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FOI 3588
Document 1

Australian Government
The Treasury

Ministerial Submission

MS23-001712

FOR ACTION - Competition Taskforce – mergers reform

TO: Treasurer - The Hon Jim Chalmers MP
CC: Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment - The Hon Dr Andrew Leigh MP

TIMING

By Friday, 15 September 2023

Recommendation

- That you agree to the Competition Taskforce conducting a public consultation process on mergers reform commencing in October this year.

Agreed / Not agreed

Signature	Date: / /2023

KEY POINTS

- Your media release of 23 August 2023 stated that the Competition Review will consider mergers reform as an initial priority.

s 22

- Ensuring that Australia's mergers competition framework is operating effectively is critical for preventing businesses from accumulating market power simply by acquiring their competitors, to the detriment of consumers, workers, and productivity and dynamism across the economy more broadly.

- The Australian Competition and Consumer Commission (ACCC) has publicly raised significant concerns that the existing mergers framework is failing to protect competition.

  - In particular, it argues that the mergers framework contributes to increasing market concentration and market power because it is 'skewed towards clearance'. The ACCC contends that this has resulted in major acquisitions, albeit a relatively small number, proceeding which should have been blocked.

- Recent research, including Treasury working papers, indicates that competitive pressure in Australian markets has lessened over the last two decades as market concentration and price markups have increased.

  - While further research is needed to assess the extent to which these results relate to the effectiveness of the mergers framework, they do underline the need to ensure that the framework is working as effectively as possible.

s 22

- We also note that the ACCC's recent decision to block ANZ's proposed acquisition of Suncorp's banking arm, and the expected review of this decision by the Australian Competition Tribunal, is likely to maintain media and business attention on mergers law over coming months.

ACCC proposals

- The ACCC released comprehensive reform proposals in March (see Attachment A). Broadly, the proposals would:

  - require all mergers above a statutory threshold to be notified to the ACCC and prohibit them from proceeding unless and until the ACCC grants clearance. ACCC decisions would be reviewable by the Australian Competition Tribunal;

  - reverse the onus of proof, so that the businesses proposing a merger must satisfy the ACCC (or Tribunal) that it is not anti-competitive; and

  - broaden the statutory test (which currently prohibits mergers that 'substantially lessen competition') to prohibit businesses with substantial market power from acquiring another business where the merger would materially increase this power.

- In light of the concerns outlined above, we consider the ACCC's proposals warrant careful consideration. They are, however, contentious.
  - In response to your announcement of the Review, the Business Council of Australia reiterated its view that 'overzealous' merger regulation carries risks for growth and productivity.

s 22

s 42

Proposed process for considering mergers reform

- We do not have a preferred option for mergers reform at this stage. s 22

s 22

- An outline of the proposed consultation paper is at Attachment B. Broadly, it would seek a range of stakeholder views on:
  - the effectiveness of the existing mergers framework, both as regards mergers review processes and the statutory mergers test;
  - the range of options that could address identified concerns about the mergers framework, including the ACCC's proposed reforms; and
  - the benefits and risks of all options, including the ACCC's proposals, for addressing identified concerns.

s 22

Clearance Officer
Jason McDonald
First Assistant Secretary
Competition Taskforce Division
1 September 2023

Contact Officer
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CONSULTATION

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ATTACHMENTS

A: Additional Information
B: Outline of the Proposed Consultation Paper

s 22

[redacted]

ACCC's mergers reform proposals

- The ACCC's specific concerns about the existing mergers framework are that:
  - the statutory mergers test is 'skewed towards clearance' because it places the onus on the ACCC to show that a merger is anti-competitive, rather than on businesses to show that it is not anti-competitive;
  - the mergers test fails to adequately address acquisitions by dominant businesses of small competitors that, for example, increase their market power through a series of 'creeping' acquisitions'; and
  - businesses proposing mergers are 'increasingly pushing the boundaries' in the way they engage with the ACCC's voluntary merger review process.
- The ACCC proposes to replace the informal merger review and authorisation processes with a new statutory framework. The key elements of the proposed framework are to:
  - require that the ACCC be notified of all mergers above a statutory threshold;
  - enable the ACCC 'call in' mergers below the threshold where it considers they raise competition concerns;
  - prohibit notified or 'called-in' mergers from proceeding unless and until they obtain ACCC (or Tribunal) clearance; that is, mergers could not proceed until there is a final decision;
  - prohibit mergers where the ACCC is not satisfied that a proposed acquisition would not substantially lessen competition; that is, the onus would be on applicants to satisfy the ACCC that a proposed acquisition is not anti-competitive;
  - broaden the definition of 'substantial lessening of competition' to include entrenching, materially increasing or materially extending a position of substantial market power;
  - provide for a second-stage public benefit test for proposed acquisitions if formal clearance is not granted on competition grounds; and

- revise and modernise the merger factors in section 50. Existing factors would be amended to explicitly refer to the change that the proposed merger may have on key market features such as barriers to entry. New factors would be added to address ACCC concerns; for example, about creeping acquisitions.

- ACCC clearance decisions would be subject to limited merits review by the Tribunal. The Tribunal's decisions would be subject to judicial review by the Full Federal Court.

- The ACCC would have compulsory information-gathering powers akin to those already provided for merger authorisations.

s 42

s 22

ATTACHMENT B – OUTLINE OF THE PROPOSED CONSULTATION PAPER

- An indicative outline of the proposed consultation paper is set out below.
- The paper would be a Treasury publication (using the standard consultation paper template) and would be published on the Competition Review page on the Treasury website.
- The consultation paper would invite stakeholders to provide written submissions (to the Competition Review email address) within **[six]** weeks of the paper's release.

Introduction

- The introduction would:
  - outline the Competition Review, including rationale, scope, process and timeline;
  - identify mergers reform as an initial priority for the Review; and
  - outline the consultation process including its scope, objectives and timeframe.

The economic and social impacts of mergers

- This section would set out the various views on the benefits and risks of mergers, including the following.
  - A often-cited argument in support of mergers is that they improve productive efficiency; that is, that merging firms are able to take advantage of economies of scale and scope, with these costs savings placing downward pressure on consumer prices.
    - However, recent research casts doubt on whether these claimed efficiency benefits eventuate in practice, particularly in larger mergers.
  - A further economic benefit arguably provided by mergers is that they improve allocative efficiency, by helping resources move to their most productive use around the economy, although this is more difficult to measure.
  - Mergers have been a traditional focus of competition law because they potentially enable businesses to accumulate market power simply by acquiring their competitors. The exercise of market power can have significant impacts on:
    - consumers, via higher prices, less choice and lower quality;
    - wages and supplier prices, where monopsony power exists; and
    - inequality by disproportionately effecting vulnerable and lower income individuals who spend a higher proportion of the income and savings on consumption, rely on competitive market access to resources to achieve upward social mobility, and have less labour market bargaining power.
  - There is an important and longstanding debate about the impact of mergers on innovation; that is, whether market power:
    - reduces incentives to innovate because incumbents risk losing existing profits (as argued by Kenneth Arrow); or

: increases incentives to innovate by allowing firms to capture greater value from their discoveries (as argued by Joseph Schumpeter).

- The consultation paper would then seek stakeholder views on the benefits and risks of mergers for the economy and more broadly.

Australia's mergers competition framework

- This section would outline Australia's mergers framework, including;
  - the existing mergers test; and
  - the two processes for obtaining ACCC clearance for a proposed merger – that is, informal merger review and authorisation.
- It would also provide information about the performance of the mergers framework over time (for example, number of matters considered annually, the outcomes of legal cases etc).

Emerging concerns

- The consultation paper would outline:
  - concerns raised in recent years by the ACCC and others about Australia's mergers framework, both the mergers test and assessment processes;
  - other views on Australia's mergers framework; for example, those in the Productivity Commission's recent 5-year productivity inquiry and in academic literature;
  - the findings of recent research about competition and dynamism in Australia and overseas;
  - specific concerns about digital platform acquisitions and creeping acquisitions; and
  - overseas merger reform proposals and international best practice in merger regulation.
- The paper would seek stakeholder views on these and any other concerns.

Policy options and analysis

- The consultation paper would:
  - outline the ACCC's merger proposals, along with its views on their likely impact;
  - outline other reform proposals that have been publicly advocated; and
  - ask stakeholders to suggest further options.
- The paper would then seek stakeholder views on the benefits and risks of the various options, including their impact on:
  - the number of mergers that would come before the ACCC;
  - merger assessment outcomes, timeframes and regulatory costs;

- competition and dynamism in the Australian economy; and
- any other benefits and risks they consider arise.

Australian Government
The Treasury

Ministerial Submission

MS23-002263

FOR ACTION - Competition Review - Mergers consultation paper

TO: Treasurer - The Hon Jim Chalmers MP
CC: Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment - The Hon Dr Andrew Leigh MP

TIMING

s 22

Recommendation

- That you approve the release of the consultation paper canvassing options for reform to merger regulation for an 8 week public consultation period from November 2023 to January 2024 (**Attachment A**).

Approved / Not approved

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Signature	Date: / /2023

KEY POINTS

- You have agreed to the Competition Taskforce conducting a public consultation process on merger reform (**MS23-001712**).
- We recommend releasing a public consultation paper (**Attachment A**) and summary (draft to be provided to your office in due course) outlining three broad reform options:
  - **Option 1** introduction of a voluntary clearance process, together with a 'satisfaction test' where the ACCC needs to be satisfied that a merger is **not** likely to substantially lessen competition (similar to New Zealand). If merger parties did not voluntarily notify, the ACCC would need to commence action in the Federal Court to stop an anti-competitive merger.
  - **Option 2** introduction of mandatory notification of mergers above a threshold and suspension of the merger for a period for the ACCC's review. Mergers would only be blocked if the ACCC commenced action in the Federal Court (similar to the United States and Canada).
  - **Option 3** is the ACCC's proposal which would introduce both a satisfaction test (Option 1) and a mandatory and suspensory notification process (Option 2).
  - The paper also considers: changes to the mergers test to increase the focus on the effect of a merger on the structure of a market; changes to the merger factors to reflect concerns about acquisitions by large companies and interlocking directorships or minority cross-shareholdings; and increasing the focus on related agreements between merger parties.

Risks/sensitivities

- Public release of the consultation paper is likely to attract media attention and be sensitive with some stakeholders (**MS23-001712**). The paper is balanced, allowing the government to choose from a range of options, depending on feedback.
  - A suggested questions and answers document for government use is attached (**Attachment B**).

s 22

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CONSULTATION

ACCC, Department of the Prime Minister and Cabinet, Department of Industry, Science and Resources, Expert Advisory Panel.

ATTACHMENTS

A: Draft consultation paper on merger regulation and appendices (still being fact checked)
B: Q&A

s 22

Australian Government
The Treasury

Competition Review

Merger Reform

Consultation paper

[November 2023]

Manager
Media Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

Contents

Consultation process

Request for feedback and comments

This paper seeks information and views to inform options for modernising Australia's merger regulation.

Questions are included throughout the paper to guide comments. Interested parties may wish to provide responses to some or all the questions, or to comment on issues more broadly.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

Publication of submissions and confidentiality

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the Freedom of Information Act 1982, may affect the confidentiality of your submission.

If you would like to share information and views that may be sensitive, you are welcome to indicate that you would like all or part of your submission to remain confidential. Treasury also welcomes the opportunity to discuss your views in a meeting.

Closing date for submissions: 19 January 2024

Email	**CompetitionTaskforce@treasury.gov.au**
Mail	Competition Taskforce The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be directed to [CompetitionTaskforce@treasury.gov.au]

Executive summary

Competition is an important driver of dynamism, productivity, and wages growth. Competition encourages productivity gains to be passed onto consumers through lower prices, higher quality, or an improved variety of products, and to workers through higher wages.

However, there is evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries. This reduction in competition is likely to have contributed to Australia's declining productivity performance over a long period. Many countries around the world face similar concerns and are reviewing their competition policy settings.

Mergers involve separate firms coming together to form a new firm. They may also involve the acquisition of shares or assets of one firm by another, even if that is less than a full 'merger'. Mergers are important for the efficient functioning of the economy. They can provide an important way for firms to achieve economies of scale and scope, diversify risk and exit businesses. Mergers can enhance competition if these efficiencies are passed onto consumers via lower prices, improved product quality, range, or service.

Most mergers do not raise competition concerns. However, a small proportion of proposed mergers, if allowed to proceed, would be anti-competitive. Merger control is about maintaining competitive market structures which lead to better outcomes for consumers. It is the legal regime and underlying process that enables a competition authority to consider mergers that could be harmful to the competitive process and, if necessary, amend or prevent harmful mergers. Ideally, merger control regimes would target those that are anti-competitive and allow mergers that are pro-competitive or benign to proceed. In practice, this is hard to achieve. It is difficult to predict the future competition and efficiency impacts of proposed mergers. Merger control regimes therefore need to be risk-based, devoting more regulatory resources to those that are more likely to be anti-competitive and therefore more likely to cause the harm to the community.

Emerging concerns

In Australia, productivity growth has slowed over a long period, and most measures of dynamism have declined. A range of competition indicators – including industry concentration, incumbency, and firm mark ups – suggest a deterioration in competition in Australia since the early 2000s. This is consistent with trends in many other advanced economies.

Australia's merger control regime has a prohibition on mergers that are likely to have the effect of substantially lessening competition,[1] assessed through voluntary informal merger review, voluntary merger authorisation and Federal Court proceedings. The Australian Competition and Consumer Commission (ACCC) has raised concerns about Australia's mergers control regime, particularly that:

- it is 'skewed towards clearance' where there is uncertainty or a number of possible future outcomes. This is because of the emphasis courts place on having to predict the likely state of competition in the future with and without the merger, the information asymmetry between

[1] *Competition and Consumer Act 2010* (Cth) s 50.

merger parties and the ACCC, the weight often placed by courts on the evidence of the merger parties' senior executives and the reluctance of third parties to give evidence in court; and

- the existing voluntary system of merger notification and assessment is not as effective as it needs to be because, for example, merger parties are threatening to complete a merger transaction before the ACCC has completed its review, are failing to notify at all (including for international cross-border mergers), and/or are providing insufficient or inaccurate information to the ACCC.

However, others suggest that the ACCC's limited success in court is more due to its litigation strategy and reliance on economic theory that does not account for commercial realities. Further, cases where the ACCC has identified a completed merger and acted either to undo it or to seek penalties appear to be rare (although the ACCC does not publicise all instances where it investigates mergers post-completion).

Internationally and in Australia, concerns have been raised that the anti-competitive effects of certain types of acquisitions by large firms are not adequately captured by current competition laws. These include:

- creeping or serial acquisitions – that is, a series of small acquisitions by large firms – which have been of concern to the ACCC in Australia in sectors such as supermarkets, liquor and hardware;
- acquisitions by large incumbents of nascent competitors. While nascent firms play a vital role in competitive markets as key sources of new ideas, products, and business models, it can be difficult to know whether they would have provided a meaningful competitive constraint in the future if not acquired; and
- expansions into related markets, mainly by digital platforms. For example, Google's major acquisitions in recent years include YouTube, DoubleClick, Waze, and Fitbit, and Meta's major acquisitions include Instagram and WhatsApp.

Key elements of a merger control regime

Key elements to be considered in designing a merger control regime include:

- **Notification:** whether notification should be voluntary or mandatory; what ability should exist for the ACCC to deal with non-notified mergers; and whether mergers should be suspended for a period of time to allow the ACCC to assess;
- **Assessment:** whether the ACCC or the Federal Court should be the primary decision-maker; whether the default position should be to permit or block mergers where there is uncertainty; what should be taken into account in determining the impact of a merger on competition, including whether more focus should be given to the effect of a merger on market structure; and, whether the 'public benefits' of a merger should be considered; and
- **Enforcement**: whether a clearance model should be adopted that provides formal legal certainty; whether ACCC decisions should be subject to limited merits review by the Australian Competition Tribunal (the Tribunal); and how the Federal Court should interact with any mandatory notification regime.

Possible policy options

The purpose of merger control is to identify and prevent the prospective anti-competitive effects of mergers. The possible options considered below group key elements of merger regimes drawing from experience globally.[2] This includes merger reform proposals provided to Treasury by the ACCC in March 2023.[3] Each option is a proposal to reform the current informal merger regime to address shortcomings given evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries.

Merger control processes

Stakeholders are invited to suggest alternative options or variations of these options and outline their benefits and risks, as well as provide views on whether the existing merger authorisation regime should be retained. Under all options, it is assumed the informal merger review process would be replaced by the reformed merger control process.

	Option 1	Option 2	Option 3 (ACCC's proposal)
Notification	Voluntary suspensory clearance	Mandatory suspensory notification	Mandatory suspensory clearance
Decision maker	ACCC (subject to review by the Competition Tribunal)*	Federal Court	ACCC (subject to review by the Competition Tribunal)
Test applied	Must be satisfied merger is not likely to SLC	Must be satisfied merger is likely to SLC	Must be satisfied merger is not likely to SLC (or net public benefit)

*The ACCC would be required to commence legal action in the Federal Court if the merger parties do not notify or decide to proceed, as is the case for Option 2.

- **Option 1 – A voluntary formal clearance regime** could be introduced where businesses could choose to notify of a merger and the ACCC could grant legal immunity from court action under the prohibition against anti-competitive mergers in section 50 of the *Competition and Consumer Act 2010* (Cth) if satisfied the merger would not be likely to substantially lessen competition.
- **Option 2 – A mandatory and suspensory regime** could be introduced, with compulsory notification of mergers above a threshold. Transactions would be suspended for a period while the ACCC conducts its assessment. To prevent an anti-competitive merger, the ACCC would need to prove to the court that the merger would be likely to substantial lessen competition.
- **Option 3 (ACCC's proposal) – A mandatory formal clearance regime** could be introduced, with compulsory notification of mergers above a threshold and allowing the ACCC to 'call-in' transactions below the threshold where there are competition concerns. The ACCC would only

[2] See OECD (Organisation for Economic Co-operation and Development), OECD Competition Trends 2021 – Volume II: Global Merger Control, 2021, p 12, accessed 29 October 2023.

[3] The ACCC's 2023 merger proposals are a revised version of proposals released in 2020. This consultation paper refers to the ACCC's 2023 proposals, which are reproduced at [LINK] unless stated otherwise.

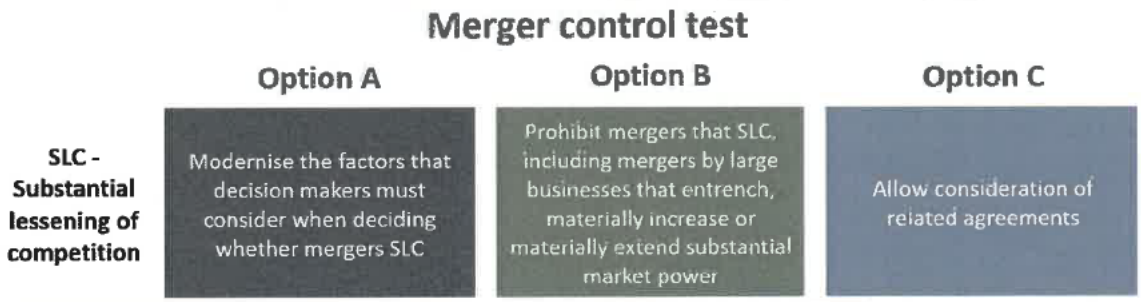
grant clearance if it was satisfied the merger was not likely to substantially lessen competition. Clearance would provide formal immunity from court action under section 50.

The first two options are 'judicial enforcement' merger control models relying on litigation to stop a merger considered by the ACCC to be anti-competitive if parties nevertheless decide to proceed. The third option is primarily an 'administrative' model with transactions requiring ACCC approval before they can proceed.

A significant proportion of mergers considered by the ACCC annually are effectively already subject to a mandatory notification and suspensory framework, as they involve foreign investment and are therefore subject to Australian foreign investment approval processes. In considering possible policy options, it would be important to ensure that the foreign investment and competition approval regimes worked effectively together.

Changes to the merger control test

The ACCC has also proposed changes to the test for whether mergers are 'likely to substantially lessen competition' (under section 50) to better recognise the effect that some acquisitions – particularly by large firms – have on competition and the structure of the market.



- **Option A:** Modernise the list of matters that the ACCC may, and the court must, consider when assessing the impact of mergers on competition (known as the 'merger factors' in section 50(3)). This could also include removing the merger factors from the legislation.
- **Option B:** The substantial lessening of competition test could be expanded to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.
- **Option C:** Related agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) could also be considered as part of the consideration of the effect of the merger on competition.

Each of these options could be implemented alone, together, or along with the changes to the process discussed above. For example, the ACCC's proposed option is to adopt option 3 as well as giving greater focus to the effect of a transaction on market structure (that is, option 3, A, B, and C).

Next steps

Feedback on these options will inform advice to Government on potential directions for merger reform. Each option could be implemented alone, or as a package. Once the Government has settled

its preferred approach, and if change is proposed, further consultation will be undertaken on the implementation approach.

Introduction

On 23 August 2023, the Australian Government announced that a review of competition policy by a Competition Taskforce established in the Australian Treasury would consider proposals for merger reform.[4]

This consultation paper seeks views on:

- whether Australia's current mergers control regime is effective, that is, whether it readily enables beneficial mergers to proceed while ensuring that mergers which may pose substantial competition risks are blocked; and
- to the extent that Australia's mergers control regime could be improved, the options available for reform and their benefits and risks.

[4] The Hon Dr Jim Chalmers, Treasurer, and the Hon Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment, *A more dynamic and competitive economy* [media release], Australian Government, 23 August 2023, accessed 27 October 2023.

