Tech Council of Australia

Reforming mergers and acquisitions – notification thresholds

Tech Council of Australia Submission

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1. Introduction

Thank you for the opportunity to make a submission in relation to the proposed notification thresholds, as set out in the Consultation Paper, for the Government's proposed reforms to Australia's merger regime. The Tech Council of Australia (TCA) recognises the importance of strong competition laws as a foundation for economic growth and driver of innovation across all industries. In particular, we recognise the importance of merger laws and their role in clearing pro-competitive mergers with minimal delay or disruption to the transaction, while preventing anti-competitive mergers and acquisitions. Competitive markets result in enhanced choices, reduced costs and improved quality for consumers.

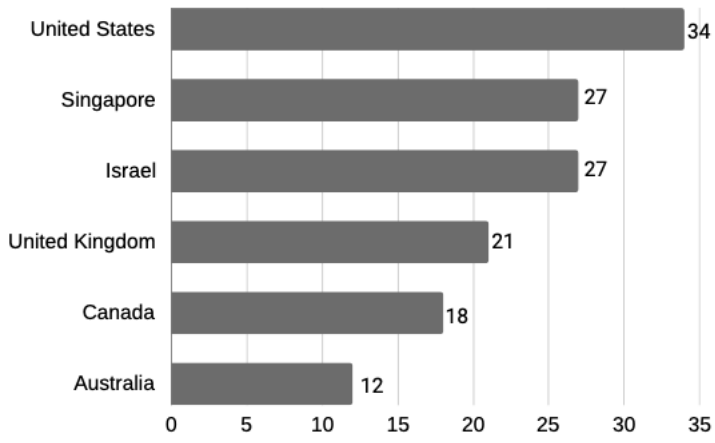
The TCA is Australia's peak industry body for the tech sector. The tech sector is a key pillar of the Australian economy and is Australia's seventh largest employing sector. The TCA represents a diverse cross-section of Australia's tech sector, including startups, scale-ups, venture capital funds and global tech companies.

The TCA supports reforms to Australia's merger regime that increases certainty for tech companies about which transactions need to be notified to the ACCC. However, the lack of notification thresholds in the current regime creates uncertainty, and uncertainty can create a tech ecosystem in which innovation is limited and investment is deterred.

Australia is already a challenging place for tech companies to scale. Australia falls behind on early-stage funding, with less invested per capita in Australia, compared to the US, Singapore, Israel, the UK and Canada, as demonstrated below

Figure 1: Angel and seed stage funding per capita[1]

$ per capita, February 2021



Source: Dealroom

Further, the probability of success for a firm drops significantly, compared to the US, from Series B funding rounds onwards.[2]

Notwithstanding these challenges, Australia has experienced significant growth in its tech sector over the past ten years. With an increase in VC investment into Australia's tech sector increasing 18-fold between 2014 and 2022, which has enabled the growth of Australia's tech sector.[3]

[1] Tech Council, Shots on Goal, July 2023, p.19
[2] Tech Council, Shots on Goal, July 2023, p.6
[3] Tech Council, Shots on Goal, July 2023, p.11

The object of the *Competition and Consumer Act 2010 (Cth)* (the Act) is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[4] The TCA is concerned that the proposed thresholds in the consultation paper risk over-capturing many deals that would then attract burdensome notification requirements. This triggers significant, burdensome requirements for providing information and documents to the ACCC, and the transaction would also have to be publicly listed. It is also likely to expose transactions to competitor scrutiny or, in some cases, security concerns even though the transaction raises no competition concerns that would justify the disclosure.

Exposing transactions to scrutiny at the stage of notification, especially for transactions that are captured by low thresholds and are unlikely to raise competition concerns, can have serious consequences for a transaction. It can create unnecessary market speculation and share price volatility for acquirer and target, disproportionately impacting listed companies.

Over-capturing mergers also has significant implications for the timeliness with which the ACCC is able to meaningfully assess mergers. As the TCA has previously submitted, it is well accepted that regulatory delays kill transactions and harm the business being acquired. This is because transactions often involve competing bids and long regulatory approval timelines may eliminate the best pro-competitive buyer and/or result in the acquired business coming to a standstill (often with negative results) while the new potential acquirer tries to obtain approval ultimately abandoning the transaction.

The TCA supports monetary notification thresholds that are:

- Clear and objective, and provide certainty for businesses about when transactions should be notified to the ACCC
- Risk-based and appropriately targeted, to avoid over-capture of mergers that have no material impact on Australian markets, and
- Capable of providing certainty and predictability for businesses across the economy.

