BCA
Business Council of Australia

Submission to Treasury consultation on Merger Notification Thresholds

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1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to the Competition Review Taskforce's consultation on merger notification thresholds.

The government's proposed merger reforms create a legal obligation for businesses to notify, or otherwise seek a notification waiver, for prospective acquisitions captured by notification thresholds. We understand that the proposed thresholds seek to balance the need to scrutinise mergers with potential anti-competitive effects, while not creating excessive compliance costs, but the BCA remains concerned the new merger control regime creates uncertainty for businesses and disincentives for investment in the Australian economy, particularly as Australia embarks on a substantial energy transition.

It is important that the new merger control regime does not deter potential mergers and acquisitions that may ultimately benefit consumers by passing on the benefits of more efficient ownership and capital structures, as well as potential economies of scale and scope. The BCA is particularly concerned that this deterrent effect may occur even before a transaction is notified and scrutinised by the Australian Competition and Consumer Commission (ACCC).

This highlights the importance of a well-designed notification regime that captures transactions most likely to be of concern from a competition perspective, but without overly burdening the majority of acquisitions that contribute to the more efficient ownership and control of equity capital.

The BCA has a number of major concerns about the proposed notification thresholds, including:

1. The proposed thresholds will over-capture transactions. This is compounded by the use of three separate, rather than combined, types of threshold (turnover, transaction value and market share), which is without precedent in other major jurisdictions. The low transaction value threshold for large acquirers and the proposed approach to serial acquisitions also places Australia substantially out of step with other jurisdictions.
2. The increased reporting activity resulting from unreasonably low thresholds creates an unnecessary burden on business and the ACCC. The proposed notification waiver option provides little effective relief from full notification. The amount of information business would likely need to supply to convince the ACCC to grant a waiver is potentially as onerous as full notification. It is likely that many of the transactions that might make use of the waiver will instead be fully notified.
3. The market concentration notification thresholds lack clarity, will increase compliance costs, and reduce legal certainty. In view of the proposal to significantly increase penalties for failure to notify under the draft Bill, it is paramount to ensure legal certainty on defining the thresholds for when a filing obligation is triggered. Otherwise, companies can be fined because of disputes over market definition or failure to access certain market share data. Most companies do not have easy access to market share data and will definitely not have access to comprehensive market share data for all possible permutations of market definition, and the discretionary power to set thresholds could lead to unpredictability and political influence. Additionally, emphasising market structure over competitive effects is flawed, as concentration levels do not reliably indicate anticompetitive harm. Turnover-based thresholds provide a clearer, more predictable basis for determining the need for merger notifications and aligns more closely to other major economic jurisdictions.
4. High compliance costs and the risk of penalties from uncertain mandatory filing requirements risks deterring investment in Australia, particularly for global deals where acquirers may be incentivised to carve out Australian operations and assets. These carve-outs already occur due to uncertainties and delays associated with Foreign Investment Review Board approval. This risks isolating the Australian economy by reducing investment and innovation, as well as lessening competition in sectors requiring global capital integration and expertise.

Key design elements of the proposed monetary and market concentration thresholds have been left to subsequent delegated legislation, the detail of which remains unknown at this stage. Given the economy-wide impact of the proposed changes, the BCA urges the government to engage in a detailed consultation process on these regulations based on best practice principles of regulatory consultation.

