Gilbert + Tobin

Merger reforms in Australia

The *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (**Bill**) marks the most significant reforms to Australia's merger laws in the 50 years since the introduction of the *Trade Practices Act 1974* (Cth), now known as the Competition and *Consumer Act 2010* (Cth) (**CCA**).

The new merger control process, commencing on **1 January 2026**, will introduce a mandatory and suspensory notification regime and prohibition on mergers proceeding without approval by the ACCC or Australian Competition Tribunal, subject to thresholds.

Elements of the regime commence earlier and allow parties to voluntarily notify deals from 1 July 2025. This means that deal strategy should already be taking the options created by the changes into account, particularly for large or complex multi-jurisdictional transactions.

What you need to know in a nutshell

01

Notifying in Australia is mandatory and thresholds are low

The reforms will convert Australia's merger process from a voluntary to a mandatory and suspensory regime. There will be a prohibition on mergers above a threshold proceeding without ACCC approval. Failure to notify a notifiable transaction will render it legally void and expose the parties to substantial penalties.

At a high level, notification will be mandatory for acquisitions involving change of control of a target that meet the monetary thresholds, which the government indicated it intends to set as follows:

a. Australian turnover of the combined businesses is above **A$200 million**, and either the business or assets being acquired has Australian turnover of more than **A$50 million** or global transaction value above **A$250 million**.

b. A very large business with Australian turnover of more than **A$500 million** buying a smaller business or assets with Australian turnover above **A$10 million**.

For some listed transactions, there is a safe harbour which assumes there is no acquisition of control if the transaction would only result in the acquirer obtaining a shareholding of 20% or less, or where the acquirer already has over 20% shareholding and the transaction would increase that shareholding.

02

Designations power

Some sectors may also be subject to special notification requirements under a power for the Minister to make specific determinations aimed at specific deal types, or markets. At this stage, the Minister has indicated an intention to designation mandatory notification for:

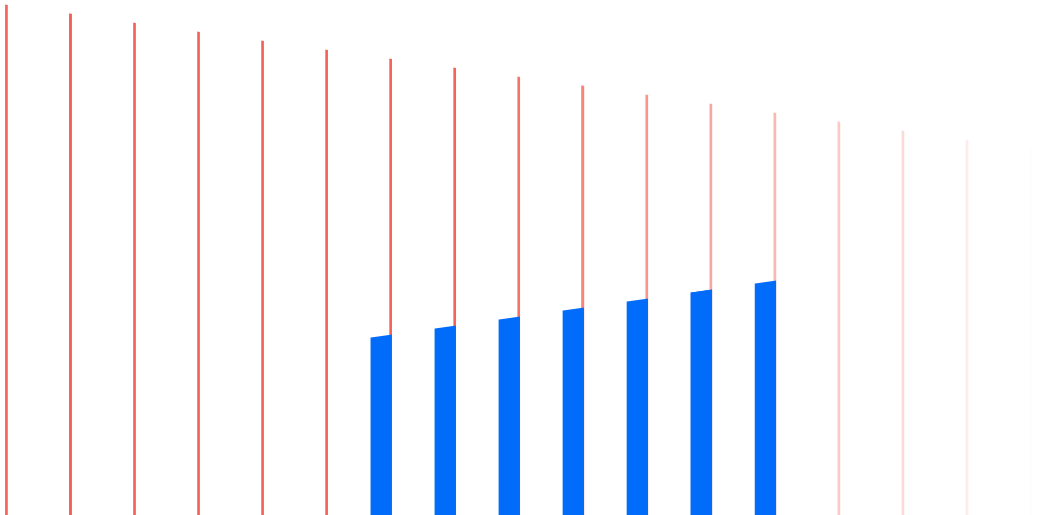
a. **all supermarket mergers**; and

b. interests of 20% or more in **private or unlisted companies** if one of the parties has turnover of more than **A$200 million**.

03

The new regime will apply where a target that meets the threshold has a "material connection to Australia"

In deciding whether a deal has a sufficient Australian nexus, it will be enough for the target to be carrying on, or *to have plans to carry on*, a business in Australia. It would also include business registered in Australia or which generate revenue in Australia.



04

There is a focus on serial acquisitions, with a 3-year look back period

To address concerns raised by the ACCC about serial acquisitions, the government indicated it also intends to set notification thresholds to capture all mergers by businesses with combined Australian turnover of more than A$200 million, where the cumulative Australian turnover from acquisitions in the same or substitutable goods or services over a three-year period is at least A$50 million, will be captured; or A$10 million if a very large business is involved.

When assessing the effect of a merger, the ACCC can now also examine the effect of an acquisition as being the combined effect of the current acquisition and any one or more acquisitions over the prior 3 years.

05

The timeframe for straightforward transactions should be short (15-30 business days) but for complex deals, the timeframe and cost is higher

The regime includes statutory timeframes for the ACCC. The timeframes for the process are set out in the diagram below. The ACCC will have a number of rights to extend these timeframes or "stop the clock" in specified circumstances. There is scope for the ACCC to waive the requirement to notify and it has already indicated that it wants to use pre-filing engagement more regularly, particularly for complex deals, to help parties identify filing and evidentiary requirements.

