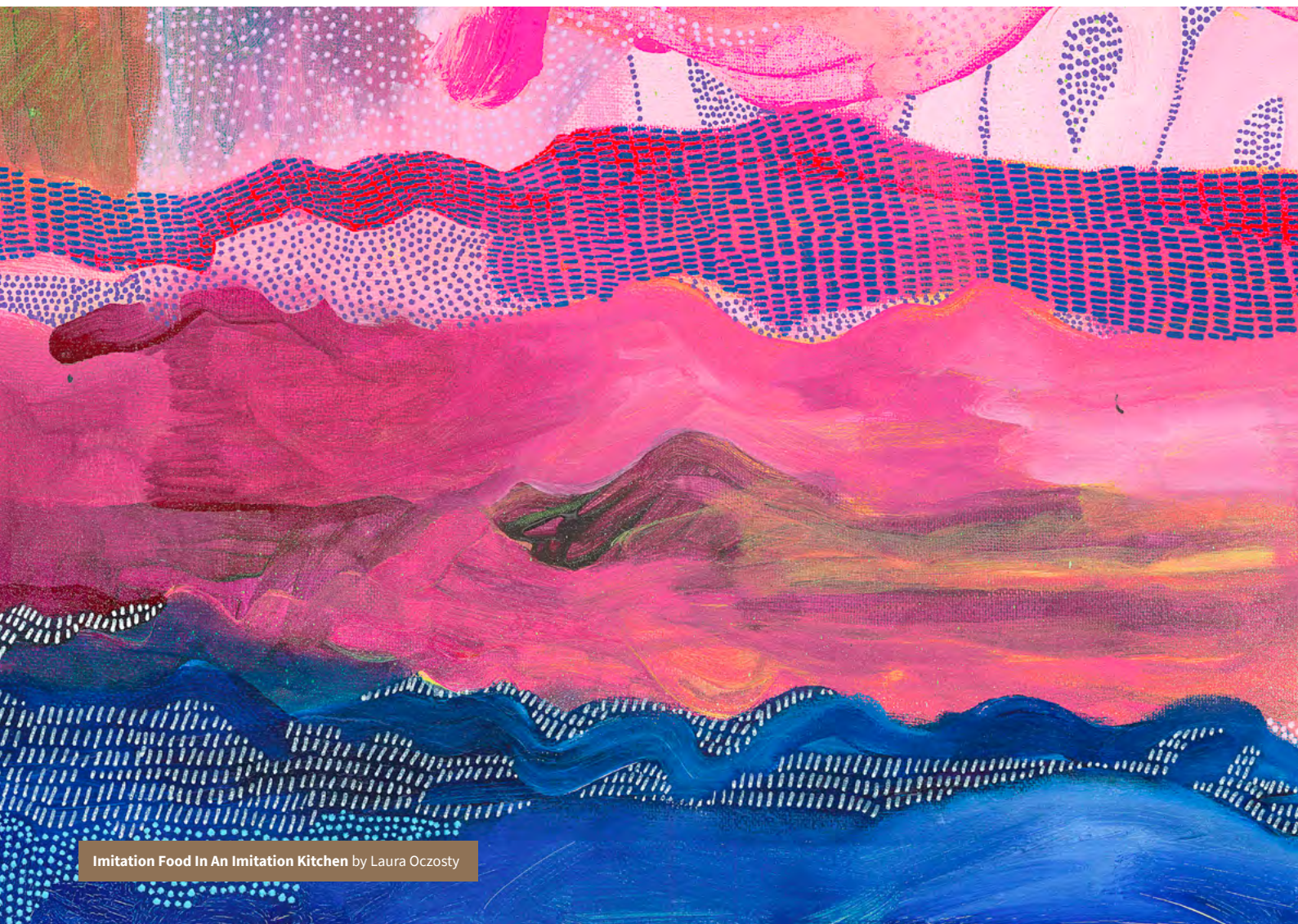


IT'S PUBLIC

KWM M&A INSIGHTS | 2025



MERGE AHEAD: NAVIGATING AUSTRALIA'S NEW MERGER REGIME

KWM
PODCASTS



In this episode of “It’s Public,” host **Antonella Pacitti** welcomes FIRB and foreign investment specialists **Lizzie Knight** and competition law expert **Jennifer Barron** to discuss the newly implemented mandatory merger notification regime in Australia.

