Australian Information Industry Association

Submission on

Treasury Laws Amendment Bill 2024: Acquisitions

13 August 2024

Introduction
The Australian Information Industry Association ("AIIA") welcomes the opportunity to provide feedback on the exposure draft of the *Treasury Laws Amendment Bill 2024: Acquisitions*.

The AIIA supports the government's initiative to amend the Treasury Laws to enhance the regulatory framework for acquisitions, with the aim of encouraging competition and which in turn will lead to competitively priced technology products and services for the Australian consumer. However, we believe certain provisions within the draft legislation may require further consideration to ensure they achieve the intended outcomes without stifling innovation and business activity.

Our primary concerns center around the potential impact on the digital economy, which the Treasury's merger reform proposal has identified as a focus. In particular, the Treasury's merger reform proposal identified that "the Australian economy is undergoing significant structural shifts including the rise of the care economy, rapid transformation to net zero, and the growth of the digital economy. Allowing the ACCC to consider whether an otherwise anti-competitive mergers raises substantial and meaningful net public benefits is important as our economy responds to these challenges."

The AIIA will make suggestions in support of this vision by addressing potential uncertainties and inefficiencies in the new regime. We are keen to highlight the technology sector's unique dynamics, including its rapid pace of innovation and the importance of M&A activity for growth and development. In addition, the ability to merge for economies of scale or to build competitive competencies is especially critical for Australian Small and Medium tech business to survive or to be world-leading enterprises. For this reason, we recommend the framework to be tailored to accommodate these dynamics and avoid imposing undue burdens on tech businesses.

Part A: Uncertainty in the New Regime

Recommendation 1: Clarify and Harmonise Definitions
The draft legislation introduces ambiguity in defining crucial terms, which could result in confusion over the types of transactions that require clearance from the ACCC.

The definition of "control" is overly complex and prescriptive, failing to properly account for the nuances of "control" found in certain transactions, including minority acquisitions and changes in the level or type of control for joint ventures (e.g., negative and positive control). The definition differs from well-understood concepts of control in the *Corporations Act* 2001 (Cth) (which is incorporated into accounting standards) and equivalent overseas jurisdictions with mandatory and suspensory regimes (e.g., the EU, which has the "decisive influence" concept). This creates additional complexity and uncertainty for cross-border transactions. The assessment of whether a party has control requires a complex factual analysis of "practical influence" and "patterns of behaviour" (rather than enforceable rights), and the range of "matters" that the explanatory materials list as being relevant to the assessment include things that do not necessarily relate to the core operations of the business (for example 'financial and reporting policies').

Additionally, the AIIA submits that the revision of the term "asset" to include acquisitions such as land and patents—even when transacted in the ordinary course of business—necessitates a heightened level of regulatory consideration. This broadening of the definition raises concerns about the potential for increased regulatory burdens on businesses. Entities must now consider the ramifications of this extended scope when engaging in asset acquisitions that were traditionally part of standard commercial operations. This change will bring a greater number of transactions within

the regulatory framework, increasing procedural complexity and potentially slowing down routine business operations.

We recommend the adoption of the definition of "control" set out in s50AA of the *Corporations Act*, which is readily understood by the business community. Furthermore, the new regime could adopt the "decisive influence" test used in the EU, which is supported by a substantial body of guidance and case law, aligning Australia with key overseas frameworks.

Recommendation 2: Addressing Transition Provisions for Ongoing Acquisitions
The draft legislation's transition provisions inadequately address acquisitions that are already underway, potentially leading to procedural bottlenecks and a slowdown in merger activities. There are no effective grandfathering provisions for acquisitions signed but not completed on or before 31 December 2025. Any acquisition completed after 1 January 2026 will be subject to the new merger clearance regime, including the prohibition on completing without ACCC merger clearance, regardless of whether the acquisition was signed, notified, or cleared under the ACCC's informal merger review process prior to 1 January 2026. Without legal grandfathering for acquisitions that are notified or approved under the ACCC's informal merger review process, parties will have no incentive to notify the ACCC under the informal merger clearance process in H2 2025 (or earlier). This could either create a significant backlog of clearance notifications once applications for the new regime commence on 1 December 2025, or have a chilling effect on M&A in Australia.

We recommend excluding acquisitions notified to the ACCC prior to 1 January 2026 from the operation of the new regime. The legislation could provide that if, before 1 January 2026, an acquisition:

- has received clearance from ACCC under the ACCC's informal merger review process, or
- has been notified to the ACCC under the ACCC's informal merger review process and that review has commenced,

then that acquisition will not be subject to the new merger clearance regime (i.e., will not be considered to be an acquisition that is "required to be notified" under section 51ABG).

Additionally, the introduction of an "open for business" provision which could provide that the suspensory obligation (i.e., section 45AY) does not commence until 1 July 2026, to give parties who have notified the ACCC under the informal clearance regime 6 months from 1 January 2026 to complete their acquisition without having to notify the ACCC under the new regime (and without being penalised).

Recommendation 3: Ministerial Consultation for Targeted Notification Obligations
The Treasury Merger Reform paper states that a Minister would be given power "to introduce additional targeted notification obligations in response to evidence-based concerns regarding certain high-risk mergers." We caution that the broad ministerial discretion to determine targeted thresholds could create uncertainty and risk unnecessary appeals.

It is critical that any decision made by the Minister takes into account the views of the affected sectors or industries. However, the draft legislation only provides that the Minister "may" consider any reports or advice of the ACCC when determining additional targeted thresholds. Consultation with the ACCC, experts, or relevant industry stakeholders does not appear to be a mandatory, relevant consideration for the Minister. This broad discretion poses a risk of the Minister setting targeted thresholds that are not based on evidence of high-risk mergers, but rather on political or

ideological considerations. This creates the potential for legal errors, resulting in determinations that could be subject to lengthy, complex, and potentially unnecessary judicial reviews.

