ACCC submission

Reforming mergers and acquisitions – Exposure draft legislation

August 2024

Introduction

In announcing its decision to reform Australia's merger laws, the Government recognised the crucial gatekeeper role that an effective and efficient merger control system has in preventing acquisitions that are likely to substantially lessen competition, thereby preventing harm to consumers and the wider economy.[1] The Government's policy position is that maintaining competition and encouraging business dynamism through an efficient and effective risk-based merger system will lead to better outcomes for Australians. [2] Being able to discourage and ultimately prevent anti-competitive mergers is crucial for maintaining downward pressure on the cost of living.

As the agency responsible for administering Australia's merger laws, the ACCC fully supports the need for reforms to deliver a strong, simple, transparent and effective merger system: one that appropriately balances the burden on business to notify proposed mergers, with the need for the ACCC to have the necessary tools to scrutinise mergers, quickly approve those that are non-contentious while being able to prevent those that pose a serious risk to competition, consumers and the economy.

These reforms come at an important time. As found by Minister Leigh and Adam Triggs, in more than a fifth of Australia's industries, the two biggest firms control at least half the market.[3] Cost of living pressures are being felt acutely by many in the community and some markets are particularly vulnerable to being adversely affected by further consolidation.

As we know, concentrated markets are generally not good for consumers – or indeed for economic growth and productivity. Companies operating in concentrated markets tend to charge higher price markups above costs for their goods and services. They also often have less incentive to compete by innovating in ways that benefit consumers.

The ACCC considers that the key elements in the exposure draft are capable, when taken together, of delivering the objectives set by the Government for a reformed regime that is a faster, stronger, simpler, more targeted and a more transparent merger regime.

1 In this submission we use the terms "merger" and "acquisition" interchangeably.

2 Treasury Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy, 10 April 2024, p 1.

3 Adam Triggs, New finding: in 49 Australian industries the major firms are owned by common investors, *The Conversation*, 7 June 2021, accessed 12 August 2024.

Under the reforms, certain mergers must be notified to the ACCC and will be suspended until the ACCC has conducted a review. The ACCC will be the first instance decision-maker, unlike under current merger laws. For notified mergers, the ACCC will be bound by administrative law and procedural fairness obligations which have been built into the proposed legislation. The ACCC will focus on transparency and timeliness in implementing the new regime.

Further, and importantly, the Australian Competition Tribunal (the **Tribunal)** will hold the ACCC to account in its decision making by hearing applications for review by merger parties or third parties of ACCC decisions. The Tribunal will make its own decision, based on the information and evidence that was before the ACCC.

In implementing the new regime, the ACCC considers it likely that more than 80% of notified acquisitions will be considered in 15 to 20 business days. There will be transparency for businesses and consumers, with decisions and reasons recorded on a public register, and details of any competition concerns clearly articulated to the merger parties.

The change to an administrative model with the ACCC as the expert, first instance decision maker with decisions reviewable by the Tribunal will improve merger outcomes and ensure that explicit emphasis is placed on economic methodology and analysis of competitive effects. A significant benefit of the new regime is that the ACCC will provide reasons for its competition assessments. In particular, there will be detailed reasons in any notice of competition concerns issued in phase 2. This will greatly improve the transparency of ACCC decision-making.

The key elements outlined above are fundamental to the new regime's overall objectives. However, as this submission outlines, the details underpinning the regime are vitally important to the effectiveness and workability of the regime over the longer term. This submission outlines areas in the exposure draft that the ACCC considers should be clarified or changed to ensure that the merger regime meets the Government's objectives and is workable and effective when implemented.

At a high level, the ACCC considers that the government's objective of providing for a simpler merger control regime may be compromised by the overly prescriptive, codified approach which makes the new system less flexible, including over the longer term, and risks creating inefficiencies in how it operates. We strongly consider that, to the extent possible, the legislation should be simplified to improve clarity and reduce complexity. Changes are proposed in this submission to achieve this.