Jennifer Barron explains the transition to the new merger regime, which from January 1, 2026, means any deal that meets framework criteria requires Australian Competition and Consumer Commission approval or a waiver for completion. This marks a significant shift from the informal clearance process - which remains temporarily available under transition arrangements.

Lizzie Knight emphasizes the growing importance of managing regulatory risk, particularly the interplay between Foreign Investment Review Board and ACCC requirements. With foreign investment regulations becoming more stringent, bidders must be proactive in ensuring compliance, or risk derailing their deals.

Antonella, Lizzie & Jennifer also discuss “Hell or High Water” clauses, which bind bidders to accept conditions imposed by regulators. While these clauses can protect deal value, they introduce additional complexity and timing risks. The trio also reflect on the broader economic and political landscape impacting M&A activity in Australia, particularly in critical sectors such as commodities and national security.

The transcript below has been edited for brevity and clarity. You can listen to the full conversation here via KWM’s podcast channels.

Download the podcast here



Antonella Pacitti: Hello and welcome to our “It’s Public” podcast, your source for public M&A and markets. I’m Antonella Pacitti, a partner at King & Wood Mallesons in Perth. Today, I’m joined by two of our newest partners: FIRB and foreign investment specialist Lizzie Knight in Canberra, and competition law expert Jennifer Barron from Sydney, recently returned from the ACCC. Welcome, Lizzie and Jennifer.

Lizzie Knight: Hi, Antonella.

Jennifer Barron: Hello, Antonella

Antonella Pacitti: The new mandatory notification merger regime is like navigating a new country’s road rules — you know your destination, but the journey is different. Can you help us navigate this regulatory traffic to get a deal done? Lizzie, what’s on our agenda?

Lizzie Knight: We’ll discuss how dealmakers should approach regulatory and deal completion risk under the new merger regime, focusing on how ACCC and FIRB processes work together. Jennifer understands the new merger regime’s mechanics, and I, the FIRB gearbox. We’ll show how to steer them to complete a deal.

Antonella Pacitti: OK. For dealmakers, what does this mean for completion risk in an uncertain market? Should public takeovers remain conditional on FIRB and ACCC approval, or is upfront approval the way to go? What about “Hell or High Water” clauses, and will we adopt US practices? Jennifer, what arrived on July 1st?

Jennifer Barron: Merger reform has been a long discussion, beginning in August 2021 with then ACCC Chair Rod Sims. It’s remarkable how quickly we’re now implementing a new regime. Legislation passed late last year, setting up a mandatory framework for deals completing after January 1st next year. If your deal is caught, you must engage with the ACCC and cannot complete without a waiver or approval; otherwise, the acquisition is void. While mandatory aspects start next year, the ACCC began accepting notifications on July 1st this year.

Antonella Pacitti: So, the ACCC started accepting notifications a week ago. Where are we now?

Jennifer Barron: We're in a transitional phase where the new regime operates alongside informal clearance. Parties can choose informal clearance, which offers a year to complete without the new process, or start the new process now. To use informal clearance, the ACCC must decide this calendar year. The new regime is less flexible but offers statutory timeframes and timely review by the Australian Competition Tribunal, unlike the expensive Federal Court path. Many parties new to ACCC engagement will need to understand their obligations. Previously, you considered competition impact; now, notification requirements are central to deal timing. Fresh news includes a new ministerial instrument on June 30th, setting thresholds and fees, and the ACCC's interim process guidance on July 1st, outlining expectations.

Antonella Pacitti: That's clear, Jennifer. Now, let's bring in FIRB. Lizzie, how does this new merger clearance regime interact with FIRB, especially in a volatile market? How do we manage execution and timing risk? Are we heading towards "Hell or High Water" positions?

