

Australia's new merger regime What you need to know

Australia's new merger reforms have commenced and mark the most significant overhaul in how mergers and acquisitions are regulated in decades.

The changes introduce a mandatory notification process, giving the Australian Competition and Consumer Commission (**ACCC**) greater power to assess deals before they proceed. The regime is complex and any failure to notify applicable transactions to the ACCC results in a deal being automatically void – so it is critical that you understand how the rules will affect you.

This briefing note offers an overview of the new rules and how they may affect you.

Compulsory notification and penalties for non-compliance

From **1 January 2026**, notifiable acquisitions must not close or be put into effect until after they have been approved by the ACCC (or the Competition Tribunal, on review).

During a transitional period from 1 July 2025 to 31 December 2025, parties can *voluntarily* notify the ACCC of acquisitions under the new laws. This gives them protection if completion is delayed until next year.

The consequences of not notifying are very significant:

- the transaction is legally void (i.e. it will be automatically treated as if it never occurred)
- substantial penalties and other orders can also apply.

What types of transactions are caught?

The new regime applies to a very wide range of commercial transactions, beyond traditional M&A or asset sales.

An acquisition of any legal or equitable right or interest can be caught, even if it does not involve a form of property. Examples of deals that are now potentially captured include:

- all types of land transactions, including leases, agreements for lease, licences, covenants, easements and options
- project development rights and concession agreements
- long-term energy or infrastructure agreements
- IP licences, customer novations, commercialisation agreements
- various types of financial and debt products and instruments
- joint ventures and partnerships.

Notifiable transactions and thresholds

An acquisition must be notified where the following are satisfied:

- it involves the acquisition of assets, or 'control' of an entity through a share sale
- it meets the monetary thresholds (or specific ministerial designation, for example, supermarkets)
- the target is 'connected' with Australia.

Unless an **exemption** applies, or the parties have sought and obtained a **waiver** from the ACCC.

Importantly, it is no longer relevant whether or not an acquisition is likely to raise a potential competition concern. If your deal triggers the thresholds, you <u>must</u> notify it to the ACCC.

What is meant by 'control'?

In the case of a share sale, you are required to notify a transaction if it gives you 'control' of a body corporate. This concept is defined broadly, and will apply in any case where:

- · you are acquiring a majority stake; or
- you (either alone or together with associates) are in a position to determine the outcome of decisions about the financial and operating policies of the company.

In some cases, minority stakes (under 50%) will offer sufficient influence to be considered a controlling interest. There is uncertainty about how this test applies to companies subject to shareholders agreements, joint venture agreements or similar documents (that give all members jointly influence over the company).

The uncertainty surrounding the control test means that it is recommended that you seek advice about notification, even for minority stakes, if your deal meets the financial thresholds.

There is a safe harbour for listed companies (or unlisted companies with more than 50 members) if the acquirer obtains less than 20% voting power or already has over 20% and is acquiring more.

Monetary thresholds*

The primary test for notification is based on the revenue of the parties or total transaction value. Lower thresholds apply for company groups with more than \$500 million turnover in Australia.

When assessing these revenue thresholds, the turnover of the firms as well as any 'connected' entities will be relevant. Two entities are connected if one controls the other or if both are controlled by a third company (using the control test above).

Economy-wide thresholds

The combined revenue of merger parties (including relevant connected entities) on contract date is ≥\$200 million, and either:

- revenue of target (including connected entities) or assets being acquired is ≥\$50 million; or
- transaction value is ≥\$250 million (calculated as the greater of market value or consideration under sale agreement).

Acquisitions by very large groups

The acquirer (including connected entities) has revenue on contract date of ≥ \$500 million and the revenue of the target (including connected entities) or assets being acquired is ≥ \$10 million.

Cumulative (or serial) acquisitions

As well as thresholds that apply to the standalone revenue of a target business, there are also thresholds that apply to similar transactions undertaken over the last three years. These are:

(a) if the combined revenue of the merger parties (including connected entities) is ≥\$200 million and the cumulative revenue from acquisitions by acquirer (including connected entities) in the past 3 years involving competitive goods/services is ≥50 (b) if the combined revenue of the merger parties (including connected entities) is ≥\$500 million and the cumulative revenue from acquisitions by the acquirer (including connected entities) in the 3 years before the contract date involving competitive goods/services is ≥10 million.

When applying this 3-year cumulative test, exempt transactions or those that involve revenue less than \$2 million are not included.

Attributing revenue to asset transactions

For share and business sales, the application of the revenue rules will generally be straightforward. However, under the new regime, certain asset sale transactions, such as some property transactions, must now also be assessed against the revenue thresholds.

If you are acquiring an asset that has associated revenue (e.g. a factory that produces a particular product, a store location that is already operating etc.), then you also need to consider whether the revenue attributable to the asset(s) meets the revenue threshold.

If it is not possible to identify or attribute revenue, then the deemed revenue associated with the asset will be 20% of the market value of the asset. This may be the case, for example, if you are accepting the novation of a lease.

However, this test will generally not apply to assets created as part of a transaction that generate no revenue, or to assets without pre-existing revenue – for example, the sale of vacant land.

*Revenue refers to revenue in Australia in last 12-month reporting period, per accounting standards.



What is involved and what does it cost?