Notification thresholds that are poorly targeted will have a significant detrimental impact on the incentives for technology companies to undertake the very large investment needed to offer new services in Australia or to undertake acquisitions that can be used to deliver technology services or innovations to Australian consumers, businesses and government bodies. For example, the investment needed to develop a data centre to provide services to the Australian government. This is especially so where mergers and acquisitions have been key to Australian tech businesses and their ability to grow, scale and become globally competitive.

Accordingly, the TCA makes 9 recommendations in relation to the proposed notification thresholds:

- **Recommendation 1:** Monetary thresholds should not reference global transaction value, instead, they should focus on the materiality of the transaction in Australia.
- **Recommendation 2:** The definition of Australian turnover should be clarified and refer only to revenue that is generated from Australian sales or customers, rather than from IP that is generated and held in Australia, but being used elsewhere.

[4] *Competition and Consumer Act 2010 (Cth)*, section 2

- **Recommendation 3:** The lowest Australian turnover for targets and buyers (separately) should be at least $20 million. Rather than referring to global transaction value, if the target has less than $20 million in Australian turnover, it should not be caught by the notification thresholds.
- **Recommendation 4**: Introduce targeted and different thresholds for certain asset classes which should be developed in further and new consultation with Treasury.
- **Recommendation 5**: Market concentration thresholds should not be included in the proposed notification thresholds, in favour of clear and objective monetary thresholds.
- **Recommendation 6**: Treasury Ministers should not have the broad discretion to set additional targeted requirements. If the Government does maintain this discretion in the merger regime, then there should be clear procedural safeguards to ensure that additional targeted notification requirements are transparent, clear and have sufficient accountability mechanisms.
- **Recommendation 7**: Notifiable mergers should have a material connection to Australia in the form of a reasonable Australian turnover threshold in line with Recommendation 2 for the merging parties.
- **Recommendation 8:** Monetary thresholds will adequately capture serial acquisitions, rendering the new three-year rule for capturing serial acquisitions ineffective and unnecessary. Government should remove the three-year rule for serial acquisitions from the proposed merger reforms.
- **Recommendation 9:** The penalties for failure to notify the ACCC of a transaction should involve a flat monetary penalty, and, where the transaction has already been closed, it could be appropriate for the ACCC to have the power to seek an order from the Federal Court to unwind all or part of the transaction.

2. Monetary thresholds risk over-capture

We consider that the proposed monetary thresholds in the consultation paper will significantly over-capture pro-competitive mergers and acquisitions. This has serious consequences for tech companies seeking merger clearance, and consequences for the timeliness of merger review outcomes in circumstances where the ACCC is resource-constrained, and has a broad set of powers to extend merger timelines. Appropriately targeted merger thresholds should have both reasonable jurisdictional limits, and involve a targeted approach to ensure that ACCC resources and scrutiny are focused on transactions that have the capacity to genuinely affect competition in Australian markets.

Firstly, we consider that it is important that monetary thresholds are based on Australian turnover rather than global transaction value. The thresholds being consulted on risk considerably over-capturing deals with no significant impact in Australia, with either limb capturing a very large number of companies, ensuring that most, if not all, acquisitions they make will be notifiable.

Any monetary thresholds should also clearly define what is considered to be 'Australian turnover' – for example, whether Australian turnover includes turnover generated from license fees paid for IP that is registered in Australia, or whether it refers to revenue

generated from Australian customers/users. In the case of Australian tech companies, most have a global user base in which the majority of revenue is generated from global sales and customers, however, the IP is held and generated in Australia. Monetary thresholds which apply to revenue generated from IP held and generated in Australia would disincentivise innovation and growth of Australian tech companies. The definition of 'turnover' should also exclude revenue received through government grants or funding programs, which particularly affects capital-intensive, deep technology companies, and will ensure that merger laws do not undermine the operation of other government policies.

The monetary thresholds are such that large acquirers will have to notify every single acquisition that they make. This is likely to have a significant impact on the tech sector. In technology sector many extremely small startups focus on developing a 'feature' (rather than a standalone business) that the feature can be implemented into an existing technology service. Small startups are founded with the express aim of selling to an existing technology firm, and limiting the ability for startups to be acquired will make Australia a less attractive market for small to medium scale mergers and acquisitions, with devasting impacts on Australia's local tech sector. The ability for an existing technology company to incorporate new features for existing services is an important source of innovation in the tech sector. Restricting the ability and incentives for existing technology firms to acquire small start-ups significantly impacts startups incentives to innovate and the likelihood that their innovations are made available to consumers. That is, existing technology firms deploy innovations quickly across their customer base in a way that cannot be achieved by a startup.

