in a timely manner
- Obligations of relevant parties must be clear and unambiguous
- The party offering the merger remedy is capable of meeting its obligations
- Can the remedy offered be frustrated by the actions (or inaction) of third parties?
- What consequences flow if there is non-performance of the obligations?

# Proportionality of merger remedies

- Remedy should be proportionate to the competition concerns or detriments
- Burden and costs of implementing a merger remedy should be considered
- Remedy does not need to improve competition beyond the pre-merger level of competition
- Needs to adequately address the potential harm identified which results from the merger and be effective in restoring or maintaining competition

# Transparency and consistency of merger remedies

- Transparency can assist in optimising the effectiveness of the remedy and compliance by the merger parties with their obligations
- Transparency should not involve any disclosure of confidential information
- Consistency will provide a reliable basis for merger party decisions and expectations – however, unique transactions may require a different approach/solution depending on the specific circumstances.

**May be instances where outright rejection of a merger is the only suitable outcome**

- If no remedy can be shown to be effective and enforceable, outright rejection of the merger may be the only suitable outcome



# ACCC experience

- Standard features of an undertaking:
  - Objectives & competition concerns to be remedied
  - Interpretation clauses
  - Information gathering clauses
  - Monitoring compliance: auditors and independent managers
  - Merits of standard clauses - consistency vs flexibility

# ACCC experience

- Incentives of parties may change
  - good faith negotiations
  - impact on future undertakings
- Preference for up-front divestiture
  - aligns interests of parties and regulator
  - composition, asset and purchaser risks
- Behavioural vs. structural remedies
  - strengths and weaknesses, including monitoring & enforcement challenges

## ACCC experience

- Commercial timeframes – offering undertakings early
- Remedial action available for breach of undertaking
- Undertakings Compliance Unit – dedicated unit for negotiation, monitoring and enforcement of undertakings