Additionally, the ACCC considers that it is vital that the final legislation and regulations ensure the following:

- there is no inadvertent weakening of the ACCC's cartel enforcement function. For example, through changes to the definition provisions, the anti-overlap provisions or via notification of related agreements as part of the acquisition notification process;
- consistent with international best practice, clear objective monetary thresholds are the primary threshold and are capable of capturing a significant proportion of high-risk mergers (that is, the types of mergers identified by the ACCC in past mergers as raising significant competition concerns), with a lesser reliance on proposed ministerial determinations requiring certain acquisitions to be notified and a low reliance on market share thresholds;
- the timelines allow an adequate opportunity for the ACCC to conduct a proper assessment of the notified acquisition. This includes:

- allowing time for meaningful engagement, including pre-notification discussions, with the merger parties and third parties (such as competitors, suppliers, customers), and
- providing for prescribed circumstances where timelines can be extended, where appropriate, to ensure the ACCC has the necessary information to reach a view and/or if circumstances change.

A stronger merger system

In addition to the key elements outlined above, the exposure draft includes important clarifications to the substantial lessening of competition test, which will provide a greater focus on the structural conditions for competition. Further, the changes that enable the ACCC to be better able to deal with serial acquisitions are welcome and important. They ensure that such transactions, like the recent series of rollup acquisitions by Petstock which were not notified to the ACCC and which raised serious competition concerns, are subject to scrutiny before they are able to be completed.[4]

However, there are critical areas where the ACCC considers that the robustness of the regime may be compromised by the approach taken in the exposure draft and requires amendment.

Clarification of the substantial lessening of competition test

Subject to some amendments to the drafting, the ACCC supports the proposal in the exposure draft to amend section 4G of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) to clarify that a "substantial lessening of competition includes creating, strengthening or entrenching a substantial degree of power in the market". This appropriately provides greater focus on the structural conditions for competition.

The ACCC considers it appropriate that this clarification applies across all provisions in the CCA that incorporate a substantial lessening of competition test.

The ACCC understands concerns have been raised in public commentary about the impact of this clarification on the operation of other sections in the CCA, and in particular the application of section 46. Concerns include that the clarification might stifle otherwise pro-competitive conduct by firms with substantial market power, or firms which might gain substantial market power by innovative conduct.

The ACCC does not agree that the proposed changes to section 4G would have this effect. Section 46 does not prohibit firms having market power or engaging in competitive conduct. It prohibits firms with substantial market power from engaging in conduct *only when* it has the purpose, effect or likely effect of substantially lessening competition in a relevant market - i.e. anti-competitive conduct rather than (innovative) competitive conduct.

However, to allay concerns, the ACCC would support an amendment to remove the word "creates" from the proposed amendments to section 4G, which may be contributing the concerns expressed in some commentary. The ACCC also considers it would be appropriate for the legislation to be drafted to clarify that a substantial lessening of competition <u>includes</u> *entrenching, increasing or extending* a position of substantial market power.

[4] ACCC 14 December 2023, Media release - Woolworths' acquisition of controlling interest in Petstock not opposed, as Petstock gives undertakings relating to past acquisitions

While the ACCC does not agree with the concerns regarding the impact on how the substantial lessening of competition test is applied in other parts of the CCA, the ACCC would accept limiting the substantial market power clarification to the assessment of acquisitions in the new merger regime, provided this is done in a manner that clearly identifies that the clarification should not be taken to limit the scope and meaning of 'substantially lessen competition' where used elsewhere in the CCA. In particular, the clarification does not exclude consideration of whether the conduct entrenches, increases or extends a position of substantial market power from an assessment of whether the conduct at issue is likely to substantially lessen competition.

Relevant matters to replace section 50(3) merger factors

The merger factors, which are being replaced with the "relevant matters" under proposed section 51ABX, set out factors that the ACCC 'must' or 'may' consider in undertaking the competition assessment.

The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. These are relevant to the purpose and function of the merger regime. The ACCC considers that the specification of matters that the ACCC 'must' have regard to – being the object of the Act and all relevant matters, including the interests of consumers – ensures that this guidance is carried over to merger analysis.

In relation to proposed subsections 51ABX(3) to (5) which includes a long and prescriptive list of relevant matters the ACCC 'may' have regard to, the ACCC supports not including these in the legislation.[5] The ACCC understands Treasury's policy intent to shift away from the current section 50(3) 'checklist' and move towards a broader set of 'economic' considerations for the competition assessment.[6] However, the ACCC is concerned that the proposed replacement list of matters introduces unnecessary and prescriptive concepts to an already well established understanding of the 'substantial lessening of competition' test developed through many years of jurisprudence.

