A NEW DAWN FOR THE AUSTRALIAN MERGER CONTROL REGIME

On 10 April 2024, Treasurer Jim Chalmers announced the highly anticipated merger reforms in Australia (**Merger Reforms**), promising "a streamlined path to approval". From **1 January 2026**, a single mandatory and suspensory administrative merger control regime is set to come into force, replacing the current voluntary notification and authorisation process. The Australian Competition and Consumer Commission (**ACCC**) welcomed the Government's move to reform Australia's merger laws and bolster the ACCC's role and powers in reviewing mergers. The Merger Reforms will bring Australia closer in line with other OECD and EU jurisdictions in terms of how mergers are assessed and cleared, and are the most significant changes to Australian merger control laws in 50 years. Businesses will need to factor in the Merger Reforms when planning and executing domestic and cross-border M&A transactions with an Australian nexus. This briefing outlines the key changes set to be implemented and their potential impact on M&A deals in Australia.

Key changes

The Merger Reforms will replace the current voluntary notification and authorisation process with a mandatory and suspensory clearance regime that largely reflects the model advocated for by the ACCC, but with two substantive differences: there will be no changes to the onus of proof and no introduction of call-in powers for the ACCC in respect of transactions that do not meet notification thresholds.

The ACCC will be the first-instance administrative decision-maker with responsibility to determine whether a merger may be put into effect, with or without conditions. The reforms will introduce limited substantive changes to the way in which mergers are assessed but will include a modified version of the "substantially lessening competition" (**SLC**) test that also examines whether a transaction creates, strengthens or entrenches a position of substantial market power, which will be accompanied by new s50(3) merger factors. Whilst there are no fundamental changes to the way in which mergers will be assessed, "roll up" strategies or serial acquisitions (such as those undertaken by PE buyers) will face more scrutiny and be subject to review even in cases where there are limited overlaps with all mergers within the previous three years by the merger parties now being capable of being considered as part of the ACCC's merger review.

The Merger Reforms will affect each of the three stages of the merger clearance process, including notification, assessment and enforcement:

Notification

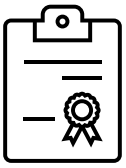
- **Mandatory notification:** Parties will be required to notify the ACCC of any deal above a certain monetary (*e.g.*, turnover, revenue) and supply / market share-based thresholds. Consultation is expected to occur on the relevant notification thresholds later in 2024. As outlined in our previous briefing, it will be important to ensure that relevant notification thresholds are set at an appropriate level and include a sufficient nexus requirement to Australia to avoid capturing transactions that will have little to no effect on markets in Australia. If notification thresholds are set at appropriate levels, the reforms may give businesses greater certainty in terms of review timelines. However, smaller deals (not currently caught by the ACCC's voluntary regime) will likely face delays not currently experienced, and commercial timelines will need to be adjusted accordingly.
- **Upfront notification requirements:** Calibrated upfront information requirements will be introduced where parties will be required to provide relevant information at the time of notification to enable the ACCC to undertake its review and efficiently differentiate mergers that may be assessed under the fast-track process. Parties will be required to submit a 'simple' shorter notification form for mergers unlikely to raise competition concerns, and a more detailed longer notification form for others. It remains to be seen the extent to which the ACCC's information requirements will change from the existing discretionary guidance currently provided under the ACCC's Informal Merger Clearance Process Guidelines and/or how prescriptive the filing form(s) will be. Whilst we expect merger parties to lose some discretion as to the scope and nature of material to be included in merger filings, this will likely be offset by greater certainty as to what information and materials the ACCC will require upfront. However, merger parties will need to be mindful of how more sensitive information will be managed by the ACCC and the increased potential for information to be shared with other agencies, particularly in multi-jurisdictional transactions. The ACCC is expected to consult on merger notification forms in 2025.
- **Evidence gathering powers:** The ACCC's evidence gathering powers will also be strengthened – the ACCC will be able to request further evidence and information from merger parties and relevant third parties during its review, in addition to its existing powers under section 155 of the *Competition and Consumer Act 2010* (Cth) (**CCA**). We expect that the ACCC will seek to use such powers more frequently once the Merger Reforms are implemented to ensure the veracity and completeness of information and documents that are submitted by merger parties in support of their application for merger clearance.
- **Filing fees:** All merger notifications will be accompanied by a fee. Indicatively, Treasury expects this to be around AUD$50,000–100,000 for most mergers. An exemption from fees will be available for small business. Consultation is expected to occur on the relevant filing fees later in 2024.
- **Pre-notification discussion:** Parties will be able to engage in confidential pre-notification discussions as to the information to be provided to the ACCC but will no longer be able to receive an 'informal view' on a proposed merger. This practice is consistent with a number of other major jurisdictions and will allow merger parties to engage constructively with the ACCC on issues that may be more likely to attract scrutiny.
- **Merger register:** To improve transparency, all mergers considered by the ACCC will be listed on an ACCC public register, with brief information including the names of the merger parties, a short description of the transaction and affected products and/ or services, and review timeline. It remains somewhat unclear the extent to which the ACCC will be required to publish detail reasoning in respect of its decisions but more transparency and precedent (similar to the Competition and Markets Authority and European Commission) would help provide merger parties and practitioners with a more comprehensive body of decisional practice upon which to rely.
- **Suspensory clearance model:** Parties will be prohibited from completing the merger until the ACCC clears the transaction. Notably, if the ACCC does not make a decision within a certain time period, the merger may be permitted to proceed. Indicative timelines for review are consistent with international practice, including Phase 1 (15-30

