Gilbert +Tobin

Merger reforms in Australia

The Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 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

The key aspects of the Government's merger reforms are:

01

Mandatory notification regime and notification thresholds

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 with a 'material connection to Australia' (i.e., if they are carrying on, or have plans to carry on, a business in Australia) 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**.

c. To target serial acquisitions, 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.

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

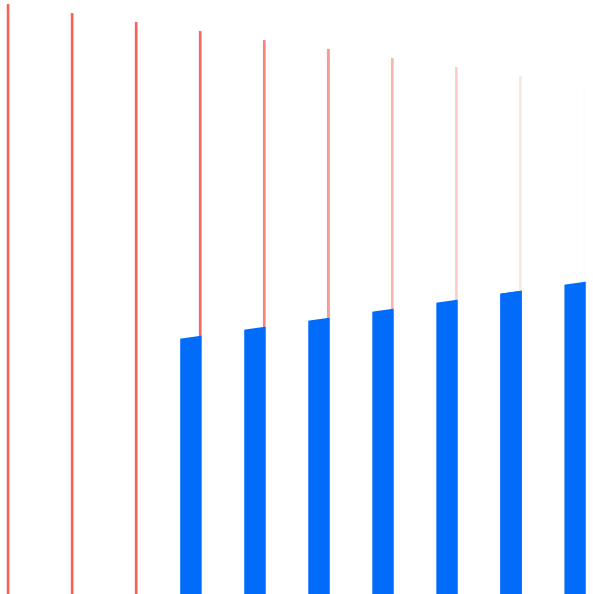
Waiver

Following calls from business and other stakeholders, the legislation introduces a power which allows the ACCC to waive the obligation to notify an acquisition. It is anticipated that the ACCC will provide a process for parties to apply for a notification waiver.

03

Designations power

The Treasurer will have power to designate a particular class of acquisitions as requiring notification, regardless of whether thresholds have been met. To date, the Treasurer has indicated an intention to designate transactions by supermarkets and certain private company investments involving an acquisition of a stake of 20% or more.



04

Decision maker and timeframes

The ACCC will be the first instance, administrative decision maker and the Australian Competition Tribunal will have the ability to undertake a limited merits review of the ACCC's decisions. The initial 'Phase 1' ACCC review period will be up to 30 business days or a 'fast-track' determination if no concerns are identified after 15 business days. The in-depth 'Phase 2' review period will be up to 90 business days, subject to any extensions. Parties can agree on different timelines with the ACCC. The ACCC will need to provide merger parties with a "notice of competition concerns" during phase 2, which must set out the case against the deal and the material facts, information, and evidence relied upon by the ACCC. The ACCC will publish a register of all mergers considered under the new regime. A clearance will become 'stale' 12 months after an ACCC or Tribunal clearance if the cleared transaction is not completed.

The ACCC will have a number of rights to extend these timeframes or "stop the clock" in specified circumstances.

The ACCC is keen for merger parties in complex mergers to engage in pre-lodgement discussions with the ACCC, including to identify what data and information should be produced. The statutory timelines will not commence until any pre-lodgement discussions have been finalised. More information about the new ACCC process will be released through guidelines.

Phase 1 Initial review 30 business days	Phase 2 In depth review 90 business days	Substantial Public Benefits (SPB) Consideration of substantial public benefits 50 business days		Parties may seek Tribunal review
If Phase 1 remedy is proposed by day 20, Phase 1 is extended by 15 business days	If Phase 2 remedy is proposed by day 90 (the 60th day after the start of Phase 2), Phase 2 is extended by 15 business days	SPB Application must be lodged within 21 calendar days of Phase 2 determination	If remedy is proposed within 35 business days, SPB consideration is extended by 15 business days	Application for Tribunal review must be lodged within 14 calendar days (90 calendar day review)

05

Test to be applied for considering competition impacts and substantial public benefits

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. The proposed amendments clarify that a SLC can result from creating, strengthening or entrenching substantial market power. The Explanatory Memorandum emphasises that the amendments are not intended to substantively change the approach to the current competition test, but rather to focus on what mergers may do to market structure. A subsequent process for considering public benefits is available if a deal fails to be cleared based on an SLC analysis.

06

Review of serial acquisitions

The ACCC may treat the effect of an acquisition as being the combined effect of the current acquisition and any one or more acquisitions:

a. that are put into effect by the parties (or their related bodies corporate) during the 3 years ending on the effective notification date of the notification of the current acquisition; and

b. the targets of which are involved (directly or indirectly) in the supply or acquisition of the same goods or services or goods or services that are substitutable for, or otherwise competitive with, each other (disregarding any geographical factors or limitations).