As a result of this dynamic, we consider that the thresholds should distinguish between target and acquirer, so that acquisitions of a target that has Australian turnover below a certain threshold are excluded. International examples of thresholds that distinguish between target and acquirer are below:

- Canada - one of the thresholds is if the target has assets in Canada whose book value exceeds CAD93M (~$100M AUD), or annual gross revenues in/from Canada generated from such assets exceeding CAD93M.
- Japan - for notification of share acquisitions, one limb is where the acquiring group's consolidated domestic sales in Japan exceeds JPY20B (~$200M AUD).
- Poland - transaction is exempt from notification if the target's turnover in Poland was below €10M in any of the 2 preceding years (~$16.4M AUD).

The TCA also considers that notification waivers, in their current proposed form, are unlikely to be a solution to the problems outlined above with the proposed notification thresholds. They are only likely to be useful if the waiver process is faster than the initial review itself. At present, the 30-day waiver process is the same as a phase 1 review, and significantly slower than the 15-day fast track review.

The proposed thresholds also fails to take account of different asset classes and impact this will have on the efficient operation of the proposed mandatory notification regime.

Across the Australian economy there are a very diverse range of transactions. Not only is there a very diverse range of transactions but different sectors of the economy have very different parameters. For example, certain asset classes such as commercial land, leases and property involve: 1) very substantial numbers of transactions; and 2) very high transaction values. At the same time, there is no shortage of alternatives in this assets class and therefore the risk of competitive harms is generally low. The proposed low transaction thresholds will therefore unreasonably capture the large number of land, lease and licence

transactions that occurring daily and are part of many corporations' ordinary course of business.

Accordingly, given the limited resources that the ACCC has to review land, licence and lease acquisitions noting the very large volume of high value transactions in an asset class, the objective of a quick, efficient merger regime can only be achieved if a more nuanced approach is taken. Consideration should be given to setting a different and higher transaction threshold for certain asset class such as land, leases and the like. Given the serious consequences for a failure to notify, a higher different threshold for certain asset classes will help to avoids a deluge of applications that do not raise competitive concerns.

Accordingly, the TCA makes the following recommendations:

- **Recommendation 1:** Monetary thresholds should not reference global transaction value, instead, they should focus on the materiality of the transaction in Australia.
- **Recommendation 2:** The definition of Australian turnover should be clarified and refer only to revenue that is generated from Australian sales or customers, rather than from IP that is generated and held in Australia, but being used elsewhere.
- **Recommendation 3:** The lowest Australian turnover for targets and buyers (separately) should be at least $20 million. Rather than referring to global transaction value, if the target has less than $20 million in Australian turnover, it should not be caught by the notification thresholds.

  The reference to "global transaction value" should be deleted. If the Australian target of a global transaction is at least $20 million in Australian turnover, that is a sufficient jurisdictional trigger. Given the size of global transaction, no transaction will fail to satisfy the proposed "global transaction value" and therefore Australia is suggesting it reviews all global transaction just because there may be a small subsidiary in Australia.
- **Recommendation 4**: We recommend targeted and different thresholds for certain asset classes which should be developed in further and new consultation with Treasury.

3. Market concentration thresholds introduce uncertainty

The TCA is concerned that market concentration-based thresholds do not provide sufficient certainty or clarity to businesses to ensure that businesses know when they must notify their acquisition to the ACCC. This is for two reasons:

- market definition is typically a key question in merger review, and one which may not be agreed upon between the transacting parties and the ACCC
- transacting parties may not have sufficient information to be able to accurately determine market shares, or shares of supply, in any market.

The ACCC's current Merger Guidelines acknowledge the importance of market definition, which can require a complex, lengthy competitive analysis of the product and geographic

dimensions of the market. The Merger Guidelines note that in determining market definition, 'current evidence from market participants will often be critical'.[5]

This is particularly significant in tech markets, where it is very difficult to determine current market boundaries with any degree of certainty. Parties may also be unlikely, for tactical reasons, to want to commit to a specified market definition during the notification process. This is especially the case where a market definition may be defined before parties have the benefit of feedback from third parties about the likely relevant markets for the transaction.

Clarity in notification thresholds is of critical importance in mandatory and suspensory merger regimes, and the TCA has strong concerns about the inclusion of market concentration thresholds.

The TCA makes the following recommendation:

- **Recommendation 5**: Market concentration thresholds should not be included in the proposed notification thresholds, in favour of clear and objective monetary thresholds.

4. Targeted notification requirements

The TCA is concerned about the ability for Treasury Ministers to set additional targeted notification requirements at their discretion. Given the importance of thresholds to the effective operation of the merger regime, it is not appropriate for Treasury Ministers to have the power to fundamentally change the operation of the regime. Instead, the ability to change the thresholds should be reserved to parliament following an appropriate public notice and consultation process, including allowing for a regulatory risk assessment to be undertaken.