business days) and Phase 2 (90 business days). It is expected that the ACCC will determine that the vast majority of mergers may be put into effect within the Phase 1 period of around 15-30 working days. These time periods may be extended by the ACCC, *e.g.*, if remedies are offered by the merger parties, by mutual agreement or if requested information is not promptly provided. If a likely SLC is found following the ACCC's Phase II determination, merger parties may seek either approval from the ACCC for the merger if it can be established that the merger would result, or be likely to result, in a substantial benefit to the public which outweighs the anti-competitive detriment of the merger (a decision upon which would need to be made by the ACCC within 50 business days), or may seek review of the ACCC's determination by the Competition Tribunal**.** Please see the attached **infographic** for further details of the indicative suspensory timeline. It is expected that further consultation on these timeframes will occur in 2024 but we believe that the Merger Reforms will bring greater certainty in respect of timing and process.

Assessment

- **Modified SLC test:** The ACCC will have to determine that a merger can be put into effect (with or without conditions) unless it considers the merger would have the effect, or be likely to have the effect, of SLC in any market, including (but not exclusively) if ***the merger creates, strengthens or entrenches a position of substantial market power in any market***. This modification will capture related agreements.
- **Merger factors:** Current s.50(3) merger factors will be replaced with criteria, focused on the conditions for competition and structure of relevant markets, as well as the market position of the businesses concerned and their economic and financial power. The ACCC will be expected to update and periodically review its guidance.
- **Serial acquisitions:** To target serial or "creeping" acquisitions and roll up strategies, the cumulative effect of all mergers within the previous three years by the merger parties may be considered as part of the assessment of the notified merger (and will be aggregated for the purpose of assessing whether a merger meets the notification thresholds), whether or not those mergers were themselves individually notifiable.
- **Public benefits test:** It is anticipated that the current substantial public benefits test will be retained as a 'second limb'. If the ACCC disallows the merger, approval may be sought if the merger would result, or be likely to result, in substantial public benefits that outweigh the anti-competitive impacts.

Enforcement



- **Administrative model:** Notifiable transactions will require ACCC approval before they can proceed (compared to the previous judicial enforcement model where the ACCC would need to commence action in the Federal Court in order to oppose a merger that it believes is likely to SLC).
- **Review:** ACCC decisions will be subject to limited merits review by the Australian Competition Tribunal (**Tribunal**) with time limits. Judicial review of decisions by the Tribunal will be available in the Federal Court. The Merger Reforms remove the option to seek a negative declaration from the Federal Court and limit appeal rights to limited merits review before the Tribunal. This will remove existing and important checks and balances on over enforcement. Limited merits review will place merger parties at a disadvantage due to substantial information asymmetries that will arise in terms of material accessible by the ACCC and merger parties (in the context of Tribunal proceedings). Further consultation on procedural safeguards is expected to occur later in 2024.
- **Penalties:** Substantial penalties (monetary and/or divestiture) will also be introduced. A failure to notify a notifiable merger or proceeding with the merger ahead of the ACCC's determination or otherwise than in accordance with the ACCC's determination will result in substantial penalties for the entity concerned and executives or officers responsible for the merger, and voiding of the transaction. Penalties will also apply for the provision of false or misleading information. Further consultation on penalties is expected to occur later in 2024.

