Australian Government
The Treasury

Competition Review

Merger Notification Thresholds

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Contents

Consultation process

Request for feedback and comments

The Government is simplifying and strengthening Australia's current approach to merger control from 1 January 2026.[1] As part of the new merger control system, Treasury is consulting on notification thresholds and will use feedback received to inform advice to the Government, which will allow for subordinate legislation to be introduced to support the new merger system.

Questions are included throughout the paper to guide comments. You are invited to answer some or all of 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: 20 September 2024

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1 Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, Treasury, Australian Government, 2024.

Executive summary

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. Importantly, mergers can benefit consumers through lower prices, more choice, and higher quality goods and services.

However, some mergers substantially lessen competition, allowing businesses to raise prices and not pass economic gains on to consumers. Discouraging and opposing such mergers is crucial for maintaining downward pressure on the cost of living.

The purpose of merger notification thresholds is to ensure the Australian Competition and Consumer Commission (ACCC) is aware of those mergers most likely to impact Australian consumers if they are anti-competitive, while keeping compliance costs low for business.

The Government's merger reform proposal will create a legal obligation for businesses to notify acquisitions[2] that are captured by notification thresholds, enforced by substantial penalties. The system is designed so businesses will have strong incentives to notify such acquisitions. Importantly, businesses will obtain a timely decision and certainty that the ACCC cannot take action for potential breaches of the *Competition and Consumer Act 2010* (*Cth*) (CCA).

Striking an appropriate balance is important to facilitate investment in Australia, while ensuring that potentially problematic acquisitions can be scrutinised. This means designing targeted, risk-based notification thresholds and ensuring expedited review of notified mergers that do not raise competition concerns. Businesses could also seek a 'notification waiver' from the ACCC, removing the obligation to notify if granted, including if there is uncertainty as to whether the notification thresholds are met.

In designing targeted, risk-based notification thresholds, the objectives should be to:

- capture anti-competitive and economically significant acquisitions, at national, state, territory, regional or local levels, including serial acquisitions
- enable scrutiny of acquisitions by businesses with substantial market power, including acquisitions of nascent competitors
- target acquisitions that adversely impact Australian consumers, while not capturing foreign acquisitions that do not have a sufficient connection to Australia and are unlikely to impact Australian consumers.

Based on international practice and available data, Treasury has developed the following monetary and market concentration thresholds for consultation with stakeholders. This is to identify the pool of acquisitions that require assessment by the ACCC and prevent the small number of harmful anti-competitive acquisitions likely to increase the cost of living for Australians. Treasury is seeking feedback on the proposed design and values of the thresholds, such as whether market share or share of supply measures should be used for the market concentration thresholds.

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2 In Australia, it is envisaged that the new merger control system will apply to acquisitions of shares or assets, subject to certain exclusions. See Treasury, *Reforming mergers and acquisitions – exposure draft*, Treasury, Australian Government, 2024. For ease of reading, this consultation paper uses the term 'merger' and 'acquisition' interchangeably, and the term 'merger' is used to encompass acquisitions of shares or assets.

An acquisition will be notifiable if at least one of the monetary or market concentration thresholds limbs are met and there is a material connection to Australia			
Monetary thresholds	**Limb 1** a. Combined Australian turnover of merger parties (including acquirer group) is at least **$200 million** AND b. Either the Australian turnover is at least **$40 million** for each of at least two of the merger parties OR the global transaction value is at least **$200 million**	**OR**	**Limb 2** a. Acquirer group Australian turnover is at least **$500 million** AND b. Either the Australian turnover is at least **$10 million** for each of at least two of the merger parties OR the global transaction value is at least **$50 million**
OR			
Market concentration thresholds	**Limb 1** a. Combined share of the merger parties is at least **25 per cent** AND b. Australian turnover (including acquirer group) is at least **$20 million** for each of at least two of the merger parties	**OR**	**Limb 2** a. Combined share of the merger parties is at least **50 per cent** AND b. Australian turnover (including acquirer group) is at least **$10 million** for each of at least two of the merger parties

There are other risk factors that could also indicate specific competition concerns, such as small acquisitions within specific sectors or local markets. Such acquisitions could also be required to notify as a result of a Ministerial determination, if there are evidence-based concerns about high-risk acquisitions, avoiding the need to lower the economy-wide thresholds and reducing the incidental capture of benign mergers within the thresholds. For example, some acquisitions in the grocery retailing sector and other high-risk sectors could be subject to these more targeted notification requirements.

These proposed thresholds are based on Treasury's analysis of the ACCC's historical public merger review data that identifies acquisitions that raised potential competition concerns, and capture around 90 per cent of all acquisitions that were publicly reviewed and considered by the ACCC as potentially raising competition concerns since 2018. The remaining around 10 per cent of historical below-the-threshold acquisitions that raised competition concerns could, under the new system, be investigated by the ACCC for breach of any other applicable provisions of the CCA.

Over time, the thresholds are expected to average an overall volume of mandatory notifications similar to current volumes, with around 300 to 500 annual notifications projected using existing available data. Regular reviews, including the three-year review and annual reports, will be important to consider system efficiency and the volume of notifications.

The types of mergers that pose competition concerns will change as the economy changes and as new data and analysis becomes available. The intention is that notification data is used along with other data analytic techniques to monitor mergers not caught by the thresholds and to monitor the system's effectiveness over time. Mergers will be routinely assessed for their possible impact on consumer prices. This information will be provided in an annual report on merger risks to competition.

Feedback on the proposed thresholds will inform advice to Government on the notification thresholds in the new merger control system. Once the Government has settled its preferred approach, further consultation will be undertaken on the relevant subordinate legislation.

Targeted mandatory notification thresholds

The purpose of merger control is to identify and prevent the prospective anti-competitive effects of mergers. In the new mandatory merger control system, the notification thresholds will ensure the ACCC, as the administrative decision-maker, becomes aware of the small number of anti-competitive mergers likely to harm Australian consumers before those mergers are completed. The notification thresholds do not change what may be a permissible merger or one that might be stopped, but rather focuses on what mergers need to be notified to the ACCC for review.

Australia's merger control system, consistent with good regulatory design principles, needs to be risk-based. The proposed thresholds are based on risk factors that indicate a merger is more likely to have an appreciable effect on competition. The thresholds will determine which mergers must be notified to the ACCC, and the ACCC will undertake an assessment of whether the merger is likely to substantially lessen competition.[3]

Focusing on acquisitions that give rise to the capacity to control or influence the competitive behaviour of the target business can act as a further filter in a merger control system.[4] Internationally, several jurisdictions use the concept of 'control' to determine when a merger or acquisition is within the scope of its merger rules. 'Control' can be defined in different ways, such as the possibility of exerting decisive influence over the strategic commercial decisions of the target in the European Union,[5] or ability to materially influence the policy of the target in the United Kingdom and South Africa.[6] In Australia, the concept of 'control' currently exists in various contexts, including in corporations law,[7] foreign investment,[8] taxation,[9] and media control rules around broadcasting licences and newspapers.[10] Under the new merger system, 'control' is proposed to be defined as the capacity to directly or indirectly determine the policy of the body corporate in relation to one or more matters.[11]

In some situations, the concept of 'control' is accompanied with percentage-based thresholds based on the size of the interest or voting rights to increase clarity.[12] Changes in the nature or type of control

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3 International Competition Network (ICN), *ICN Recommended Practices for Merger Notification and Review Procedures*, ICN, 2018, p 3, accessed 30 July 2024.

4 Note however that minority or partial interests can still be of interest to competition agencies. Economic literature suggests that common ownership may be associated with competition issues, such as higher prices: OECD, *Common ownership by institutional investors and its impact on competition*, OECD, 2017, p 16, accessed 31 July 2024.

5 *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* [2004] OJ L 24/1, art 3(2) ('*European Union Merger Regulation*'); *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* [2008] OJ C 95/1, paras 54 and 62.

6 *Enterprise Act 2002* (UK) s 26; *Competition Act 1998* (South Africa) s 12(2).

7 For example, see *Corporations Act 2001* (Cth) ss 50AA, 259E, 608 and 910B.

8 *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 54.