If the proposal remains, additional clarity and safeguards are needed. To date, there has been little information provided regarding procedural safeguards to ensure that additional targeted notification requirements are transparent, clear, and have sufficient accountability mechanisms built into them. For example, as a minimum, an obligation should be imposed on Treasury Ministers to consult all affected stakeholders including other Government agencies and provide for reasonable timeframes for submission and a review mechanism for that decision.

We consider that there is also a significant risk that the introduction of targeted notification requirements would overlap significantly with the FIRB regime, which grants the Treasurer powers to block or impose conditions on acquisitions, based on a broad national interest test.

The TCA is concerned that this proposal introduces significant ongoing uncertainty and complexity into the administration of Australia's merger laws, and carries significant risk of the merger process being politicised.

The TCA makes the following recommendation:

- **Recommendation 6**: Treasury Ministers should not have the broad discretion to set additional targeted requirements. If the Government does maintain this discretion in the merger regime, then there should be clear procedural safeguards to ensure that

[5] ACCC, Revised Merger Guidelines 2008, updated 2017, p14.

additional targeted notification requirements are transparent, clear and have sufficient accountability mechanisms.

5. Requirements for a sufficient material connection to Australia are ineffective

The notification requirements set out in the Consultation Paper require that, in order for a transaction to require notification to the ACCC, the transaction must meet the relevant thresholds and have a 'material connection to Australia'. The TCA is concerned that this additional test does not add anything meaningful to the proposed notification thresholds, and instead, is likely to create significant uncertainty for the Australian tech sector.

The Consultation Paper lacks detail about what is a material connection to Australia, beyond 'being registered or located in Australia, supplying goods or services to Australian customers, or generating revenue in Australia'.[6] This is particularly challenging for technology markets, where Australian customers may be supplied with goods and services when they travel, or are outside of the country, and therefore may be captured even though the services are not available in Australia.

Further, the 'material connection' to Australia test introduces further uncertainty given that the Act already covers the application of the act to conduct outside of Australia and there is substantial clarifying case law on the existing test. By introducing a new test into the Act, parties and the courts will reasonably see this as a deliberate change leading to the question of what difference is intended. The additional uncertainty introduced by this test is unnecessary and does not achieve the Government's objective of a transparent merger clearance regime.

The TCA makes the following recommendation:

- **Recommendation 7**: Notifiable mergers should have a material connection to Australia in the form of a reasonable Australian turnover threshold in line with Recommendation 2 for the merging parties.

6. Uncertainty regarding how serial acquisitions will be captured by new notification requirements

The proposed three-year rule to capture 'serial acquisitions' in the new merger regime is confusing, uncertain, and not at all clear in how it will work in practice, especially with respect to notification requirements. The ability to capture all acquisitions made in the preceding three years will already be captured by the proposed monetary thresholds, as the combined turnover of the merged entity will be able to account for prior acquisitions.

The mere fact of an acquirer making previous acquisitions should not make future acquisitions problematic, if they would not be problematic when considered individually. The TCA is also concerned that subsequent acquisitions could be used by the ACCC to reopen, or revisit previous acquisitions that have already been cleared (or were not sufficiently concerning to have been captured by the merger thresholds at the time).

[6] Consultation Paper, p18.

In the tech sector, it is common for tech companies to grow by way of acquisition. There is typically little overlap between the target and acquirer, with the acquisition providing new functionality and features to the tech company. The concept of serial acquisitions, as set out in previous TCA submissions in relation to merger reform, is unnecessarily broad and prohibitive.

The TCA makes the following recommendation:

- **Recommendation 8:** Monetary thresholds will adequately capture serial acquisitions, rendering the new three-year rule for capturing serial acquisitions ineffective and unnecessary. Government should remove the three-year rule for serial acquisitions from the proposed merger reforms.

7. Penalties for failure to notify should be amended

The TCA supports the introduction and implementation of penalties that incentivise compliance with notification requirements in the new merger regime, given that penalties will support the effective administration of the regime.

However, the Consultation Paper proposes that the penalty for failing to notify the ACCC of a transaction which should be notified is found null and void in law, which is an extreme penalty and significantly out of step with international best practice (such as in the EU, which imposes a financial penalty). This is an especially pressing concern where there is considerable complexity and uncertainty inherent in the notification thresholds that are proposed in the Consultation Paper.

The TCA makes the following recommendation:

- **Recommendation 9:** The penalties for failure to notify the ACCC of a transaction should involve a flat monetary penalty, and, where the transaction has already completed, it could be appropriate for the ACCC to have the power to seek an order from the Federal Court to unwind all or part of the transaction.