Why Australia's merger control regime is important

Australia's merger control regime has a prohibition on mergers that are likely to have the effect of substantially lessening competition,[5] assessed through:

- informal merger review – a process which has developed without any statutory framework that enables merger parties to manage regulatory risk and seek the ACCC's non-binding view on whether a merger is likely to substantially lessen competition.

- merger authorisation – a formal statutory process[6] which allows the ACCC, and the Australian Competition Tribunal on review, to provide businesses with immunity from court action under competition law for a proposed merger if it is satisfied that the merger would not be likely to substantially lessen competition or that it is likely to result in a net public benefit; and

- Federal Court proceedings in which the ACCC or merger parties can seek orders relating to the merger. This can include an application by the ACCC to injunct to restrain the merger prior to completion or an order that the completed merger is void, with divestiture and substantial penalties, post-completion. Alternatively, the merger parties may seek a declaration that a merger does not substantially lessen competition. Such relief is at the discretion of the Federal Court of Australia and the evidentiary burden of proving the case is usually on the party seeking the orders.

Merger control plays a critical gatekeeper function, preserving the integrity of markets by preventing mergers that may substantially lessen competition.

Mergers are important for the efficient functioning of the economy. They can provide a way for firms to achieve economies of scale and scope, diversify risk and exit businesses. Mergers can enhance efficiency and consumer welfare if these efficiencies are passed onto consumers via lower prices or improved quality, service, or range.

A significant number of mergers occur each year in Australia. Over the past 10 years, the ACCC considered 330 mergers each year on average. Most mergers do not raise competition concerns. However, a small proportion of proposed mergers, if allowed to proceed, would be anti-competitive. Australia's merger control framework recognises that:

> [b]y altering market structure, the underlying conditions for competition, mergers may adversely affect efficiency and consumer welfare for many years, and such changes are not easily reversed.[7]

Horizontal mergers involve the merging of actual or potential competitors in the same or similar industry. Horizontal mergers eliminate the competitive constraint that the firms exerted on each other pre-merger. Whether the merger will in fact be anti-competitive depends on factors such as market

[5] *Competition and Consumer Act 2010* (Cth) s 50.
[6] *Competition and Consumer Act 2010* (Cth) ss 88, 90(7).
[7] J Walker, 'An Economic Perspective on Part IV', in Gvozdenovic M and Puttick S (eds) *Current Issues in Competition Law: Vol 1*, Federation Press, 2021, p 87.

concentration, barriers to entry including regulatory or intellectual property constraints, import competition and product differentiation.[8]

Vertical[9] and *conglomerate*[10] mergers involving firms at different, adjacent or unrelated levels of the production supply chain have become more contentious in recent years partly as a result of developments in technology and modern commerce (particularly the growth of digital platforms), and a growing evidence base showing the potentially anti-competitive effects of these types of mergers.[11] Acquisitions by digital platforms, such as Booking.com's acquisition of eTraveli and Facebook/Meta's acquisition of Giphy, have attracted scrutiny from competition authorities around the world. In Australia, an example of vertical integration is Pacific National's acquisition of the Acacia Ridge Terminal from Aurizon, which was completed in 2021.

Risk and design principles for Australia's merger control regime

The overarching policy objective of Australia's merger control regime should be to promote competition that enhances the welfare of Australians, consistent with the object of the *Competition and Consumer Act 2010* (Cth) (CCA).[12] An efficient and effective merger control regime should seek to achieve its policy objective at the lowest cost possible and in a timely manner, with appropriate powers and resources for the competition authority.[13]

Ideally, mergers that are pro-competitive (or do little or no competitive harm) should proceed, while anti-competitive mergers should be blocked. In practice, this goal is challenging to achieve, given it is hard to predict the future effects of a proposed merger.

Acknowledging these uncertainties, a merger control regime must balance its risk tolerance for allowing anti-competitive mergers to proceed against the risk of blocking mergers that are pro-competitive (or that do little or no competitive harm). At the margin, a more *permissive* system will err towards allowing a greater proportion of anti-competitive mergers to proceed, while a *stricter* system will err towards blocking a greater proportion of mergers that may be pro-competitive or do little or no competitive harm.

Ideally, this regulatory stance would be informed by robust empirical evidence, including studies based on large datasets of merger activity over an extended period and across a range of markets. While this statistical analysis is to be developed further in Australia, internationally there is accumulating evidence that merger control regimes may have been, at the margin, too permissive.[14] Relatedly, the international evidence casts doubt on the frequency and extent to which mergers give rise to efficiencies,[15] and whether such efficiencies are then passed on to consumers.

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[8] ACCC, Merger Guidelines, Australian Government, 2008, para 1.4 and 3.9-3.13, accessed 27 October 2023.

[9] Vertical mergers involve firms operating at different functional levels of the same vertical supply chain: ACCC (2008) Merger Guidelines, Australian Government, p 4, accessed 27 October 2023.

[10] Conglomerate mergers involve firms in different markets. Often the relevant firms supply goods or services that are, for example, products that are complementary in either demand or supply: ACCC, Merger Guidelines, Australian Government, p 4, accessed 27 October 2023.

[11] For example, the UK's Furman Review concluded that while most mergers by digital companies may benefit consumers, a minority are likely to have resulted in harm to competition: HM Treasury, Unlocking digital competition – Report of the Digital Competition Expert Panel, Government of the United Kingdom, 2019, ISBN 978-1-912809-44-8, accessed 27 October 2023.

[12] *Competition and Consumer Act 2010* (Cth) s 2.

[13] Productivity Commission, *On efficiency and effectiveness: Some Definitions*, Staff research note, Australian Government, 2013, accessed 27 October 2023.

[14] See further [LINK to background source material].

[15] B Blonigen and J Pierce, 'Evidence for the Effects of Mergers on Market Power and Efficiency', Finance and Economics Discussion Series 2016-082, 2016, Board of Governors of the United States Federal Reserve System, https://doi.org/10.17016/FEDS.2016.082, 2016, accessed 27 October 2023.

Australia's merger control regime should also be consistent with good regulatory design principles. This includes being risk based, where the regulatory burden reflects the expected costs and benefits to the community. More resources should be devoted to analysing mergers more likely to harm competition.

According to the OECD, competition authorities should have sufficient powers to conduct efficient and effective merger review, and merger notification and review procedures should:

- be effective, efficient, timely and transparent;
- avoid imposing unnecessary costs to set reasonable information requirements, establish clear and objective notification criteria, and expedite review of mergers that do not raise material competitive concerns; and
- be procedurally fair, by providing the right to respond, the right to seek review, to hear from third parties and protect confidential information.[16]

Consultation questions

1. *Are these the appropriate principles to use when considering reform of Australia's merger control regime? Are there any others? If so, please identify them.*
2. *What lessons can be learned from experiences overseas?*

[16] OECD, *OECD Recommendation on Merger Review*, 2005, accessed 28 October 2023.

Emerging concerns

Industry concentration is increasing in advanced economies

In Australia, productivity growth has slowed and many measures of dynamism have declined.[17] A range of competition indicators – including industry concentration, incumbency and firm mark ups – suggest a deterioration in competition in Australia since the early 2000s.[18] There is evidence that declining firm entry rates have contributed to a reduced rate of convergence to the productivity frontier within industries, and that the rate of convergence is slower within industries that have experienced the largest increases in markups.[19]. The OECD in its recent economic survey of Australia has noted evidence that "a growing body of evidence links excessive concentration and market power with a range of poor economic outcomes".[20]

This is consistent with trends in many other advanced economies. The International Monetary Fund finds that key measures of market power – markups of prices over marginal cost and the concentration of revenues among the four biggest firms in an industry – have increased significantly among publicly listed firms in advanced economies since the early 1980s.[21]

While numerous case studies provide some insights, there is a lack of comprehensive statistical evidence demonstrating the link between the merger control regime, industry concentration and market outcomes in Australia. However, the international evidence on these questions is growing, with an increasing number of retrospective econometric studies that take advantage of novel high-quality datasets.[22] While these studies find a variety of effects, on balance, they point to a surprisingly large proportion of mergers resulting in anti-competitive effects (increased market prices and/or reduced activity). Linked to this, some recent evaluation studies that investigate efficiency gains in the newly formed firm have found little or no evidence of such gains.[23]

Put simply, the evidence suggests that too many anti-competitive mergers have been allowed to proceed in these jurisdictions and that "merger enforcement has been too lax over the past 25 years".[24,25] Another common finding is that market structure is important in determining outcomes. Broadly speaking, mergers in oligopolistic markets (with only 3 or 4 remaining firms) are significantly more likely to lead to higher prices and reduced output post-merger. While subsequent new entrants or

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[17] D Andrews and D Hansell, 'Productivity-Enhancing Labour Reallocation in Australia', Australian Treasury, 2019, Working Paper No 2019-06, accessed 28 October 2023; D Andrews, J Hambur, D Hansell and D Wheeler, 'Reaching for the Stars: Australian Firms and the Global Productivity Frontier', Australian Treasury, 2022, Working Paper No 2022-01, ISBN 978-1-925832-41-9, accessed 28 October 2023.

[18] I Day, Z Duretto, P Hartigan and J Hambur, 'Competition in Australia and its impact on productivity growth', Australian Government Treasury, 2020, accessed 28 October 2023.

[19] D Andrews, J Hambur, D Hansell and D Wheeler, 'Reaching for the Stars: Australian Firms and the Global Productivity Frontier', Australian Treasury, 2022, Working Paper No 2022-01, ISBN 978-1-925832-41-9, accessed 28 October 2023.

[20] OECD, OECD Economic Surveys: Australia 2023, 2023, p 57, accessed 28 October 2023.

[21] International Monetary Fund, Rising Corporate Market Power: Emerging Policy Issues, Staff Discussion Notes, 2021, ISBN 9781513512082/2617-6750, accessed 28 October 2023.

[22] See further [LINK to background material].

[23] In the US manufacturing industry: B Blonigen and J Pierce, Evidence for the Effects of Mergers on Market Power and Efficiency, Finance and Economics Discussion Series 2016-082, Board of Governors of the Federal Reserve System, 2016, https://doi.org/10.17016/FEDS.2016.082, accessed 27 October 2023.

[24] C Shapiro, 'Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets', 2019, *Journal of Economic Perspectives*, 33 (3): 69-93.

[25] See for example, analysis in J Kwoka, 'Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice', Northwestern University, 2019, http://dx.doi.org/10.2139/ssrn.3332641, accessed 28 October 2023. Mergers may also have non-price effects – out of 26 studies of non-price effects, only 10 showed benefits to consumers arising from mergers: J Kwoka and S Kilpatrick , 'Non-price effects of Mergers: Issues and Evidence', *The Antitrust Bulletin*, 2018, 63(2), https://doi.org/10.1177/0003603X18771756.

existing players could, in theory, mitigate the impact of an anti-competitive merger on a market's structure, it could take years or may not happen at all.[26]

While none of the above studies focus on Australia, their insights are relevant in considering the effectiveness of Australia's merger control regime in promoting competition that enhances the welfare of Australians, given its broadly comparable features.

Australia is not alone in considering reforms to its merger control regime.[27] The US, Canada, the European Union (EU), the UK and South Korea are all conducting or have recently completed significant reviews or reforms. While Australia is unusual in not having mandatory notification (one of only three countries in the OECD),[28] other jurisdictions are grappling with similar issues to Australia. These include more concentrated markets, industries with one or more entrenched or dominant firms, serial or creeping acquisitions, acquisitions by digital platforms, common ownership of minority interests in competing firms and interlocking directorships. The OECD has recently recommended, in the context of medium-term priorities to boost living standards, that Australia consider introducing pre-merger notification, given indicators of competitive intensity in product markets have weakened.[29]

Effectiveness of Australia's merger control test

Forward-looking test

To determine whether a merger is likely to substantially lessen competition, merger assessment under section 50 requires a comparison of the future with and without the merger.[30] The ACCC is concerned that the forward-looking test combined with a judicial enforcement model is 'skewed towards clearance':[31]

The OECD notes acquisitions of nascent firms, as a particular example, 'constitute a whole category of acquisitions of young firms with products whose competitive significance remains highly uncertain' and therefore challenging to assess within the framework of the forward-looking test.[32]

Judicial enforcement model

The ACCC has raised concerns about the difficulties of proving a case in a judicial enforcement model. A judicial enforcement model requires the competition authority or a third party to take legal action and prove an alleged breach of the law in a court on the balance of probabilities.

In an adversarial court proceedings, the evidentiary burden is on the party bringing the action, and findings of fact and evidence may be contested between the parties.

For example, in *Pacific National*, the Full Court accepted that while there would be increased barriers to entry as a result of the acquisition, there was a lack of evidence of new entry within the relevant timeframe (five years). As the competitive constraints facing *Pacific National* in the factual and

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[26] As an illustrative example see A Collard-Wexler, 'Mergers and Sunk Costs: An Application to the Ready-Mix Concrete Industry', *American Economic Journal: Microeconomics*, 2014, 6(4): 407-447, doi:10.1257/mic.6.4.407 - A study of the US concrete industry which showed that an entrant typically took 9-10 years to respond to a merger that had resulted in the market becoming a monopoly.

[27] For a historical discussion of previous proposals to review Australia's mergers clearance process, see Appendix D.

[28] OECD, *OECD Competition Trends 2021 – Volume II: Global Merger Control*, 2021, p 12, accessed 31 October 2023; OECD, *OECD Economic Surveys: Australia 2023*, 2023, p 57, accessed 28 October 2023.

[29] OECD, *OECD Economic Surveys: Australia 2023*, 2023, p 60, accessed 28 October 2023.

[30] *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77 [103].

[31] Justice JM Jagot, 'Some thoughts about proof in competition cases, Judicial address, University of South Australia & ACCC Competition and Economics Law Workshop, 15 October 2021, accessed 29 October 2023.

[32] OECD, *OECD Background Note: Start-ups, killer acquisitions and merger control*, 2022, p 11, accessed 29 October 2023.

counterfactual were found to be the same, the structural changes in the market were not sufficient to find a substantial lessening of competition.

Weight placed on evidence

The ACCC argues that 'the weight placed on the evidence of the merger parties' senior executives'[33] is an important factor explaining why the mergers test is 'skewed towards clearance':

> the tribunal and the courts appear to give greater weight to evidence from the parties to the transaction who ... have a vested interest in the acquisition proceeding, rather than from the evidence from third party witnesses.[34]

In *Vodafone v ACCC*, the court emphasised that the ACCC was not the one making the relevant commercial decisions. Similarly, in *Sea Swift*, the Tribunal preferred the evidence of Toll's executives to the "theoretically based speculation by the ACCC as to what Toll or some other person might do in the circumstances".

However, Samuel, King and Cao argue the ACCC's lack of success in proving in court that a merger is likely to substantially lessen competition is due to the ACCC's tendency to rely on theoretical economic arguments.[35]

Reluctance of third parties to give evidence

Evidence from competitors, customers, suppliers and other third parties is important in demonstrating the likely competitive effect of a merger. For example, third party evidence on market entry – and its credibility – significantly influenced the *Pacific National* case.[36] However, third parties can be reluctant to engage in the review process or give evidence in court because of concerns about time, cost, confidential information,[37] and/or possible retribution and adverse consequences. Such concerns might arise because the potential merged firm is a supplier, customer or competitor. The firm with relevant evidence may be worried that their interests might be harmed as punishment for their cooperation with the ACCC.

Effectiveness of Australia's merger notification and assessment process

The ACCC has raised concerns that Australia's voluntary system of merger notification and assessment is not effective in preventing accrual of market power by firms over time.[38]

Concerns with the process raised by the ACCC include parties notifying but threatening to complete before the ACCC has completed its review, failing to notify, and/or providing insufficient or inaccurate information, which could all impede the ACCC's ability to assess and successfully challenge mergers which raise competition concerns.

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[33] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 7.

[34] ACCC, Digital Platforms Inquiry - Final Report, Australian Government, 2019, p 108, accessed 29 October 2023.

[35] H Cao, S King, and G Samuel, 'Contested mergers and the ACCC's proposed merger reforms', *Australian Business Law Review, 2022*, 5(34), p 46.

[36] *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77.

[37] OECD, OECD Background Note: Economic analysis in merger investigations, 2020, *2020 OECD Global Forum on Competition Discussion Paper*, pp 24, 45-46, accessed 29 October 2023; OECD, Investigative Powers in Practice - Breakout session 2: Requests for information: Limits and Effectiveness, 2018, OECD Issues Notes: Breakout Session 2 DAF/COMP/GF(2018), pp 5, 9, accessed 29 October 2023.

[38] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 1.

Completing or threatening to complete transactions before the ACCC has finalised its review

The ACCC has also raised concerns that:

> An increasing number of merger parties threaten to complete the transaction prior to the conclusion of the ACCC's review and/or put pressure on the timing of the review, which creates substantial inefficiencies and compromises the effectiveness of the informal merger review process.[39]

If merger parties attempt to complete their transaction before the ACCC has completed its review, the ACCC may commence court proceedings in which it seeks an injunction to stop or delay the merger (see Box 1). Injunctive relief is at the Court's discretion and if unsuccessful, the transaction may complete before the end of the ACCC's review.

Court proceedings are also time and resource intensive – placing greater demands on the ACCC, the impact of which may be broader than the matter in hand – and also come at significant public cost. Before it can commence proceedings, the ACCC must obtain evidence that is of sufficiently high standard to meet the 'model litigant' obligations that apply to all Commonwealth parties. This can be difficult to do, particularly if the ACCC is relying on merger parties to provide complete and accurate information regarding the transaction, market structure and potential competitive effects.

The ACCC may also try to negotiate 'hold separate' undertakings to preserve the pre-merger status quo while it completes its review. However, merger parties have discretion about whether to offer an undertaking, and on what terms.

Failing this, it is difficult to use remedies to restore the status quo once a merger has been completed, even if a court subsequently finds it substantially lessened competition. Time limits apply to seeking remedies, and they can become harder to implement the more time has passed since the transaction..[40]

Box 1: Virtus' proposed acquisition of Adora

On 30 August 2021, Virtus provided a letter informing the ACCC of its intent to acquire Adora, another provider of IVF services. On 3 September 2021, the ACCC notified Virtus that it was not possible to confidentially pre-assess the proposed acquisition. After receiving a supplementary submission and meeting with Virtus' legal advisors, the ACCC commenced a public review on 21 September 2021. On 8 October 2021, Virtus informed the ACCC that it intended to proceed with the proposed acquisition on 15 October 2021, notwithstanding the ACCC had not completed its informal public review. The ACCC requested an undertaking not to complete before its indicative decision date of 25 November 2021, which Virtus refused to provide.[41]

The ACCC commenced proceedings on 13 October 2021, obtaining an interim injunction until the Federal Court granted an interlocutory injunction on 25 October 2021 preventing the parties from completing the proposed acquisition until proceedings had been finalised in the Federal Court.

The Federal Court noted:

> the respondents were aware of the requirements of s 50 and the available processes for seeking formal or informal approval of the Adora acquisition from the ACCC, but chose not to seek approval. The evidence suggests that Healius would not have agreed to sell the Adora business subject to a condition that

[39] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 6.
[40] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 5.
[41] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295, [47]-[59].

> required ACCC approval and both parties took the risk of the ACCC opposing the acquisition and seeking injunctive relief.[42]

The merger parties subsequently decided not to proceed with the transaction before there was a final hearing on the substantive competition issues.

Failure to notify mergers

The ACCC has raised concerns that 'in some cases, merger parties are choosing not to notify the ACCC of relevant proposed acquisitions'.[43]

It is difficult to assess how frequently this occurs. The ACCC does not assess mergers that complete without prior notification under the informal merger regime. Instead, the ACCC may launch an enforcement investigation and possible litigation seeking penalties alleging contravention of section 50. The ACCC does not announce enforcement investigations and cases where the ACCC has publicly identified a completed merger and taken action to undo it[44] or seek penalties[45] appear to be rare, although there are challenges with unwinding a merger. However, some notable examples include:

- In 2023, the ACCC commenced investigation into several completed acquisitions over a six-year period by specialty pet retailer Petstock and is currently consulting on possible divestiture undertakings.
- In 2015, Primary Health Care did not notify the ACCC prior to its acquisition of pathology sites from Healthscope which were subsequently divested after the ACCC conducted a lengthy investigation post completion- and raised competition concerns in the supply of community pathology services.
- In 1996, the Federal Court imposed a penalty of $4.8 million on Pioneer Concrete for completing an acquisition in breach of section 50.[46]In 1988, the Trade Practices Commission sought an order for divestiture against Australian Meat Holdings but an undertaking to the court was considered more appropriate.

Concerns that insufficient or inaccurate information is provided by merger parties

Insufficient information

The ACCC has raised concerns that merger parties are providing insufficient upfront information to enable it to properly assess the likely competitive effects of a merger.[47]

> Merger parties decide what information to provide to the ACCC at the commencement of a merger review, with the result that the quality and timeliness of the information available to the ACCC is often not sufficient and

[42] *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295, [45]. In another example, Qube notified the ACCC of its proposal to acquire Newcastle Agri Terminals on 8 September 2021 and completed the acquisition on 30 September 2021 before the ACCC had concluded its review. The ACCC ultimately decided not to pursue enforcement action.
[43] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 6.
[44] The ACCC has 3 years from when merger takes place to commence proceedings under *Competition and Consumer Act* 2010 (Cth) s 81.
[45] S King 'The Australian Competition and Consumer Commission's Proposed Merger Reforms', 2021, http://dx.doi.org/10.2139/ssrn.3948278, p 2; *Competition and Consumer Act 2010* (Cth) s 77.
[46] *ACCC v Pioneer Concrete (Qld) Pty Ltd* (Federal Court of Australia, Lockhart J, 20 December 1996).
[47] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 6.

generally requires multiple requests for additional information during a review.[48]

When the ACCC becomes aware of a proposed merger, it initially assesses whether a public review is required. This pre-assessment is based on information from the merger parties and other information before the ACCC. If the ACCC is satisfied there is a low risk of a substantial lessening of competition, it decides that a public review is not necessary (i.e. it 'pre-assesses' the proposed merger). However, the lack of mandatory upfront information requirements results in variation in what and how much information merger parties provide to the ACCC. This impacts the ACCC's ability to conduct pre-assessment efficiently and effectively. Information asymmetry hinders effective implementation of a risk-based regulatory regime.