These new relevant matters are open to differing interpretation that may create uncertainty regarding the test for business and advisers in assessing whether a merger may be anti-competitive. For example, the reference to 'the need to maintain and develop effective competition in markets' (proposed subsection 51ABX(3)(a)), and subsequently proposed subsections 51ABX(4), is unclear, whereas the object of the Act clearly states that it is '….to enhance the welfare of Australians through the *promotion of competition* and fair trading and provision for consumer protection'. This is simple, well-established, and understood.

Regardless of whether the relevant factors are included or not, the ACCC will supplement the established jurisprudence with accessible public guidelines on the application of the test for proposed acquisitions. This is aligned with the approach of some overseas jurisdictions, including the United States and United Kingdom that take a principled approach to the test in the legislation.

Further, over time the decisions by the ACCC and Tribunal will provide further guidance for business and their advisers.

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5 The ACCC also supports the equivalent provision for the substantial public benefit phase, at proposed section 51ABZM(3), not being included in the legislation for consistency.

6 Exposure draft explanatory materials, p 31.

Fast Track Tribunal review

The exposure draft introduces the option for a Fast Track review of ACCC decisions by the Tribunal. While the ACCC agrees with the underlying objective to enable faster reviews, it raises significant concerns regarding its application both for the ACCC and the Tribunal. A key concern is the ambiguity arising from what constitutes a finding of fact given the nature of the analysis and findings reached in a merger determination by the ACCC.

The ACCC considers that a significant number of reviews may not be appropriate for determination by the Tribunal on a fast-track basis due to the complexity of the matter, the issues being raised and other matters such as the volume of evidence that would need to be considered by the Tribunal.

In the ACCC's experience, matters that seek review by the Tribunal are generally more complex matters raising difficult and contentious issues. These reviews require the Tribunal to stand in the shoes of the ACCC and reach its own decision. This requires the Tribunal to consider complex issues and a significant volume of information in a tight timeframe, which the ACCC has gathered and considered over the course of its whole review.

The Tribunal will already be under significant time constraints in the new regime for matters subject to the exposure draft's standard review process, which provides (subject to extensions) the Tribunal with 90 days to make its decision.

To ensure that the Tribunal has the opportunity to fully take into account relevant information and issues, the ACCC recommends the new regime provide for no fast track tribunal review process.

If the Treasury is minded to retain a fast track process, the ACCC considers that the ACCC's consent should be a necessary requirement before a matter can proceed on that basis. The ACCC would consent if the matter is suitable for fast track, for example due to the limited scope of issues in dispute. However, if the parties to the review and the ACCC do not all agree, the matter should proceed as a standard review.

Ability for Tribunal to consider new information

The ACCC strongly supports the approach taken in the exposure draft to adopt limited merits review of ACCC decisions by the Tribunal in the new merger regime. New information would only be permitted in relation to events that occur after the conclusion of the ACCC's review of the acquisition and impact on the competitiveness of the relevant markets. As highlighted by the Tribunal in *Applications by Telstra Corporation Limited and TPG Telecom Limited [2023] ACompT 1* **(Telstra/TPG Telecom)**, these limitations:

> …appropriately balance the interests of all parties to a review… of a merger authorisation matter; …are intended to ensure that applicants for merger authorisation provide the Commission with all relevant material at the time of the application, and do not delay production of that material until later in the process or until Tribunal review; and…facilitate the Tribunal conducting its review expeditiously, given the time sensitive nature of merger transactions.

Importantly, the Tribunal in Telstra/TPG Telecom also acknowledged those limitations on new information do not prejudice parties 'where there is genuinely new relevant information, documents or evidence that was not in existence at the time of the Commission's determination'.

To support the clear policy intention of the new regime that merger parties provide all relevant information upfront to the ACCC as the first instance administrative decision maker, the ACCC considers the exposure draft requires further clarification to ensure that only remedies that have been offered to the ACCC during the merger review are capable of being offered to the Tribunal. This ensures that remedies can be exposed to appropriate stakeholder consultation that may not be possible during a Tribunal review. It does not, however, prevent the Tribunal from imposing conditions, including remedies, in making its decision.

Court powers in respect of contraventions in the new merger regime

For the new regime to achieve its objective of promoting competition and protecting consumers, it needs to not only discourage anti-competitive mergers, but also provide effective remedies where such mergers are (or purport to be) put into effect. Effective remedies need to be available where there is a breach of the new prohibitions.