2. Key recommendations

1. Remove the serial acquisition component of notification thresholds. The combination of the low proposed monetary notification thresholds and the serial acquisitions provisions will result in almost all acquisitions of any sizeable company requiring notification. This undermines the effectiveness of the thresholds by effectively mandating all acquisitions of larger companies to require approval of the regulator. Such an approach is also markedly out of alignment with other jurisdictions. The competitive effects of serial acquisitions already form a part of the ACCC's substantive post-notification assessment of mergers.
2. Require merger notification thresholds to be formally reviewed after 12 months of operation, recognising the difficulty in determining the full effect of these thresholds on prospective merger activity and the operation of the new merger control regime.
3. Remove the proposed market concentration thresholds as such an approach creates significant compliance risk, is not best practice and is out of step with the majority of international jurisdictions.
4. Increase the turnover threshold for target businesses under the second monetary threshold from $10 million in annual turnover to at least $30 million and higher if an economy-wide serial acquisition notification approach is retained.
5. Clarify the nexus to Australia requirements to ensure that regulations only capture transactions that materially affect Australian consumers and businesses and exempt de minimis transactions, such as offshore joint ventures that have no meaningful impact on the Australian market.
6. Adopt a definition of control consistent with existing Australian legal and accounting definitions. In particular, the BCA supports the adoption of a definition of control that is consistent and aligns with the *Corporations Act 2001* (Cth).
7. Treasury should reconsider the removal of the exemption for land acquisitions as part of transactions in the ordinary course of business. The currently proposed approach is too blunt and Treasury would be better to target any unwinding of the existing exemption to those where there is a clear, competition law-based rationale.
8. Undertake consultation on the proposed drafting of the notification thresholds recognising that there are many details that remain to be determined which will impact the operation of them.
9. Ensure that clear criteria and procedural safeguards are set for the creation and amendment of any targeted thresholds determined by the responsible minister. Any targeted threshold must be based on detailed and robust evidence demonstrating the insufficiency of any economy-wide notification thresholds and require wide-ranging and public consultation for parties affected by the targeted thresholds.
10. Treasury should reconsider the design of the merger notification waiver mechanism as the waiver will only be of benefit if the information required by the regulator is significantly less onerous than formal notification, and can be assessed in substantially less time.
11. In addition to recommendations concerning the merger notifications, the BCA wishes to make the following recommendations to support the overall effectiveness, transparency and accountability of the new merger regime:

a. Formal key performance indicators (KPIs) in consultation with industry on the timeliness of merger assessments including average time for pre-notification consultation, Phase 1, 2 and 3 assessments, and the average time to assess notification waivers, to be reported publicly on a quarterly basis.

b. Data on the number of s155 notices issued to merger parties should be published following the introduction of the regime, including the stage in the merger regime at which each notice is issued. The BCA notes that with mandatory notification requirements and forms (the details of which are to be provided in delegated legislation) the ACCC should be receiving much of the information it requires to assess the competition issues pertaining to a merger upfront allowing for less reliance on s155 notices.

c. Data should be published on the occurrence and duration of "stop the clock" and "restart the clock".

d. Establish a targeted consultative committee with the business and legal community to support the transition to, and implementation of, the new regime. Such a committee would be in addition to the ACCC's Regulator Performance Consultative Committee (RPCC) noting that the RPCC's remit is far wider than merger implementation and is therefore not a suitable means of assisting with the transition.

3. Key issues

3.1 Market concentration thresholds

The consultation paper proposes a four-limb notification threshold regime based on both market concentration and monetary thresholds, including turnover or transaction values. Notification is mandated if any of the four limbs under either the market concentration or monetary threshold headings is triggered. The use of three separate types of threshold is without precedent in other major jurisdictions. The low transaction value threshold for large acquirers and the proposed approach to serial acquisitions also places Australia substantially out of step with other jurisdictions.

The proposed market concentration thresholds assume that businesses have information about overall market shares and concentration levels, but this is typically based on best business estimates rather than market data. For some products and services businesses may not have information regarding total market size by sales value or volume that is of most concern from a competition policy perspective. The consultation paper concedes that "using market share thresholds may create uncertainty in a mandatory merger control system" given different market definitions.[1] This information will be costly for business to acquire and submit. Moreover, parties face substantial penalties if their assessment differs from the ACCC's as the BCA made clear in its response to consultation on the merger legislation exposure draft.

The consultation paper references the OECD and International Competition Network (ICN) recommendation 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. The ICN also notes (not referenced in the consultation paper) that whereas:

> "Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process… such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification."[2]

Existing and prospective market concentration is also a poor guide to likely competitive effects. Market concentration may be the outcome of pro-competitive technical innovation or economies of scale or scope that are highly beneficial to consumers. Improving a firm's products and thereby increasing sales will naturally lead to an increase in market share that is nonetheless pro-competitive from a consumer standpoint.