The ACCC has the power to issue information gathering notices under section 155 of the CCA if the ACCC has reason to believe that the recipient is capable of providing information, documents or evidence relating to a matter that may constitute a contravention of the CCA. Meeting this test requires some upfront information suggesting the merger does raise competition concerns. In addition, for persons carrying on a business in Australia but who are not present in Australia, such inquiries could be better facilitated by enabling section 155 notices to be served on their Australian representatives, whoever they might be.

By contrast, competition authorities in the US or Canada can issue a broad 'second' request of information about a merger which stops the clock – often for several months – until the information is provided by merger parties. In addition, for persons carrying on a business in Australia but who are not present in Australia, such inquiries could be facilitated by enabling section 155 notices to be served on their Australia representatives, whoever they might be.

Inaccurate information

An ACCC ex post review of six mergers raised concerns about inaccurate information provided by merger parties.[49]

While there are penalties for parties negligently providing false or misleading information, this requires the ACCC to seek a court order for penalties or refer the matter for prosecution.[50]

A lack of information can hamper the effectiveness of a risk-based regulatory approach. The asymmetry of information between competition authorities and merger proponents increases the challenge to ensure the review is appropriately targeting mergers more likely to harm competition. Improving a competition authority's access to information can improve its ability to appropriately target their compliance activities according to risk – that is, focusing more on mergers that are likely to substantially lessen competition, while permitting the rest.

[48] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 6.

[49] The ACCC found that some cleared mergers have resulted in significant price increases for segments or markets; the likelihood of new entry and expansion can be overstated (although as noted earlier this can take significant time in some markets); the removal of a vigorous and effective competitor can harm competition even when market shares appear relatively low; and third parties are poor assessors of their own countervailing power. ACCC, Ex Post review of ACCC merger decisions, Australian Government, 2022, p 7, accessed 29 October 2023.

[50] *Competition and Consumer Act 2010* (Cth) s 9 and ss 155(5), (6A), (8A); *Criminal Code* (Cth) s 137.

Serial acquisitions

There have been long-standing concerns about serial or creeping acquisitions (Appendix B),[51] historically in the grocery sector, and more recently in sectors such as retail liquor and hardware.[52]

In 2011, the CCA was amended to assist in targeting creeping acquisitions. The 2015 Harper Competition Policy Review did not recommend further changes to address this type of acquisition.

However, the ACCC considers this is still a concern[53] and other jurisdictions have sought to address the issue of serial acquisitions, including by requiring notification in certain sectors or by businesses with substantial market power, or considering aggregate transactions within a certain timeframe.[54] In the UK, designated grocery retailers are required to notify the Competition and Markets Authority (CMA) of any acquisition of a grocery store with over 1,000 m^2 of retail space.[55]

Acquisitions by large firms

Internationally and in Australia, concerns have been raised that the anti-competitive effects of acquisitions by large firms are not adequately captured by current competition laws.[56] These include a series of small acquisitions by large firms (known as 'creeping or serial acquisitions');[57] acquisitions by large incumbents of nascent competitors (including 'killer acquisitions'); and expansions into related markets, often by digital platforms.

In some cases, these types of mergers may not be found to breach competition laws that prohibit mergers likely to 'substantially' lessen competition. For example, where the target firm is a new, innovative, or small firm it may be difficult to predict its future growth. In addition, the focus on an individual transaction does not capture the pattern and effect of the series of transactions overall. In jurisdictions with voluntary notification such as Australia, if merger parties consider the acquisition of a small firm is unlikely to substantially lessen competition, they may be unlikely to notify the acquisition to the competition authority.

Nascent competitors

Concerns have been raised by the ACCC and internationally about the acquisition of nascent competitors by dominant firms. These firms have traditionally been considered too small to provide a meaningful competitive constraint, and in most cases, these transactions are too small to be captured by notification thresholds.[58] However, small firms are increasingly recognised as being important innovative disruptors.[59]The ACCC has raised concerns about acquisitions by digital platforms (Box 2).

Box 2: Facebook's acquisition of Instagram

One of the issues faced by competition authorities in considering mergers in highly dynamic markets is predicting how those markets and will evolve both with and without the merger. As noted by the ACCC:

Facebook's acquisition of Instagram highlights an inherent challenge for competition agencies reviewing potential acquisitions by digital platforms: the need to speculate about changing digital habits by consumers, and the likelihood of firms to grow and develop to match those changing habits in the absence of a proposed acquisition.[60]

In 2012, Facebook acquired Instagram for USD 715 million. At the time of the merger, competition authorities such as the US Federal Trade Commission (FTC), the UK Office of Fair Trading (now the Competition and Markets Authority) and the European Commission did not raise competition concerns about the merger. The ACCC did not consider the merger.

In its 2019 Digital Platforms Inquiry report, the ACCC considered that:

[59] OECD, *OECD Background Note: Start-ups, killer acquisitions and merger control*, 2020, p 1, accessed 29 October 2023.
[60] ACCC, *Digital Platforms Inquiry - Final Report*, 2019, pp 80-81, accessed 29 October 2023.

> in acquiring Instagram, Facebook eliminated a potential competitor. At the time of the acquisition, Instagram was primarily a photo-sharing app, and did not sell advertising inventory. Following the purchase, however, Facebook developed Instagram into a broader social media platform, with the ability for users to share information and photos, to message other users, and to now sell advertising inventory. While... it is difficult to determine how Instagram would have developed in the absence of its acquisition by Facebook, Instagram had at least the potential to develop into an effective competitor...
>
> In 2019, the UK CMA published an independent ex post analysis of mergers including Facebook/Instagram which found that the original assessment "underestimated Instagram's potential to grow into a significant competitive force as a social network" and that "the acquisition of Instagram has provided a competitive advantage to the merged entity ... which has resulted in unmatched growth".[61]
>
> In 2020, the US FTC took action against Facebook for allegedly engaging in a years-long course of anti-competitive conduct to eliminate threats to its personal social networking monopoly, including through its acquisition of Instagram. The complaint cited Facebook CEO Mark Zuckerberg's view, expressed in a 2008 email, that "it is better to buy than compete", and message to a colleague the day Facebook announced the acquisition acknowledging Instagram was "our threat" and that "[o]ne thing about startups... is you can often acquire them."[62]

Killer acquisitions

Acquisitions of nascent competitors can substantially lessen competition when large companies acquire smaller competitors and discontinue development of the target's product/innovation – so-called 'killer acquisitions'. This can be difficult to prove for a single acquisition. The OECD notes this has been of concern in the technological, chemical and pharmaceutical sectors. In the US pharmaceutical sector, it has been estimated almost 6 per cent of all acquisitions of firms with drug projects in development are killer acquisitions, which if correct would amount to around 50 acquisitions each year.[63]

Large firms expanding into related markets

The ACCC argues that, under the current substantial lessening of competition test, it may be difficult to stop acquisitions that lead to a dominant firm extending their market power into related or adjacent markets.[64] This has been raised as a particular concern in digital platform markets, given the rapid expansion of large digital platforms across a range of services.[65] However, the ACCC's view was that this issue should be addressed as part of the consideration of any industry-wide merger reform.

Minority interests and interlocking directorships

Acquisitions of minority interests that result in control or influence over competing firms may change incentives for firms to increase prices or increase the risk of commercially sensitive information being

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[61] E Argentesi, P Buccirossi, E Calvano, T Duso, A Marrazzo and S Nava, *Ex-post assessment of Merger Control Decisions in Digital Markets - Final Report*, Lear Economics Consultancy, 2019, report to the UK Competition and Markets Authority, accessed 29 October 2023.

[62] Federal Trade Commission v Facebook Inc, Complaint for Injunctive and other Equitable Relief, DC Cir 1:20-cv-03590-JEB, Document 51 (redacted), filed 13 January 2021, p 2; US FTC, *FTC Sues Facebook for Illegal Monopolizations*, United States Government [FTC Media Release], 9 December 2020, accessed 29 October 2023.

[63] C Cunningham, F Ederer and S Ma, 'Killer Acquisitions', *Journal of Political Economy*, 2019, 129(3):649-702, http://dx.doi.org/10.2139/ssrn.3241707. As cited in OECD, *OECD Background Note: Start-ups, killer acquisitions and merger control*, 2020, pp 13-14, accessed 29 October 2023.

[64] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 7 .

[65] ACCC, *Digital Platform Services Inquiry 2020-25: September 2022 interim report – Regulatory reform*, 2020, pp 38-39, accessed 29 October 2023. The Government is considering its response to the ACCC's Regulatory Reform Report which, among other things, proposed that 'designated' digital platforms be subject to mandatory competition codes. These codes would only apply to 'designated' digital platforms that meet clear criteria relevant to their incentive and ability to harm competition: see recommendations 3 and 4.

shared amongst rivals to facilitate collusion.[66] With the increase in funds under management by private equity firms and other investors, the issue of whether acquisitions which result in commonly owned, -cross owned- or managed minority interests may dampen competition has been considered by the OECD, in the EU and US.[67] Recent enforcement action has also been taken in the US to unwind instances of directors simultaneously serving on the boards of competitors.[68]

Cross-border mergers

International cross-border merger transactions are increasingly important. Cross-border mergers are estimated to be around 30 percent of the total number and 37 percent of the total volume of acquisitions around the world in recent years.[69]

The ACCC has commented that merger parties may not notify it of global mergers in a timely way.[70] For example, the ACCC was not notified of Facebook/Meta's acquisition of Giphy prior to completion of the transaction.[71] Data limitations mean it is difficult to assess how frequently this occurs. The ACCC is also concerned about its ability to block global transactions.[72]

Section 50A of the CCA deals with mergers occurring outside Australia, but which have competition effects in Australia. However, section 50 is broad enough to cover most anti-competitive mergers producing anti-competitive effects in Australia, so section 50A has been little, if ever, used.

Post-merger evaluation

Periodic evaluation of the effectiveness and impact of a merger regime, including post-merger evaluation, is important to ensure policy settings remain appropriate for the times. The OECD recommends periodic review of merger laws and practices on a regular basis to seek improvement and convergence towards recognised best practices.[73] Indeed, the ACCC recently conducted an ex post review of ACCC merger decisions to 'inform and improve [the ACCC's] merger investigative processes, investigation efficiency and our decisions'.[74] However, the ACCC's ability to conduct such ex post evaluations is limited to public information or information otherwise before it, impeding its effectiveness.

Issues include:

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[66] OECD, '*OECD Background Note: Common Ownership by Institutional Investors and its Impact on Competition*', 2017, accessed 31 October 2023, p 17-21.

[67] OECD, '*OECD Background Note: Common Ownership by Institutional Investors and its Impact on Competition*', 2017, accessed 31 October 2023; F Thépot, F Hugon and M Luinaud, 'Interlocking Directorates and Anticompetitive risks: An Enforcement Gap in Europe?', *Concurrences N° 1-2016*, 2016. Partial ownership or minority interests is highlighted in one of the 13 guidelines in the US Department of Justice and Federal Trade Commission's recent draft merger guidelines: Department of Justice and Federal Trade Commission, '2023 Draft Merger Guidelines', 2023, accessed 31 October 2023. The OECD also previously considered issues relating to minority shareholdings and interlocking directorates in 2008: OECD,'*Antitrust issues involving minority shareholding and interlocking directorates*', 2008.

[68] Department of Justice, 'Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates', 2023.

[69] I Erel, Y Jang and M Weisbach, 'Cross-Border Mergers and Acquisitions', Fisher College of Business, Working Paper No. 2022-03-011, Charles A. Dice Center, Working Paper No. 2022-11, 2022, Research Paper Forthcoming, http://dx.doi.org/10.2139/ssrn.4253979.

[70] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 6 .

[71] Natasha Gillezeau, 'ACCC to investigate Facebook's acquisition of Giphy', *Australian Financial Review*, 8 June 2020, accessed 29 October 2023. After investigation, the UK CMA concluded that the completed acquisition would be likely to result in a substantial lessening of competition and ordered Facebook to divest Giphy to Shutterstock: UK CMA 'Facebook, Inc (now Meta Platforms, Inc) / Giphy, Inc merger inquiry', 12 June 2020, accessed 29 October 2023.

[72] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 7.

[73] The OECD recommends periodic review of merger control regimes: OECD, *Recommendation of the Council on Merger Review*, 2005, OECD/LEGAL/0333, page 6, accessed 2 November 2023.

[74] ACCC, Ex post review of ACCC merger decisions, 2022, p 2, accessed 2 November 2023.

- whether merger parties should be required to report on the outcomes of mergers and provide data to the ACCC, which enables the ACCC to assess whether efficiency claims made at the time of the merger clearance decision have been realised; and
- whether the ACCC should have enhanced information-gathering powers to support periodic evaluation of the merger regime and post-merger impact evaluation.

Consultation questions

3. *What concerns about the current system should be considered in the design of a new regime?*
4. *What role, if any, have mergers played in reducing competitive pressures in Australia?*
5. *Is Australia's voluntary merger control regime effective at ensuring anti-competitive mergers are blocked while allowing pro-competitive or benign mergers to proceed?*
6. *Is Australia's mergers law 'skewed towards clearance'? Would it be more appropriate for the framework to skew towards blocking mergers where there is sufficient uncertainty about competition impacts?*
7. *Should there be periodic evaluation of the effectiveness of Australia's merger regime, including post-merger impact evaluation? If so, how should the ACCC obtain the necessary information?*
8. *Is there evidence of acquisitions by large firms (such as serial or creeping acquisitions, acquisitions of nascent competitors, 'killer acquisitions', and acquisitions by digital platforms) having anti-competitive effects in Australia?*
9. *Should Australia's merger regime focus more on acquisitions by firms with market power, or the effect of the acquisitions on the overall structure of the market?*
10. *Should the ACCC have greater powers to address international cross-border mergers that affect competition in Australia? Are any changes required to the CCA to allow the ACCC to exercise its existing powers more effectively? Should section 50A be repealed, since it is seldom used?*
11. *Are there other issues with the current regime that should be addressed?*

Foreign investment and competition approval processes

The foreign investment framework requires foreign investors to notify the Treasurer of proposed investments, including acquisitions of Australian businesses, that meet certain criteria. The Treasurer, advised by the Foreign Investment Review Board (FIRB), assesses these acquisitions to ensure they are not contrary to the national interest.

Competition is one of a number of factors considered in the Treasurer's assessment. Transactions that are being assessed under the foreign investment framework are prohibited from being completed before the Treasurer has made a decision. This means that, in practice, a sizeable proportion of the

proposed mergers considered by the ACCC – almost two-thirds in 2022-23 – are effectively subject to mandatory notification and suspension requirements imposed via the foreign investment framework.[75]

If the Government were to move to a formal merger regime, it would be important to ensure that the foreign investment and competition approval regimes worked effectively together. A referral mechanism from the FIRB to the ACCC may be required.

Consultation questions

12. *Are there any issues arising for foreign investors from the interaction of the foreign investment and competition approval processes?*

Key elements of a merger control regime

Broadly, elements of merger control regimes can be grouped thematically into three categories: notification, assessment and enforcement.

Notification

Voluntary or mandatory notification

A merger control regime could provide for voluntary notification of proposed mergers – as is currently the case in Australia, New Zealand and the UK – or it could require merger parties to notify the competition authority – as is the case in the US and Europe.

If notification is voluntary, merger parties would choose to notify a proposed merger to the ACCC. Confidential pre-notification approaches to the ACCC could facilitate self-assessment. Voluntary regimes can reduce the regulatory burden for proposed mergers which are unlikely to raise competition concerns, particularly as the ACCC provides guidance on when merger parties should notify. However, these regimes have a higher risk of proposed mergers that may raise competition concerns not being notified to the ACCC.

A mandatory notification regime would require mergers to be notified to the ACCC if certain predefined criteria or thresholds are met.

Clear notification thresholds can provide certainty to businesses about when to notify the competition authority and reduce the risk of proposed mergers that may raise competition concerns not being notified. However, mandatory notification can impose regulatory burdens on mergers that do not raise competition concerns. Penalties for failing to notify would also need to be set at a level to ensure compliance (discussed below).

[75] Data provided by the ACCC shows that for merger assessments commenced in 2022-23, 233 of the 366 mergers considered by the ACCC were subject to foreign investment approval. The ACCC became aware of 186 of these 233 matters exclusively via FIRB referral. 11 of the matters referred by FIRB were returned to FIRB on the basis that the ACCC did not view referral as necessary.

Notification thresholds

Designing thresholds for notification can be difficult.[76] If thresholds are set too high, a number of anti-competitive mergers may evade merger control scrutiny.[77] If thresholds are set too low, there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and authorities. Thresholds therefore need to reflect the relative risk weighting of these costs.

However, whatever levels they are set at, thresholds do need to be clear to reduce the costs of uncertainty and strategic game-playing. Turnover and asset values are commonly used measures, market shares less so.[78] The ACCC has suggested:

> [the threshold] could be set with reference to the value of the proposed transaction, the size of the business being acquired globally and/or within Australia, or a combination of these factors. Based on our preliminary analysis of past ACCC informal public reviews, an acquirer or target turnover threshold of $400 million or global transaction value threshold of $35 million could be appropriate.[79]

For cross-border mergers, jurisdictions typically also outline a threshold level of domestic turnover that triggers notification, reflective of OECD best practice to only investigate mergers that pose competition concerns within that jurisdiction.

The actual design of mandatory notification thresholds is an implementation issue that would only need to be addressed if the Government decides to adopt a mandatory notification regime.

Which mergers should be notified?

In some jurisdictions, only mergers involving acquisition of shares above a certain percentage threshold or conferring a certain level of control (such as voting rights, ability to appoint directors) may need to be notified. For example, in the US, acquisitions of stakes of 10% or less that are solely for the purpose of investment are exempt from notification.[80] In other jurisdictions, such as the UK, the legislation may not specify a percentage stake and the competition authority may review a broad range of transactions provided it gives the acquirer a degree of control or the ability to exercise material influence over the target.[81] The issue of which mergers would need to be notified would need to be addressed as an implementation issue, particularly if mandatory notification were to be adopted.

Ability to deal with non-notified mergers

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[76] See OECD, *Secretariat background Note: Investigations of Consummated and Non-Notifiable Merger Local Nexus and Jurisdictional Thresholds in Merger Control*, OECD Working Party No.3 on Co-operation and Enforcement, 2016, DAF/COMP/WP3(2016)4/REV1, p 6.

[77] J Kepler, V Naiker and C Stewart, 'Stealth Acquisitions and Product Market Competition' *Journal of Finance*, 2021, forthcoming, http://dx.doi.org/10.2139/ssrn.3733994 provides evidence suggesting that, across all industries, a disproportionate number of deals fall just below HSR reporting thresholds.

[78] OECD, *Secretariat background Note: Investigations of Consummated and Non-Notifiable Merger Local Nexus and Jurisdictional Thresholds in Merger Control*, OECD Working Party No.3 on Co-operation and Enforcement, 2016, DAF/COMP/WP3(2016)4/REV1, p 6. Turnover and asset value are generally preferred by the OECD, as they allow authorities to target transactions involving parties above a certain economic size and with a sufficient local nexus. Market share may be a better predictor than other thresholds for whether a transaction is likely to raise competition concerns but will impose significant costs on merging parties to calculate. The OECD also recommends competition authorities should only review mergers which raise competition concerns in their territory.

[79] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 8.

[80] *Hart-Scott-Rodino Act* 15 USC s 18a.

[81] UK CMA, Mergers: Guidance on the CMA's jurisdiction and procedure, 2022, p19-22.

Mergers of all sizes are potentially capable of raising competition concerns. While ideally mandatory notification thresholds would ensure all proposed mergers raising competition concerns are notified to competition authorities, in practice, mergers below the threshold may raise concerns from time to time. Both voluntary and mandatory notification regimes can allow for competition authorities to take action against mergers that are not otherwise required to be notified. The ACCC currently may investigate all mergers, even if they are not notified.

For example, the UK merger control regime provides for voluntary notification of proposed mergers, along with the power for the UK CMA to impose 'Interim Measures' to prevent or halt pre-emptive action, such as integration of the acquirer's and target's businesses, within 4 months of completion of a merger.[82] The CMA considers that its "it is essential to the functioning of the UK's voluntary, non-suspensory merger regime that Interim Measures to preserve the pre-merger competitive structure of markets should be effective".[83] Once imposed by the CMA, the Interim Measures continue until the CMA has concluded its investigation, subject to any variation, release or revocation by the CMA.[84]

In merger control regimes such as the United States and Canada where, to block a merger, competition authorities must prove it is anti-competitive in court (US) or a tribunal (Canada), these authorities retain the discretion to take mergers falling below the notification threshold to court. That is, the legislative prohibition on anti-competitive mergers applies to all mergers, whether above or below the mandatory notification threshold.

In some European merger control regimes, such as Norway, Sweden and Ireland, where competition authorities themselves may block anti-competitive mergers (subject to review by the courts), competition authorities have the power to 'call-in' or request notification for mergers below mandatory notification thresholds.

If notification was voluntary, to incentivise notification of mergers where competition concerns may arise, the ACCC could 'call-in' or require notification of proposed mergers where the ACCC has reason to believe the merger may be likely to substantially lessen competition, but which have not been voluntarily notified. This could involve requiring merger parties to provide information about the merger to the ACCC and/or holding separate while the ACCC considers that information, similar to the regime in the UK.