9 For example, see *Income Tax Assessment Act 1936* (Cth) s 328-125.

10 *Broadcasting Services Act 1992* (Cth) s 6 and Schedule 1.

11 For details on the proposed concept of 'control' in the new merger system, see section 51ABC in the exposure draft of Treasury Laws Amendment Bill 2024: Acquisitions, and Chapter 2 of the exposure draft explanatory materials: Treasury, *Reforming mergers and acquisitions – exposure draft,* Treasury, Australian Government, 2024.

12 For example, see *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 4 (definition of 'substantial interest') and 54(4)(b); *Corporations Act 2001* (Cth) ss 606(1)(c) and 606(2)b).

(e.g. from sole to joint control, and vice versa) are also typically caught,[13] recognising the different incentives and types of control.

Treasury envisages that a balanced approach to 'control' or similar concepts aimed at targeting mergers of interest could be tailored to provide for exclusions of certain types of transactions, including those involving minority share acquisitions of listed companies, which are not likely to raise competition concerns.

For an 'acquisition' (as defined in the law) that exceeds the notification thresholds, notifying the ACCC will be compulsory, with penalties for failure to notify.[14] Penalties incentivise merger parties to comply with their obligations and will deter parties from proceeding without notifying. Penalties may also incentivise businesses to voluntarily notify, depending on the consequences of failing to notify. In particular, an unnotified acquisition that is required to be notified to the ACCC will be void in law. For this reason, there will be a process for businesses who are uncertain about whether they need to notify.

In the new system, clear and upfront information requirements calibrated to the merger's likely competition concerns will enable the ACCC to efficiently and effectively differentiate benign mergers from those of concern. Mergers may proceed within 30 working days unless the merger raises competition concerns. There will also be an expedited, 'fast-track' determination available if no concerns are identified by the ACCC after 15 business days.[15] The process will be quick and simple for the vast majority of mergers that are notified.[16] This also ensures the ACCC's resources can be focused on analysing mergers that are more likely to harm competition and consumers.

Acquisitions below the notification thresholds may voluntarily notify and opt into the system, allowing businesses to obtain regulatory certainty. Businesses could also be able to seek a 'notification waiver' from the ACCC, including if there is uncertainty as to whether the notification thresholds are met.

Notification thresholds will assist in identifying acquisitions that are more likely to impact competition. However, the notification thresholds should not be treated as a definitive yardstick because there may be acquisitions that fall below the thresholds that could substantially lessen competition.[17]

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13 In the European Union, changes in the quality of control (i.e. between sole and joint control, and changes in the identity of those who have joint control) may be notifiable: *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* [2008] OJ C 95/1, para 83.

14 For details on the proposed new civil penalties, see sections 45AW and 45AZA and amendments to section 76 in the exposure draft of Treasury Laws Amendment Bill 2024: Acquisitions, and Chapter 7 of the exposure draft explanatory materials: Treasury, *Reforming mergers and acquisitions – exposure draft*, Treasury, Australian Government, 2024.

15 Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, Treasury, Australian Government, 2024, p 6.

16 The ACCC estimates that 80% to 90% of notified mergers will be cleared within 4 weeks. Data compiled by the Organisation for Economic Cooperation and Development (OECD) on 60 jurisdictions that shows that 93.6% of mergers were cleared in Phase 1 (i.e. an initial review) in 2020: OECD, *Competition Trends 2022*, OECD, 2022, p 79, accessed 31 July 2024.

17 Under the Government's proposed reforms, the ACCC will be able to take enforcement action in relation to anti-competitive acquisitions that fall below the thresholds under other provisions of the *Competition and Consumer Act 2010* (Cth), which prohibit anti-competitive conduct.

A risk-based approach to designing notification thresholds

The new mandatory merger control system in Australia will be risk based. It will be focused on those acquisitions that are most likely to harm competition and/or consumers. These acquisitions will be made notifiable through a combination of monetary and market concentration thresholds, as well as additional targeted notification requirements set by a Treasury Minister.

While the proposed thresholds are based on the best data available, the OECD notes that 'no jurisdiction can predict with full certainty whether the threshold level is set at an optimal level from the first time'.[18] A statutory review, designed and supported by the Australian Centre for Evaluation, will take place three years from commencement of the new system to evaluate the functioning of the system – including the notification thresholds. This will be supported by annual ACCC reporting on merger activity, ex-post merger analysis and data analytics.

The thresholds should be underpinned by clear objectives

The proposed thresholds outlined in this consultation paper have been broadly designed to achieve the following objectives, consistent with a risk-based and targeted approach.[19]

Capturing anti-competitive and economically significant acquisitions, including serial acquisitions

While the size of a merger is not a perfect indicator of its potential effects on competition, acquisitions of businesses or assets by medium to very large businesses are more economically significant in size and therefore could cause greater potential harm to more consumers. Larger businesses may also have greater financial power. While this is not necessarily the same as market power, it may be indicative of their capacity to set anti-competitive prices or act in an otherwise anti-competitive way that may not be financially sustainable for smaller businesses.

These types of acquisitions have the potential to cause harm to consumers and other businesses, adversely impacting the cost of living. For example, a large acquirer may have greater reach or greater potential to affect the prices of goods or services, quality and/or range. These risks are greater in markets that already have weakened levels of competition, such as in oligopolistic markets. For example, Ashenfelter (2014) conducted a survey of case studies on the effect of horizontal mergers in the United States. Of the 49 studies surveyed, there was evidence of merger-induced price increases in 36 of them. In particular, the researchers concluded the evidence demonstrates mergers in oligopolistic markets can result in economically meaningful price increases.[20]

The consolidation of small to medium-sized businesses can raise concerns where it leads to greater market concentration and harm to competition and consumers. In particular, serial acquisitions,

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18 OECD, *Assessment of Merger Control in Chile*, OECD, 2014, p 80.

19 The International Competition Network recommends setting goals for thresholds: ICN, *Setting Notification Thresholds for Merger Review*, ICN, 2008, p 2.

20 O Ashenfelter, A Hosken & M Weinberg, 2014, *'Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers'*, *Journal of Law and Economics*, 57(S3), S67-S100; See also Stiebale and Szücs (2022) who found that merger rivals increase their markups following a merger and this increase is larger in more concentrated markets: J Stiebale & F Szücs, 2022, *'Mergers and market power: evidence from rivals' responses in European markets'*, *RAND Journal of Economics*, 53(4), 678-702.

where businesses make a series of acquisitions of smaller competitors that do not individually raise competition concerns, may have a significant impact on competition when taken together.[21] This can be particularly the case in small, regional or local markets.

The thresholds are not designed to capture acquisitions involving low-value assets or small businesses. Instead, the thresholds focus on acquisitions that are significant in size. However, in limited circumstances, relatively small acquisitions may raise competition concerns because they involve accumulating and entrenching the market power of the acquirer. They may also raise concerns in local and/or regional areas where there may be a limited number of competitors.

Scrutiny of acquisitions by acquirers with substantial market power, including of nascent competitors

There are significant competition risks associated with acquisitions by businesses that already have substantial market power, even where the target is relatively small. The existence of substantial market power is indicative of a lack of competitive constraints. 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'.[22]

Businesses with substantial market power may also make 'killer acquisitions' and prevent future competition by acquiring smaller, nascent competitors and discontinuing the development of their product or innovation before they become a competitive threat.[23] This can occur when a small business is seen by a larger business as a potential competitive threat. The OECD notes this has been of concern in the technological, chemical, and pharmaceutical sectors,[24] with between 5 to 7 per cent of acquisitions in US pharmaceutical industry sample data estimated to be killer acquisitions.[25]

These acquisitions can entrench and strengthen a position of substantial market power and further weaken competition and outcomes for consumers by eliminating a source of competition that might constrain the market power of the firm with substantial market power. It can also increase the market power and markups of the acquirer's rivals following a merger, with larger effects when market concentration is high.[26]

These acquisitions warrant greater scrutiny, particularly as they can risk entrenching poor outcomes for competition and consumers for long periods of time. For example, a study of the US concrete industry showed that an entrant typically took 9 to 10 years to respond to a merger that had resulted in the market becoming a monopoly.[27]

Targeting acquisitions that directly affect Australian consumers

The notification thresholds should only capture acquisitions that affect Australian consumers. They should not capture foreign acquisitions that are unlikely to cause harm in Australia or to Australian consumers. This aligns with the OECD's and the International Competition Network's (ICN)

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21 OECD, *Serial Acquisitions and Industry Roll-ups*, OECD, 2023, p 13, accessed 31 July 2024.