Notably, the Merger Reforms align reasonably closely with the ACCC's proposal that was submitted to Treasury in November 2023 and tested by the Competition Review Taskforce alongside two other policy options. For more details,

please see the attached **infographic** comparing the current regime in Australia *vis-à-vis* the ACCC's proposal and the Merger Reforms to be implemented from **1 January 2026** (subject to further consultation).

No special 'call-in' powers

Treasurer Jim Chalmers rejected the ACCC's request for a special 'call-in' power. Although the ACCC will not have the ability to ‘call-in’ mergers below the thresholds for review, it still may investigate a below-the-threshold merger for breach of any other relevant provisions of the CCA, as only notified mergers will receive the benefit of anti-overlap provisions.

No change to onus of proof

The ACCC previously proposed that merger parties should be required to satisfy the ACCC that a merger is not likely to SLC before approving a merger. Many stakeholders objected on the basis that this reversed the onus of proof, effectively introducing a presumptive 'ban' on mergers. Treasurer Jim Chalmers confirmed that the Merger Reforms will not implement this reversal of onus, noting the Competition Taskforce's view that "disproving the existence of a substantial lessening of competition may be difficult and impractical for businesses to satisfy, particularly those in emerging markets". As such, the burden of proof rests on the ACCC to establish that a merger is likely to SLC in order to not approve a transaction. The public benefits test currently applied to merger authorisations will be maintained as a 'second limb' for the ACCC's assessment of whether a merger should be allowed because it gives rise to net positive substantial public benefits, if the ACCC disallows a merger on SLC grounds.

Government's announcement welcomed by ACCC

The ACCC welcomed the Government’s announcement that it will move to strengthen Australia’s merger laws and deepen its regulatory role in assessing mergers. The ACCC responded to the Statement of Expectations issued by the responsible Minister through a Statement of Intent (**SOI**), outlining how it will meet the Government's expectations. The SOI includes the ACCC's strategic objective to prevent anti-competitive mergers and to support the implementation of merger law reform and a fit for purpose merger regime.

Potential impact of the Merger Reforms on M&A landscape

The Merger Reforms will likely have some important ramifications for businesses seeking to undertake domestic and international M&A transactions with an Australian nexus. Australia's Merger Reforms are not dissimilar to the merger control regimes in many OECD jurisdictions and as such, do not signify a radical shift for businesses that have previously sought merger clearance from overseas regulators. Subject to further consultation, the Merger Reforms may give businesses greater certainty and alignment of review timelines where clearance is being sought in multiple jurisdictions.

Where transactions may be more contentious from a competition perspective, it appears that the ACCC may take a more data driven approach, particularly for Phase 2 reviews. This is also in line with jurisdictions such as the European Union. As indicated by the Competition Taskforce, "a shift in capabilities and practice will be required to support the change from enforcement action to more data and economics-led administrative decision-making". This change from a judicial enforcement model to an administrative model, in conjunction with the legal and regulatory focus on whether a transaction creates, strengthens or entrenches market power, will likely give the ACCC a greater ability to factor in and rely on economic rather than purely legal principles.

Businesses that undertake "roll up" strategies or that are considering undertaking multiple transactions in the same industry will need to be particularly mindful of the three-year lookback period and will need to consider the strategic implications of more in-depth reviews arising from recent deal activity.

Implementation and next steps

The Merger Reforms are set to come into force on 1 January 2026. However, before this happens both the federal and state governments will need to sign off on them. Treasury will commence consulting on exposure draft legislation with key issues yet to be determined including: (1) merger notification thresholds, including what is a "notifiable" merger; (2) merger review timelines; (3) notification fees; (4) procedural safeguards; and (5) penalties. In 2025, the ACCC will consult on the form of notification / filing form.