06

The Australian competition test for mergers has been changed to increase the focus on structural effects in concentrated markets

A merger will be permitted to proceed unless the ACCC "reasonably believes" it would have the effect or likely effect of substantially lessening competition (**SLC**) in all the circumstances. Consistent with global trends, the proposed amendments clarify that this can result from *creating, strengthening or entrenching* a position of substantial market power.

07

There are no residual call-in powers for below threshold deals – but failure to notify leaves deals with some risk

Unlike mergers that are notified (which have the benefit of an anti-overlap rule preventing them from being prosecuted), acquisitions that do not meet the thresholds and are not notified may still contravene general prohibitions on conduct or agreements that has or have the purpose, effect or likely effect of SLC.

08

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. The ACCC will now have power to declare the exemption does not apply if it is satisfied that the provision is not necessary to protect the purchaser's goodwill.

09

Transitional arrangements

The legislation provides for voluntary notification by merger parties under the new regime from 1 July 2025. There is some protection for deals that receive informal clearance under the current process between 1 July 2025 and 31 December 2025 provided that the transaction is completed within 12 months.

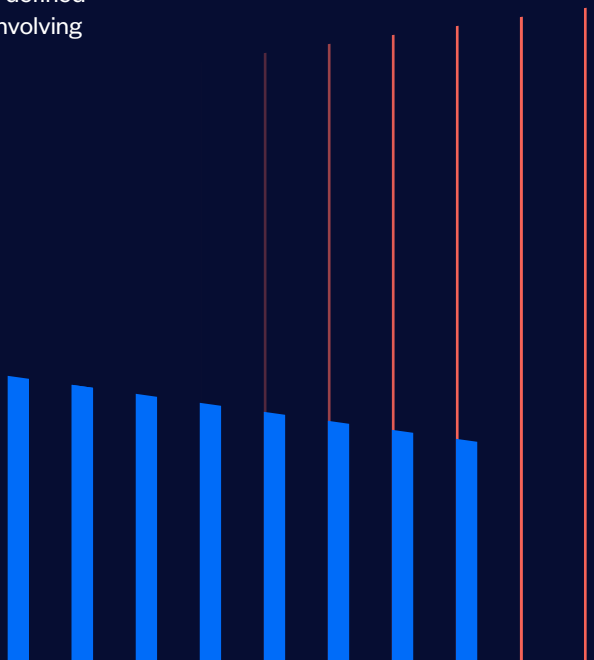
What does it mean for global advisers and their clients?

Many important elements of the new regime remain to be developed over coming months, including the regulations for the final thresholds, application forms (which will set out information and documents which must be provided), availability of waivers, filing fees and updated ACCC process and substantive guidance. We will keep you updated as these developments occur.

For now, it is important to help global clients understand the changing landscape. In particular, for large or complex multi-jurisdictional transactions with an Australian connection, there will be a need to consider the new regime now when framing conditions precedent and considering timing implications. There is scope to voluntarily adopt the new notification process from 1 July 2025 and for transactions with complex multi-jurisdictional filings (which may slow or complicate the Australian process), this may be advisable.

Parties will also need to carefully consider any non-compete in the sale and purchase agreement, to the extent it relates to Australia.

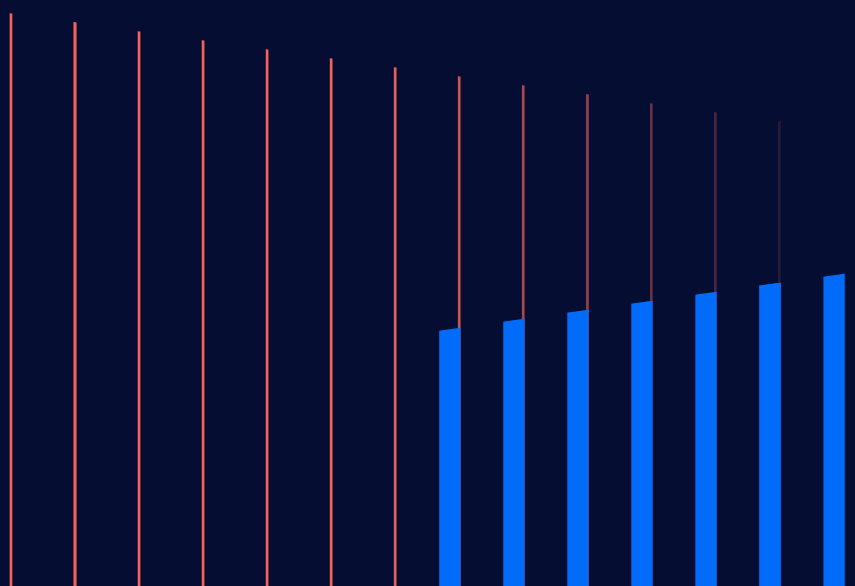
The jurisdictional nexus to Australia is also yet to be properly defined and may mean an increasing number of global transactions involving links to targets with Australian operations will be caught.



Competition, Consumer and Market Regulation

Our Competition, Consumer and Market Regulation Group is widely recognised as the leading competition and regulatory practice in Australia, with unparalleled depth and breadth, advising on many of the most complex competition law cases in Australia and globally.

With a comprehensive understanding of competition law issues and regulated markets, grounded in the analytic rigour, commerciality and creativity that are the hallmarks of our team, we provide practical and strategic legal advice that will help you deliver on your corporate objectives, while mitigating risk.



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