22 OECD, *OECD Economic Surveys: Australia 2023*, OECD, 2023, p 57, accessed 28 October 2023.

23 OECD, *Start-ups, Killer Acquisitions and Merger Control – Background Note*, OECD, 2020, p 5, accessed 31 July 2024.

24 OECD, *Start-ups, Killer Acquisitions and Merger Control – Background Note*, OECD, 2020, p 8.

25 C Cunningham, F Ederer & S Ma, '*Killer Acquisitions*', *Journal of Political Economy*, 2021, vol. 129(3), 649-702, University of Chicago Press.

26 J Stiebale & F Szücs, 2022, '*Mergers and market power: evidence from rivals' responses in European markets*', *RAND Journal of Economics*, 53(4), 678-702.

27 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

recommendations that competition agencies only investigate mergers that pose competition concerns within – and have a significant and direct economic connection to – their jurisdiction.[28]

Projected number of notified acquisitions

The combination of monetary and market concentration thresholds as well as additional targeted notification requirements are designed to act together as a 'net' to capture potentially anti-competitive mergers, consistent with the targeted, risk-based approach outlined above.

Applying these thresholds to historical data, Treasury estimates that between 300 to 500 acquisitions would be notifiable each year. This compares to a total of around 1500 or more mergers that reportedly occur each year in Australia.[29]

These projected number of notifications are subject to a substantial margin of error. This reflects limitations in the available historical data, which is partly the result of the limited visibility of merger activity that Australia's voluntary notification system has provided to date. In particular, the data relied upon in our projected notifications are incomplete, and do not fully cover acquisitions of, for example, patents, land or minority interests. Even though Treasury has relied upon multiple data sources, these limitations cannot be fully overcome.

The substantial margin of error in projected notifications also reflects the uncertainty in future merger activity in Australia, which will depend greatly on underlying market conditions that are difficult to predict even a year in advance. Moreover, there may be additional transactions that parties choose to voluntarily notify even when not required to do so by the thresholds. The volume of such voluntary notifications is too difficult to quantify but could be significant, especially in the early years of the new system if businesses err on the side of notifying.

Further details of Treasury's methodology and data sources are outlined in Attachment A.

28 International Competition Network (ICN), *ICN Recommended Practices for Merger Notification and Review Procedures*, 2018, pp 3-5, accessed 30 July 2024; OECD, *Executive Summary of the Roundtable on Jurisdictional Nexus in Merger Control Regime*, 2016, p 2.

29 Treasury, '*Tracking mergers in Australia using worker flows*', Treasury, Australian Government, 2024. The number of mergers each year is sensitive to the definition of merger that is applied, which differs somewhat across datasets.

Monetary

Monetary thresholds generally relate to the size of the merger based on well understood financial metrics such as turnover, assets and transaction value. Monetary thresholds will be used to capture mergers by medium to very large businesses that are economically significant in size. They can also be structured to capture other mergers of concern such as serial acquisitions and nascent acquisitions.

Monetary thresholds are consistent with international practice

The OECD and ICN recommends the use of clear and objective criteria when setting notification thresholds.[30] Thresholds based on monetary metrics are widely used across jurisdictions with mandatory notification requirements, including in the United States, Canada, Japan, and Europe. A benefit of monetary thresholds is they enable businesses to assess whether they need to notify an acquisition based on information that is generally readily available to them and prepared in the course of their business.

Different monetary metrics are used internationally, including turnover thresholds (which are generally preferred within the OECD), transaction value and the value of assets.[31] A combination of these metrics may also be used in notification thresholds.

Structure of monetary thresholds

To capture acquisitions by large businesses, criteria that focuses on the characteristics of the acquirer, such as the Australian turnover of the acquirer's business and other businesses in their corporate group (if applicable), may be an appropriate basis for setting notification thresholds in Australia.

Businesses within a corporate group will generally be financially and operationally connected. Businesses may also establish holding or shell companies in the course of a transaction for taxation and other purposes. In determining the value of an acquirer's business, the focus should therefore be on the substance, rather than the form. This will enable acquisitions by integrated and/or conglomerate acquirers to be appropriately considered.

The turnover of the target and multiple acquirers can be screened through 'combined turnover' thresholds (i.e. the sum of all of the merger parties' Australian turnover, not just the acquirer) and/or by assessing the Australian turnover of the target business or asset. This will allow for reviews of business combinations or acquisitions of an economically significant size, irrespective of transaction structuring. Additionally, setting turnover requirements for 'at least two of the merger parties' addresses acquisitions where there are more than two merger parties and where it may be difficult to

30 OECD, *Recommendation of the Council on Merger Review*, OECD, 2005, accessed 31 July 2024; ICN, *ICN recommended practices for merger notification and review procedures*, ICN, 2018, pp 5-6, accessed 31 July 2024.

31 OECD, *Competition Trends*, OECD, 2022, p 76, accessed 31 July 2024. For example, turnover-based thresholds are used in the United States, Japan, South Korea and European Union. Transaction value thresholds are used in Germany. Asset-based thresholds are used in Canada and United States.

distinguish the 'target'. This would not include the turnover of the seller of the business or asset, only the turnover associated with the business or asset being acquired.

Setting additional thresholds based on other monetary metrics such as transaction value can capture 'killer' or nascent acquisitions where other monetary metrics (such as turnover) do not sufficiently reflect a target's potential competitive significance in Australia. This is particularly important to enable scrutiny of acquisitions, such as in the digital and technology sectors, where firms may have little turnover but may still act as a competitive constraint to large incumbent businesses. A high transaction value can be indicative of potential market and commercial impact – for example, Facebook acquired Instagram in 2012 for USD 715 million despite Instagram having no turnover.[32]

Transaction value thresholds are typically based on the total size of the transaction globally to avoid arbitrary country-specific apportionment of transaction value on global transactions.[33] Asset acquisitions will be also captured by the proposed monetary thresholds if the transaction value threshold is met or if the turnover threshold is met based on the attribution of turnover generated by the acquired assets where applicable, such as the lease income associated with a property acquisition.

To address concerns regarding serial acquisitions, all acquisitions within the previous three years within the same product or service market/s (irrespective of geographic location) by the acquirer and acquirer corporate group are proposed to be aggregated for the purposes of assessing whether an acquisition meets the monetary turnover threshold only, regardless of whether those acquisitions were themselves individually notifiable.[34] Without having cumulative turnover thresholds, some serial acquisitions of concern may not be picked up by the notification thresholds.

In addition to the thresholds being based on Australian turnover, the target business or asset should have a material connection to Australia. This will include, but not be limited to, being registered or located in Australia, supplying goods or services to Australian customers, or generating revenue in Australia. Requiring a material connection to Australia will ensure the monetary thresholds (including the cumulative turnover thresholds) only capture acquisitions that impact Australian consumers, without capturing foreign acquisitions with negligible operations in Australia or impact on Australian commerce that may otherwise be captured by the global transaction value threshold.

The regulations will further clarify how turnover and transaction value are calculated for the purposes of whether the monetary thresholds are met. Based on other jurisdictions, relevant turnover could be calculated based on, for example, the most recent financial year/s sales revenue for the relevant party. Similarly, transaction value could be calculated by considering the sum of all assets and monetary benefits received by the seller from the merger. Further detail on this calculation, including changes due to foreign exchange and share prices, will be set in regulations (following consultation).

32 D Tam, '*Facebook's final Instagram tab: $715 million in cash, stock*', *CNET*, 24 October 2012; UK Office of Fair Trading (OFT), *Anticipated acquisition by Facebook Inc of Instagram Inc*, OFT, 2012.

33 For example, in Germany, no distinction is made between the domestic and overseas components of the transaction value: Bundeskartellamt, *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (section 35 (1a) GWB and Section 9 (4) KartG)*, 2022, p 11.