Lizzie Knight: Everyone's focused on this "New World Order," with geopolitics and geo-economics being key terms. Regulatory risk, especially foreign investment risk, is a primary concern. Targets in volatile markets seek regulatory certainty and are wary of bearing regulatory and timing risks, as delays cost money and hinder deal execution. We see targets scrutinizing bidders' ability to transact, considering equity stacks and potential ACCC overlaps. This is coupled with significant verbal regulatory conditions, which, while not "Hell or High Water" yet, make it hard for bidders to commit, as conditions impact value. For example, a bidder buying a target with offshore data was told by FIRB that all data must be stored and accessed in Australia, and directors couldn't take phones abroad — a significant cost and inconvenience. The market is rightly focused on this. With the new merger regime, the ACCC is already taking interest in FIRB applications, particularly on data and roll-ups. Hopefully, the ACCC's July 1st guidance will improve FIRB-ACCC collaboration.

Jennifer Barron: I'm glad you're using our competition law terms, Lizzie. Streamlining is the goal, but ensuring the ACCC has necessary information for competition assessment remains crucial, regardless of notification. The ACCC and Treasury are working on the foreign investment framework's interaction with the new merger regime. FIRB applications will now ask if the acquisition will be notified to the ACCC. FIRB can still refer deals to the ACCC for assessment if not notified. The ACCC suggests voluntary notification for potential competition issues. Streamlining means parties who've notified the ACCC or obtained a waiver can provide FIRB their reference number instead of detailed analysis. Otherwise, they'll need to provide sufficient information for a competition assessment. The ACCC can also impose conditions in their approvals. While remedies are usually undertakings, other conditions are possible, with expected party engagement. For "Hell or High Water" clauses, it depends on what parties can accept and its impact on value. They must consider how far they'll pursue the ACCC process, including costly Phase Two or Tribunal proceedings, before even approaching the ACCC.

Lizzie Knight: That's interesting, Jennifer. It suggests we'll be working hand-in-hand through regulatory approval. I'm curious about "Hell or High Water" outs. Antonella, can you explain what it means and if it works in Australia?

Antonella Pacitti: Great questions, Lizzie. We've long dealt with foreign counterparts' influence on "Hell or High Water." It's thrilling to now have a regulatory environment for these considerations. It's challenging for a control counterparty, usually the bidder, to agree to "Hell or High Water," which binds them to conditions imposed by a third-party regulator. In short, the bidder must accept any conditions imposed by the ACCC or FIRB, with no or limited ability to walk away, even if conditions materially shift the deal's value (e.g., divestment, operational curtailment). It can also mean no sunset date for approval conditions, leading to protracted deal completion. The "time kills deals" adage becomes even more relevant.

Lizzie Knight: Antonella, in this competitive public market, I wonder how this works. FIRB has new guidance on refunds and credits for competitive processes. Jennifer, how will this work with the ACCC?

Jennifer Barron: This is a key change. The new ACCC regime is less flexible. Currently, the ACCC assesses multiple bidders. Under the new regime, an acquisition can't be notified until the vendor and acquirer intend to agree, making formal notification unlikely during competitive bids. However, pre-notification discussions are possible to facilitate quicker post-notification assessment. Formal fees are substantial: nearly \$57,000 for filing, and up to over \$1.5 million for Phase Two, depending on transaction value. Parties need an early, well-informed view of competition risks. The ACCC aims to quickly clear 80% of mergers (15-20 business days), but complex issues require thorough preparation. Lizzie, how does FIRB feed into this deal planning?

Lizzie Knight: It feels like a new world order, but some things remain constant, like regulatory risk. Strategies haven't changed much: read political tea leaves, consider press focus, and be proactive in contentious deals. For most deals, regulatory approval is just a process; overstating it can create unnecessary concern. In this dance of narratives, who should lead — bidder or target?

Antonella Pacitti: I always favour a collaborative approach. If both parties see merit, the target should support the bidder in obtaining FIRB or ACCC approvals. This ensures conditions are met promptly and builds a collaborative reputation. However, if the value proposition is borderline, a more neutral approach is understandable. I don't believe our regulatory framework fully supports "Hell or High Water." Post-execution, bidder and target should collaborate to ensure regulator-imposed conditions are well-informed and preserve value for all stakeholders.

Jennifer Barron: We've discussed the new regime's details, but it's part of a larger economic and political picture, especially regarding productivity, a government focus. The new regime aims to give the ACCC better tools to prevent anti-competitive mergers while speeding up benign ones, promising a more efficient and predictable process. The ACCC targets 80% of mergers determined in 15-20 business days. However, such significant change can be unsettling amid global economic uncertainty. Lizzie, what's the climate for deals and investment attractiveness?