In the new merger regime, financial penalties, injunctions, and director disqualifications can all be important remedies for addressing breaches of the prohibitions. However, a crucial element for effectively addressing the harm to competition that arises from anti-competitive mergers are remedies that can appropriately address the structural and competitive changes brought about by such mergers.

The ACCC considers the exposure draft has two key limitations in the context of the express court ordered remedy provisions, which have the potential to limit the ACCC's ability to obtain orders to address anti-competitive acquisitions which have been completed without review.

First, the proposed regime relies primarily on the automatic voiding provisions to unwind the effects of mergers that occur in breach of the mandatory notification and suspensory rules. If parties purport to complete a 'stayed' merger, it is taken to be void, and the ACCC can seek orders from the Federal Court to give effect to that voiding if necessary. However, the exposure draft also gives the Court discretion to order that this voiding will not apply. The draft explanatory materials suggest that this might occur, for example, in the case of an inadvertent failure to notify.[7]

Inadvertent breaches of the prohibitions may still result in anti-competitive outcomes. It is crucial that alternative remedies are available in those circumstances to address competitive harm. Such remedies need to be able to be obtained as part of a workable and efficient process.

There are likely to be many situations where voiding is not an appropriate or viable remedy. For example, where the assets are combined or have been on-sold or have been closed, and where employees have been terminated or have new employment contracts with the acquirer. The ACCC considers that giving the Federal Court a broad divestiture power in respect of acquisitions, in addition to voiding, is likely to be able to deal with anti-competitive structural change much more effectively. For example, the Federal Court could require that certain assets be divested to address the anti-competitive effects of the merger, even where those assets were not the assets acquired.

Second, it is widely recognised that unless notification thresholds are set very low, they will not capture all potentially anti-competitive acquisitions. The Government's policy announcement stated that the ACCC will be able to take enforcement action for anti-

7 Exposure draft explanatory materials, p 30.

competitive acquisitions that do not meet the thresholds if they breach other provisions in Part IV, including section 45 of the CCA. [8]

However, unlike the current position for a breach of section 50, there is no specific divestiture remedy available for acquisitions that breach either section 45 or other Part IV provisions.

The ACCC considers that the legislation should provide for divestiture remedies for breaches of section 45 where the relevant contract, arrangement or understanding, or concerted practice, is an acquisition. The court not having express divestiture remedy powers in respect of acquisitions that breach section 45 creates a potential loophole so that below the threshold anti-competitive mergers may be subject to penalties, but the resulting structural change may not be able to be remedied. For this reason, the ACCC considers that the legislation should provide for divestiture remedies for breaches of section 45 where the relevant contract, arrangement or understanding, or concerted practice, is an acquisition.

Simpler merger laws

The ACCC is concerned about the complexity of the exposure draft. Simple clear provisions will enhance the workability and effectiveness of the new regime.

Definition of share acquisitions and control

It is important that the legislation provides business and the ACCC with a clear and certain understanding of what will constitute an acquisition that, if the thresholds are met, will be subject to the mandatory notification requirements.

The ACCC considers that many aspects of the proposed definition are helpful in this regard, particularly where they rely on well understood pre-existing concepts in the law. For example, the ACCC supports the focus on acquisitions of shares and assets, consistent with the approach in existing section 50.

However, the ACCC is concerned that some elements of the provisions applying to share acquisitions, including the reliance on a concept of 'control', are likely to create considerable uncertainty and, in some respects, afford overly broad carve outs from the mandatory regime. In particular, the ACCC is concerned by proposed section 51ABC, which has the effect that only share acquisitions resulting in 'control' are captured by the mandatory regime, and any such acquisition in which there was pre-existing 'control' is excluded. This gives rise to two key issues.

First, removing or reducing the reliance on the concept of 'control', and instead focusing on whether there is an acquisition of shares that meets the thresholds, will minimise uncertainty regarding whether an acquisition needs to be notified. The ACCC supports including a simpler, more clear-cut carve out for acquisitions that result in an acquirer (and its associates) holding less than 20% of the share capital or voting rights, as long as that does not result in control. All other share acquisitions would be potentially notifiable, subject to any other applicable exceptions and the relevant thresholds. Such measures would avoid capturing shareholdings that are less likely to significantly impact market structure or incentives to compete and are therefore appropriate to exclude from the mandatory regime.