34 Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, Treasury, Australian Government, 2024, p 6.

Analysis of economic data to determine monetary thresholds

Treasury has used a range of data sources[35] as well as comparisons with thresholds in other jurisdictions to inform the design and values of the monetary thresholds to achieve the objectives.

International comparisons

The OECD has noted that 'Although there is no unique rule or general principle for the determination of the numerical threshold levels, there is some consensus on the need to consider various factors such as Gross Domestic Product (GDP), size of companies operating within the territory, and average number of transactions that can be effectively reviewed'.[36]

The OECD has previously conducted international benchmarking by comparing thresholds as a percent of GDP or GDP per capita for jurisdictions of similar sized economies, characteristics of merger control systems and population size.[37] The ICN also recommends comparing thresholds with similar jurisdictions to determine what may be a reasonable range for thresholds.[38]

Jurisdictions that have similar GDP and/or GDP per capita to Australia include Canada (GDP and GDP per capita), South Korea (GDP), Spain (GDP), Denmark (GDP per capita), the Netherlands (GDP per capita) and Germany (GDP per capita).[39] Each of these jurisdictions have mandatory and suspensory notification and, except for Canada, are administrative merger control systems.

As shown in Table 1 and Table 2, setting turnover and transaction value thresholds at the same proportion of GDP as other jurisdictions produces a wide indicative range of possible turnover and transaction value thresholds, informing the values that could be adopted in Australia.

35 The data sources used includes ACCC historical public merger review data, Treasury's Merger Database, Bloomberg, commercial property transaction data and Refinitiv. However, there is substantial uncertainty with these estimates given the limitations of each dataset and the incomplete picture of acquisitions they each provide (discussed further in Attachment A).

36 OECD, *Assessment of merger control in the Philippines*, OECD, 2023, p 35, accessed 31 July 2024. See also OECD, *Assessment of merger control in Chile*, 2014, pp 78-80, accessed 31 July 2024.

37 Ibid.

38 ICN, *Setting Notification Thresholds for Merger Review*, ICN, 2008, p 3.

39 International Monetary Fund (IMF), *GDP, current prices*, IMF, 2024, accessed 2 August 2024.

Table 1. Merger party (acquirer or target) turnover thresholds in notable jurisdictions, their percentage of GDP in 2023 and corresponding turnover threshold in Australia if set at the same percentage of GDP

Jurisdiction	GDP 2023 (AUD in billions)	Party turnover threshold (AUD in millions) (2023)*	% of GDP multiplied by 100	Party turnover threshold (AUD in millions) if set in Australia at same proportion of GDP (2023)	Number of notified mergers (if available) or decisions (2023)
Germany	6,709	81.4	0.1213	31.8 (one party)	805#
		28.5	0.0425	11.1 (other party)	
		813.8^	1.2130	318.0 (combined worldwide)	
Japan	6,341	214.3	0.3380	88.6 (acquirer)	306 (FY2022)
		53.6	0.0845	22.2 (target)	
France	4,563	81.4	0.1783	46.8 (at least two parties)	266#
		244.1^	0.5350	140.3 (combined worldwide)	
Italy	3,395	52.1	0.1534	40.2 (at least two parties)	77#
		865.9^	2.5506	668.7 (combined)	
Canada	3,221	103.7	0.3221	84.4 (target)	208
		446.2^	1.3853	363.2 (combined)	
South Korea	2,578	345.8	1.3414	351.7 (one party worldwide)	927
		34.6	0.1341	35.2 (other party worldwide)	
Spain	2,380	97.7	0.4104	107.6 (at least two parties)	70#
		390.6^	1.6414	430.3 (combined)	
Ireland	821	16.3	0.1981	51.9 (at least two parties)	68#
		97.7^	1.1888	311.7 (combined)	
Norway	731	14.3	0.1951	51.1 (at least two parties)	113#
		142.6^	1.9508	511.4 (combined)	
Denmark	610	21.8	0.3582	93.9 (at least two parties)	66#
		196.6^	3.2242	845.3 (combined)	
Netherlands	1,681	48.8	0.2904	76.1 (at least two parties)	113#
		244.1^	1.4520	380.7 (combined worldwide)	
European Union	27,615	406.9	0.1473	38.6 (at least two parties)	356
		8138.0^	2.9470	772.6 (combined worldwide)	

* Approaches to turnover thresholds vary. For example, turnover thresholds may require at least two parties to meet the same specified party turnover threshold, turnover may be combined, there may be different thresholds for each of the parties, and it may be based on global and/or domestic turnover. ^ Denotes combined turnover thresholds. # The number of notifications for individual European Union (EU) or European Economic Area (EEA) member states are lower than would otherwise be the case as mergers that meet the EU thresholds are notified to the European Commission rather than Member State(s).

Source for GDP: International Monetary Fund. Exchange rate based on ATO average rate for USD to AUD for year ended 31 December 2023 where available — otherwise based on Bloomberg data. Australia's GDP in 2023 was AUD 2,622 billion.

Table 2. Transaction value thresholds in notable jurisdictions, their percentage of GDP in 2023 and corresponding threshold in Australia if set at the same percentage of GDP

Jurisdiction	GDP 2023 (AUD in billions)	Transaction value threshold (AUD in millions) (2023)	% of GDP multiplied by 100	Transaction value threshold (AUD in millions) if set in Australia at same proportion of GDP (2023)	Number of notified mergers (if available) or decisions (2023)
South Korea	2,578	691.6	2.6829	703.4	927
Germany	6,709	651.0	0.9704	254.4	805[#]
Austria	782	325.5	4.1615	1,091.0	294[#]

[#] The number of notifications for individual countries in the EU and EEA are lower than otherwise would be the case as mergers that meet the EU thresholds are notified to the European Commission rather than Member State(s).

Source for GDP: International Monetary Fund. Exchange rate based on ATO average rate for USD to AUD for year ended 31 December 2023 where available — otherwise based on Bloomberg data. Australia's GDP in 2023 was AUD 2,622 billion.

Treasury's approach to designing the monetary thresholds

Treasury is proposing a two-limbed monetary threshold (indexed over time) where at least one of the limbs must be met for an acquisition to be notifiable through the monetary threshold, assuming a material connection to Australia.

- The first limb will be met if: the combined Australian turnover of the merger parties (including the acquirer group's turnover, excluding the seller) is at least $200 million; AND either the Australian turnover is at least $40 million for each of at least two of the merger parties OR the global transaction value is at least $200 million.
- The second limb will be met if: the acquirer group's Australian turnover is at least $500 million; AND either the Australian turnover is at least $10 million for each of at least two of the merger parties OR the global transaction value is at least $50 million.

In setting the values for these thresholds, Treasury considered the intended objectives of the thresholds and used a range of data sources to inform its assessment. While there is no existing complete database of merger activity in Australia and each data source has its own limitations, collectively the data assists to better understand how many acquisitions of concern in the ACCC's historical public merger review data would be captured, and how many acquisitions would be notifiable.

Treasury considers mergers caught by the first limb of the turnover monetary threshold are mergers that are economically significant in size. The smallest acquisitions captured by this limb would be the acquisitions of upper-medium businesses ($40 million turnover) by very big medium businesses ($160 million turnover).[40] Treasury's analysis suggests setting thresholds above these values risks the monetary threshold capturing too few of the acquisitions of concern based on the ACCC's historical public merger review data. Setting thresholds lower than these values might capture more acquisitions of concern, but would undermine a risk-based approach and most likely capture too many acquisitions that are less economically significant.

40 The ATO defines medium businesses as those with group turnover of $10 million to $250 million and reported that about 80% of these medium businesses have turnover of less than $50 million. Setting a threshold of $40 million likely reflects less than half of all medium businesses. Australian Taxation Office (ATO), *Medium business income tax gap 2019-20: Latest estimates and trends*, ATO, 2023.