The AIIA supports the implementation of a mandated consultation process which will provide a more predictable and stable environment for businesses, fostering confidence in the merger review process. The legislation should explicitly outline the Minister's obligations, including a requirement to consult with and consider evidence from the ACCC, experts, and industry stakeholders when determining any additional targeted thresholds. This will ensure that the merger regime remains fair, transparent, and evidence-based, minimising the risk of arbitrary or politically motivated decisions.

Recommendation 4: Net Public Benefits Test Threshold
The AIIA supports a comprehensive evaluation of public benefits in merger assessments. However, we caution that raising the current threshold could undermine clarity and efficiency in decision-making.

The approach under the *Competition and Consumer Act* 2010 (Cth) on the net public benefits test has been to apply a single evaluative judgment of "instinctive synthesis" rather than a mathematical equation to quantify and weigh the benefits and detriments. The inclusion of a requirement for the public benefits to "substantially" outweigh any public detriments complicates the weighing of benefits and detriments by requiring a greater degree of quantification and comparison between disparate matters.

The current net public benefits test only requires that public benefits outweigh public detriments, rather than any quantification of by how much they outweigh the detriments. The AIIA recommends maintaining this threshold, as the existing test is well understood by the ACCC, the Australian Competition Tribunal, and legal practitioners.

Part B: Inefficiencies in the New Regime

Recommendation 5: Clear and Predictable Review Timeframes
Clear and predictable timeframes are crucial for providing businesses with greater certainty and enabling them to plan their M&A activities more effectively. The inclusion of broad discretionary powers to delay, stop, and restart the clock for a review of a notified acquisition will lead to unpredictability and extended review periods that could disrupt effective planning and execution of acquisitions. Despite the promise of "procedural safeguards" to ensure discretion is not abused, the draft legislation includes only an internal review mechanism, which is limited to decisions on delaying or restarting the clock. Considering the 90-day timeframe for internal reviews, this safeguard will likely be ineffective as it could potentially result in prolonged review periods comparable to or exceeding the initial delays.

We recommend the establishment of clearer and more predictable timeframes for the review process, with limited opportunities for extensions by capping the number of Request for Information (RFIs) and s155 notices that can be issued by the ACCC. The legislation could stipulate a limit of one or two RFI's or s155 notices per each phase of the review, with limited exceptions in the case of material changes of fact. We also propose the introduction of a right for affected parties to apply for an urgent interlocutory appeal (e.g., 1 week) of an ACCC decision that has the effect of delaying, stopping or restarting the clock. Additionally, we recommend implementing a limit on any time extensions if the ACCC fails to publish a 'Notice of Competition Concerns' within a specified period (e.g., 10 business days). If the ACCC does not meet this deadline, the timeframes should proceed towards deemed clearance, or the parties should have the right to appeal directly to the Tribunal.

In line with reducing delays from challenges of the ACCC decisions, we recommend a clearer Definition of "Material Change" to reduce uncertainty and minimise the potential for the ACCC to "stop the clock" arbitrarily.

Recommendation 6: Concurrent Assessment of Public Benefits
The AIIA is concerned that the proposed sequential approach to public benefits assessment will create unjustified delays. The ACCC has demonstrated its ability to conduct public benefits assessments in parallel with competition assessments for decades; seeking to bifurcate these processes will only introduce inefficiencies into the regime. Preventing merger parties from relying on net public benefits unless and until the ACCC has determined a likely substantial lessening of competition will unnecessarily delay reviews. If merger parties can establish that there are net public benefits justifying clearance for an acquisition, there is no reason why they should be prevented from raising those public benefits until the ACCC has made a determination in relation to the competitive effects of an acquisition

We see no adequate policy justification for considering the net public benefits test and the substantial lessening of competition test sequentially. Therefore, if merger parties consider there to be substantial public benefits arguments to support their acquisition, the ACCC should consider these during its phase II review.

Recommendation 7: Third Party Appeals
While the explanatory materials provide some guidance as to which third parties might have “sufficient interest” to appeal an ACCC decision (i.e., consumer associations and consumer interest groups), it remains unclear whether these parties would have standing to appeal a decision of the ACCC to clear a merger. This may reduce deal certainty, as ACCC clearance may be subject to appeal by dissatisfied third parties, including competing bidders or competitors. Therefore, the right to appeal a decision of the ACCC should be limited to the notifying parties and persons who are directly impacted by the acquisition.

Conclusion
We appreciate the opportunity to contribute to this important legislative process and look forward to continued collaboration with the government to ensure regulatory objectives are effectively balanced with the need to promote innovation, business growth, and fair competition. Should you require further information, please contact Ms Siew Lee Seow, General Manager, Policy and Media, at siewlee@aiia.com.au or 0435 620 406 or Mr David Makaryan, Advisor, Policy and Media at david@aiia.com.au.

Yours sincerely
Simon Bush
CEO, AIIA

About the AIIA

The AIIA is Australia's peak representative body and advocacy group for those in the digital ecosystem. Since 1978, the AIIA has pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment for our members and to contribute to Australia's economic prosperity.

We are a not-for-profit organisation to benefit members, which represents around 90% of the over one million employed in the technology sector in Australia. We are unique in that we represent the diversity of the technology ecosystem from small and medium businesses, start-ups, universities, and digital incubators through to large Australian companies, multinational software and hardware companies, data centres, telecommunications companies and technology consulting companies.