If notification was mandatory above a threshold, mergers below the threshold which raise competition concerns could be similarly 'called-in' or required to notify if certain conditions are met. This could be where the ACCC has reason to believe that competition concerns may arise (as proposed by the ACCC) or reserved for specific firms or sectors where competition issues have been identified (as in Germany, Norway and Sweden). While such a feature helps ensure that all proposed mergers potentially of concern are subject to a competition assessment, it undermines a claimed benefit of mandatory notification, that is, certainty for merger parties about when they need to notify competition authorities.

An example of a call-in power that currently exists in an Australian context is the Treasurer's ability to call in investments for review that are 'reviewable national security actions' which are not otherwise notified to the FIRB. If an action is called in for review, the *Foreign Acquisitions and Takeovers Act*

[82] UK CMA , *Interim measures in merger investigations*, 2021.
[83] UK CMA, *Interim measures in merger investigations*, 2021, p3.
[84] UK CMA, *Interim measures in merger investigations*, 2021, p7.

1975 (Cth) allows the Treasurer to issue a no objection notification, impose conditions, prohibit the action or require divestment.[85]

Upfront information requirements

For an effective and low-cost merger regime, merger parties need to provide competition authorities with sufficient upfront information to undertake a competition assessment when notifying. Information is crucial to the speedy processing of low-risk mergers and the targeting of mergers that pose higher risks of anti-competitive outcomes for the community. Competition authorities may also need to request further information from merger parties as issues become clearer.

Issues include:

- who would set upfront information requirements; for example, the ACCC could approve a form setting out these requirements, similar to the current merger authorisation application form. Alternatively, the ACCC could issue guidance (similar to the UK) or it could be given the power to set out information requirements in regulation (similar to the US);
- what checks and balances could be incorporated into the process for setting information requirements to ensure that they are not overly onerous;
- how the ACCC can ensure information received is accurate and what penalties should apply for providing misleading information; for example, senior executives or directors of merger parties could certify or attest that the information provided is true, accurate and correct; and
- how merger parties would be able to provide additional information to the ACCC as its assessment proceeds, including to respond to any competition concerns raised.

Filing fees

Many overseas merger control regimes charge fees for notifying proposed mergers to competition authorities,[86] with the European Commission being a notable exception.[87] Filing fees are typically charged at a uniform flat rate or a variable rate based on case specific metrics including turnover, transaction or asset value, market share, complexity or the quantity of services required.[88]

Currently, the average cost for an informal public merger review by the ACCC that does not proceed to litigation is in the region of $300,000 to $350,000. Under cost recovery principles, where an identifiable group creates extra or specific demand for a specific regulatory activity, they should generally be charged for the activity – that is, fees should reflect the resources the competition authority needs to efficiently carry out the regulatory work associated with investigating and approving mergers.[89] The main reason cited by competition authorities for not charging fees is that merger control is seen as a public service that ought to be funded by general tax revenue rather than

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[85] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 66A; Foreign Investment Review Board, Guidance Note 8 – National Security, Australian Government, 1 July 2023, p11; Explanatory Memorandum, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (Cth), para 1.57.

[86] OECD, OECD Competition Trends 2021 – Volume II: Global Merger Control, 2021, pp 2-13 and figure 2.3, accessed 31 October 2023.

[87] The European Commission rejected a recommendation by the European Court of Auditors in 2020 to consider introducing filing fees: European Court of Auditors, Special Report: The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight, p 51, accessed 31 October 2023.

[88] International Competition Network (ICN), Merger Notification and Filing Fees: A Report of the International Competition Network, 2005, p 7, accessed 31 October 2023.

[89] Department of Finance, Australian Government Charging Framework: Cost Recovery Policy, Australian Government, 2023, accessed 2 November 2023.

burdening the filing parties.[90] While there are no fees for the informal merger reviews (which make up the vast majority of mergers considered by the ACCC), a $25,000 fee currently applies for merger authorisation applications.[91]

Suspension

Suspension prevents merger parties from completing their transaction for a specified period of time, to allow the ACCC to conduct a review of the proposed merger. Issues include:

- how the suspension is implemented;
  - for instance, the competition authority may be empowered to refuse to consider a proposed merger unless merger parties undertake not to complete for a period of time;
  - alternatively, merger parties could be legislatively prohibited from completing a transaction for a specified period of time, consistent with most mandatory notification regimes across the OECD (Appendix D);
- when a suspensory period should commence (for example, when information requirements are satisfied);
- how long mergers should be suspended for – that is, how long the ACCC would have to complete its assessment;
  - unduly short periods could undermine the ACCC's ability to adequately assess a proposed merger. Unduly long periods could result in a proposed (and potentially competitively benign) merger not proceeding for commercial reasons;
  - in the OECD, most control regimes typically have two stages, with an initial 'phase 1' review which may be followed by a 'phase 2' review if there are competition concerns or if a remedy is proposed.[92] In general, jurisdictions have around 30 to 40 working days for phase 1 assessment and around 30 days to 5 months for phase 2. However, the overall assessment time can be longer because the clock only 'starts' in specified circumstances and may 'stop' for some time between phases 1 and 2 (Appendix D). The International Competition Network (ICN) recommends that initial review periods should be completed within 6 weeks and that extended review periods should be completed within 6 months;[93]
- what flexibility should exist for the suspensory period to be extended;
  - this could occur where remedies are offered, where there are delays in responses to information requests, to allow the ACCC to request further information, or with the agreement of the merger parties;
- what should occur if timelines expire before the ACCC has completed its assessment – in several jurisdictions, the merger is deemed to be approved, but under Australia and New Zealand's merger authorisation processes, the application is deemed to be denied; and

[90] ICN, *Merger Notification and Filing Fees: A Report of the International Competition Network*, 2005, p 2, accessed 31 October 2023.
[91] *Competition and Consumer Regulations 2010 (Cth)*, sch 1B item 2.
[92] OECD, *OECD Competition Trends 2022*, 2022, p76, accessed 31 October 2023.
[93] ICN, *ICN Recommended Practices for Merger Notification and Review Procedures*, 2018, p11, accessed 31 October 2023.

- what penalties should apply for breach of the suspensory obligation; and
    - in overseas merger regimes, taking steps to implement a merger prior to receiving approval, colloquially known as 'gun jumping', is generally subject to substantial penalties so as to deter this conduct. Penalties need to be sufficiently high to make it commercially uneconomic to be tempted to 'gun jump'.

Assessment

Decision-maker – Competition authority or court

Broadly speaking, there are two approaches to merger control regimes. In a judicial enforcement model, the competition authority prosecutes the cases that it brings in an adversarial proceeding in a courtroom. In an administrative model, the competition authority investigates and adjudicates cases, typically with some form of separation between the investigators and the decision-maker.[94] Some jurisdictions adopt one model or the other and some adopt a combination of the two.

The ACCC proposes shifting Australia fully towards an administrative model for merger proposals above the thresholds, voluntarily notified or otherwise called in, where clearance would be required before a merger could proceed. This is similar to the current merger authorisation process in Australia. The ACCC's decision would, however, be reviewable by the Australian Competition Tribunal, and the Federal Court would provide judicial review. The ACCC would not have to take action in the Federal Court to block a merger.

Procedural fairness

Administrative decision-making requires procedural fairness mechanisms. These could include (many of which are part of the current merger authorisation process):

- **Public notifications:** whether merger notifications (or a summary) should be public to provide sufficient information about the transaction for third parties to make submissions.
- **Opportunity to respond:** whether the ACCC would allow parties the opportunity to respond to concerns (for instance through providing a draft decision), and whether this would be left to the discretion of the ACCC or required by legislation.
- **Evidence:** whether merger parties (and potentially third parties) would have the right to access the information the ACCC relied onto make its decision, such as third-party submissions[95]and economic reports, or whether the release of such information would be at the ACCC's discretion.
- **Providing reasons for decision:** whether the ACCC would be required to publish its reasons or only provide them to parties.[96]

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[94] F Jenny, 'The institutional design of Competition Authorities: Debates and Trends', *ESSEC Business School*, 2016, doi:10.2139/ssrn.2894893.

[95] Subject to confidentiality claims by persons lodging submissions.

[96] Currently, the ACCC provides detailed reasons for its decisions on merger authorisations (given these decisions are reviewable by the Competition Tribunal). In informal public merger reviews, the ACCC only publishes a detailed summary of its reasons – known as a Public Competition Assessment, and even then not in all cases, and usually not until some weeks after it announces its decision. The ACCC publishes a PCA for merger it opposes, for which enforceable undertakings are made; when requested by the parties; or when the ACCC considers the merger raises important issues. The ACCC aims to publish Public Competition Assessments within 30 days, unless longer is

- **Timelines:** the timeframes that could apply to the proposed process (or to individual steps within it), where they would be set out and how they would be enforced.

- **Confidentiality:** how confidential information is protected, noting ACCC processes already exist.

Test for the decision-maker to apply

'Substantial lessening of competition' test

As noted above, section 50 prohibits acquisitions that are likely to have the effect of substantially lessening competition (see Appendix A for further information). The interpretation of the test in section 50 is guided by a list of factors in the legislation which the Federal Court must take into account.[97] The 'substantial lessening of competition' test is used across the CCA in various prohibitions against anti-competitive conduct.

'Satisfaction' test

The merger authorisation process in Australia currently requires the decision-maker to be satisfied that the transaction is not likely to substantially lessen competition or that a net public benefit is likely. A similar 'satisfaction' test could be adopted, as is applied in the current clearance and process in New Zealand and was part of the voluntary formal clearance process that existed in Australia between 2007-17.

The ACCC has proposed that notified proposed mergers would be cleared only if the ACCC, or the Tribunal on review, is satisfied that the merger is not likely to substantially lessen competition, with consideration of public benefits only if a merger cannot be cleared on competition grounds (discussed below). The ACCC argues that a satisfaction test is warranted because it:

> ...means that the risk of error is borne by the merger parties rather than the public. In the cases where this difference matters (for example where there is uncertainty or a number of possible future outcomes), the default position should be to leave the risk with the merger parties, not to put at risk the public interest in maintaining the state of competition into the future.[98]

In effect, this would shift the default position from allowing mergers to proceed where there is uncertainty to a position where, if there is sufficient uncertainty about the effect of a merger, it would not be cleared. One potential benefit of such a change is that it could encourage merger proponents to invest more in outlining the likely impact on competition given they are in a better position of having such information than the competition authority.

In general, there are trade-offs between the risks of false positives and false negatives in designing a merger test. A more lenient system will allow more anti-competitive mergers to proceed, ensuring that fewer competitively benign or pro-competitive mergers are not blocked. The converse will be true for a stricter system. Both allowing anti-competitive mergers and blocking pro-competitive mergers can lead to lower output, higher prices, lower quality and less innovation. However, allowing anti-competitive mergers means that merger parties benefit at the expense of consumers.

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needed because the matter is complex or becomes the subject of litigation; ACCC, Merger Guidelines, Australian Government, 2008, para 2.68 and 2.70.

[97] *Competition and Consumer Act 2010* (Cth) s 50(3).

[98] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 9.

Requiring a decision-maker (judicial or administrative) to apply the precautionary principle, where there is a risk of serious or irreversible competitive harm,[99] potentially could achieve a similar effect of leaving the risk with the merger parties, rather than put at risk the public interest.

Internationally, an administrative 'clearance' system can require the competition agency to be *positively* satisfied as to the existence of certain facts before prohibiting a merger, as is the case in the UK.[100] Alternatively, an administrative 'clearance' system can require the applicant to *disprove* the existence of facts to satisfy the decision-maker (i.e. the applicant must demonstrate that their transaction will *not* be likely to substantially lessen competition). This approach is used in Australia's merger (and non-merger) authorisation process, and New Zealand's merger clearance and authorisation process.

Amending the 'substantial lessening of competition' test to include acquisitions by firms with substantial market power

Concerns about some highly concentrated markets (discussed earlier) raises the question of whether Australia's merger control test should more explicitly consider market structure. Market structure can affect competitive pressures in that market.[101]

The ACCC proposes the prohibition against mergers that 'substantially lessen competition' should include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.[102] Other jurisdictions, notably the EU,[103] more explicitly consider market structure in their merger test (Appendix D).

The ACCC argues this change would ensure there is sufficient scrutiny of the impact of mergers on the structural features that promote competition, especially in concentrated markets as the impact on competition is more likely to be significant and long-lasting.[104] [105]

Issues include:

- whether the current merger test impedes the ability for the ACCC to challenge anti-competitive mergers, and whether the ACCC's proposals would address any limitations;
- whether the proposal might discourage innovation, by undermining the business model of small firms pioneering innovative products with a view to being bought out by a large firm better placed to bring their product to market;

[99] The precautionary principle is applied in other areas of law, such as environmental law in Australia and internationally where there is a risk of serious or irreversible harm to the environment: Justice JM Jagot, 'Some thoughts about proof in competition cases', Judicial address, University of South Australia & ACCC Competition and Economics Law Workshop, 15 October 2021, accessed 29 October 2023.

[100] In the UK, the CMA must believe that a merger has resulted, or may be expected to result, in a substantial lessening of competition before deciding to remedy, mitigate or prevent it: *Enterprise Act* (UK) ss 35, 36. Notably, the UK is less permissive of mergers as the CMA must refer a merger to a Phase II review if there is a realistic prospect of a substantial lessening of competition. This has an effect in practice, as merger parties may for commercial reasons offer remedies to avoid a Phase II review, or abandon the transaction at this point.

[101] For instance there is some international evidence prices increase if there are only three or four major market participants post-merger: O Ashenfelter, D Hosken and M Weinberg , 'Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers', *Journal of Law and Economics,* 2014, 57(S3), doi/abs/10.1086/675862.

[102] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 10 .

[103] The European Commission must consider whether the merger can be expected significantly to impede effective competition, in particular through the creation or enhancement of a dominant position.

[104] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 11.

[105] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 11.

- whether the ACCC's proposal would have any unintended consequences, for example, prohibiting proposed mergers that would lead to efficiencies or impacting other provisions of the CCA; and

- whether any other proposals or the approach taken in any other jurisdiction should be considered.

Merger factors

The ACCC argues the merger factors in section 50(3) should be amended to increase the focus on changes to market structure as a result of a merger.[106]The ACCC has proposed amending the merger factors to consider:

- changes in market structure as a result of the merger – for instance, 'the height of barriers to entry and any increase in the height of barriers as a result of the merger';

- whether the acquisition entrenches or extends a position of substantial market power;

  - this would be similar to amendments to Canadian competition law in 2022, which require the Competition Tribunal to have regard to, among other things, 'whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents';[107]

- whether the acquisition is part of a series of acquisitions. This could be over a particular time period;[108]

  - this would help address creeping acquisitions as the current section 50 only refers to 'an' acquisition;

- the likelihood that the acquisition would result in the removal from the market of a potential competitor;

  - this would help address concerns about acquisitions by dominant firms, including digital platforms (box 2);

- the nature and significance of assets, including data and technology, being acquired directly or through the body corporate;

  - this would apply economy-wide but would be particularly relevant to digital platforms.

Alternatively, Australia could remove the merger factors and instead revert to a simple substantive test (i.e. 'substantial lessening of competition' test), similar to the EU and the UK. This would enable mergers to be assessed on competition criteria but not prescriptively identify which competition

[106] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 11.
[107] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, fn 13.
[108] The ACCC argued that: "for example, by requiring prior acquisitions by the firm within a specified period to be taken into account when assessing whether or not an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. A proposal along these lines was previously suggested by the Law Council of Australia when reforms to address creeping acquisitions were previously considered": ACCC, ACCC Submission to the Australian House of Representatives Standing Committee on Economics inquiry into promoting economic dynamism, competition and business formation, 2023, Submission 34, p4, accessed 29 October 2023.

criteria should be taken into account. It may permit more flexible application of the law and a greater degree of economic analysis in merger decision-making.

Issues include:

- whether the proposed merger factors relating to creeping acquisitions and entrenching market power would be necessary if other ACCC proposals to address these issues (discussed below) were adopted;
- whether, if the other ACCC proposals to address these issues (discussed below) were not adopted, amending the merger factors as proposed would be beneficial;
- how concerns about the removal of potential competitors and creeping acquisitions could be assessed in practice – for instance, what time period is relevant, and how changes in market structure should be taken into account over that period;
- whether there are any other merger factors that should be included to deal with issues of common ownership of minority interests in competing firms and interlocking directorates; and
- whether there are any merger factors that should be removed or if the merger factors should be removed entirely.

Related or ancillary agreements

- The ACCC proposes that the competitive effects of other related agreements between merger parties should be able to be taken into account in the assessment of the effect of a merger on competition under section 50 of the CCA.
- Other agreements which are connected to a merger transaction may have effects on competition. For example, in *Pacific National,* the merger parties entered into agreements where Aurizon was, among other things, made the operator of the Brisbane Multi-User Terminal in a separate agreement from its agreement to acquire the Acacia Ridge Terminal, which affected assessment of the future without the merger.
- The competitive effects of non-merger agreements can be considered under the prohibition in section 45 of the CCA.[109] Section 45(7) of the CCA prevents overlap with the prohibition against anti-competitive mergers in section 50. While the agreements may be considered in assessing the state of the market assumed when considering the future with the merger, the competitive effects of these other agreements must be considered separately from the section 50 substantial lessening of competition assessment.
- In the EU, restrictions that are directly related to and necessary for the merger are deemed to be covered by the European Commission's decision on a transaction.[110] This includes agreements not to compete for a set period, licence agreements, and purchase and supply agreements.[111] While the European Commission is not obliged to assess and individually address such restraints, if an agreement is ancillary, it provides a level of comfort to the merger parties that the

[109] *Competition and Consumer Act 2010* (Cth) s 45 prohibits contracts, arrangements or understandings that has the purpose, or would have or be likely to have the effect, of substantially lessening competition.
[110] *Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* 'EUMR', art 6(1)(b).
[111] European Commission, 'Commission Notice on restrictions directly related and necessary to concentrations', 2005/C 56/03.

agreement will not be challenged under the prohibition on anti-competitive agreements, concerted practices and/or abuse of a dominant position.

Public benefits

At present, merger authorisation allows for the consideration of public benefits. However, a question arises whether merger authorisation should be retained as a separate approach, or alternatively, if it could be abolished. If merger authorisation was abolished, a question arises whether a public benefit test should be retained and if so, whether it should be a second-stage test.

The ACCC has proposed retaining a public benefit test:

> If clearance was not granted on competition grounds, a second stage public benefit test could apply. This differs from the current merger authorisation test... but is important to preserve the integrity of the process. [112]

Further, the ACCC considers that:

> ...for public benefits to outweigh a substantial lessening of competition, they should be real, verifiable, significant and beyond the efficiencies that can already be taken into account as part of the competition assessment.[113]

Public benefits have been relevant considerations in recent ACCC merger authorisations. For example, despite competition concerns, the ACCC recently authorised Brookfield's acquisition of Origin Energy on public benefit grounds as it would be likely to accelerate Australia's renewable energy transition.

Consultation questions

13. *Should Australia introduce a mandatory notification regime, and what would be the key considerations for designing notification thresholds?*

14. *Should a merger regime include a 'call-in' power for mergers either falling below the notification threshold or not voluntarily notified which may raise competition concerns? If so, what should the criteria for exercising such a power be?*

15. *Should filing fees be introduced? How should they be set?*

16. *Should mergers be suspended for a period of time while they are reviewed?*

17. *Should Australia's merger control regime require the decision-maker to be satisfied that a proposed merger:*

    - *would be likely to substantially lessen competition before blocking it; or*
    - *would not be likely to substantially lessen competition before clearing it?*

18. *Should Australia's substantial lessening of competition test be amended to include acquisitions that 'entrench, materially increase or materially extend a position of substantial market power'?*

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[112] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 9.
[113] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 11.

19. *Should the merger factors in section 50(3) be amended to increase the focus on changes to market structure as a result of a merger? Or should the merger factors be removed entirely?*

20. *Should a public benefit test be retained if a new merger control regime was introduced?*

21. *Should additional procedural fairness safeguards be introduced if Australia moved more towards an administrative merger control regime? If so, what?*

Enforcement

Effect of decision

Whether and what the ACCC decides depends on the design of the regime. If a clearance model is adopted using a 'satisfaction test', the ACCC could grant merger parties formal immunity from legal action. If a model was adopted similar to the one in the US and Canada, the ACCC could simply let the assessment period expire and then take action through the courts or indicate to parties that it would not do so.

Section 50 and the role of the Federal Court

Section 50 of the CCA provides a general prohibition on mergers that substantially lessen competition. The Federal Court can grant a declaration that a merger does or does not substantially lessen competition.[114]

If a new merger control regime were introduced that involved mandatory notification of mergers and administrative clearance of decisions, consideration would need to be given to whether section 50 would be retained and how it would interact with the new regime, including:

- whether mergers that are **required** to be assessed through the administrative clearance process would be excluded: for example, notifiable transactions and those that have been 'called in':
  - this would prevent a different decision-maker and possibly a different test being applied to decisions over and under the notification thresholds;
  - it would require merger parties to go through the administrative process rather than through the Federal Court declaration;
  - whether section 50 should apply for transactions that the ACCC has cleared, but then significant competition concerns arose after the transaction completed; and
  - removing section 50 for particular transactions may require enhanced procedural fairness safeguards to reflect greater reliance on the administrative decision-making process;
- whether mergers that could be subject to administrative clearance at the ACCC's discretion should also be subject to section 50, and if so, whether time limits should apply;
  - excluding transactions that can be called in from the operation of section 50 will be simpler if the criteria for exercise of the call-in power are more factual, and more complicated if the criteria require the ACCC to hold a belief;

[114] If there is a justiciable issue to be decided: *Australian Gas Light Company v ACCC* (No 3) [2003] FCA 1525, para 612.