The notification forms

If you need to notify, there is a choice of three forms:

- A waiver notification form which is suitable for straightforward transactions that do not raise any competition risks (these can only be filed from 1 January 2025).
- A short form notification which is suitable for transactions that may involve competitors (or a supplier and customer), but where there is unlikely to be any concern.
- A long form notification which is for transactions that are more complex, or which are likely to require more detailed consideration by the ACCC.

The forms are available from the ACCC website. In all cases, the ACCC can require more detailed information and supporting documents from merger parties.

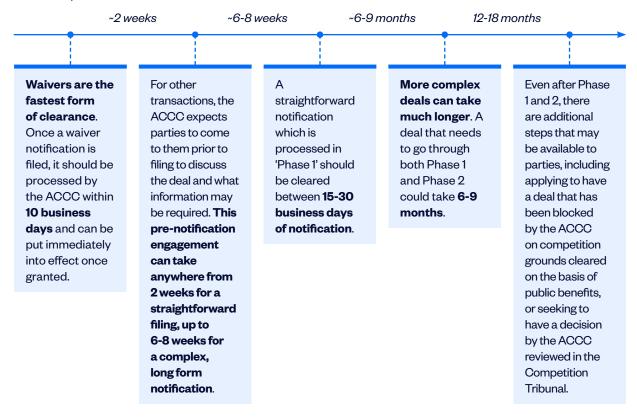
The test

A merger will be permitted to proceed unless the ACCC is satisfied that the acquisition would, in all circumstances, have the effect or likely effect of substantially lessening competition (**SLC**) in any market. Consistent with global trends, the proposed amendments clarify that SLC can result from creating, strengthening or entrenching a position of substantial market power so this may increase scrutiny of small transactions being undertaken by large players or those with a leading market position.

The process

The timeframes associated with the process vary depending upon the complexity of your deal. The ACCC expects that 80% of deals will be processed within 20 business days.

In summary:



You also cannot complete or put a deal into effect until two weeks after the ACCC publishes its reasons in relation to the notification (although you can do so immediately if you get a waiver).

The cost

The filing fees are as follows:

Category	Fee for 2025-2026
Notification waiver application	\$8,300
Notification of proposed acquisition (Phase 1)	\$56,800
Additional fee for mergers that proceed to Phase 2	If the transaction value (being the greater of the market value or consideration receivables of all shares and assets being acquired) is: • \$50 million, the fee is \$475,000
	>\$50 million and ≤\$1 billion, the fee is \$855,000
	>\$1 billion, the fee is \$1,595,000
	This fee must be paid within 7 business days commencing from the day the ACCC advises the notifying party that the notification is subject to Phase 2 review.
Public benefits application	\$401,000
Tribunal review	Will be subject to separate government decisions and consultation.

Other factors

The ACCC is required to publish all notifications it receives on a public register, so the clearance process will be public.

Are there any exemptions?

There are a range of exemptions and safe harbours that apply to particular types of transactions – if you think you may need to notify, we recommend seeking legal advice.

Examples include:

- acquiring a stake of less than 20% in a listed company (or a private company with more than 50 members)
- acquisitions undertaken in the ordinary course of business (other than land or patents)
- deals involving target revenue of less than \$2 million
- some land deals, including sale and leaseback arrangements
- internal restructuring
- the exercise of certain types of rights under financial or debt instruments.

Sale of business non-competes

Under the current Australian competition law, non competes in relation to the sale of a business are exempt from the prohibition on cartel conduct if they are solely for the purpose of protecting the goodwill acquired by the purchaser.

However, the ACCC will now have power to declare the exemption does not apply if it finds that a non-compete or other sale restraint is not necessary to protect the purchaser's goodwill.

What does it mean for me?

The regime is new and complex and will continue to change over coming months. However, here are some practical tips and recommendations for navigating the next 12 months or so:



Err on the side of caution: if you are not sure, get advice. The consequences of not notifying a transaction are severe – it is automatically void.



Remember that it applies to more than just M&A: the regime now extends to a very wide range of commercial arrangements, including leases (and agreements for lease), project agreements, energy and infrastructure deals, concession agreements and more.



Allow time for the ACCC: even a straightforward deal should now allow at least 6-8 weeks for ACCC clearance, and often more. Filing also needs to wait until after a deal has been done (that is, you cannot approach the ACCC until both parties intend to complete the transaction). If you're a seller, you need to provide for the ACCC process in any process letter.



Up-front information: the process now requires considerable up-front information about the parties, relevant markets, the deal itself as well as all transaction documents. You will also need to be able to provide information about any other relevant acquisitions over the last 3 years. If you undertake regular acquisitions, it may pay to develop some internal processes to capture the information you will need for the ACCC forms (for example, market and revenues).



All transactions now need to have an ACCC condition: we can help you to identify the right clearance process for your deal.



Be aware that your deal will be public: the register will include general information about the deal, including the parties and the asset or entity being acquired.



Check any non-competes or other restraints: the ACCC has a new power to disallow non-competes in sale agreements (or other documents, such as restrictive covenants in leases), so get these checked before filing.



Be careful not to 'gun jump': you cannot start to put a deal into effect until after the ACCC clearance process is completed. This means being extra careful about any pre-completion integration activities.



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Market recognition

Chambers Asia-Pacific 2025

Ranked band 1 for Competition / Antitrust in Australia

Global Competition Review 2025

 Recognised as an 'Elite' practice in GCR100 Australia

Legal500 2025

Beaton Australia Client Choice Award 2025

Gilbert + Tobin is recognised in the category of 'Best Client Service'. We have now won this award for four consecutive years.

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