

## Australia: The final countdown as Government introduces new merger reform bill to Parliament

### In brief

On 10 October 2024, the Federal Government introduced the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (Bill)* to Parliament. The Bill will amend the *Competition and Consumer Act 2010 (CCA)* to implement a mandatory and suspensory merger control regime in place of the former voluntary regime.

The Bill has been introduced following extensive public consultation, resulting in a number of important changes to the proposal set out in the earlier exposure draft. In this alert, we step through key elements of the Bill and changes which have been made to the previous exposure draft.

On 4 November 2024, Baker McKenzie and MLex is co-hosting a seminar with special guest Marcus Bezzi (Chief Advisor to the Competition Law Taskforce) and a panel of experts to discuss these reforms and their impact. For further information, and to register for this event, please click [here](#).

As we progress towards the implementation of these significant reforms, please contact us if you have any queries or if we can assist you to engage with the public consultation process.

For more information on these changes, please see our previous client alerts [here](#) and [here](#).

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## In more detail

### Notification thresholds

Following extensive consultation with various stakeholders, the Government has announced revised notification thresholds. There will be three alternative monetary thresholds as set out in the chart below from the Government's response to the consultation process. The notification thresholds will be contained in a standalone legislative instrument which will be the subject of consultation in 2024-25.


#### There will be one economy-wide monetary threshold ...

<p><b>Economy-wide monetary threshold</b></p> 	<p><b>An acquisition is notifiable if it meets the following limbs, and the target has a material connection to Australia:</b></p> <ul style="list-style-type: none"> <li>a. Combined Australian turnover of merger parties (including acquirer group) is at least <b>\$200 million and</b></li> <li>b. <b>Either</b> the Australian turnover is at least <b>\$50 million</b> for each of at least two of the merger parties <b>or</b> the global transaction value is at least <b>\$250 million</b></li> </ul>
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#### ... with an additional targeted threshold for very large acquirers of smaller businesses or assets ...

<p><b>Very large acquirer threshold</b></p> 	<p><b>An acquisition is notifiable if:</b></p> <ul style="list-style-type: none"> <li>a. Acquirer group Australian turnover is at least <b>\$500 million and</b></li> <li>b. The Australian turnover is at least <b>\$10 million</b> for each of at least two of the merger parties</li> </ul>
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#### ... and a separate three-year cumulative threshold to address serial acquisitions

<p><b>Three-year cumulative turnover threshold</b></p> 	<b>For medium to large sized mergers</b>	<b>For very large acquirers</b>
	<p><b>An acquisition is notifiable if:</b></p> <ul style="list-style-type: none"> <li>a. Combined Australian turnover of merger parties (including acquirer group) is at least <b>\$200 million and</b></li> <li>b. The cumulative Australian turnover from acquisitions in the same or substitutable goods or services over a 3-year period is at least <b>\$50 million</b></li> </ul>	<p><b>An acquisition is notifiable if:</b></p> <ul style="list-style-type: none"> <li>a. Acquirer group Australian turnover is at least <b>\$500 million and</b></li> <li>b. The cumulative Australian turnover from acquisitions in the same or substitutable goods or services over a 3-year period is at least <b>\$10 million</b></li> </ul>
	<p>Acquisitions below <b>\$2 million</b> Australian turnover would be excluded</p>	

 A target has a **material connection to Australia** if they are 'carrying on a business in Australia' **or** have plans to carry on a business in Australia

Source: Government response to merger reform consultation dated 10 October 2024

There will be no market-share based notification thresholds. The proposed market share thresholds had been criticised as being too complex and uncertain. The thresholds will be reviewed after 12 months after coming into effect to ensure that they are fit for purpose.

## Acquisitions

### What is included?

- Following consultation on the exposure draft, the Bill adopts simpler definitions of acquisitions which will be captured by the new merger framework. The Bill applies to the following type of acquisitions:
  - Shares or assets of a body corporate or a corporation that would result in 'control' (see further below) and which satisfy the above applicable monetary thresholds;
  - Units in unit trusts and interests in managed investment schemes that would result in control and which satisfy the above applicable monetary thresholds; and
  - Other transaction structures determined by the Minister that are not captured by the categories contained in the Bill,
- Hostile takeovers can be confidentially reviewed by the ACCC and withheld from being listed on the public register for up to 17 business days, allowing the ACCC to make a confidential decision if the acquisition is not likely to raise concerns. Surprise hostile takeovers will not be listed on the register if, prior to the end of the 17 business days, the ACCC ceases its review of the acquisition or if the applicant withdraws its application.

### What is excluded?

Certain acquisitions are exempt from notification under the Bill, including:

- Land acquisitions involving residential property development and certain commercial property acquisitions, unless they are captured by other targeted notification requirements;
- Acquisitions that do not confer or change control (being the capacity to determine financial and operating procedures of an entity), subject to exceptions;
- Acquisitions that result in up to 20% of voting power of publicly listed entities or an unlisted widely held company (i.e. entities that fall under Chapter 6 of the *Corporations Act 2001* (Cth) (**Corporations Act**); and
- Internal restructures or reorganisations.

Relevantly, the 'control' exemptions which were set out in the initial exposure draft of the proposed merger reforms have been simplified in the Bill. While the earlier exposure draft contained various rebuttable presumptions to carve out certain transactions, feedback indicated those were uncertain and unclear, resulting in a more streamlined carve-out in the current Bill which adopts a definition of 'control' which aligns more closely with that set out in the Corporations Act.