07

Clearance as an administrative decision, procedural safeguards and removal of the Federal Court ability to approve mergers

The merger reforms reflect a significant change from the current judicial enforcement model to an administrative model, under which ACCC determinations will be subject to limited merits review by the Australian Competition Tribunal, based primarily on material before the ACCC. Parties will no longer have the ability to challenge the merits of an ACCC decision before the Federal Court. In a welcome development, the legislation responds to longstanding criticism of the current Tribunal review process for merger authorisations by allowing the Tribunal to permit parties to provide new information if it is relevant to the ACCC determination and if the parties were not given a reasonable opportunity to make submissions on that information during the ACCC's review. There is also scope for new evidence to be introduced before the Tribunal as part of it receiving evidence from experts during any review process.

08

Broader enforcement powers

Acquisitions that do not meet the thresholds may still contravene general prohibitions on conduct or agreements that has or have the purpose, effect or likely effect of SLC. The ACCC won't have the power to prevent such mergers, but can seek orders from the Federal Court (including through an injunction) if they have consider that such an acquisition may contravene the law.

09

Transitional arrangements

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

10

Fees

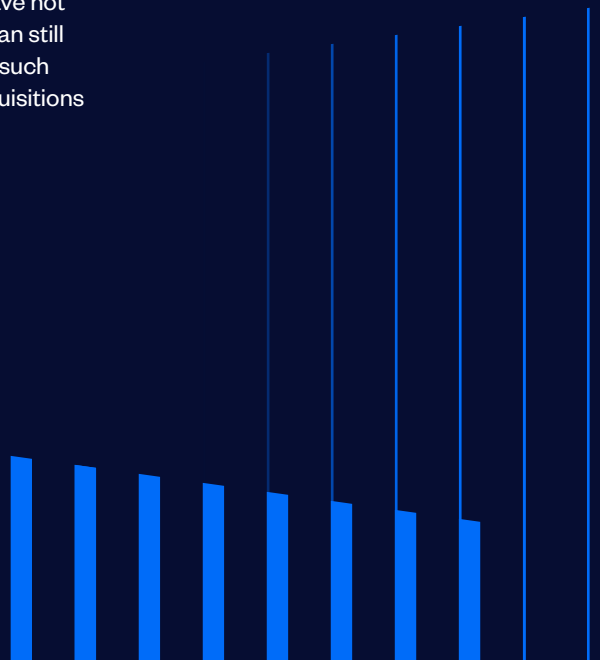
The Explanatory Memorandum states that filing fees are likely to be between $50,000-$100,000 per transaction, with exemptions for some small businesses.

Next steps

The Government will consult on merger review timelines, fees, procedural safeguards, penalties. The ACCC will consult on a range of issues raised by the changes, including **draft process guidelines, draft analytical guidelines and notification forms**.

Merger authorisation applications under the existing regime must be made by 30 June 2025 and parties can choose to notify under the new regime from 1 July 2025. For informal merger reviews that are ongoing as at 31 December 2025, the ACCC indicated it will continue engaging with merger parties and third parties as the review transitions over to the new regime from 1 January 2026. Grandfathering provisions apply to mergers authorised or granted informal clearance by the ACCC between 1 July and the end of 2025, provided the acquisition is completed within 12 months of the date of authorisation or clearance.

The new merger review system formally commences on 1 January 2026. Existing prohibitions will continue to apply to acquisitions that were entered into before 1 January 2026, even if they have not yet been completed as at that date. This means the ACCC can still take enforcement action under the existing law in relation to such acquisitions on and after 1 January 2026, provided such acquisitions were not notified and cleared pursuant to the transitional mechanisms in the new law.



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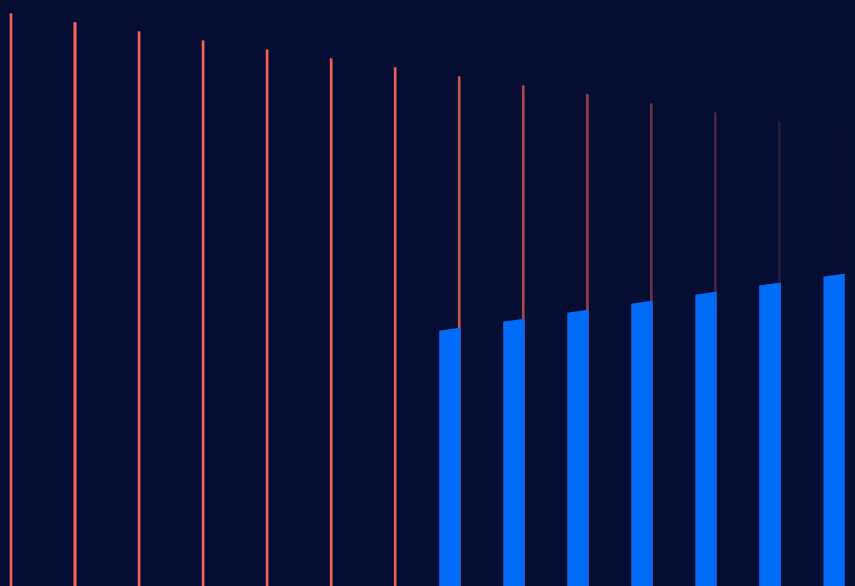

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