To further target acquisitions of concern by very large acquirers without excessively reducing the thresholds under the first limb, Treasury proposes a second limb that imposes a significantly higher threshold for the size of the turnover of the acquirer group ($500 million) but with a lower threshold for the turnover of at least two of the parties ($10 million) and a lower transaction value threshold ($50 million). Targeting only very large businesses aligns with the objectives and will assist to limit the number of acquisitions captured through the second limb by focusing on the largest 1000 or so businesses with at least $500 million in turnover.[41]

The $10 million threshold also reflects the objective to minimise capturing acquisitions of small businesses,[42] while ensuring appropriate attention will be given to acquisitions of businesses in Australia with turnover of $10 million or higher, which are estimated to account for less than 2% of all businesses in Australia.[43] The second limb would capture additional acquisitions of concern that would otherwise fall outside the notification thresholds.

Treasury calculates the proposed monetary thresholds alone would have captured around 75 per cent of the acquisitions of concern based on the ACCC's historical public merger review data. Treasury considers the proposed monetary thresholds reflect a risk-based, targeted approach that achieves the objectives to the extent possible. As noted, the aim is not to stop these acquisitions, rather to enable the ACCC to appropriately assess them. Relevant thresholds will be indexed over time to ensure they continue to be risk based and targeted and do not capture a greater proportion of low-risk mergers.

Monetary thresholds for consultation

The proposed monetary thresholds drawn from Treasury's analysis have been set to enable scrutiny of anti-competitive and economically significant acquisitions, at a national, state, territory, regional or local level, including serial acquisitions, as well as acquisitions by businesses with substantial market power, including acquisitions of nascent competitors.

41 The extra acquisitions captured by the second limb are specifically those by large parties with $500 million turnover of targets with $10–$40 million turnover or $50-$200 million transaction value, as any acquisition of a target with turnover above $40 million or transaction value above $200 million would already be captured by the first limb. In 2021-22, there were 867 companies (Australian public and foreign-owned corporate tax entities and Australian-owned resident private companies) with at least $500 million in turnover. Treasury recognises that this excludes the impact of joint ventures between companies with turnover of less than $500 million but which in aggregate will have turnover of more than $500 million. Australian Taxation Office (ATO), *2021-22 Report of Entity Tax Information*, ATO, 2023.

42 The ATO defines small businesses as those having $10 million turnover or less. Australian Taxation Office (ATO), *Small business entities*, ATO, 2023.

43 As of June 2023, there were about 48,000 out of 2.6 million (1.84%) actively trading businesses in the Australian market sector that had turnover of at least $10 million. Australian Bureau of Statistics (ABS), *Counts of Australian Businesses, including Entries and Exits* [data set], ABS, 2023.

Box 1. Proposed monetary thresholds

Notification will be required if either of the following limbs are met, AND the jurisdictional nexus is met:

Limb 1

a. Combined Australian turnover of merger parties (including acquirer group) is at least **$200 million** AND
b. Either the Australian turnover is at least **$40 million** for each of at least two of the merger parties OR the global transaction value is at least **$200 million**

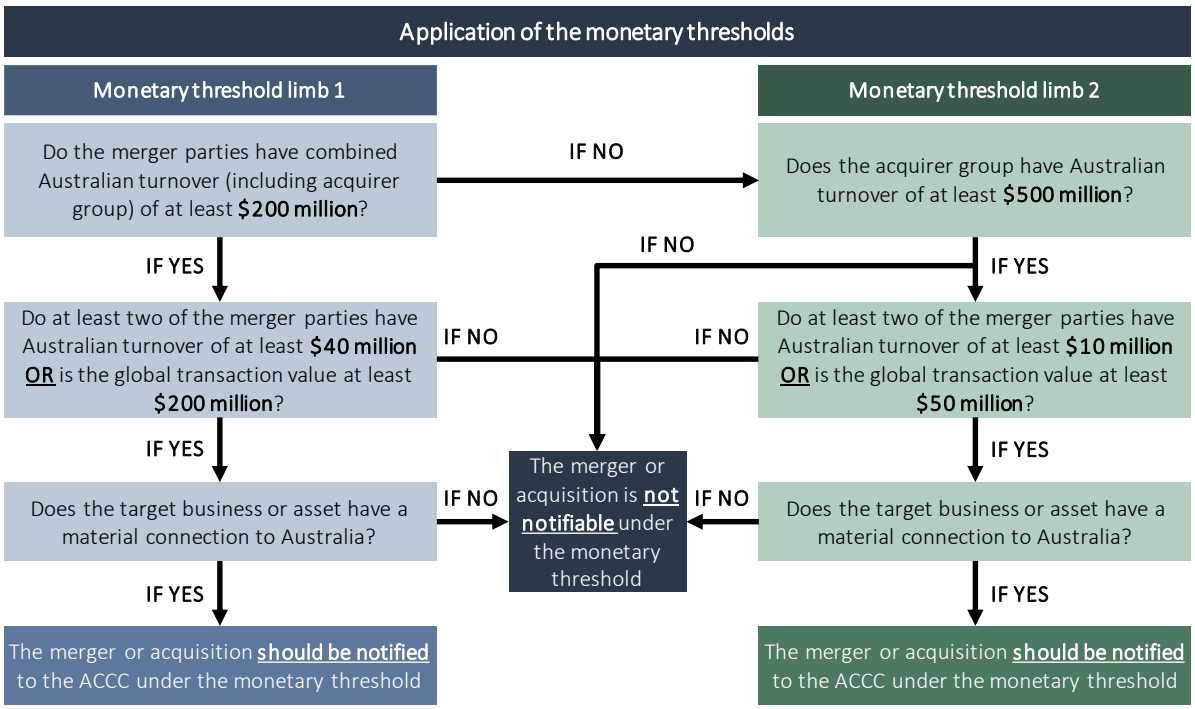
OR

Limb 2

a. Acquirer group Australian turnover is at least **$500 million** AND
b. Either the Australian turnover is at least **$10 million** for each of at least two of the merger parties OR the global transaction value is at least **$50 million**

Jurisdictional nexus: The target business or asset has a material connection to Australia, for example, being registered or located in Australia, supplying goods or services to Australian customers, or generating revenue in Australia.

Cumulative turnover thresholds: All acquisitions within the previous three years within the same product or service market/s (irrespective of geographic location) by the acquirer and acquirer corporate group are proposed to be aggregated for the purposes of assessing whether an acquisition meets the monetary turnover threshold only, regardless of whether those acquisitions were themselves individually notifiable.



Questions

1. What indicators should be used for the monetary thresholds? Are turnover and transaction value metrics appropriate for the Australian economy?
2. What structure and numerical values should be set for the monetary thresholds to ensure the merger system strikes an appropriate risk-based approach between compliance costs and competition concerns?
3. Are the proposed monetary thresholds set at a level that enables acquisitions by large businesses and/or businesses with substantial market power to be scrutinised?
4. Are the proposed cumulative turnover thresholds appropriate to address competition risks associated with serial acquisitions?
5. What other sources of data are available to inform the value of the monetary and market concentration thresholds, including the expected number of mandatory notifications?

Market concentration

Market concentration metrics are a good indicator of the market structure and potential competitive impact of the merger. In the new merger system, market concentration thresholds will be used to capture acquisitions not captured by the monetary thresholds (discussed above) by acquirers with substantial market power and other acquisitions that give rise to a notable degree of consolidation in the relevant market or industry.

Market concentration thresholds can be better predictors of competition risks than monetary thresholds as they can be more reflective of the combined market power of a merged business post-acquisition. They can also capture different combinations of mergers that may have different implications for competition, such as mergers between two businesses with modest market shares or a dominant business acquiring a business with little market share.

This is especially true for acquisitions in small, regional and local markets – the localised and concentrated nature of these markets mean smaller mergers can still cause significant harm to consumers but might otherwise be too small to be captured by economy-wide monetary thresholds.

Analysis of ABS BLADE data on share of sales suggests that market concentration has increased in Australia with firm mark-ups increasing across the economy, which potentially correlates with an increase in market power and decline in competition.[44] Other analysis of private market research data compiled by IBISWorld indicates that 'almost half of the 481 IBISWorld industries are concentrated markets'.[45]

Market concentration thresholds will ensure that acquisitions not captured by the monetary thresholds that could appreciably impact competition will be captured. Accordingly, compliance costs will be minimised as market concentration thresholds only apply if the monetary thresholds (and additional targeted notification requirements) are not met.