- what role section 50 would have alone or in conjunction with other remedies;
  - removing section 50 for particular transactions will curtail the ACCC's ability to use section 50 as a 'safety valve' where parties complete without going through the administrative process, increasing the reliance on fines and other penalties;
- what provision for third-party rights would be retained in an administrative system should section 50 be removed or curtailed;
  - third parties would no longer be able to bring a case in the Federal Court for transactions not subject to section 50. This occurs rarely. However, third parties can make submissions to the ACCC's public merger reviews; and
- whether any other restrictions should be placed on section 50 – for instance, whether some significance threshold should apply for minority acquisitions and joint ventures, as the current drafting of section 50 applies to all mergers and acquisitions.

The courts and the economic nature of competition law

Concerns have been raised about the role of the courts in enforcing competition law since the early years of the *Trade Practices Act 1974*. In 1976, Professor Maureen Brunt AO wrote that "legal process is not well-suited to extended rule of reason analysis of market power".[115]

However, Professor Brunt later revised her view in light of the 1989 High Court decision in *Queensland Wire*.[116] She recognised that in that judgement there was "a willingness to get to the economic substance of the statutory terms".[117] Similarly, Dr Philip Williams AM has noted that "Since QWI, the courts have treated us to extended economic analysis on many occasions... They have shown themselves quite willing to adopt economic modes of reasoning when the law requires them to do so".[118]

In the EU, the European Commission has a margin of discretion in assessing economic matters which is recognised by the courts of the European Union. The courts will not second-guess conclusions if based on sufficient evidence, unless the European Commission has made a manifest error.119 In New Zealand, the High Court recognises the experience and economic expertise of the NZCC in assessing mergers as first instance decision-maker.120

The ACCC considers that, consistent with merger authorisation, the Tribunal is an appropriate review body in a formal clearance regime due to the Tribunal consisting of "a President and a number of Deputy Presidents who are judges of the Federal Court, and other lay members with knowledge of or experience in industry, commerce, economics, law or public administration".121 The Takeovers Panel is another example of a specialist review body largely comprised of takeovers experts.

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[115] M Brunt, 'Lawyers and Competition Policy' in Hambly D and Goldring J (eds) *Australian Lawyers and Social Change*, The Law Book Co, 1976, Sydney, p125.

[116] *Queensland Wire Industries v BHP* (1989) 167 CLR 177. In this case Queensland Wire Industries (QWI) was successful in its claim against BHP for a misuse of market power by constructively refusing (setting the price excessively high) to supply steel products to QWI which were an essential input required for QWI to compete against a wholly owned subsidiary of BHP in the downstream fencing market.

[117] M Brunt, 'The Australian Antitrust Law after 20 Years – A Stocktake', 1994 in Brunt M (2003) *Economic Essays on Australian and New Zealand Competition Law*, Kluwer Law International, pp 311-312.

[118] P Williams, Merger authorisation processes in Australia in the light of the Tabcorp decision – Comments by Philip Williams on a paper by Dave Poddar, Frontier Economics, 2018, para 22, accessed 29 October 2023.

[119] Case C-12/03 P, Commission vs Tetra Laval BV.

[120] *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, para 49.

[121] ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 10.

Review of administrative decisions

Where the ACCC makes an administrative decision, this is subject to merits and judicial review. If a new merger control regime were introduced, consideration would need to be given to whether review rights – particularly merits review – should be altered under the new regime.

Currently, limited merits review of ACCC merger authorisation determinations is conducted by the Competition Tribunal and parties may seek judicial review on points of law in the Federal Court.

The ACCC proposes that its merger clearance decisions would be subject to limited merits review by the Competition Tribunal, as is currently the case for merger authorisations. Currently, for reviews of merger authorisation decisions, the Tribunal is limited to considering:

- information that was referred to in the ACCC's reasons;
- information requested from the ACCC by the Tribunal;
- information given to the ACCC by the merger parties and third parties during its consideration of the proposed merger, information sought by the Tribunal to clarify this information; and
- new information not in existence at the time the Commission made its decision.[122] [123]

The Tribunal recently clarified that merger parties cannot test material provided to the ACCC in reviews of merger authorisation determinations before the Tribunal.[124]

Limited merits review is intended to ensure parties have the incentive to put all relevant material before the ACCC, and to reduce the cost and delay of the Competition Tribunal considering large amounts of new evidence.[125] However, this may create incentives to 'over-provide' the ACCC with information to allow this information to be considered by the Tribunal if review was sought. In its decision on the 2023 TPG/Telstra merger authorisation, the Tribunal noted that:

> The information, documents and evidence given to the ACCC in connection with the making of its determination was vast in quantity. The parties placed that vast quantity of material before the Tribunal, although in their written and oral submissions the parties referred to a relatively small part of the material.[126]

Some parties have criticised limited merits review as lacking procedural fairness, including the Law Council of Australia.[127]

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[122] I Harper, P Anderson, S McCluskey, M O'Bryan AC, *Competition Policy Review – Final Report*, 'Harper Review', 2015, p 312, accessed 29 October 2023. See also ACCC, Outline to Treasury: ACCC's Proposals for merger reform, 2023, p 10; Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), para 9.79-9.81.

[123] *Competition and Consumer Act 2010* (Cth) ss 109 (9), (10).

[124] *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1, para 84-85.

[125] This limitation on the role of the Tribunal was introduced in 2017 when the ACCC was restored as the decision-maker at first instance; The Harper Review found that a "full rehearing...would be likely to dampen the incentive to put all relevant material to the ACCC in the first instance": I Harper, P Anderson, S McCluskey, M O'Bryan AC, *Competition Policy Review – Final Report*, 'Harper Review', 2015, p 66.

[126] *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, para 26.

[127] Law Council of Australia, *ACCC's updated merger law reform proposals – discussion paper in response*, 2023, p 23, accessed 29 October 2023.

One option would be to expand the scope of limited merits review so that parties can test evidence before the Tribunal. Another option would be to allow full merits review.

Penalties and Remedies

A change to the merger regime could result in the introduction of new penalties. For instance, if a mandatory notification regime was introduced, a breach of the requirement to notify would attract penalties. Proceeding without clearance could be a separate civil penalty such as a fine. This could include where parties complete without allowing the ACCC to finalise its review under the statutory timelines. Consideration would need to be given to setting civil penalties at a sufficiently high level to have a deterrent effect to encourage compliance.

The ACCC is currently able to seek orders from the Federal Court for pecuniary penalties (up to 6 years after the completion of a merger) and divestiture (up to 3 years post-completion of a merger).[128] Third parties are also currently able to seek damages for loss resulting from a merger.[129] It is assumed that these remedies would be retained. Consideration would need to be given to whether the ACCC should continue to be required to seek divestiture through the courts.

In certain circumstances, protecting competition and consumer welfare can sometimes only be achieved by blocking a merger outright. However, in other circumstances merger parties may also offer structural or behavioural remedies to address competition concerns. The ACCC is not obliged to accept remedy proposals put forward by merger parties, and offering structural or behavioural remedies does not alter the threshold of proof required to prohibit a merger. Under any reform, it is assumed that parties will continue to be able to offer remedies under section 87B of the CCA to address competition concerns.

Cross-border mergers require a high degree of co-ordination and co-operation between the competition authorities reviewing the merger, particularly on remedy proposals. Design of remedies must be appropriate to effectively address the competition concerns identified in Australia including where the merger parties and/or their assets are located abroad.

Consultation questions

22. *Should the ACCC or the courts be the primary decision-maker for notifiable transactions?*

23. *If Australia was to move more towards an administrative decision-making regime as proposed by the ACCC, should ACCC decisions be subject to limited merits review by the Competition Tribunal, similar to existing merger authorisations?*

[128] *Competition and Consumer Act 2010* (Cth) ss 76 and 81.
[129] *Competition and Consumer Act 2010* (Cth) s 82.

Possible policy options

This section canvasses possible options, including the ACCC's proposals, for reforming Australia's merger control regime in the event that, following this consultation process, the Government concludes that change is needed.

The purpose of merger control is to identify and prevent the prospective anti-competitive effects of mergers. The possible options considered below group key elements of merger regimes in a coherent way drawing from experience globally.[130] Each option is a proposal to reform the current informal merger regime to address shortcomings in light of evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries. Stakeholders are invited to suggest alternative options or variations of these options and outline their benefits and risks, as well as provide views on whether the existing merger authorisation regime a should be retained. Under all options, it is assumed the informal merger review process would be replaced by the reformed merger control process. The first two options are 'judicial enforcement' merger control models relying on litigation to stop a merger considered by the ACCC to be anti-competitive if parties decide to proceed. The third option is primarily an 'administrative' model with transactions requiring ACCC approval before they can proceed.

Changes to the merger control process

	Option 1	Option 2	Option 3
Notification	Voluntary	Mandatory	Mandatory
Suspension	For notified transactions	Mandatory	Mandatory
Test	ACCC must be satisfied that the merger is not likely to substantially competition	ACCC or third party must prove a likely substantial lessening of competition	ACCC must be satisfied that the merger is not likely to substantially competition
Primary decision-maker	ACCC (for notified transactions)	Federal Court	ACCC

- **Option 1:** A **voluntary formal clearance regime** could be introduced, similar to the voluntary formal clearance process that operated in Australia between 2007-17 and elements of the current process in New Zealand and the UK. Where businesses choose to notify, the transaction would be suspended for a period of time while the ACCC conducts its assessment. Upfront information requirements would be introduced. If this option were to be adopted, it would need to be supplemented with additional procedural features to encourage notification of mergers which may raise competition concerns, such as call-in powers. The ACCC would only grant clearance if it was satisfied the merger was not likely to substantially lessen competition, and the ACCC's decision would be reviewable by the Tribunal. Clearance would provide formal immunity from court action under the provision that makes it unlawful to proceed with a merger that leads to a substantial lessening of competition (section 50). However, if merger parties did not

[130] See OECD, *OECD Competition Trends 2021 – Volume II: Global Merger Control*, 2021, p 12, accessed 29 October 2023.

voluntarily notify or decided to proceed with the merger even after the ACCC expressed concerns, then judicial enforcement would be required under section 50.

- **Option 2:** A **mandatory notification and suspensory regime** could be introduced, broadly based on the approach taken in the US and Canada. This option would require mandatory notification of transactions above a threshold, although the ACCC would not be precluded from investigating mergers below the threshold. Transactions would be suspended for a period of time while the ACCC conducts its assessment. Upfront information requirements would be introduced. At the end of the formal process, if the merger is likely to substantially lessen competition and parties do not voluntarily abandon their proposal the ACCC would need to commence court action under section 50.

- **Enforcement element of options 1 and 2:** At the end of the voluntary or mandatory formal process in option 1 and 2, if the ACCC investigation gives it concerns that the merger is likely to substantially lessen competition it can invite the parties to discontinue the transaction. If the parties decide to proceed with the transaction, the ACCC could gather evidence and commence a Court case seek an injunction preventing the parties from going ahead with the merger. In those Court proceedings the ACCC would be obliged to prove to the Court on the balance of probabilities that the proposed merger would lead to a substantial lessening of competition that under section 50.

- **Option 3 (ACCC's proposal):** An **administrative mandatory formal clearance regime** could be introduced, as proposed by the ACCC. This option would require mandatory notification of transactions above a threshold and allow the ACCC to 'call-in' transactions below the threshold where there are competition concerns. Transactions would be suspended for a period of time while the ACCC conducts its assessment. Upfront information requirements would be introduced. The ACCC would only grant clearance if it was satisfied the merger was not likely to substantially lessen competition, and the ACCC's decision would be reviewable by the Tribunal. Clearance would provide formal immunity from court action under section 50.

Changes to the merger control test

The ACCC has also proposed changes to the test for whether mergers are 'likely to substantially lessen competition' (under section 50) to better recognise the effect that some acquisitions – particularly by large firms – have on competition and the structure of the market.

- **Option A:** Update and modernise the list of matters that the ACCC may, and the court must, take into account when assessing the impact of mergers on competition (known as merger factors in section 50(3)).

  - Some or all the changes discussed above could be implemented, including: changes in market structure as a result of a merger; whether the acquisition entrenches or extends a position of substantial market power; whether the acquisition is part of a series of acquisitions; whether the acquisition would result in the removal of a potential competitor; the nature and significance of assets acquired; and interlocking directorships.

  - Alternatively, the merger factors could be omitted entirely, simplifying to a substantial lessening of competition test.

- **Option B:** In addition to, or independently, the substantial lessening of competition test could be expanded to include transactions that 'entrench, materially increase or materially extend a position of substantial market power'. The ACCC argues that acquisitions in markets with high barriers to entry, high levels of concentration and a small number of participants are more likely to have significant and long-lasting effects on competition.

- **Option C:** Ancillary agreements between merger parties (such as non-compete agreement or agreements concerning supply of goods or services post-merger) could also be considered as part of the consideration of the effect of the merger on competition, as these agreements may have effects on competition.

These options are summarised in the table below.

	Current competition assessment	Possible change
Option A	The Federal Court must have regard to the 'merger factors' in section 50(3) of the CCA	**Add:** Creeping acquisitions, digital platforms, market structure, market power, interlocking directorships ... **Amend:** Expressly refer to the change in market features resulting from a merger **Remove:** omit the merger factors, simplifying to a substantial lessening of competition test
Option B	Prohibition against mergers that "would have the effect, or be likely to have the effect of substantially lessening competition"	**Add:** "including through entrenching, materially increasing or materially extending a position of substantial market power"
Option C	Excludes consideration of related and ancillary agreements	**Add:** Ancillary agreements

Each of these options could be implemented alone, together, or along with the changes to the process discussed above. For example, the ACCC's proposed option is to adopt Option 3 as well as giving greater focus to the effect of a transaction on market structure (that is, option 3, A, B, and C).

Consultation questions

24. *What is the preferred option or combination of elements outlined above? What implementation considerations would need to be taken into account?*

Q&A MERGER CONSULTATION

Question	Answer
General	
Why is the government consulting on merger reform?	• We announced the Competition Review because greater competition will help reduce the cost of living for Australians. • Competition puts downward pressure on prices, and offers Australian consumers, individuals, families and small business more choice. • Most mergers are beneficial and bring opportunities for businesses and consumers by helping firms achieve scale and increase efficiency. – For business, mergers can refresh leadership, bring new technology and processes, and offer new opportunities for growth and expansion. – For consumers, if the benefit is passed on, mergers can translate to lower prices, more choice, better quality and wage growth. • However, a small proportion of mergers can harm competition. This could lead to increased prices, reduced quality, reduced incentives to innovate, and increased barriers to entry for new businesses. • Many sectors in Australia have seen a rise in market concentration - this has not always helped consumers. Over recent decades, we've seen an increase in market concentration and an increase in mark-ups, the gap between costs and prices. We've seen a fall in the startup rate and a decline in the share of Australians starting a new job. It's very clear that the Australian economy is becoming less dynamic • We want to better target mergers that reduce choice, add to the cost of living, and add to the cost of doing business.
How is the government consulting?	s 22 • We are considering possible options address harmful mergers by considering a broad range of viewpoints, engaging in genuine consultation with a diverse range of subject matter experts and stakeholders

Contact Officer	s 22	**Contact Number**	s 22
Division	Competition Taskforce Division	**Date of update**	2 November 2023

Q&A MERGER CONSULTATION

Question	Answer
	• This includes reforms suggested by the ACCC on the grounds our current merger rules let too many harmful mergers through.
Why is the Government rushing consultation on such important reforms?	• This is not a rushed consultation. • 8 weeks (not including the week of Christmas), is consistent with best practice for public consultation (e.g. well above the minimum and indeed is at the upper end of the range recommended by the Office of Best Practice Regulation (PM&C)) • The proposals for merger reform are not new or out of the blue. The ACCC suggested reforms to the current merger rules in 2021 and updated in 2023. Other countries such as the United States, and the UK, are also considering reform to address the changing business environment. • Business and other stakeholders have had considerable time to consider the issues raised, to examine existing proposals, and to consider their own views. • The Government announced a Competition Review in August, specifically flagging it would consider proposals around merger reform including those put forward by the ACCC and letting business know we would be doing this. • The Government announced an Inquiry into promoting economic dynamism, competition and business formation in January 2023 – substantial number of submissions and appearances from business and industry representatives. • Business and industry are already engaging with the Treasury Taskforce, eager to contribute to the Review. • We also recognise that discussion of reform can create uncertainty. We want to consider the issues, the stakeholder feedback and options and provide certainty for business and consumers sooner rather than later.
What are the ACCC proposals? Are these proposals included in the consultation paper?	• The ACCC proposals aim to comprehensively reform the current merger control regime by introducing mandatory notification, suspension and clearance of mergers.

Contact Officer	s 22	**Contact Number**	s 22
Division	Competition Taskforce Division	**Date of update**	2 November 2023

Q&A MERGER CONSULTATION

Question	Answer
	• Our consultation paper includes the ACCC proposals as well as other options based on how countries across the world – particularly the US, Canada and New Zealand – assess and control mergers. • [Note: the ACCC's proposals will be attached to the consultation paper]
Isn't the Government just going to implement the ACCC's proposals?	• The government has not made up its mind on what reforms to take forward – if any. • The Government will consider the options proposed, feedback from the public consultation process and advice from the Treasury Review team and Expert Advisory Panel. • The Competition Review team in Treasury is engaging in robust and genuine consultation with a wide variety of stakeholders, representing different industry and business sectors and consumers. The consultation paper includes a range of questions and options.
Didn't the Harper Review recommend no change to merger regulation?	s 22 • Broadly, Australia's competition measures have declined significantly over the past couple of decades, so its important to look at merger laws regularly to make sure they are fit for purpose. • The world is also changing and many countries are toughening their merger laws – we also stand out amongst many developed countries in how we do mergers.
Does the Government intend to introduce mergers reform this term of office?	• The Government is undertaking a genuine consultation process. The consultation results will inform our next steps.
When will the Government make a decision on mergers reform?	• The Government is committed to reducing the cost of living for Australians. The Government will closely analyse and consider action from the outcomes of this consultation, if action will result in reducing the cost of living, improving consumer choice and boosting productivity. .

Contact Officer	s 22	**Contact Number**	s 22
Division	Competition Taskforce Division	**Date of update**	2 November 2023

Australian Government
The Treasury

Ministerial Submission

MS24-000036

FOR INFORMATION - Mergers reform - Early feedback on consultation process

TO: Treasurer - The Hon Jim Chalmers MP
CC: Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment - The Hon Dr Andrew Leigh MP

KEY POINTS

- The Competition Review has been progressing mergers reform s 22

s 22

- While the consultation process does not officially close until 19 January, our detailed discussions with key stakeholders has already revealed a clear overall message: Australia's current merger control system is 'ad hoc', lags behind best practice in comparable countries and is unfit for a modern economy.

s 22

- Based on consultation to date, key elements of a simpler, more targeted administrative system are set out in a draft public-facing decision document at Attachment B. Broadly, these include:

- A single mandatory and suspensory administrative merger control system, rather than the current process of voluntarily choosing between three routes: an informal merger review, merger authorisation or the Federal Court.
- Requiring merger parties to notify the ACCC of a proposed merger above a monetary threshold.
    - : Providing the ACCC with a power to 'call in' mergers under the threshold that it has reason to believe may be likely to substantially lessen competition.
    - : The inclusion of a call-in power will mean the notification thresholds can be set relatively high, reducing the overall compliance cost to business.
    - : We anticipate the threshold would be set so that the number of mergers assessed by the ACCC would be similar to now (around 300-400 per year), but coupled with the call-in power the system will be better targeted, with less regulatory burden on mergers that do not pose competition risks.
    - : Upfront information requirements give the ACCC the ability to efficiently and effectively differentiate (and approve) benign mergers from those requiring greater scrutiny.
    - : Charging cost recovery fees to at least partly, if not fully, offset against additional Treasury and ACCC costs for this proposal, consistent with cost recovery principles.
- The ACCC will be the first instance administrative decision-maker with responsibility to assess whether a merger would have the effect, or likely effect, of substantially lessening competition in any market and make a decision to approve, approve subject to remedies or disallow the merger.
- Such a proposal would see the ACCC shift from seeking judicial enforcement to an economics-based administrative decision-maker. This would require changes to culture, capability and practice.
- Merger parties and third parties wanting to dispute the ACCC decision being able to seek review in the Australian Competition Tribunal on a 'limited merits' basis.

- Considering stakeholder views, the above package would strike a good balance in providing businesses with a system that is more predictable and welcoming of investment yet equipping the ACCC with new tools to detect and address mergers that pose competition risks.
- While this package includes most of the ACCC's proposal, there are a few aspects of the ACCC proposal which are difficult to justify given stakeholder views. Most notably, this includes altering the merger test so that the ACCC would not grant approval *unless* satisfied the merger would not be likely to substantially lessen competition (the 'satisfaction test').
    - This element of the ACCC's proposal is presented by some stakeholders as "reversing the onus of proof", and would in effect significantly increase the burden of proof on all merger parties, not just those that present genuine competition risks.

  - This change is currently hard to justify given the lack of rigorous evidence showing that a significant number of past mergers have in fact substantially lessened competition.

- The package we outlined above would strengthen the merger control system principally through the adequate notification of mergers and focusing the system more on economic analysis by replacing the Federal Court with the Tribunal for reviewing decisions.

s 22

- To help manage stakeholders' diverging positions, we would propose a statutory review three years after the commencement of new system informed by evidence of its operation, including the economic effects of particular mergers and the performance of the ACCC.