Second, the exclusion of all acquisitions where the acquirer had 'control' of the target *prior* to the acquisition means there will likely be insufficient scrutiny given to acquisitions that

[8] Treasury, Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy, 10 April 2024, p 6.

result in the acquirer increasing their shareholding and the extent of their influence over a body corporate. For example, where a party increases a minority shareholding, with an ability to veto certain votes and exercise a relevant degree of practical influence, to outright ownership and control.

Other jurisdictions that rely on concepts of 'control' in their merger regimes often recognise that changes in the quality of control or the extent of an interest can give rise to anti-competitive effects and merit review.[9] This is equally important for the new Australian regime, particularly if the approach to 'control' in the exposure draft remains unchanged.

Application of section 51(2)(e) to related agreements

Commercial agreements reached by parties to an acquisition can include restrictions with the potential to attract the operation of other parts of the CCA. For example, as noted in the draft explanatory materials, agreements for the purchase of a business may include 'non-compete restrictions' on the vendor.[10]

The CCA currently provides, in section 51(2)(e), a straightforward exception from the operation of Part IV in respect of such restrictions, if they are solely for the protection of the purchaser in respect of the goodwill of the business being purchased. However, the exposure draft modifies the operation of that existing provision by introducing a complex suite of proposed amendments. A key element of these involves the ACCC assessing notified restrictions against certain criteria, including whether they are directly related and necessary to the acquisition, and potentially declaring they fall outside the protection afforded by section 51(2)(e).

The ACCC supports competition laws that address non-compete clauses and associated restraints of trade, where such restraints hamper competition and reduce business innovation. However, if changes to the existing provisions are to be made, it is important that they:

- can effectively address the harm being caused
- are sufficiently clear to enable businesses to act with certainty, and
- do not have unintended consequences for the administration of other parts of the CCA.

The ACCC considers that any amendments would therefore be most appropriately considered and addressed through the Competition Review's separate and focused consideration of non-compete clauses and related clauses rather than via the new merger regime.[11]

Accordingly, the ACCC considers that the proposed amendments to the operation of section 51(2)(e) should not be made at this time. The ACCC should be able to consider related agreements where they are relevant to assessing the competitive effects of an acquisition. However, the provisions in the exposure draft go beyond this and introduce unnecessary complexity and uncertainty to the operation of the new regime. Retaining the existing application of section 51(2)(e) to related restrictions will simplify the new regime and enable

[9] See for example, European Commission, Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings, p 21; *Enterprise Act 2002* (UK) s 26(4).

[10] Exposure draft explanatory materials, p 20.

[11] See 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity: Issues Paper', April 2024.

business to continue relying on this long-standing aspect of the CCA - provided the restraints imposed are solely for the protection of the purchaser of the goodwill.

However, the ACCC accepts that the merger notification forms should require parties to provide information about non-compete clauses, enabling detection of any potential concerns under section 51(2)(e).

Time limits in section 51(2) and anti-overlap provisions

Another element of the proposed suite of amendments to section 51(2)(e) limits its operation to restrictions that are conditional on notification and are notified within 30 days of the contract being made. Similar requirements are contained in cartel and section 45 anti-overlap provisions (proposed sections 45AMA and 45(7B)) that apply to the making of a contract, to the extent that its provisions provide for an acquisition of shares or assets.

The inclusion of a 30 day time limit reduces the flexibility of merger parties and the ACCC to engage in useful pre-notification discussions, and for businesses to manage their transaction timelines. Businesses may feel compelled to notify proposed acquisitions within 30 days of making the contract, even where they would otherwise prefer to delay notification, for example to prepare additional material to support their notification, or to better manage timelines in transactions subject to multiple regulatory approval processes.

The ACCC considers the anti-overlap provisions should be drafted in a way that ensures appropriate protections are given from the cartel provisions and section 45 for contracts that are properly assessed under the new administrative regime. However, this must be achieved in a way that does not prevent pre-notification engagement and ensures flexibility that is beneficial to the efficient operation of the regime. As regards section 51(2)(e), this is another aspect of unnecessary complexity that can be removed from the exposure draft for the same reasons identified above.