The rise in market concentration in Australia can have broader economic effects beyond creating greater risks to competition and consumers. It can undermine the incentives to innovate, and there is evidence higher market concentration is negatively correlated to productivity (except in export-intensive industries) and therefore real wages.[46]

Possible measures of market concentration

There are different types of market concentration thresholds. Treasury is considering two options – market share and share of supply.

44 Jonathan Hambur (2021) *Product market power and its implications for the Australian economy*, Treasury, pp 5-6, accessed 31 July 2024.

45 Andrew Leigh, Adam Triggs (2016) *Markets, Monopolies and Moguls: The Relationship between Inequality and Competition*, *Australian Economic Review*, Vol 49, Issue 4, 389, pp 391-392.

46 Productivity Commission, *5-year Productivity Inquiry: A competitive, dynamic and sustainable future. Inquiry report – volume 3*, 2023, pp 2-3; S Bakhtiari, *Trends in Market Concentration of Australian Industries*, Australian Government Department of Industry, Innovation and Science, pp 24-25.

Market share

Market concentration thresholds can be based on market share, which will be determined by the combined merger parties' proportion of the total market size by sales value and/or volume. The market share threshold should capture both anti-competitive horizontal mergers impacting affected markets and anti-competitive non-horizontal mergers impacting adjacent markets.

Acquisitions where the combined merger parties would have a large market share in the affected or adjacent market (adjacent by product, geographic or functional level), or in a substantial part of the market, would be notifiable given the potential competitive impact of the merger.

Depending on their design, market share thresholds can capture increases in market share resulting from horizontal mergers (where there is overlap in the products or services provided by the merger parties), vertical acquisitions in the same supply chain and/or acquisitions by businesses with an existing market share that meets the notification thresholds by framing the notification test by reference to the 'acquisition, creation or reinforcement' of a market share or similar wording.[47]

Market share thresholds are familiar to businesses in Australia given they have been a feature of the ACCC's merger review approach for many years. The ACCC's current merger guidelines use market shares as the 'notification threshold'.[48] They encourage parties to notify their merger to the ACCC if the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share of greater than 20 per cent in the relevant markets. The guidelines notes that:

> *"The calculation of market shares depends critically on market definition. If there is uncertainty as to the relevant market,* ***it is preferable that market shares be calculated on the basis of the market definition most likely to raise competition concerns****. This will usually mean adopting a conservative rather than broad definition of the market, unless doing so would reduce or eliminate the overlap between the merger parties."*[49]

Treasury recognises that using market share thresholds may create some uncertainty in a mandatory merger control system. The OECD and the ICN generally recommend that market share thresholds should not be used as the only indicator in a mandatory system because they are not clear and objective notification criteria.[50] Calculating market share depends on how the product and geographic dimensions of the affected market is defined. Different market definitions can give different market shares, which could create uncertainty over whether a merger should be notified. For this reason, consistent with the current ACCC approach, a market share threshold would require merger parties to calculate market share based on the market definition most likely to raise competition concerns.

Some jurisdictions including Spain, Portugal and Israel have successfully applied mandatory market share thresholds for many years. Evaluation by international competition agencies have found these market share thresholds have been particularly effective at capturing higher-risk mergers, including nascent acquisitions, that may have evaded notification.[51] Market share thresholds can also be tailored

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47 See for example, Portuguese Competition Act (Law No. 19/2012, of 8th May) article 37.

48 ACCC Merger Guidelines 2008, updated 2017.

49 ACCC Merger Guidelines 2008, updated 2017 – see paragraph 2.9.

50 International Competition Network (ICN), *ICN recommended practices for merger notification and review procedures*, 2018, pp 3-5; OECD, *Executive Summary of the Roundtable on Jurisdictional Nexus in Merger Control Regime*, 2016, p 2.

51 OECD, *Start-ups, killer acquisitions and merger control – Note by Spain*, 2020, pp 2-3; OECD, *Start-ups, killer acquisitions and merger control – Note by Portugal*, 2020, pp 4-5; OECD, *Competition Law and Policy in Israel 2011*, 2011, pp 35-38.

to balance the need to scrutinise potentially anti-competitive mergers, minimise administrative burdens and take into account economy-specific features such as smaller markets.[52]

Share of supply

As an alternative to market shares, thresholds could be based on the share of supply of goods or services by the businesses involved in the acquisition, calculated based on the activities of the acquirer and target in the areas where they are active. A benefit of this method is that it does not require businesses or the competition agency to define the relevant market/s as the assessment is based on the specific product or service supplied and it is not necessary to consider the substitutability or complementarity of goods or services.

In the United Kingdom, the Competition and Markets Authority (CMA) has jurisdiction over mergers where the merged entity will create or enhance a share of 25 per cent or more of the supply of goods or services in the UK or in a substantial part of the UK.[53] Share of supply in the UK context is capable of being defined by criterion including value, cost, price, quantity, capacity, or workers employed. The CMA has a relatively broad discretion in applying this jurisdictional threshold in its merger system where notification is voluntary.

Broad parameters may be less appropriate in a mandatory notification system. This concept could be applied in an Australian context, but in a more limited way with reference to quantity and/or value of supply of a good or service, or the capacity to supply a good or service.

Market concentration administrative approach

Product, service and geographic dimensions are relevant to considering the competition risks associated with an acquisition.

However, as discussed above, there may be compliance costs and uncertainty associated with applying market concentration thresholds. An alternative, administrative approach may be to identify certain goods or services in certain local or regional areas[54] where prior registration is required. It would balance compliance costs with the objective of preventing anti-competitive mergers in concentrated or smaller markets.

A simple administrative form could be used to register such acquisitions with the ACCC. There would be no requirement to notify unless the ACCC requests notification within a short period of time, such as within 5 or 10 business days of registration. This would minimise the compliance costs of merger parties, while allowing the ACCC to scrutinise potential mergers of concern in small product markets, or local or regional areas.

What level should the market concentration thresholds be?

Regardless of which measure is chosen, Treasury proposes a two-tiered market concentration threshold similar to the approach in Spain and Portugal. The first threshold would be set at 25 per cent

52 OECD (2020) *Start-ups, killer acquisitions and merger control – Note by Portugal*, OECD, p 2.

53 Competition and Markets Authority (2022) *Mergers: Guidance on the CMA's jurisdiction and procedure*, CMA, p 33; *Enterprise Act 2002* (UK) s 23.

54 For example, the location of the merger could be classified according to the Modified Monash Model, which uses rural, remote or very remote geographic classifications. Australian Government Department of Health and Aged Care (DHAC), *Modified Monash Model*, DHAC, Australian Government, 2023.

with total Australian turnover of at least two of the parties to the acquisition (including the acquirer group) needing to be at least $20 million to be notifiable. This market concentration figure aligns with the European Commission's guidelines that market shares exceeding 25 per cent may impede effective competition.[55] The second threshold would be set at 50 per cent, reflecting mergers involving a business with substantial market power, with a lower turnover requirement of $10 million.

This approach will ensure that key acquisitions involving merger parties with substantial market power are captured by the market concentration thresholds, without capturing very small acquisitions. It also recognises that acquisitions involving merger parties with substantial market power warrants a closer examination even if the size of the acquisition is small, given competition will already be weakened by the presence of the business with substantial market power and the risk of harm to consumers.