Clearance Officer
Owen Freestone
Assistant Secretary
Ph: 02 6263 2695
15 January 2024

Contact Officer
s 22
Deputy Chief Adviser
Competition Review Taskforce
Ph: s 22

CONSULTATION

Law Division, Foreign Investment Division

ATTACHMENTS

s 47E(d)
s 22

Attachment 1 is exempt in full and has been deleted from the document set

Australian Government
The Treasury

Ministerial Submission

MS24-000153

FOR ACTION - Competition Review - Mergers - Consultation and recommended option

TO: Treasurer - The Hon Jim Chalmers MP
CC: Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment - The Hon Dr Andrew Leigh MP

TIMING

s 22

Recommendations

- s 22 :
  - modernising Australia's approach to merger control by introducing a mandatory and suspensory administrative system, along with supporting reforms outlined in the draft public-facing Government decision (Attachment A and summarised in Attachment B).

Agreed / Not agreed

s 22

- That you **note**
  - the proposal does not 'reverse the onus' by requiring merger parties to show their merger does not substantially lessen competition, as originally proposed by the ACCC;

s 22

  - the outcomes of our consultation on merger reform (Attachments C s 22 and
  - related measures to inform future policy settings including: a 3-year statutory review; annual ACCC reporting on merger activity; and enhanced merger data evaluation.

Noted / Please discuss

Signature	Date: / /2024

KEY POINTS

Treasury recommends introduction of a mandatory, suspensory administrative merger control system

- Treasury conducted public consultation on merger reform between 20 November 2023 and 19 January 2024 (MS23-002263 refers).
- Following strong support from our Expert Advisory Panel and close consultation with the ACCC, we have now settled key aspects of our reform proposal to deliver Australia a stronger, streamlined merger system for a modern economy.
  - The key features of a new system, which remain largely in line with advice of 15 January 2024 on early consultation feedback (MS24-000036 refers), are set out in an updated draft public-facing Government decision at Attachment A, and summarised in Attachment B.

s 22

  - The Expert Panel was "*very supportive of the general approach that has been put forward: adopting a mandatory and suspensory administrative system. In short: the Panel 'support[s] the changes proposed but [are] against the reversal of onus'. The Panel consider[s] that the new system would provide, and it was important to provide, increased power to the ACCC so that it can detect, review and take action to stop anti-competitive mergers, including serial acquisitions*." The Expert Panel has confirmed this view can be made public.

- Our proposal strengthens the ACCC. It better equips the ACCC to protect Australian consumers against anti-competitive mergers. It is more accessible and transparent for stakeholders likely to be affected by an anti-competitive merger, including consumers and small businesses. And it is fair for business – simpler, faster and more certain. Key features include:

  – From 1 January 2026, a single mandatory and suspensory administrative merger control system, replacing the existing three voluntary pathways of: informal merger review; merger authorisation; or Federal Court proceedings.

  – The ACCC will be the expert, first-instance administrative decision-maker improving outcomes: mergers will be assessed by an expert agency, supported by rigorous legal and economic analysis.

    : Compared to judicial merger control systems, administrative merger control systems are quicker, cheaper and permit greater focus on economic analysis leading to improved outcomes. Administrative systems harness the knowledge and expertise of the competition authority to efficiently assess the complex competition effects of mergers. Importantly, transparency and accessibility – for merger parties, stakeholders, consumers and the community – is significantly greater under an administrative model.

    : Six members of the G7 (France, Germany, Italy, Japan, United Kingdom, European Union) and around three quarters of OECD Members have administrative merger control systems (including other advanced economies such as Spain, Norway, Denmark, Sweden and South Korea).

  – The ACCC will assess whether a merger would have the effect, or be likely to have the effect, of substantially lessening competition which includes if it creates, strengthens or entrenches a position of substantial market power in any market.

    : Extending the widely understood ‘substantial lessening of competition’ test to emphasise the importance of the competitive structure of the market in assessment of competitive effects ensures more effective review of mergers by businesses with substantial market power.

  – The ACCC can account for the cumulative effect of all mergers within the previous 3 years by merger parties in its competition assessment. This is a targeted measure to address concerns with ‘serial’ acquisitions and industry roll up strategies that have been an issue in many essential consumer-facing sectors – groceries, healthcare, pet stores, childcare, petrol and liquor retailing.

  – Mandatory notification of mergers above a monetary and/or market share threshold will ensure the ACCC is apprised of those mergers most likely to impact Australian consumers if anti-competitive. Thresholds will be subject to further consultation and set in regulation so can be varied over time to remain appropriately calibrated.

    : Targeted thresholds mean the mergers notified to the ACCC are expected to be different, and the overall volume is expected to be similar to present volume (approximately 300 a year). Businesses can also voluntarily notify a merger.

: To protect against a future scenario of high-risk mergers not being captured, the system provides for a power for a Treasury minister to introduce, additional targeted notification obligations if evidence indicates mergers likely to cause harm are not being captured.

: Notified mergers will be charged cost recovery fees, scaled to reflect complexity and risk with mergers which require a more in-depth assessment facing higher fees. An exemption from fees will be available for small business.

: Clear and obligatory upfront information requirements will ensure the ACCC has the information to promptly differentiate benign mergers from those which raise competition concerns.

– Suspension of a merger ensures the ACCC has sufficient time to complete a rigorous assessment of the merger's impact on competition.

: Treasury will take advice and consult on timelines for the ACCC to issue its determination, but the ACCC estimates that 80% to 90% of notified mergers will be cleared within 4 weeks.

– Penalties will apply for failure to notify, for giving effect to a merger before or contrary to the ACCC's determination, and for providing false or misleading information. A merger will be void and unenforceable if goes ahead without the ACCC's determination.

– The ACCC will have the ability to approve a merger considered to substantially lessen competition if the ACCC is satisfied the merger will deliver substantial offsetting public benefits. This adopts the existing – reversal of onus – test from the merger authorisation regime which we consider remains appropriate.

: Staging public benefits sequentially provides more 'off-ramps' and ensures timelines for the competition analysis are consistent with international best practice.

– ACCC determinations will be subject to limited merits review by the Australian Competition Tribunal. This brings economic and business expertise to reviews of ACCC decisions and better supports community and consumer engagement. Limited merits review supports timely scrutiny of ACCC decisions and a fast-track option will also be available. Judicial review of Tribunal determinations will be available in the Federal Court.

: Limited merits review means the Tribunal can substitute the ACCC's decision for a correct or more preferable decision but must do so on the same material before the ACCC allowing for a change of circumstances. This appropriately balances procedural fairness and mitigates strategic behaviour by incentivising the merger parties to place relevant information before the ACCC.

: Specialist knowledge and expertise afforded by the Tribunal enables it to resolve technical commercial, economic and other policy issues in a fair, efficient, effective, prompt, cost-effective and relatively informal manner. The model of a

specialist competition tribunal has been adopted in several other countries, including the United Kingdom, Norway, India and South Africa.

- The Takeovers Panel replaced the Federal Court in March 2000 as the primary forum for resolving takeover disputes to allow disputes to be resolved as quickly and efficiently as possible, avoid tactical litigation and free up court resources. Competition issues will no longer be separately assessed under the *Foreign Acquisitions and Takeovers Act* 1975, removing regulatory duplication.

- We also propose a 3-year statutory review to evaluate the functioning of the new system and other related measures to support a better understanding of how mergers affect the economy and inform future policy settings. This will include annual ACCC reporting on mergers and enhanced merger data evaluation.

Treasury anticipates strong support from consumer, agriculture and small business stakeholders and mixed support from business for Treasury model

- Treasury's extensive stakeholder consultation s 22 has indicated there is support from a range of key stakeholders for reform of Australia's merger control system.

  - Consumer groups, agribusinesses, small businesses, retail and grocery industry groups and academics support a mandatory and suspensory administrative merger control system to give the ACCC the tools it needs, and reform to capture mergers that create, strengthen or entrench substantial market power.

    : Consumer groups highlighted adverse consumer outcomes in highly concentrated sectors – grocery, banking, telecommunications, energy, insurance, and the digital economy.

    : Farming groups raised concerns about market concentration in supply chains, with limited options for buying inputs and selling products impacting their ability to sell produce at competitive prices. Farming and consumer groups advocated for increased transparency to facilitate engagement with ACCC merger reviews.

    : Consumer groups and small business strongly supported giving the ACCC the tools it needs to efficiently prevent harmful mergers and advocated for increased transparency to facilitate engagement with ACCC merger reviews.

    : Academics highlighted the significant evidentiary challenges for the ACCC to prevent anti-competitive mergers in court and lack of economic analysis.

    : Retail and grocery industry groups suggested reform focused on targeting concentrated markets, the dominant supermarkets, serial acquisitions and greater analysis of both price and non-price effects of anti-competitive mergers. Also noted that any reform should minimise regulatory burden.

  - Large businesses and their legal advisers generally prefer the flexibility and voluntary nature of the existing approach with the Federal Court as the decision-maker but acknowledge improvements could be made to timeliness, transparency and certainty.

: s 22

: We anticipate opposition to some elements of reform, particularly extending the 'substantial lessening of competition' test to enable effective review of mergers by businesses with substantial market power, the reduced role for the Federal Court, limited rather than full merits review by the Tribunal, and the introduction of cost-recovery fees for all merger notifications.

– There was significant opposition from business and their advisors, tech and property industry groups, superannuation funds and international groups to 'reversing the onus' that would see it fall to merger proponents to establish to the ACCC's satisfaction that a proposed merger would not be anti-competitive.

- A Q&A to support you managing stakeholder reactions is at Attachment C.

Next steps

s 22

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Competition Review Taskforce
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26 February 2024

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CONSULTATION

Law Division; Market Conduct and Digital Division; Foreign Investment Division; Financial System Division, Australian Centre for Evaluation, Australian Competition and Consumer Commission; Department of Prime Minister and Cabinet; Department of Finance; Department of Industry, Science and Resources; Attorney-General's Department

ATTACHMENTS

s 22

B: One page summary of merger reform proposal

C: Draft Q&A

s 22

ATTACHMENT B – ONE PAGE SUMMARY OF MERGER REFORM PROPOSAL

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Merger Reform

A Stronger Streamlined System for a Modern Economy

Competition Review

STRONGER for consumers

- Mandatory notification to ensure anti-competitive mergers don't escape scrutiny
- Substantial lessening of competition test which includes substantial market power
- Assessment better able to protect consumers from cumulative acquisitions in key sectors (e.g. retail, healthcare)
- Expert economic analysis supported by data evaluation, and ability to consider public benefits to support better outcomes for consumers and the economy

FAIRER for business

- A single risk-based administrative system with the ACCC as expert decision-maker
- Faster and more certain for benign and pro-competitive mergers with clear timelines
- Clear upfront information requirements and fast-track review options

BETTER for decision makers

- A public register and published reasons for determinations to support transparency and better decision-making
- Oversight and limited merits review of ACCC determinations by the Australian Competition Tribunal
- ACCC to serve as administrative steward

ATTACHMENT C – Q&A

Why is change needed?

- To strengthen the ACCC's ability to detect and stop harmful mergers.
  - Harmful mergers increase prices, reduce innovation, and can have long term detrimental effects on consumers, suppliers, smaller businesses and competitors.
  - Harmful mergers increase market concentration, strengthen comfortable oligopolies, create barriers to entry or expansion, reduce economic dynamism and stifle growth.

What evidence do you have to support this change?

- We have spoken to diverse stakeholders and there is a clear message: Australia's current 'ad hoc' merger process is unfit for protecting competition in a modern economy and hasn't kept up with the best practice of Australia's peers.
  - For **business,** the current merger review timeframes are unpredictable and often too long, resulting in unnecessary delays and costs.
  - For the **ACCC**, the current system hampers its ability to detect and take action to prevent anti-competitive mergers particularly serial or 'roll-up' acquisitions, that drive up prices and reduce the choice for Australian consumers. Parties can and do seek to bypass the current system and avoid scrutiny. Research by the Competition Taskforce shows for each merger the ACCC is currently aware of there are 2 to 3 more mergers taking place.
  - For **consumers**, they are not just losing out from a lack of competition, but the current approach is not accessible or transparent.

How does this new system solve this?

- The new system **is stronger for consumers, fairer for business**, and **better for decision-makers**, be it those in business or the ACCC.
- **Stronger for consumers:**
  - Consumers can have more confidence that ACCC can detect, review and act to prevent anti-competitive mergers which impact the cost of living, in sectors like retail, healthcare and supply chains.
  - Mandatory notification means anti-competitive mergers won't escape scrutiny.
- **Fairer for business:**
  - This system is faster and more certain for benign or pro-competitive mergers.
  - It has clearer information requirements and fast-track review options.
  - It's a single path, targeted and risk-based, with the ACCC as an expert administrative decision maker.

- **Better for decision makers:**
  - The ACCC is significantly better equipped to detect, review, and act against anti-competitive mergers.
  - This new system makes decision-making transparent, facilitating greater community engagement. Everyone gains access to more information about mergers reviewed by the ACCC and reasons for decisions.

How will this reform contribute to lowering the cost of living for Australians?

- Competitive markets are the best way of keeping prices low and to offer choice and better-quality products. The reforms will achieve this by better equipping the ACCC to detect and prevent anti-competitive mergers.
- This includes serial acquisitions, and mergers by firms with substantial market power in key sectors such as supermarkets, liquor, healthcare, that affect the cost of living for Australians.

Is this an attack on big business?

- No. The reforms will make the merger system faster, simpler and more streamlined for businesses, bringing Australia into line with OECD best practice.
- Unlike now, timeframes for ACCC reviews will be set out in law. This will improve predictability, transparency and timing of decisions and reduce compliance costs for the vast majority of businesses involved in mergers.
- All businesses across Australia rely on competition, as much as consumers, to manage the cost of doing business, to have choice of suppliers and buyers. They stand to benefit from a system that better addresses anti-competitive mergers and substantial market power.

Why is the Government not adopting the ACCC's proposal, supported by Allan Fels, Rod Sims and Gina Cass-Gottlieb?

- These reforms strike the right balance, adopting most elements of the ACCC's proposal. They give the ACCC a much better toolkit and Chair Gina Cass-Gottlieb is fully behind them.
- We will not be proceeding with the ACCC's proposal that merger parties need to satisfy the ACCC that a merger is not anti-competitive before a merger is approved. The Government considers that with a stronger, better-equipped ACCC under the new system, there are currently insufficient grounds for adopting this element of the ACCC's proposal.
- The ACCC's proposal to have merger parties satisfy the ACCC that a merger <u>will not</u> substantially lessen competition significantly changes the onus and would be inconsistent with our international peers.
- Many stakeholders cited risks:
  - It would effectively introduce a presumptive 'ban' on mergers unless proponents could prove they are 'innocent'.

- It could increase the burden on businesses, impacting business dynamism, investment and flow of capital in Australia.

Shouldn't the onus be on the merger parties to prove their merger won't be anti-competitive, as the ACCC previously proposed?

- These reforms give the ACCC a much better toolkit to prevent anti-competitive mergers while ensuring Australia is in line with standard practice across the OECD.
- Rules need to be reasonable and well adjusted. 'Reversing the onus' would substantially increase the burden on businesses, and would be especially challenging for new and emerging businesses in nascent, innovative industries.
- The ACCC will be much better equipped under the new system including through an expanded competition test that targets mergers that would "entrench or extend market power" as well as clear information requirements for merger parties.

The United Kingdom has a voluntary system so why does Australia need a mandatory system?

- The UK has a voluntary **administrative** merger control regime which is handled by the Competition and Markets Authority (CMA).
- However, in the UK, to ensure mergers are notified, the CMA has an ability to injunct a merger to suspend or halt a merger, even after completion. In Australia, this power resides with the Federal Court.
- In addition, the CMA continuously monitors the market and has substantial visibility over mergers likely to have an impact on competition through close alignment of the UK economy with the EU (whose Member States have public mandatory and suspensory administrative regimes).

How many mergers will the ACCC review each year?

- Treasury intends to **consult** on the thresholds but we anticipate that the number of mergers will be similar to now – approximately 300 a year.
- But different mergers will be notified – we are introducing a targeted, risk-based system so it will be those mergers which if anti-competitive would have the greatest impact on consumers.

How much will fees for a notifiable merger be?

- All mergers subject to review will be charged cost recovery fees, scaled to reflect complexity and risk with mergers more at risk of harming the economy facing higher fees.
- Treasury intends to **consult** on fees later this year. Treasury's indicative figure would be $50,000-100,000 for most mergers.

What are the likely time periods for ACCC review?

- Treasury intends to **consult** on timelines but a majority of mergers are expected to be resolved in the first phase of review, taking up to 30 working days and as little as 15 working days. The ACCC estimates that 80% to 90% of notified mergers will be cleared within 4 weeks.

- The more in-depth second phase review takes up to 90 working days – 6 months in total. A public benefit application would take an additional 50 working days.

If the ANZ/Suncorp matter had been assessed under the proposed system, what change in timeframes would be expected?

- Improvements can be made to improve the efficiency of the system and timeliness of decisions.

- The proposed reform would provide more 'off-ramps' as public benefits are argued sequentially, not concurrently and introduces a fast-track option for Tribunal review.

  - This ensures the timelines for competition analysis are consistent with international best practice (6 months). Even with a public benefits assessment and Tribunal review, our proposed timing is just over 12 months.

  - In ANZ/Suncorp, the ACCC took around eight months to make its decision and the Tribunal around six months.

Which mergers will be notifiable?

- Treasury intends to **consult** on which mergers are notifiable including monetary and market share thresholds to give certainty to business.

s 22

Will the ACCC have a call-in power for mergers below the thresholds?

- The ACCC will not have the ability to 'call-in' mergers below the thresholds for review. A call-in power would undermine the certainty that notification thresholds provide.

- Clear notification thresholds provide certainty for businesses, enabling them to be aware of their obligations upfront and avoiding last minute surprises for deal-making.

- If evidence indicates mergers likely to cause harm are not being captured, additional targeted notification thresholds may be introduced.

Will the ACCC be able to provide a waiver for mergers that don't raise competition concerns?

- The ACCC will not have the ability to issue a 'waiver' for mergers that do not raise competition concerns. As part of the new system, from day 15 of the initial review phase, the ACCC will be able to provide a fast-track determination.

Why is the Government replacing the Federal Court as the decision-maker?

- The Competition Review was established not only to make recommendations about laws, but also institutions. Are our institutions best placed to support competitive outcomes, are the right institutions making the decisions?
  - The Federal Court is constrained by rules of evidence, by process, and what it can consider.
  - Judicial process is by its very nature adversarial, and with over 3000 filings in 2022-23 (a 15% growth in filings attributed largely to corporate matters), it can be a slow path through a system in great demand.
- The ACCC acting as an expert administrative decision-maker will ensure greater economic rigour is brought to the assessment of mergers. Decisions will be based on economic and legal analysis and robust assessment of data.
- ACCC determinations will be subject to limited merits review by the Australian Competition Tribunal. Judicial review of the Tribunal's decisions will remain with the Federal Court.

s 22

Why should business trust the ACCC to be the decision-maker, particularly with a poor track record of litigating/challenging mergers?

- The ACCC is entrusted to protect competition and consumers. It has immense expertise on these matters, and this new system will build on that and empower it, providing more visibility and a better forum for decision-making.
- The ACCC will need to change, as it takes on a new role. Culture, capability, and practice will change. From litigant to administrator. From participant to steward.
- Government is committed to the success of this system. It will appropriately resource the ACCC and is making the changes necessary to implement this new system successfully.

How will confidentiality requirements related to foreign investment reviews be handled in an environment where all mergers are public?

- Foreign investment review will continue to be confidential. To the extent that FIRB require assistance from the ACCC for whatever reason that would be confidential.

- The ACCC's review will be on the basis of the information it receives directly from the merger parties or third parties; the public register information will only include basic information about a merger. The ACCC's reasons for its decision will be redacted for confidential information.

What is the measure of success for these reforms, how will you know if they have worked?

- Government is committed to the success of these reforms. This is a stronger, fairer and better system. These are our goals and the measure of success is to see that in practice.

- Government will work with the ACCC and stakeholders to implement the system effectively, will monitor its progress, and intends to review the system in 3 years to make sure we're hitting those goals.

What were the views of the expert panel on this? Is this the system they proposed or support?

- The expert panel is deliberately a group of diverse voices representing different sectors and backgrounds. Their views along with stakeholder input informed Government's decisions on this system. Their advice is confidential, though individual panel members are free to speak in their own capacities.

Australian Government
The Treasury

Ministerial Submission

MS24-000376

FOR ACTION — Competition Review — Merger Reform— Public announcement

TO: Treasurer — The Hon Jim Chalmers MP
CC: Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment — The Hon Dr Andrew Leigh MP

TIMING

Ahead of 10 April 2024, to support the public announcement of the Government's proposed merger reforms on 10 April 2024.

Recommendation

- That you agree to publish the merger reform paper (Attachment A) to support the Government's public announcement of the proposed merger reform.

Agreed / Not agreed

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[redacted]

Signature	Date: / / 2024

KEY POINTS

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- merger reform paper for Treasury to upload to the relevant website outlining the proposed reform in detail (Attachment A), noting drafts provided undercover of MS24-000153 and MS24-000036.

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[redacted]

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8 April 2024

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CONSULTATION

Internal: Market Conduct and Digital Division; Communications Branch, Corporate Division; Law Division; Commonwealth-State and Population Division

External: Department of Prime Minister and Cabinet, ACCC

ATTACHMENTS

A: Merger Reform Paper
s 22

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Australian Government
The Treasury

Competition Review

Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy

10 April 2024

Manager
Media Unit
The Treasury
Langton Crescent
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Email: media@treasury.gov.au

Contents

A faster, stronger and simpler merger system

Mergers and acquisitions are important for building a more productive and dynamic economy. They allow businesses to achieve greater economies of scale, and to access new resources, technology and expertise. In doing so, mergers can help businesses maximise the benefits of the big shifts in our economy, such as the transformation to net zero, the emergence of new digital technologies and the growth of the care economy. Importantly, mergers can benefit consumers through lower prices, more choice, and higher quality goods and services, as well as help support sustainable wage growth for workers.