Restrictions on when the ACCC may impose conditions

Currently, merger parties may choose to offer remedies to the ACCC at the outset or early in the review before the ACCC has reached a preliminary view, in order to address likely competition concerns and expedite the ACCC's review. The ability to accept remedies on the basis that they address the competition concerns identified by the ACCC but before it has reached a final view is a benefit to business and also the ACCC.

Under the test in proposed section 51ABW(2), before the ACCC can approve a notified acquisition subject to conditions, the ACCC must reasonably believe that:

- there is a real, and not merely a remote, possibility of a substantial lessening of competition, and
- conditions would comprehensively address the possibility of the adverse effects of such a substantial lessening of competition.

This is an overly prescriptive, codified approach to when merger parties can propose remedies, and when the ACCC can impose conditions, which risks creating inefficiencies in how the regime operates.

This limits the incentive and flexibility for businesses to pragmatically offer upfront commitments to be in the best position to achieve an early approval of an acquisition. The proposed approach is also not consistent with the approach taken internationally. As outlined in the ICN Remedies Guide, early and ongoing dialogue between the competition authority and the merger parties throughout the investigation, about both the potential competitive harm and the design and choice of remedies, can facilitate a timely resolution to an otherwise anti-competitive merger. [12]

The ACCC considers that the legislation should be simplified and made less prescriptive for the benefit of businesses and to enable the ACCC to efficiently assess mergers and approve the ones that should be allowed to proceed with commitments with the minimum possible delay.

Consequential amendments

There are several important competition safeguards in legislation other than the CCA that ensure certain transactions are subject to merger review at present. Importantly, this includes the Radiocommunications *Act 1992*, which deems certain spectrum transactions to be acquisitions for the purposes of section 50 of the CCA. This is to ensure that these transactions are subject to a competition assessment. Consequential amendments to this legislation are required to ensure that these competitive safeguards continue to apply to spectrum allocations, assignments and sub-licences, by the introduction of new deeming provisions which bring them into the new merger regime. Amendments will also be required in other legislation.

Faster and targeted merger laws

A further objective underpinning the new regime is that it is faster, more targeted, risk-based and enhances the ACCC's ability to effectively assess and consider anti-competitive acquisitions. Clear, certain and objective thresholds for notification are critical to this objective.

Thresholds

For the new regime to be effective and workable, it should be capable of capturing and reviewing the right transactions.

The thresholds for merger parties to notify transactions are a critical component of this, and to be effective they need to be set at the right level to capture the mergers likely to be of concern and provide certainty about when businesses are required to notify.

When the Treasurer announced the reforms in April, he noted that the problem with the current system is that the ACCC has limited visibility of merger activity and doesn't always see the ones that present the greatest risks to competition. [13] The reforms are meant to ensure that the ACCC reviews mergers that pose a risk to competition, consumers and the economy. Setting thresholds too high would mean that many mergers likely to be of concern will proceed without scrutiny, and this would fundamentally undermine the rationale for the new regime.

Setting thresholds in a way that creates uncertainty for business about when to notify undermines the efficiency and effectiveness of the new regime. Therefore, where possible, thresholds should be based on objective and quantifiable criteria, such as those based on turnover or transaction value. This provides certainty to business, and reduces the opportunities for strategic behaviour.

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12 International Competition Network, Merger Remedies Guide 2016, pp 5-6.

13 The Hon Dr Jim Chalmers MP, Address to the Bannerman Competition Lecture, Sydney, 10 April 2024

Consistent with international best practice, the ACCC supports the new merger regime primarily relying on thresholds that provide clear objective monetary thresholds. The thresholds must be capable of capturing a significant proportion of high-risk mergers — that is, the types of mergers identified by the ACCC in past mergers as raising significant competition concerns — with less reliance on market share thresholds and ministerial notification determinations.

The ACCC did not propose thresholds that included market shares in its proposal for reform for the same reason that the vast majority of OECD economies have chosen to only apply objective monetary thresholds: market share thresholds require evaluative assessment of the competition issues, including market definition. However, in the absence of a call-in power for mergers below the monetary thresholds, the ACCC sees that market share thresholds have a role to play, particularly in smaller markets (such as local and regional market/s) which may not be captured by the monetary thresholds.

Any related issues regarding the uncertainty that merger parties face as to whether or not their transaction requires notification based on the market share thresholds could potentially be managed by the ACCC via a discretionary waiver process.