Box 2. Proposed market concentration thresholds

Notification will be required if either of the following limbs are met:

Limb 1

a. Combined share of the merger parties is at least **25 per cent** AND
b. Australian turnover (including acquirer group) is at least **$20 million** for each of at least two of the merger parties

OR

Limb 2

a. Combined share of the merger parties is at least **50 per cent** AND
b. Australian turnover (including acquirer group) is at least **$10 million** for each of at least two of the merger parties

Market share

Notification will be required if either of the following circumstances are met:

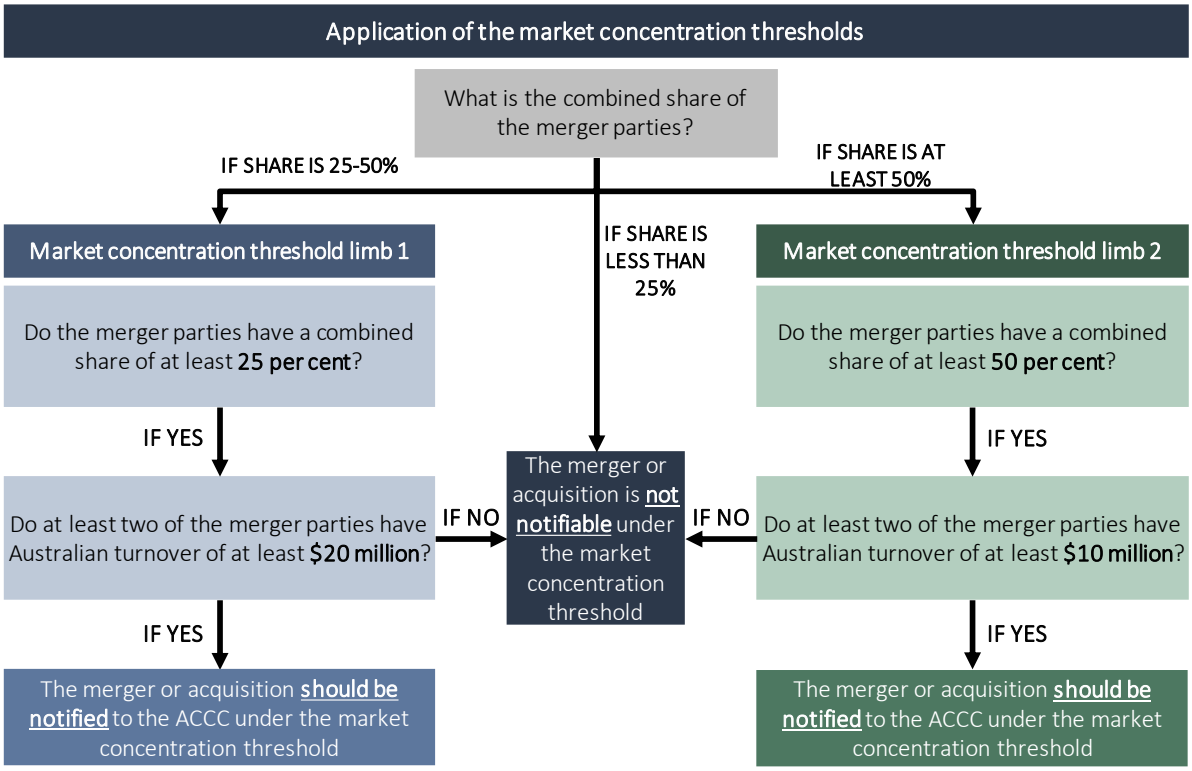
- Market share of the combined merger parties is at least 25 per cent in the affected or adjacent market/s and the Australian turnover for each of at least two of the parties is at least $20 million; OR
- Market share of the combined merger parties is at least 50 per cent in the affected or adjacent market/s and the Australian turnover for each of at least two of the parties is at least $10 million.

Share of supply

Notification will be required if either of the following circumstances are met:

- If parties to an acquisition together supply 25 per cent or more of a good or service within Australia, within a state or territory or within a regional area (to be defined in the regulations) and the Australian turnover for each of at least two of the parties is at least $20 million; OR
- If parties to an acquisition together supply 50 per cent or more of a good or service within Australia, within a state or territory or within a regional area (to be defined in the regulations) and the Australian turnover for each of at least two of the parties is at least $10 million.

55 European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2004, p 3.



Questions

6. Is market share or share of supply the appropriate metric to use for the market concentration threshold? Are there alternative indicators that Treasury should consider?
7. Is the proposed two-tiered approach appropriate to target different levels of market concentration?
8. What should be the numerical values for the market concentration threshold that appropriately captures mergers that have the potential to raise competition concerns and balances compliance costs?
9. Is the administrative approach for market concentration an alternative to the market concentration thresholds? If so, what design should the administrative form take?

Additional targeted notification requirements

There may be enduring competition risks that arise in certain markets over time that may not be captured by the monetary or market concentration thresholds. In these circumstances, targeted notification requirements set by a Treasury Minister in response to evidence-based concerns may be appropriate to ensure certain potentially anti-competitive mergers are examined by the ACCC.

Scrutiny may be warranted in certain areas

Internationally, there has been a rise in the use of industry or business specific thresholds or requirements to target specific competition risks or certain types of behaviour (such as serial acquisitions). For example, in the United Kingdom, 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.[56]

In Norway, the Norwegian Competition Authority requires specific market operators in the groceries and fuel retail sectors to disclose all transactions regardless of whether the notification thresholds are otherwise met.[57] In 2021, Germany introduced a '*Remondis clause*' where stricter thresholds are imposed on specific companies in sectors or markets at risk of concentration.[58]

In Australia:

- The ACCC has identified groceries, fuel, liquor and oncology-radiology as sectors where potential competition issues may arise.[59]
- The Select Committee on Supermarket Prices has identified the use of land banking and creeping acquisitions as a way of reducing competition and solidifying market power in grocery retailing.[60]
- The e61 institute has identified that fuel stations in metropolitan areas with less competition tended to charge higher wholesale margins. The same report also observed that as wholesale fuel prices rose in 2022, margins fell at a slower pace for stations in more concentrated markets, suggesting a lack of competitors may reduce the incentive to absorb a cost increase.[61]

Ministerial thresholds will be based on evidence

Prior to any Ministerial determination of an additional notification requirement being made, evidence-based analysis and advice will need to be presented to a Treasury Minister, and stakeholder consultation undertaken. The Exposure Draft (*Treasury Laws Amendment Bill 2024: Acquisitions*) sets out the proposed process that must be followed for a Treasury Minister to set additional targeted notification requirements.

A Treasury Minister will be required to consider any reports and advice from the ACCC and to seek appropriate consultation as reasonably practicable (section 17 of the *Legislation Act 2003*) on the

56 *Groceries Market Investigation (Controlled Land) Order 2010 (UK)*, art 11.
57 Norwegian Competition Authority, *Disclosure requirements for specific markets*, 2024.
58 *Competition Act 2023*, s 32f.
59 Australian Competition and Consumer Commission (ACCC), *Treasury – Competition Taskforce Merger Reform – Consultation Paper ACCC Submission*, ACCC, 2024, p 8.
60 Select Committee on Supermarket Prices, *Supermarket Prices: Final report*, 2024, p 133.
61 e61 Institute, *The State of Competition in Australia*, 2023, p 9.

threshold being proposed in the legislative instrument. The instrument will be disallowable in Parliament and the accompanying explanatory statement will be required to describe the consultation process undertaken.

It is intended there will be clear procedural requirements for the ACCC and the Treasury Minister to follow, which could include clear timelines, criteria the Minister must consider and steps to facilitate transparency and consultation.[62] To ensure the process is transparent, the ACCC report/s or advice provided to a Treasury Minister that is used to inform the setting of the threshold could be published.

The targeted Ministerial notification obligations threshold set by a Treasury Minister will sunset (i.e. end) after a maximum of five years. This will mean the relevant Minister must seek new advice during the five-year period from the ACCC on the effectiveness of the threshold to target specific competition risks or certain behaviour before setting a new notification threshold.

62 For example, the Minister is required to consider criteria in the context of the News Media Bargaining Code: *Competition and Consumer Act 2010* (Cth) s 56AD, s 56AE.

ACCC's role as an administrative steward of the new system

The ACCC, as administrative decision-maker, will be responsible and accountable for administering the merger control system. The Government has set expectations for the ACCC in delivering the Government's merger reforms through:

- a risk-based approach with resources prioritised to managing or stopping mergers most likely to harm the community
- making use of data and economic analysis to enhance merger review and to identify risks to the community
- increased transparency and guidance to the community on merger activity and areas of ACCC concern to enhance community understanding and administrative predictability.[63]

An administrative system will shift the emphasis to the ACCC to perform the role of an administrative steward, providing public guidance and meaningful engagement for merger parties. This will provide more certainty for businesses and enhance community understanding and awareness of mergers.

Application of the thresholds will be supported by guidance

The ACCC will publish guidance on the processes and application of the new system, which will enable businesses to transition into the new system with greater certainty and predictability.