While most mergers are unlikely to raise competition concerns, some can harm competition, allowing businesses to raise prices and not pass economic gains on to consumers. Australia's merger control system plays a crucial gatekeeper role in focusing on the small number of mergers that could substantially lessen competition, harming consumers and the wider economy. Discouraging such mergers, and stopping those that try to proceed, is crucial for maintaining downward pressure on the cost of living.

The Government asked the Competition Review to assess whether Australia's merger control system is fit for purpose.

The Review consulted a diverse range of stakeholders. An Expert Panel, comprising Kerry Schott, David Gonski, John Asker, Sharon Henrick, John Fingleton, Danielle Wood and Rod Sims, contributed their views. Feedback from stakeholders was clear: Australia's current 'ad hoc' merger process is unfit for a modern economy, lagging best practice in comparable countries. For business, some uncontentious mergers are subject to delays, uncertainty, and added costs – with only limited guidance provided. For the wider community, engaging with the Australian Competition and Consumer Commission's (ACCC) merger reviews is often difficult. And for the ACCC itself, the current merger approval process can impede its ability to effectively and efficiently detect and prevent anti-competitive mergers. It often has to deal with inadequate notification of mergers, insufficient information, and a reactive, adversarial approach from some businesses, with limited capacity for economic evidence to be presented in court.

In response to these problems, the Albanese Government will reform Australia's merger rules to promote competition, protect consumers and provide greater certainty by streamlining the approvals process. The changes will make our merger approval system faster, stronger, simpler, more targeted and more transparent. The reforms will simplify and speed up the process for mergers, consistent with the national interest, and give the ACCC stronger powers to identify and scrutinise transactions that pose a risk to competition, consumers and the economy. This will mean more clarity and certainty for businesses, and better safeguarding of consumers.

The Government's reformed merger system will be:

Stronger: A mandatory and suspensory administrative system for mergers will be introduced, with the ACCC the expert, first instance decision-maker. A merger may proceed, unless the ACCC reasonably believes it is likely to substantially lessen competition, including if it creates, strengthens, or entrenches substantial market power. If the ACCC does not make a decision within a certain time, the merger will be permitted to proceed. Review of decisions will be available in the Australian Competition Tribunal (Tribunal).

Simpler: The ACCC will be responsible for a single merger control pathway, replacing the current three, ad hoc, voluntary and fragmented pathways. All mergers above a threshold will be subject to the system. A single pathway will strengthen system integrity by removing the ability for merger proponents to 'cherry pick' the path best able to avoid detection. Mergers will be differentiated by the risk they pose to the community.

Targeted: ACCC merger reviews will be risk-based. With clear information requirements upfront, the ACCC will be able to quickly differentiate (and approve) benign mergers from those requiring greater scrutiny. Mergers subject to review will be charged cost recovery fees, scaled to reflect the complexity and risk of the merger. Consistent with comparable jurisdictions overseas, fees are likely to be in the range of $50,000-100,000. There will be additional fees for Tribunal review. An exemption from fees will be available for small business.

Faster: Mergers may proceed within 30 working days where no competition concerns are raised by the ACCC, with the option of 'fast-track' determination if no concerns are identified after 15 working days. The vast majority of mergers will either not have to be notified (because they fall below the notification thresholds) or can proceed within three to six weeks. Where competition concerns are raised, the ACCC will undertake an in-depth assessment within a 4-and-a-half-month period. A fast-track procedure will also be available for Tribunal review.

Transparent: The ACCC will identify the up-front information needed for mergers, maintain a public register of all merger reviews setting out details of notified mergers and publish reasons for determinations.

The new merger control system will apply from 1 January 2026.

Greater certainty and speed will reduce cost and facilitate valuable investment in pro-competitive and benign mergers. Consumers and businesses, along with the broader community, will be better informed and more confident that the ACCC has the toolkit to perform its gatekeeper role and effectively review mergers, including serial acquisitions and mergers by businesses with substantial market power. Maintaining competition in the marketplace and encouraging business dynamism through an efficient and effective risk-based merger system will lead to better outcomes for Australians.

The Government recognises this new, streamlined merger system involves significant change, including for business, advisors, the ACCC and the Tribunal. The ACCC will be given the resources and mandate to act as merger system steward to promote and maintain competitive markets in Australia. A shift in capabilities and practice will be required to support the change from enforcement action in court to more data- and economics-led administrative decision-making. To facilitate this change, new performance standards will be set for the ACCC for merger assessments, including timeliness, guidance and reasons for determinations.

The Government will not be proceeding with the ACCC's proposal that merger parties need to satisfy the ACCC that a merger is not likely to substantially lessen competition before approving a merger. Many stakeholders objected to the perception that this 'reversed the onus of proof'; effectively introducing a presumptive 'ban' on mergers. Treasury heard from stakeholders that this element of the ACCC's proposal could introduce systematic bias, increasing the number of rejected mergers every year. Some stakeholders also raised concern that 'reversing the onus' may undermine the use of the detailed legal and economic analysis required to assess the inherent risks and uncertainty associated with a merger. The Government considers that with a stronger, better-equipped ACCC under the new system, there are insufficient grounds for adopting the ACCC's proposed approach in merger assessment. However, the 'satisfaction' test will be maintained for the ACCC's assessment of whether a merger should be allowed because it brings substantial offsetting public benefits.

The Government will review the new system three years after commencement, informed by evidence around the impact of mergers on the economy and the performance of the ACCC.

The remainder of this paper details the new system (Attachment A visualises the new system). Attachment B outlines stakeholder feedback and the Government's response to the options presented in the merger reform consultation paper.

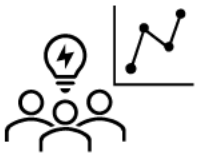
A mandatory and suspensory administrative merger control system

From 1 January 2026, the Australian Government will simplify and strengthen the current approach to merger control in Australia. A single mandatory and suspensory administrative merger control system will replace sections 50 and 50A of the *Competition and Consumer Act 2010* (CCA) and the current merger authorisation process in sections 88 and 90(7) of the CCA.

A single, streamlined merger control system will enhance efficiency, predictability and transparency for businesses, stakeholders and the community, and removes the scope for strategic behaviour by merger parties. It will ensure the ACCC is significantly better equipped to detect, review and act against those mergers that substantially lessen competition.

Australia's merger control system

Empowering the ACCC to protect competition and consumers from anti-competitive mergers



Greater scope for economic and evidence-based analysis with an administrative decision-maker

A simpler single process with faster administrative decision-making

Targeted as ACCC must review higher risk mergers in advance

Aligned with international best practice

More accessible and transparent for consumers and business

Treasury will undertake a statutory review to evaluate the functioning of the system, three years after commencement. This will be supported by annual ACCC reporting on merger activity, ex-post merger analysis and data analytics. Ex-post merger analysis will permit insights into the impacts of mergers, helping to refine and improve merger assessments and decision-making by the ACCC.

Treasury will consult on exposure draft legislation to implement the reforms in 2024.

A stronger, expert administrative decision-maker

The ACCC will be the expert first instance administrative decision-maker. The ACCC will determine whether a merger may or may not be put into effect, with or without conditions. In doing so, the ACCC will assess whether a merger would have the effect, or be likely to have the effect, of substantially lessening competition, which includes if it creates, strengthens or entrenches a position of substantial market power in any market.

The shift to administrative decision-making, rather than judicial enforcement, will ensure the ACCC is better placed to protect consumers and competition in our economy. As an administrative decision-maker the ACCC will gather all relevant information and evidence, analyse this material, weigh up relevant considerations and set out objective, factual findings and other considerations in its reasons for decision. This involves engaging with the merger parties and consulting widely with third parties – consumers, suppliers, competitors – affected by the merger. The ACCC, as an administrative decision-maker, rather than the Federal Court, is best placed to undertake this consideration. It will enhance accountability, accessibility and transparency of merger review. Necessary economic rigour will be applied to the assessment of mergers, supported by information and evidence without being limited by the rules of admissibility under the *Evidence Act 1995* (Cth). This, in conjunction with review by the Tribunal, will improve merger outcomes. This will mitigate the risk of harmful mergers being cleared and benign mergers not proceeding, delivering better outcomes for merger parties, consumers, suppliers and the Australian economy.

Information provided to the ACCC on competition issues by foreign merger proponents should be sufficient for the consideration of competition issues under the *Foreign Acquisitions and Takeovers Act 1975*. Foreign investors will not be required to notify below-the-threshold mergers to the ACCC. The Government will also explore opportunities to streamline the competition assessment of mergers in sectors subject to separate national interest considerations, including under the *Financial Sector (Shareholdings Act) 1998* and *Insurance Acquisitions and Takeovers Act 1991*.

Faster, targeted merger review

The new system will enhance the ACCC's ability to effectively assess and consider mergers. It responds to the ACCC's concerns that it is not adequately notified of mergers and is given insufficient information and evidence to complete its review.

Targeted mandatory notification thresholds

A merger can occur when there is a change of control of a business or asset. The competitive structure of a market can be affected by mergers which involve both an acquisition of outright control, but also minority acquisitions which may provide de facto control or the ability to materially influence the acquired business.

The person or people acquiring control of the business or assets will be required to notify the ACCC of a merger that meets the thresholds.

A merger must not be put into effect until the ACCC has determined that it may be (with or without conditions). Any merger or contract, arrangement or understanding related to the merger, which purports to be put into effect otherwise than in accordance with the ACCC's determination, or the time period has otherwise elapsed, will be void.

To ensure the system is risk-based and targeted at those mergers most likely to result in harm to competition and consumers, notification thresholds will be both monetary and share of supply or market share-based. This will mean that the ACCC is apprised of those mergers most likely to impact

Australian consumers if they are anti-competitive, while reducing the overall compliance burden on businesses.

Monetary thresholds will be subject to consultation and set by reference to typical business metrics such as turnover (sales revenue), profitability or transaction value. Share of supply or market-share thresholds will ensure mergers below the monetary thresholds but which otherwise present risks to competition will be notified to the ACCC. Market share thresholds are familiar to businesses in Australia given they are a feature of the ACCC's current merger review approach. A Treasury Minister will be given the power to introduce additional targeted notification obligations in response to evidence-based concerns regarding certain high-risk mergers. The merger notification thresholds will be subject to periodic review.

In addition, to respond to concerns regarding serial or creeping acquisitions and roll up strategies, all mergers within the previous three years by the acquirer or the target will be aggregated for the purposes of assessing whether a merger meets the notification thresholds, irrespective of whether those mergers were themselves individually notifiable.

To promote predictability for businesses, the ACCC will be required to issue, following consultation, guidance to assist merger parties to determine if their combined market share is in excess of a particular threshold. The publication of reasons for its determinations (see below), will also guide businesses as to the ACCC's approach to market definition in past mergers.

It will be important that the thresholds are not easily strategically circumvented and can address the risks of serial acquisitions and 'midnight mergers'. Anti-avoidance measures will prevent merger parties from evading merger control obligations by transaction structuring, for example, dividing or staggering the merger into several smaller transactions.

Treasury will also consult on the interaction of the new system with the obligations associated with hostile takeovers.

Treasury anticipates that the thresholds will be set such that the overall volume of notifications to the ACCC will be similar to current volumes (approximately 300 a year). The mergers notified are projected to be different; instead focused on those mergers which, if anti-competitive, would have the greatest impact on consumers.

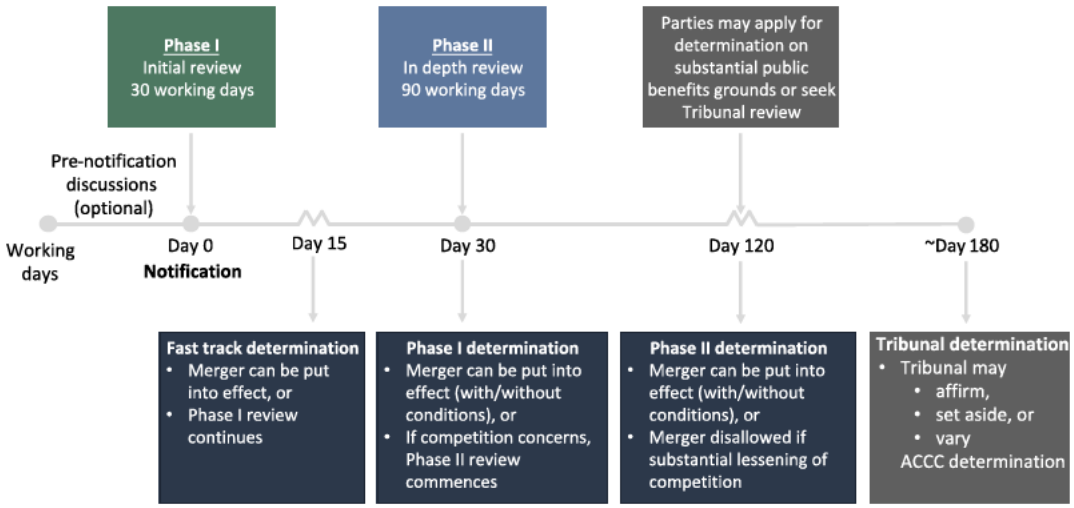
Mergers below the threshold may also be voluntarily notified to the ACCC. Such mergers would be subject to the same administrative system as above-the-threshold mergers. The ACCC will not have the ability to 'call-in' mergers below the thresholds for review, but the ACCC may investigate a below-the-threshold merger for breach of any other relevant provisions of the CCA.

Treasury will consult on merger notification thresholds, including what is a notifiable 'merger' in 2024.

Suspensory timelines supporting prompt review

Mergers are time sensitive, and prompt decision-making is critical. Clear review timelines are an important procedural safeguard and will assist merger parties in transaction planning and interested stakeholders to engage with the ACCC's review. Time periods are predicated on the ACCC having the information and evidence needed to efficiently and effectively assess a merger.

The system will provide for set timelines for the ACCC's merger review. Treasury will set the merger review timelines following consultation in 2024. However, to assist stakeholders understand the new system, Treasury has outlined an indicative timeline below.



Indicative timelines, broadly consistent with international best practice, would be a 'Phase I' review period of 30 working days and a more in-depth 'Phase II' review period of 90 working days, with the option of fast-track determination after at least 15 working days only if no concerns are identified by the ACCC. It is expected that the ACCC will determine that the vast majority of mergers may be put into effect within the Phase I period of around 15-30 working days.

These time periods may be extended by the ACCC, in appropriate circumstances and subject to procedural safeguards, for example if remedies are offered by the merger parties, by mutual agreement or if requested information is not promptly provided. Treasury will consult on the rules as to how the 'clock' can start and stop and the associated procedural safeguards in 2024.

The Phase I review period would commence upon receipt by the ACCC of a complete notification. Merger parties will be able to engage in optional confidential pre-notification discussions with the ACCC to facilitate prompt notification of a merger if they wish to do so.

The ACCC will only commit a merger to a Phase II review if it has a reasonable basis to consider the merger raises competition concerns. The Phase II process is intended for in-depth economic and legal analysis of mergers identified as most likely to be anti-competitive following the Phase I review. During the Phase II review, merger parties will receive a notice of competition concerns setting out material facts, evidence, and other information which explains the ACCC's analysis of potential harms. Merger parties will have the opportunity to respond in writing and/or orally, ahead of the ACCC's determination, and the ability to request additional time, to ensure procedural fairness. As an administrative decision-maker, there are a range of obligations that will apply to the ACCC under Australian law.

The ACCC will publicly announce when it commences a Phase II review, issue a notice of competition concerns, and issue a determination (including reasons, commensurate with the substantive review undertaken).

If the ACCC does not make a determination in relation to a merger within a certain time period, the merger may be put into effect.

Treasury will consult on merger review timelines in 2024.

Simpler, clearer merger review process

The ACCC requires sufficient information about a merger to properly undertake its review, and to efficiently and expeditiously differentiate benign mergers. Merger parties are best placed to provide information about their business, future plans and the industry.

Upfront notification requirements

Calibrated upfront information requirements will ensure merger parties provide relevant information to the ACCC and mitigate the need for subsequent requests and possible delay. Merger 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. As administrative expert bodies, the ACCC, and the Tribunal on review, will not require information to be presented in a legally admissible form. This promotes focus on the substance rather than form and reduces cost.

Senior executives or directors of merger parties will need to certify or attest that the information provided is true, accurate, complete and correct. Civil and criminal penalties will apply, including director disqualification.

The ACCC will consult on the form of notification to be required in 2025. The ACCC will also issue, following consultation, process guidelines to assist merger parties and interested stakeholders to engage with the merger review process (including pre-notification) and associated procedural safeguards.

Evidence gathering powers

The ACCC will be able to request further evidence and information from merger parties and relevant third parties during its review. Consequential amendments will be made so that the ACCC's formal information gathering powers (currently mainly in section 155 of the CCA) will also be available to enable the ACCC to gather all relevant information and evidence, including from people carrying on a business in Australia but who are not present in Australia.

Fees

All merger notifications will be accompanied by a fee. Cost recovery principles prescribe that, as an identifiable group creating a specific demand for a specific regulatory activity, merger parties should pay fees. The fees should reflect the resources required by the ACCC to efficiently carry out the review of a merger. Indicatively, Treasury expects this to be around $50,000–100,000 for most mergers. An exemption from fees will be available for small business so that the fees are not a disproportionate burden for those businesses. The fees will ensure the ACCC is properly resourced to undertake its expert administrative decision-making role.

Treasury will consult on fees in 2024.

Transparency

Transparency is important for ensuring fairness, balancing the interests of the merger parties, interested stakeholders and the ACCC. Transparency also reduces uncertainty, assisting the predictability around processes and public understanding of how merger laws are applied.

The ACCC is accountable to the Australian community for its review of mergers: it must do so having regard not only to the interests of merger parties, but also interested stakeholders, consumers and the broader community.

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. Merger 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. The ACCC's ability to engage with stakeholders and the ability for stakeholders to bring their concerns about a merger to the attention of the ACCC is significantly impacted if merger reviews are confidential.

The ACCC will set out its findings on material facts, with reference to the evidence or other material on which those findings were based, and the reasons for all determinations, commensurate with the substantive review undertaken. While the ACCC will not be bound by previous determinations, this will facilitate transparency and predictability in the administrative system. It will also shape the boundaries of merger control over time as a body of previous determinations, including the economic and legal reasoning, will develop to guide stakeholders. Provision will also be made to ensure confidential information is appropriately protected.

Empowering the ACCC to protect competition and consumers

Competition test

The ACCC must permit a merger to be put into effect unless the ACCC reasonably believes that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in any market, including (but not exclusively) if the merger creates, strengthens or entrenches a position of substantial market power in any market.

The substantive 'substantial lessening of competition' analysis requires consideration of the closeness of competition between the merger parties, to understand what is lost as a result of the merger. The inclusion of 'creates, strengthens or entrenches a position of substantial market power' emphasises the importance of considering the competitive structure of the market, in the context of the overall assessment of the effects of the merger on competition.

To respond to concerns regarding 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, whether or not those mergers were themselves individually notifiable. This is a targeted measure to address concerns that some businesses are engaging in anti-competitive roll up strategies that increase prices and reduce quality and choice for consumers yet minimise unintended impacts on Australia's vibrant start-up and small-and-medium enterprise sector. Three years is considered an appropriate reference period to capture strategic business behaviour and take account of dynamic conditions of competition in markets.

The test will also be supplemented by principles, replacing the 'merger factors' currently in section 50(3) of the CCA. In making its determination the ACCC will be required, to the extent possible, to give effect to the object of the Act and take into account considerations such as:

- the need to maintain and develop effective competition within markets in view of, among other things, the structure of all the markets concerned and the conditions for competition, and the actual or potential competition from businesses carrying on business in Australia whether located in Australia or elsewhere; and

- the market position of the businesses concerned and their economic and financial power, including commercial relationships, the alternatives available to suppliers and users, their access to supplies, inputs including data, or markets, any barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

The principles are intended to assist the ACCC in its role as an administrative decision-maker and ensure explicit emphasis is placed on economic methodology and analysis of competitive effects. The principles also ensure the competitive effects of related agreements by the merger parties may be taken into account in the ACCC's assessment. The specific conditions of competition that would prevail absent the merger will be considered as part of the substantive competitive assessment. This recognises both the limitations of inherently uncertain counterfactuals and their use as a tool to consider prospective effects.

The ACCC will be expected to consult on, issue and periodically update substantive guidance on its assessment of mergers.