Lizzie Knight: It's FIRB's 50th birthday this year. Assistant Minister for Productivity Andrew Leigh has criticized regulatory "thickets" and "risk aversion" holding Australia back. With a population of 25 million, we need foreign capital and its benefits. It's a race for capital, and Australia must remain competitive against nations like New Zealand, Canada, and the UK. Businesses support FIRB streamlining, and I hope it pays off. Lessons from New Zealand and the UK's FDI revamp, like minimizing compliance costs and avoiding duplicate conditions, are valuable. New Zealand went from least to most attractive for foreign investment. I want to shift from low-productivity compliance to focusing on attracting investment. Antonella, what are your views on public market trends and Australia's attractiveness?

Antonella Pacitti: Lizzie, public markets are under pressure due to private capital's continued dominance and ease of execution. This means more proactive sell-side analysis of bidder risk by targets. It's not just about an approach, but testing if a bidder can go the distance and provide necessary information to regulators. This impacts the dynamic between private capital and publicly scrutinized investors. We'll see more emphasis on liquidated damages, break fees, reverse break fees, and triggers for failing to get critical regulatory approvals. Bidders previously resisted reverse break fees for third-party regulator issues, but I foresee a lower bar for triggering them when deals fail. We've discussed "Hell or High Water" and the US view; let's see how it plays out here. Lizzie, your work on national interest decision-making is fascinating. Can you give us an overview?

Lizzie Knight: I've been studying the last decade's key events defining national security. It shows the convergence and ubiquitous nature of data, and the palpable expansion of national security's definition. Small events lead to regulatory changes in the US, Canada, or UK, then adopted here. This interconnectedness makes national security seem expensive and daunting. But I'm optimistic. Sensible statements from figures like Jake Sullivan and Dr. Stephen Kennedy emphasize balancing economics and national security, advocating "high fences and small yards" to avoid "insurmountable fences and infinite yards." The balance isn't quite right, but policymakers are working to protect economic and strategic interests without one dominating the other. I hope the "front door" provides a solution. Jennifer, where is the regulator's interest most acute?

Jennifer Barron: A key benefit of the new ACCC regime is greater visibility of serial acquisitions, including private equity roll-ups. Scrutiny is high in liquor, pathology, and radiation oncology, with bespoke thresholds for supermarkets. Generally, the ACCC focuses on retail, essential services, and the digital economy, but other sectors aren't exempt. Competition law's strength is learning about diverse industries. Recently, the ACCC opposed mergers in pathology, toll roads, supermarkets, aviation, fertility services, and ready-made meals. Industry dynamics are crucial. Antonella, what areas see regulatory attention in Western Australia?

Antonella Pacitti: Jennifer, in Western Australia, we think commodities. Regulator interest in commodities means critical minerals, as the name suggests. The tariff discussion is also looming large in 2025. It raises the question of whether our government will leverage critical mineral stocks in tariff negotiations with the US — a reverse CFIUS situation. Interestingly, FIRB and the ACCC's merger reforms show real interest in gold and conventional commodities. Lizzie, are you seeing that too?

Lizzie Knight: Yes, gold is a concern in a volatile market for hedging; we need to keep it here. FIRB recently approved Goldfields' 3.7 billion acquisition of Gold Road Resources. Everyone is watching Harmony Gold's US1 billion acquisition of the CSA copper mine in NSW, which will be the first test of the new FIRB portal. This deal shows gold miners increasing copper exposure for the new energy transition. FIRB recently asked us for all minerals on our exploration licenses; though we focused on gold, trace critical minerals caused a stir. But with proper management and explanation, there's always a way through.

Antonella Pacitti: We appreciate that, Lizzie. FIRB looking at our assets from the ground up, even before the portal. Lizzie and Jennifer, thank you both for this terrific discussion. It's been a thrill to distil this complex environment and highlight your market-leading capabilities.

A big thank you again to Lizzie and Jennifer, and until next time.





ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3000 lawyers in 29 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

Disclaimer

This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

Asia Pacific | North America

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See kwm.com for more information.

www.kwm.com

© 2025 King & Wood Mallesons

JOIN THE CONVERSATION



SUBSCRIBE TO OUR WECHAT COMMUNITY.
SEARCH: KWM_CHINA