Timelines for review

It is crucial that the review timelines in the new merger regime are realistic and provide an opportunity for meaningful engagement with the merger parties and potentially impacted third parties. This will ensure the ACCC is equipped to conduct effective reviews of notified acquisitions.

The ACCC considers the exposure draft establishes clear review timelines, but also includes the ability to extend review timelines in limited and prescribed circumstances where appropriate, for example, when further information is required and/or circumstances change. The exposure draft contains appropriate safeguards for such extensions, which are important to preserve. Specifically:

- for notices issued pursuant to section 155, the determination period is extended by the number of days it takes the merger party to respond.
- for voluntary information requests, the determination period is only extended by the number of days, if any, that the response is late.

The proposed legislation also allows merger parties to initiate timeline extensions to ensure they have sufficient time to provide a response to key competition issues, or public benefit issues, during the ACCC's consideration of a proposed acquisition. For example, merger parties can:

- request an extension of time to prepare a response to the ACCC's Notice of Competition Concerns or Substantial Public Benefit Assessment.
- request an extension to the determination period for any reason at any stage of the ACCC review process.

The proposed merger regime provides no limits on the number of such extensions.

However, the ACCC considers three areas of the proposed legislation relating to timelines that may impact on the workability of the regime:

- *inclusion of early January in the meaning of business day.* Consultation with consumers, customers, competitors and other relevant third parties is a critical factor in the operation of a merger regime. In the ACCC's experience, consultation in

Australia in late December and early January is extremely difficult. The business day count already excludes the period from just prior to the Christmas public holiday until New Year's Day, but in the ACCC's view, this should be extended for a period into early January to ensure the ACCC can hear from affected parties and that the regime is effective during those periods. However, the ACCC accepts that early 2026, at the commencement to this regime, would need to be excluded from this pause as part of the transition arrangements.

- *timeframes for when notifying parties may no longer provide the ACCC with information*. Currently the restriction on late information being taken into account applies where it is provided in the last 10 business days of phase 2 and the substantial public benefit phase. The ACCC considers this needs to be extended to 15 business days for phase 2 and the substantial public benefit phase, so that there is sufficient time to have regard to critical information from the merger parties and third parties. If the ACCC is given large amounts of information just 10 business days prior to making a major decision, there is a real risk the ACCC will not be able to properly consider that information and incorporate it into its decision-making make an informed decision.
- *requirement to publish the reasons on the date of the determination.* The ACCC considers that a very short period, 48 hours, should be built in, to better enable confidentiality checking on the full reasons. A summary of the reasons and the decision itself would be made public, but in the ACCC's experience confidentiality checking by the merger parties and other relevant stakeholders is beneficial before the full reasons for the determination are published.

The notification and application forms

As Treasury's policy document recognises, the ACCC will require sufficient upfront information about a proposed acquisition to properly undertake an administrative review, and to efficiently and expeditiously differentiate benign mergers. [14] Calibrated upfront information requirements will ensure merger parties provide relevant information to the ACCC and mitigate the need for subsequent requests and possible delay.

The ACCC notes that critical to achieving this objective is it having the ability to specify the information and documents required upfront in notification and application forms.

The exposure draft currently proposes that the notification and application forms and accompanying information or documents will be determined and approved by the Minister, or a delegated SES employee in Treasury. This is achieved via (non-disallowable) legislative instruments.

The ACCC considers that, as the body responsible for administering the new regime expert decision maker with the necessary direct experience, it is best placed to determine the content of the forms that will apply. This is consistent with the conduct authorisation procedure, in which the legislation provides that applications are to be made in a form approved by the ACCC. Whatever legislative mechanism for determining or setting the forms, the ACCC considers that this should be within its direct control, subject to undertaking consultation processes with key stakeholders including consumer groups, small and large business groups, the Law Council and states.

The ACCC recognises the need to achieve an appropriate balance of not imposing an undue burden on business, and the need for the ACCC to be provided with sufficient upfront

[14] Treasury, Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy, 10 April 2024, p 8.

information to assess acquisitions efficiently and effectively. As recognised in the draft explanatory materials, it will also be important for the forms and requirements for any accompanying information or documents to be readily modified from time to time, including in response to experience and feedback in the future.[15]

The ACCC proposes that the draft forms be based on the forms used in comparable administrative merger regimes overseas, and would be informed by consultation. The ACCC is acutely aware that businesses proposing acquisitions that raise minimal potential competitive effects should be able to apply via a shorter form to minimise the burden on these parties. The ACCC will develop a short form application and guidance to ensure this occurs.