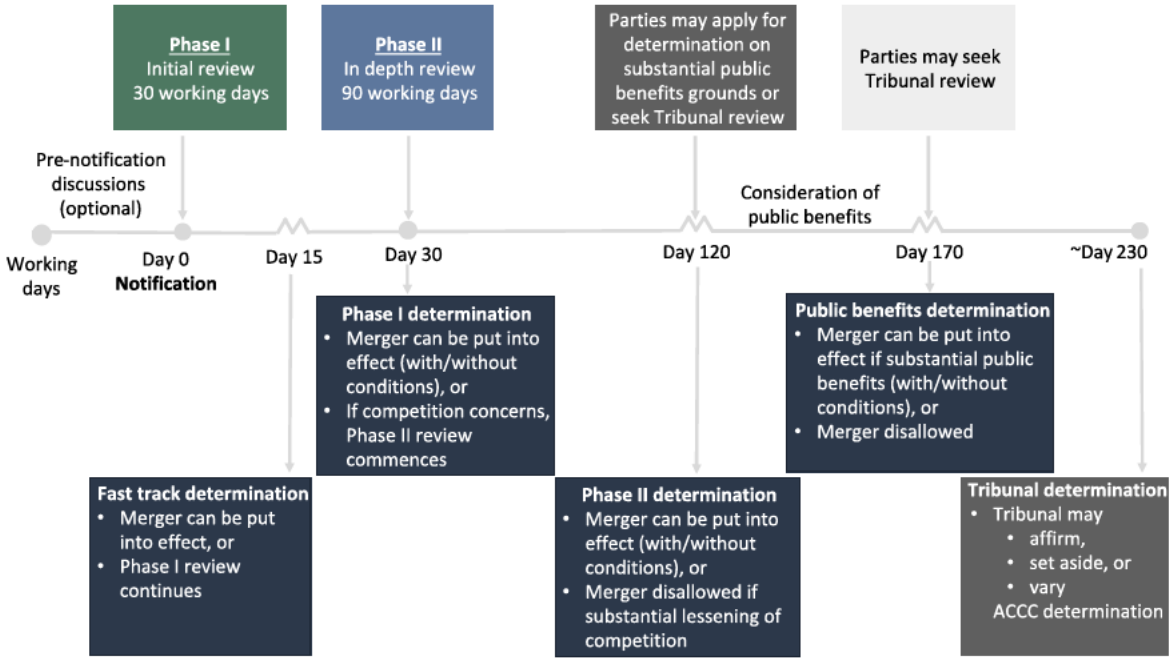
Substantial Public Benefits test

Merger parties may, following the ACCC's Phase II determination, seek approval from the ACCC for the merger if the ACCC is satisfied 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.

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 merger raises substantial and meaningful net public benefits is important as our economy responds to these challenges. The ACCC is currently given broad discretion to consider what constitutes a public benefit, providing flexibility to enhance the welfare of Australians by approving mergers that are net desirable to the economy.

The sequential approach provides more exit points for merger parties and will ensure the substantive analysis and timeframes for the ACCC's determination on competition considerations are robust and consistent with international best practice.

The system will provide for clear timelines for the ACCC to accept a notification for approval based on substantial public benefits and subsequently undertake its review. An indicative review timeline would be 50 working days. Treasury will consult on merger review timelines in 2024.



Any proceedings before the Tribunal seeking review of the ACCC's Phase II determination would be stayed, pending the outcome of the application for approval based on substantial public benefits.

All applications for approval based on substantial public benefits will be accompanied by a fee, based on cost-recovery principles. Treasury intends to consult on the specific fees in 2024.

Conditions

The ACCC may make a determination that a merger may be put into effect subject to conditions. This will include, but not be limited to, a condition that a person may give and comply with an undertaking under section 87B of the CCA in connection with a matter.

Merger parties will be able to offer commitments or remedies in the form of a section 87B of the CCA undertaking to address competition concerns identified by the ACCC in either Phase I, if the competition concerns are readily identifiable and can be easily remedied, or Phase II. During the ACCC's review of the substantial public benefits afforded by the merger, the remedies will need to address concerns relevant to that assessment. If remedies are offered, the timeline will be extended to permit consideration by the ACCC and, if appropriate, engagement with market participants.

The ACCC may determine the nature, form and scope of any conditions imposed to comprehensively address the substantial lessening of competition and any adverse effects resulting from it. The ACCC will also have regard to its effect on consumers and any resulting consumer benefits. Similar provision will also be made for remedies offered in relation to the substantial public benefits assessment.

A stronger system

Review of ACCC determinations and procedural safeguards

ACCC determinations will be subject to review by the Tribunal upon application by the merger parties, or third parties (subject to having standing). Judicial review of decisions by Tribunal will be available in the Federal Court.

The ability to seek Tribunal review represents an important safeguard for merger parties and interested third parties and promotes the integrity of the merger system. The Tribunal, with its independent economic, business and legal expertise, will improve the quality and consistency of ACCC decisions and promote good decision-making by the ACCC based on sound economic and legal principles. The Tribunal is able to conduct proceedings expeditiously and with as little formality as required for proper consideration of the issues which will minimise cost and facilitate participation by affected stakeholders, including supporting consumer groups.

Merits review means the Tribunal can substitute the ACCC's decision for a correct or preferable decision. The Tribunal may make a determination affirming, setting aside or varying the ACCC's determination and, for the purposes of the review, may perform all the functions and exercise all the powers of the ACCC. The scope and basis for the Tribunal's review will be consistent with the current approach for merger authorisation, that is, on review the Tribunal will apply the same test as the ACCC and it will not be a rehearing.

The Tribunal's review of ACCC determinations will be limited as it will be based on the material before the ACCC. However, the Tribunal may seek clarifying information, and the Tribunal may allow the parties to present new information or evidence which was not in existence at the time of the ACCC's determination. Alternatively, a fast-track review by the Tribunal may be sought, based only on the material before the ACCC. With a fast-track review, the Tribunal would be bound by the findings of fact made by the ACCC.

Tribunal review will allow for reconsideration of the ACCC's determination, subjecting it to scrutiny and review. Limited merits review, rather than full merits review, appropriately balances procedural fairness by allowing for a change of circumstances to be taken into account and ensures merger parties have the incentive to place relevant information before the ACCC. This mitigates the risk of strategic behaviour. Limited merits review also, importantly in a merger situation, reduces the time required to review an ACCC determination.

As mergers are time-critical, the Tribunal's review should be subject to a time limit of 90 calendar days (approximately 60 working days), which could be extended by a further 90 calendar days where necessary – this is the same time period as currently applies for review of ACCC merger authorisation decisions. This will ensure that, even for mergers considered by the ACCC and the Tribunal on review, the process could be expected to be complete in around 12 months. If a fast-track review by the Tribunal is sought, the Tribunal's review will be subject to a time limit of 60 calendar days (approximately 40 working days), with no option for extension. The Tribunal will also have a discretion to extend its time limits if excessively voluminous material is placed before it.

At present, the Tribunal has no general power to award costs in relation to merger authorisation proceedings. However, given the time and commercial imperatives associated with mergers, the Tribunal should have a power to award costs where an application for review is frivolous or vexatious. There will also be fees for Tribunal review. An exemption from fees will be available for small business.

The Government will also consider the institutional and procedural arrangements of the Tribunal to ensure it is fit for the purpose of reviewing ACCC merger determinations. Treasury will consult on any potential reforms.

Merger parties will be able to address complaints about the conduct of the ACCC's merger review, which are unable to be resolved directly with the ACCC staff involved in the matter, to an identified senior executive, such as the Chief Executive Officer, uninvolved in the merger review. This is in addition to the availability of the Commonwealth Ombudsman.

The ACCC is also subject to the Regulator Performance Guide, which is part of the Australian Government's commitment to boosting productivity by cutting red tape, reducing duplicative

processes, modernising regulation and improving regulator performance to improve the quality of regulation and ease cost of living pressures for Australians. Treasury will review the role of the ACCC Performance Consultative Committee, which consists of business, legal and consumer representatives, to promote regulatory best practice.

Treasury intends to consult on procedural safeguards in 2024.

Penalties

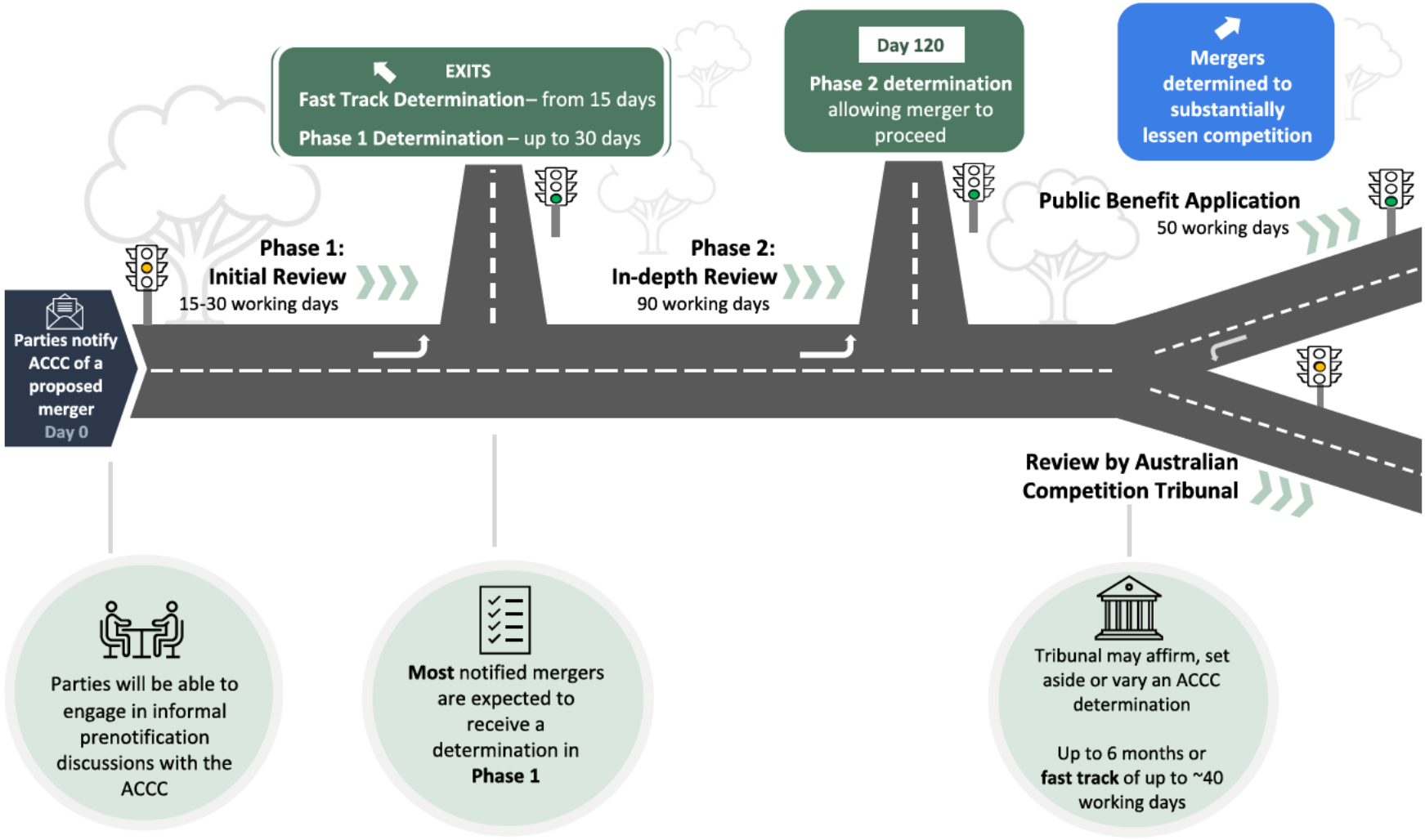
A failure to notify a notifiable merger or proceeding with the merger ahead of the ACCC's determination or otherwise than in accordance with the ACCC's determination will result in substantial penalties for the entity concerned and executives or officers responsible for the merger. Penalties will also apply for the provision of false or misleading information. The ACCC will be able to seek such penalties in the Federal Court, subject to limitation periods.

In addition to civil and criminal penalties, any merger or contract, arrangement or understanding related to the merger, which purports to be put into effect otherwise than in accordance with the ACCC's determination (or when the time period has otherwise elapsed), will be void.

Consistent with existing provisions, the ACCC may make an application for divestiture, or the court may declare the merger void, if false or misleading information was provided, or there was a material omission by the merger parties, in the making of the ACCC's determination.

Treasury will consult on penalties in 2024.

Attachment A: A faster, stronger and simpler merger system



Attachment B: Merger reform consultation — stakeholder feedback and Australian Government response

Elements of a merger control system adopted		
Element	**Stakeholder consultation feedback**	**Australian Government response**
Notification		
Targeted mandatory notification thresholds	Current approach gives rise to uncertainty for businesses about when to notify; concern that the ACCC is not adequately notified of mergers. Clear thresholds would provide more certainty but must be calibrated.	The person or people acquiring control of the business or assets will – if the thresholds are met – be required to notify the ACCC of a 'merger'. Thresholds will be monetary and supply/market share-based, balancing regulatory burden with potential harm to competition. There will also be a Ministerial power to introduce additional targeted notification thresholds in response to evidence-based concerns regarding certain high-risk mergers. Mergers below the thresholds may also be voluntarily notified to the ACCC. Such mergers would be subject to the same administrative system as above-the-threshold mergers. The ACCC will not have the ability to 'call-in' mergers below the thresholds for review, but the ACCC 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.
Upfront notification requirements	Information requirements should be clearer and proportionate, and merger parties are best placed to provide information to facilitate efficient and effective assessment.	Notification requirements calibrated to likelihood that transaction raises competition concerns; enables ACCC to properly undertake its review and to efficiently and promptly differentiate benign mergers.
Fees	Cost is currently borne by the public and ACCC needs to be appropriately resourced.	All merger notifications accompanied by a fee (subject to consultation). An exemption from fees will be available for small business. This ensures ACCC is appropriately resourced and funding is responsive to need.
Suspensory timelines supporting prompt review	ACCC should have sufficient time to review mergers before completion. ACCC currently not bound by timelines in informal review process which creates significant uncertainty for businesses and for market participants to engage. Delays in merger reviews can be very costly for businesses.	Mergers are time sensitive, and prompt decision-making is critical. Clear review timelines are an important procedural safeguard and will assist merger parties in transaction planning and interested stakeholders to engage with the ACCC's review. Acquirer must receive determination from the ACCC before closing notifiable transaction.

Elements of a merger control system adopted		
Element	**Stakeholder consultation feedback**	**Australian Government response**
	Robust, clear time frames would provide more certainty.	Indicative timelines (subject to consultation): • Phase I: 30 working days • Phase II: 90 working days • Option of fast-track determination if no concerns identified after 15 working days • Approval for substantial public benefits: 50 working days Time periods may be extended in limited circumstances. If no ACCC determination within a certain time period, transaction will be permitted to proceed.
Assessment		
A stronger, expert administrative decision-maker	Administrative decision-making can be quicker, more accessible for third parties, more transparent and draw on economic expertise more easily than judicial enforcement.	ACCC will be the expert first-instance administrative decision-maker with responsibility to determine whether a merger may be put into effect, with or without conditions. Delivering better outcomes: mergers will be assessed by an expert agency, with engagement and information from stakeholders and supported by rigorous legal and economic analysis. It will enhance accountability, accessibility and transparency of merger review.
Transparency and predictability	Current informal approach is not transparent. Publishing information about mergers reviewed by the ACCC would lead to greater predictability, confidence in ACCC decision-making and broader community awareness.	Information about all mergers considered by the ACCC will be listed on a public register. The ACCC will set out the findings on material facts, with reference to the evidence or other material on which those findings were based, and the reasons for all decisions commensurate with the substantive review undertaken. This will facilitate transparency and predictability in the administrative system and shape the boundaries of merger control over time as a body of previous determinations, including the economic and legal reasoning, will develop.
Test for decision-maker to apply including 'merger factors'	'Substantial lessening of competition' test is the appropriate framework, but concerns with the requirement to 'prove' the counterfactual in forward-looking merger assessments. Reviews could substantially benefit from more rigorous economic and legal analysis.	The ACCC will be empowered to protect competition and consumers. ACCC must 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 substantially lessening competition in any market, including (but not exclusively) if the merger creates, strengthens or entrenches a position of substantial market power in any market.

Elements of a merger control system adopted		
Element	**Stakeholder consultation feedback**	**Australian Government response**
	Usefulness of the 'merger factors' is somewhat limited; updating guidance to reflect current economic thinking would be more helpful for businesses, advisors and others.	Merger factors to be replaced with p**rinciples**, focused on the conditions for competition, also to address concerns with the counterfactual. ACCC will be expected to update and periodically review its guidance.
Substantial market power amendment to 'substantial lessening of competition' test	Concerns about market power in concentrated sectors, such as supply chains. Acquisitions by firms with substantial market power should be captured by the 'substantial lessening of competition' test.	The ACCC will be empowered to protect competition and consumers. Clarify that the existing 'substantial lessening of competition' test includes if the merger creates, strengthens or entrenches a position of substantial market power in any market.
Related agreements	Related agreements by the merger parties should be taken into account.	The p**rinciples** ensure related agreements by the merger parties may be taken into account in the ACCC's assessment.
Substantial public benefits	Ability to consider public benefits should be retained.	If ACCC disallows the merger, approval may be sought if the merger would result, or be likely to result, in a substantial public benefit which outweighs anti-competitive impact. Allowing the ACCC to consider whether an otherwise anti-competitive merger raises substantial and meaningful net public benefits is important as our economy responds to significant structural shifts including the rise of the care economy, rapid transformation to net zero and the growth of the digital economy.
Serial acquisitions	Concerns about whether a single acquisition, which does not result in material changes in market concentration or competitive dynamics but over time forms part of a strategy of consolidation, can be appropriately assessed under the current law.	All 'mergers' within the previous three years by the merger parties may be considered as part of the review of the notifiable merger (and will be aggregated for the purpose of assessing whether a merger meets the notification thresholds). This is a targeted measure to address concerns that some businesses are engaging in anti-competitive roll up strategies that increase prices and reduce quality and choice for consumers yet minimise unintended impacts on Australia's vibrant start-up and small-and-medium enterprise sector.
Review and penalties		
Review of administrative decisions and procedural safeguards	Reviews of decisions would benefit from greater economic and business expertise; it is important that review processes are accessible to stakeholders likely to be affected by a merger such as consumer groups. Reviews of merger decisions are time-sensitive.	ACCC decisions subject to limited merits review by the Australian Competition Tribunal with time limits. The Tribunal, with its independent economic, business and legal expertise, will improve the quality and consistency of ACCCC decisions and promote good decision-making by the ACCC based on sound economic and legal principles.

Elements of a merger control system adopted		
Element	**Stakeholder consultation feedback**	**Australian Government response**
		The Tribunal is able to conduct proceedings expeditiously and with as little formality as required for proper consideration of the issues which will minimise cost and facilitate participation by affected stakeholders, including supporting consumer groups. The fair, accountable and improved administration of the merger system benefits merger parties, interested stakeholders and the Australian community. In addition to the availability of complaints mechanisms, the ACCC is subject to the Regulator Performance Guide.
Penalties	Significant penalties would deter strategic behaviour and encourage compliance.	Substantial penalties (monetary and/or divestiture) for non-compliance for entities concerned/officers responsible for merger, on application by the ACCC in Federal Court.

Elements of a merger control system not adopted		
Element	**Consultation feedback**	**Australian Government response**
Notification		
Informal system	Current system provides flexibility but creates significant uncertainty about timing and outcome, is costly for businesses due to time delay, less transparent and information requirements can be unclear.	Clear timeframes and performance metrics to hold the ACCC accountable. Information requirements to ensure the ACCC is provided with information to facilitate the efficient and effective review of mergers.
Voluntary notification	Allows self-assessment but gives rise to more uncertainty than overseas systems that have clear mandatory notification requirements; risk is that the ACCC is not notified of potentially anti-competitive mergers	Unclear that it would address concerns about non-notification of mergers. Merger parties would have minimal incentives to cooperate in a judicial enforcement system.
Call-in power	A call-in power would create uncertainty for businesses; the current system allows the ACCC to investigate any merger in Australia; smaller transactions or mergers in local markets may still raise competition concerns.	Targeted notification thresholds to provide clarity for businesses and target mergers most likely to raise risks to competition.
Section 50 and declarations in the Federal Court	Multiple pathways facilitate strategic behaviour.	Streamline into a single simpler mandatory and suspensory administrative system. Retain the substantial lessening of competition test, incorporated into a stronger administrative system.
Assessment		
Decision-maker must not grant approval unless satisfied the merger is not likely to substantially lessen competition	Merger parties would have the incentive to promptly provide relevant information to the ACCC. However, this test would substantially increase the burden of proof on merger parties, even mergers that are unlikely to pose risks to the community, imposing additional risks and costs on all mergers. Disproving the existence of a substantial lessening of competition may be difficult and impractical for businesses to satisfy, particularly those in emerging markets.	The ACCC will need to reasonably believe certain facts exist before disallowing the merger.
Review		
Judicial enforcement	Federal Court proceedings have significant cost and timing implications for merger parties, third parties and the ACCC. Less transparent than an administrative system with less precedent available. Third parties may be affected by a merger but are currently deterred from participation due to reluctance to appear in court, fear of retribution, or cost.	Replace the current ad hoc approach with a stronger, simpler, more efficient, risk-based and transparent administrative system that enables market participants, such as customers and small businesses, to be heard in merger reviews.

Elements of a merger control system not adopted		
Element	**Consultation feedback**	**Australian Government response**
Full merits review	It is important to incentivise parties to provide information upfront to the ACCC. Not limiting reviews of ACCC decisions to the investigatory record that was before the ACCC would ensure quality and robust regulatory processes. Full merits review would take longer than limited merits review and mergers are time-sensitive.	The Tribunal's review of ACCC determinations is limited as it will be based on the material before the ACCC. However, the Tribunal may seek clarifying information, and the Tribunal may allow the parties to present new information or evidence which was not in existence at the time of the ACCC's determination. A fast-track review by the Tribunal may alternatively be sought, based only on the material before the ACCC. With a fast-track review, the Tribunal would be bound by the findings of fact made by the ACCC. Limited merits review will allow for reconsideration of the ACCC's determination, subjecting it to scrutiny and review. Limited merits review, rather than full merits review, appropriately balances procedural fairness by allowing for a change of circumstances to be taken into account and ensures merger parties have the incentive to place relevant information before the ACCC. This mitigates the risk of strategic behaviour. Limited merits review also, importantly in a merger situation, reduces the time required to review an ACCC determination.