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PROPOSED CHANGES TO MERGER CONTROL REGIME	Current regime in Australia	ACCC proposal	Proposed Regime from 1 January 2026 (subject to further consultation)	ACCC proposal implemented?
	Voluntary informal regime	Mandatory and suspensory administrative regime	Mandatory and suspensory administrative regime	Yes / No
Mandatory notification based on materiality thresholds 	**No – Voluntary** Parties are encouraged to notify ACCC where parties' products are substitutes or complements and merged entity will have ≥20% market share.	**Yes – Mandatory** In initial proposal put to Treasury, companies with a turnover threshold of AUD 400m or global transaction value threshold of AUD 35m would trigger the mandatory notification requirements.	**Yes – Mandatory** Parties acquiring control of business or assets will be required to notify ACCC of a merger that meets monetary (e.g., turnover) and supply/market share-based thresholds.	✓
Suspensory clearance model 	**No**	**Yes – Suspensory** Transactions suspended for a period of time while ACCC conducts its assessment.	**Yes – Suspensory** Parties prohibited from completing the merger until ACCC clears the transaction or a set time period elapses after which the merger may be permitted to proceed. Indicative timelines for review appear broadly consistent with international practice: Phase 1 review period of 30 working days and a more in-depth Phase 2 review period of 90 working days, with the option of fast-track determination after at least 15 working days only if ACCC identifies no concerns. ACCC may extend these periods e.g., if remedies offered.	✓
Upfront notification requirements 	**No** Parties put in submission with information parties consider to be relevant to ACCC's review. Voluntary and / or mandatory information requests may be issued during ACCC's review depending on issues raised. Informal Merger Review Process Guidelines set out information ACCC would generally require to assess transaction.	**Yes** Parties required to provide complete information upfront.	**Yes** Upfront notification requirements will be adopted that are calibrated to likelihood a transaction raises competition concerns. Merger parties will be able to engage in confidential pre-notification discussions as to information to be provided to ACCC but will no longer be able to receive an 'informal view' on a proposed merger.	✓
Filing Fees 	**No** No filing fees.	**Yes** Filing fees should reflect the resources the competition authority needs to efficiently carry out the regulatory work associated with investigating and approving mergers.	**Yes** All merger notifications must be accompanied by a fee. Indicatively, Treasury expects this to be around $50,000–100,000 for most mergers. An exemption from fees will be available for small business.	✓
Merger register 	**Yes** Public informal merger reviews register, which contains all public informal merger reviews under consideration or completed. Indicative timelines are also available. Confidential pre-assessments not included on register.	**Yes** Merger notifications (or a summary) should be public to provide sufficient information about the transaction for third parties to make submissions.	**Yes** All mergers considered by ACCC will be listed on a public register, with brief information including names of merger parties, a short description of transaction and affected products and/or services, and review timeline.	✓
Discretionary "call-in" powers 	**No** ACCC may issue a letter requesting information about the transaction, and may review transaction as an enforcement matter.	**Yes** Where a transaction does not meet the relevant notification threshold(s), ACCC proposed to have a power to call-in the transaction for review where it considers it may raise competition concerns.	**No** Targeted notification thresholds adopted instead.	✗
Streamlined notification waiver process for non-contentious transactions 	**Yes** Confidential pre-assessment process.	**Yes** Parties to non-contentious transactions would be able to apply for ***notification waivers*** to be exempt from making a full formal application. ACCC expected most mergers would be dealt with via waiver, similarly to the pre-assessment stage of the current informal regime.	**Alternative adopted** If transaction falls within notification threshold, fast track determination process is available if no concerns are identified by the ACCC after 15 working days.	✗
Primary decision maker 	**FCA** Judicial enforcement model – if ACCC has concerns that transaction raises competition concerns, ACCC must commence FCA court proceedings.	**ACCC** Administrative model – transactions will require ACCC approval before they can proceed.	**ACCC** Administrative model – transactions will require ACCC approval before they can proceed.	✓
Burden of proof (BOP) 	**ACCC** ACCC must establish the merger is likely to SLC (s.50 test).	**Parties** BOP reversal. To obtain clearance, parties required to demonstrate and ACCC must be positively satisfied that the merger is not likely to SLC or it has net public benefits.	**ACCC** ACCC must establish merger is likely to SLC.	✗
Merger test 	**SLC** Prohibition against mergers that "would have the effect, or be likely to have the effect of SLC". FCA must have regard to the merger factors in section 50(3) of the CCA.	**Modified SLC and public benefits test** Update and modernise merger factors ACCC may and FCA must take into account when assessing mergers, including adding creeping acquisitions and related agreements, as well as giving greater focus to the effect of a transaction on market structure.	**Modified SLC and public benefits test** Current s.50(3) merger factors to be replaced with criteria, focused on conditions for competition, structure of relevant markets, and if transaction creates, strengthens or entrenches a position of substantial market power. Related agreements and creeping acquisitions specifically captured. Substantial public benefits test to be retained as second limb.	✓
Appeals and review 	**No** Parties can make a formal application to the FCA for a declaration that the proposed transaction does not SLC.	**Yes** Limited merits review by the ACT. Judicial review by the FCA.	**Yes** Limited merits review by the ACT. Judicial review by the FCA.	✓

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INDICATIVE SUSPENSORY TIMELINE