If further oversight of the forms is required, the ACCC is supportive of an alternative approach in which the ACCC can determine the forms, but if for any reason the Minister chooses to directly issue their own forms, these would take precedence, meaning that notifying parties would be required to comply with the forms issued by the Minister.

Transition arrangements

The ACCC supports further consideration being given to transition arrangements.

The proposed regime requires businesses to notify all acquisitions that meet the notification thresholds if they will complete the transaction after 31 December 2025. This applies even if the business has notified their acquisition the ACCC under the informal regime or have received approval under the informal regime but not completed the transaction by that date.

To achieve the objectives of the policy while also allowing for a pragmatic approach to informal merger reviews affected during the transition period, the ACCC would support provision being made in the legislation to avoid double handling. Potentially, this may be via the use of a notification waiver process for mergers that have been cleared under the informal regime but not completed by 1 January 2026.

More transparency

The ACCC recognises that the move to an administrative regime will require greater levels of transparency than what is provided in the informal, enforcement-based regime. The additional transparency comes from requirements on the ACCC to provide written reasons to support administrative decision-making as well as publishing all notified acquisitions on a public register which will identify the parties involved, the review timeline and the ACCC's decision and reasons. Currently the ACCC confidentially pre-assesses approximately 85%-90% of mergers are and these are not included on a public register.

A key part of the increased transparency in the new regime is the notice of competition concerns issued early in phase 2, which the draft explanatory materials identify as an important procedural safeguard.[16] For the notice of competition concerns to perform its function as a safeguard to inform the merger parties of the ACCC's preliminary concerns it needs to be issued at the point in the process where the ACCC has had sufficient opportunity to gather information, data and documents and synthesise these materials to form preliminary views. The ACCC firmly considers that 25 business days into phase 2 is the minimum time that this should occur to ensure that third parties' views can be taken into account and the ACCC can effectively assess the material and reach a preliminary view.

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[15] Exposure draft explanatory materials, p 22.

[16] Exposure draft explanatory materials, p 41.

While the objective of the notice of competition concerns is to provide transparency and act as a procedural safeguard, it is important that these objectives are not inconsistent with the objectives and operation of the system holistically. An important part of the regime is ensuring that stakeholders are not disincentivised to provide direct evidence to the ACCC during the review due to disclosure requirements in the legislation relating to the notice of competition concerns. Accordingly, the legislation must be clear that such disclosure is not required.

This will not prevent the notifying parties from being provided with procedural fairness in respect of their notification. The ACCC is committed to ensuring high levels of transparency about any competition concerns that arise, and merger parties would be provided with sufficient information about concerns arising to enable them to respond meaningfully.

Impact on innovation

The ACCC recognises concerns have been raised by stakeholders regarding the reforms risking dampening investment in Australia, including via private equity and venture capital.

The ACCC understands that an important consideration for some startup businesses is that they are able to exit or grow via merger or acquisition. However, we do not consider the proposed new merger regime will make it harder to obtain clearance for acquisitions that pose no competitive concerns. Small businesses and tech start-ups looking for a buyer will, in most cases, not raise competition concerns. Those mergers will either not meet the notification thresholds, or may be considered through the proposed notification wavier or will be assessed promptly through the 15 business day fast track review.

Importantly, one of the barriers to the success of new entrants is the size and power of the very largest players. New entry is more likely when markets are competitive and are not dominated by a few firms able to exercise market power. As such, there are some scenarios, such as where a large player is looking to purchase smaller businesses in the same industry, that may need to be considered carefully.

However, if a proposed acquisition fails the competition assessment phase but is likely to result in public benefits from innovation or employment for example, the merger parties are able to have their proposal considered under the substantial public benefit test after the completion of phase 2.

Further, the proposed new regime will better target the mergers that are likely to raise competition concerns and ensure that those mergers are assessed in a thorough and timely manner before they can go ahead as mentioned above. To facilitate this the ACCC intends to provide appropriate guidance and encourage merger parties to engage with the ACCC in advance and provide all relevant information upfront for prompt assessment.