As part of the suite of changes to the merger reform framework, the Bill also provides for:

- A notification waiver system to allow parties to request that the ACCC waive the obligation to notify an acquisition on a case-by-case basis (with details to be determined by the Minister and set out in a separate legislative instrument); and
- The introduction of a targeted screening tool to capture acquisitions in designated concentrated regions and/or sectors which fall below the monetary thresholds but which may raise specific competition concerns. If the target business or asset in an acquisition falls within the designated region or sector, it is proposed that the acquisition would need to be registered via an online form prior to it being made, and the acquisition would only become notifiable if the ACCC requests notification within 5 to 10 business days of completing the tool.

The Government has also announced that it intends to use its discretionary powers to respond to high-risk mergers, including in the supermarket sector, and will consider targeted notification requirements for sectors such as fuel, liquor and oncology radiology.

## The substantial lessening of competition and public benefit tests

The ACCC must grant merger clearance unless it is satisfied that an acquisition would, in any circumstances, have the effect or be likely to have the effect of substantially lessening competition in any market.

The earlier exposure draft proposed specific changes to the substantial lessening of competition (**SLC**) test, namely that any acquisitions which have the effect or likely effect of *creating, strengthening, or entrenching a substantial degree of power in the market*, may give rise to an SLC. The Bill clarifies that those changes will only apply to how the SLC test is used to assess mergers, but will not apply to other provisions of the CCA.

The earlier exposure draft also provided that the ACCC may approve mergers which may result in an SLC if it would result in a net public benefit which would 'substantially' outweigh the public detriment. The Bill has revised this exemption to remove the word 'substantial', thereby making it consistent with the authorisation public benefits test.

## Simplified timeframes and clock-stopping

The Bill adopts slightly revised timeframes for making determinations, including the maximum time in which the ACCC must make its determinations, subject to any extensions.

The Phase 1 determination period has been reduced to 30 business days. However, if no concerns have been identified within 15 business days of the date of notification, the ACCC may make a prompt 'fast track' determination. The Phase 2 determination period is 90 business days, commencing immediately after the end of the Phase 1 determination period.

By the 25th business day of the Phase 2 review period, the ACCC may provide a written 'notice of competition concerns' setting out its preliminary assessment of the acquisition. Importantly, if the ACCC wishes to determine that an acquisition cannot be put into effect, it must issue the 'notice of competition concerns' within that period.

If a notification is false or misleading, or materially incomplete, the ACCC will have the option to 'stop the clock' on the statutory timeframe. If this occurs during a Phase 1 review, the statutory timeframe will reset at day zero. However, if this occurs during a Phase 2 review, the ACCC will have the option to 'stop the clock', and the timelines will resume once the required information has been received. The ACCC is empowered to 'stop the clock' within 10 business days after serving any section 155 notice (which is a mandatory request for information, documents and/or examination of individuals) and there has been no response from the merger parties.

## Merits review

The earlier exposure draft provided for the Competition Tribunal to undertake a limited merits review of merger determinations made by the ACCC. It was proposed that the Competition Tribunal could only take into account information which was before the ACCC when it made its determination.

The Bill however introduces a right for the Tribunal to consult with consumer associations or consumer interest groups and have regard to their views in making its decision, and to allow a person to provide certain new information including information not in existence at the time of the ACCC's determination, and information relevant to matters that the parties were not given a reasonable opportunity to address during the ACCC's review.

## Transitional timelines and next steps

The key timelines are outlined in the chart below.

<b>October 2024</b>	<ul style="list-style-type: none"> <li>■ Legislation is introduced into Parliament</li> </ul>
<b>Q1 2025</b>	<ul style="list-style-type: none"> <li>■ Public consultation on draft process guidelines, analytical guidelines and notification forms</li> </ul>
<b>Q2 2025</b>	<ul style="list-style-type: none"> <li>■ Guidance published on the transitional arrangements, including engagement with merger parties and stakeholders on what to expect in the lead up to mandatory notification commencing</li> </ul>
<b>1 July 2025</b>	<ul style="list-style-type: none"> <li>■ Voluntary notification available under the new regime</li> </ul>
<b>During 2025</b>	<ul style="list-style-type: none"> <li>■ Merger authorisations applications will be accepted up until 30 June 2025</li> <li>■ Merger authorisations lodged before 30 June 2025 will continue to be considered until the ACCC or Tribunal makes a determination on the application</li> </ul>
<b>During 2025 and 2026</b>	<ul style="list-style-type: none"> <li>■ For informal merger reviews that are ongoing as at 31 December 2025, the ACCC will continue engaging with merger parties and third parties as the review transitions over to the new regime from 1 January 2026</li> <li>■ For mergers that the ACCC does not object to in the informal system between 1 July 2025 and 31 December 2025 and which are completed within 12 months of the ACCC's decision - these will not require notification under the formal regime</li> </ul>
<b>1 January 2026</b>	<ul style="list-style-type: none"> <li>■ Mandatory notification for the formal regime commences</li> </ul>
<b>1 January 2027</b>	<ul style="list-style-type: none"> <li>■ A review of the notification thresholds will be conducted</li> </ul>
<b>1 January 2029</b>	<ul style="list-style-type: none"> <li>■ A review of the formal regime will be conducted three years after commencement, informed by evidence around the impact of mergers on the economy and the performance of the ACCC</li> </ul>

Source: [ACCC Statement of Goals for Merger Reform Implementation](#)

In parallel with the Bill, the ACCC released its 'Statement of Goals for Merger Reform Implementation' which describes its aims for the implementation process. This document provides that the ACCC is set to introduce new guidelines, as well as the relevant notification forms, for public consultation commencing in early 2025. The ACCC hopes that the guidelines will better reflect the new approach to competition assessments and evolving markets, making them more accessible for businesses, which will in turn help businesses better evaluate potential competition risks of any proposed acquisition.

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