To mitigate uncertainty that may arise, for example, in accurately calculating market shares or determining whether an acquisition is notifiable, businesses will also be able to engage with the ACCC prior to formal notification.

Notification waiver

To provide certainty to businesses and their advisors, the Government is considering establishing a notification waiver process that would allow parties to an acquisition to seek a 'notification waiver' from the ACCC, including if there is uncertainty as to whether the notification thresholds are met.

The ACCC would have the discretion to grant a notification waiver that would relieve parties of the obligation to notify an acquisition. The ACCC would consider whether the matter warrants (or does not warrant) notification based on potential competition concerns and taking into account whether the notification thresholds would be likely to be met. Parties seeking a notification waiver would be required to provide the ACCC with sufficient information to enable it to form a view about whether criteria to grant a notification waiver are met.

Granting a notification waiver would be binding on the ACCC (unless granted based on false or misleading information), in that the ACCC would not be able to subsequently bring proceedings for failure to notify or for failure to adhere to the suspensory obligation. The notification waiver would also have the legal effect of excluding the relevant acquisition from the penalties associated with these obligations (including voiding). This would provide merger parties with certainty.

63 Australian Competition & Consumer Commission (ACCC), *Statement of Expectations and Statement of Intent*, ACCC, 2024.

However, a notification waiver would not provide merger parties with the benefits of notification, including the protections conferred by the anti-overlap provisions. For this reason, if it were to subsequently emerge that the acquisition may have been for an anti-competitive purpose or had an anti-competitive effect, it could be the subject of investigation and action by the ACCC under Part IV of the CCA.

The ACCC would have 30 business days to provide a notification waiver following receipt of a complete application. Apart from a limited exception for unconditional on-market bid proposals, applications for a notification waiver would be required to be listed on the ACCC's public register and any notification waiver decision would be published with an explanation of the reasons for the waiver, consistent with the approach for notified mergers. A cost-recovery fee will also be payable.

Review by the Australian Competition Tribunal would be available if the ACCC refused or failed to grant a notification waiver within 30 business days. Non-merger parties with a sufficient interest in the acquisition would also be able to seek review. The availability of judicial review of decisions to refuse or fail to grant a waiver would be limited, recognising the availability of review by the Tribunal.

The availability of the notification waiver process would not preclude businesses voluntarily notifying acquisitions, including to receive a 'fast-track' Phase 1 determination within 15 business days of notification.

Questions

10. What guidance would be helpful from the ACCC? Are there particular sources of data or methodologies that would assist the ACCC in its role as administrative steward of the new merger system and in providing more certainty to businesses when engaging with the system?
11. How can the Government improve the certainty of the application of market concentration thresholds? Will the proposed approach address potential concerns regarding uncertainty?
12. Will the availability of an ACCC notification waiver, if there is uncertainty as to whether the notification thresholds are met, appropriately address the need for business certainty about compliance with notification obligations? Should the availability of the notification waiver be broader than proposed?
13. Does the level of transparency of the ACCC notification waiver process appropriately meet the interests of all relevant stakeholders?
14. Will the process adequately provide third parties with an interest in an acquisition with rights to review a waiver decision?

Attachment A – Methodology and data to estimate the number of acquisitions captured

Methodology

The proposed monetary thresholds were set to strike a balance between capturing as many acquisitions of concern as possible while keeping compliance costs low for business. ACCC data on past acquisitions of concern was used to assess the share of these acquisitions of concern that would be captured by the proposed thresholds, while a combination of past ACCC data and commercial databases were used to estimate the number of projected notifications. Thresholds were also chosen to maximise the share of acquisitions of concerns that are captured by monetary thresholds rather than market concentration thresholds.

The ACCC data is based on its public merger reviews in recent years, which includes 166 acquisitions that went through public review by the ACCC between 2018 and 2024, 83 of which were acquisitions of concern. Acquisitions of concern are those that were opposed by the ACCC, had a red or amber light statement of issues, were not opposed subject to a s87B undertaking, were withdrawn, or were subject to formal merger authorisation.

For the majority of transactions, the ACCC public merger review data contains acquirer and target turnover and transaction value, with some transactions having data on the merger parties' market share data. These metrics are all used as part of Treasury's proposed monetary and market concentration thresholds, allowing Treasury to apply the proposed thresholds to each transaction to determine whether the transaction would have had to be notified.

Estimating the projected annual number of notifications (300 to 500 per year) in the paper relies upon ACCC data on past acquisitions along with external data, including the Bloomberg database and proprietary property sale data provided to Treasury. As explained below, none of these data sources have complete coverage of all the required variables (deal value, turnover for target and acquirer) and each have different selection effects.

Treasury's approach is therefore to principally rely on ACCC past acquisition data, which has relatively detailed coverage of financial data for a substantial share of acquisitions. Then, to account for the fact the ACCC's data is only a subset of overall merger activity in the market each year, these counts are scaled up by a factor to align with overall merger activity in Australia using the external databases. This scaling factor is assumed to range from 1.5 and 3, reflecting the merger counts by transaction value in the Bloomberg and Refinitiv databases compared with the ACCC counts. The relatively wide range in this factor reflects both the uncertainty in overall merger activity in Australia, and other sources of uncertainty such as some, but not all, acquirers in Bloomberg and Refinitiv being flagged as 'international' but may still have a substantial presence in Australia.

The projected notifications of 300 to 500 per year do not include the additional transactions that parties may choose to voluntarily notify even when not formally captured by any of the thresholds. The volume of such voluntary notifications is too difficult to quantify, but may be significant especially in the early years of the new system as businesses err on the side of notifying as a precaution.

The turnover and transaction value data were adjusted to 2023-24 dollars using CPI data from the ABS to compare the real turnover and transaction value of each acquisition against the proposed thresholds. Values were adjusted based on the financial year of the commencement date of the acquisition – for example, the values for an acquisition any time in the 2020-21 financial year were

adjusted up to account for the three years of inflation that occurred between the 2020-21 and 2023-24 financial years.

This is likely to still understate the real value of the acquisition given the values are adjusted to 2023-24 dollars, but the thresholds will apply at the start of 2026. Additionally, the deflator is based on the commencement date of the review, but the turnover values are likely to be based on the financial year prior to the commencement date.

Data sources

ACCC historical public merger reviews include pre-assessments and public reviews undertaken by the ACCC. This data only captures mergers that were voluntarily notified to the ACCC, and is therefore not a complete dataset of Australian mergers and acquisitions. Counts for historical reviews were based on 2023 (pre-assessments) and 2018-2024 (public reviews).

The Bloomberg database includes a wide range of transactions, including property purchases, partial acquisitions, acquisitions by international buyers and joint ventures. The upper range for Bloomberg including domestic and international acquirers of Australian targets and may include international businesses with no local presence. The lower range for Bloomberg only includes Australian targets and Australian acquirers. Approximately 40 per cent of transaction value data is undisclosed or not publicly available.

Refinitiv, like Bloomberg, is a commercial database of merger and acquisition activity. It also includes acquisitions by domestic and international acquirers, partial acquisitions, and covers a wide range of industries and deal types. Refinitiv counts are based on both domestic and international acquirers of Australian targets. Around 50 per cent of transaction values in Refinitiv are undisclosed or not publicly available.

For both Bloomberg and Refinitiv, Treasury analysis assumes the distribution of missing transaction values is the same as transactions with known values.

The Treasury Merger Database[64] employs a new approach to identifying mergers by using Business Longitudinal Analysis Data Environment (BLADE) administrative micro-data based on the flow of workers between ABNs, and ABNs switching between tax consolidated groups. Any acquisitions that do not result in a worker flow or an ABN switch between tax groups are therefore not captured in the current version of the Treasury Merger Database, which may miss property acquisitions, including land banking and long-term lease acquisitions. We expect the true number of mergers and acquisitions to be higher than the current Treasury Merger Database estimates. The Merger Database does not include transaction values, and counts by transaction value have been estimated based on the target turnover, assets, and whether the target has foreign financial connections based on taxation information. Counts are averaged over the period 2014 to 2018.

64 Treasury, '*Tracking mergers in Australia using worker flows*', Treasury, Australian Government, 2024.