[1] Treasury, Merger Notification Thresholds, 30 August, 2024. p. 21

[2] International Competition Network, Recommended Practices for Merger Notification and Review Procedures, 2002-2018, p. 6. https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/

If market concentration is the basis for notification, it will be critical to better define and explain the proposed application of the concepts of "affected" and "adjacent markets" to mitigate against over-reporting and a growing compliance burden on business. More information is needed on how the ACCC will assess market share claims and determine whether the threshold is satisfied, especially if questions are raised in the notification waiver/pre-notification stage.

There is no way for parties to know what market definition the ACCC will use when they assess a merger. Competition regulators in different countries often form different views on market definition for the same deal and merger parties will not have the same information from third parties that the ACCC will have making its assessment. Market definition is a frequently and fundamentally contested point even outside of a merger control setting, making it inappropriate as a basis for parties to assess the notifiability of a transaction.

Market share-based notification thresholds generally do not feature in other jurisdictions with mandatory and suspensory merger regimes. Where market share is used, it is predominantly not used as a threshold for notification to which penalties attach. This includes the United States, European Union, Canada, Brazil, Turkey, Mexico, China, Russia, India, Japan, and South Korea, which all have mandatory and suspensory merger regimes and rely solely on an objectively-assessable notification threshold.

Thresholds that are more subjective in nature, such as market share-based notifications, penalise merger parties for reaching a different view from the regulator on what constitutes a market. In the handful of jurisdictions operating a mandatory regime based on market share thresholds, such as Spain and Portugal, the authorities' guidance makes clear that parties won't be penalised from taking a different view on market share (unless that is done in bad faith). Parties to a global transaction may not have sufficient local market share data in the early stages of a transaction to reliably run assessments, and it is even less likely for small business targets to hold comprehensive market share data to facilitate such assessments.

As an alternative to market shares, the consultation paper canvasses thresholds based on the share of supply of goods and services by the businesses involved in the acquisition, based on the activities of the acquiring and target firms in the areas in which they are active. This approach might impose a lower compliance burden on business, although share of supply is also subject to considerable uncertainty and is not a familiar concept in Australia. For these reasons the BCA considers share of supply unsuitable as a notification metric.

3.2 Monetary thresholds

The BCA supports the use of monetary thresholds for setting merger notification requirements but remains concerned about the low monetary thresholds proposed and the high regulatory burden attached to key design elements, including nexus to Australia and control.

Nexus to Australia

As proposed, the use of global transaction values as part of limbs one and two of the monetary thresholds notification triggers will over-capture deals with little or no nexus to Australia given these are alternative rather than complementary triggers to the Australian turnover thresholds. The material connection to Australia test aims to avoid capturing foreign acquisitions with negligible operations in Australia or impact on Australian commerce that may otherwise be captured by the global transaction value threshold. But this test lacks clarity and will create considerable uncertainty, providing little or no effective relief from notification in practice. Businesses that notionally offer services in Australia, but have few if any Australian customers would potentially be captured. The main jurisdictions that use global transaction values have some guidance as to what constitutes a material connection or will limit the transaction value threshold to that proportion of the value that is attributable to the local jurisdiction, similar to the approach taken by FIRB in Australia. Further guidance around how that material connection is defined is also needed to ensure certainty over what a "connection" is (beyond assets, revenue, or registered IP). For instance, it should only encompass direct users or the proportion of users in a given market of the target business, not indirect users (e.g., customers of customers in a B2B transaction, for instance).

Monetary thresholds should be set separately for the buyer and seller to avoid a situation where a large acquirer will have to notify every single future acquisition. International practice in relation to merger notification frequently distinguishes between target and acquirer with thresholds based on turnover.

Turnover and transaction values

BCA members are widely of the view that the $10 million turnover threshold under limb 2 is too low, with a higher threshold of $30 million viewed as the minimum necessary to avoid over-capture of insignificant transactions from a competition policy perspective.

The global transaction values proposed under both monetary thresholds are exceptionally low and present a real risk of capturing a large amount of no-issues transactions. The $50 million threshold under the second monetary threshold is low relative to other jurisdictions. These thresholds fall below the average of global and Australian deal values and are significantly lower than deals similar to those that the ACCC has previously publicly expressed an interest in reviewing or has sought to review. The ACCC would be capable of pursuing below-threshold transactions pursuant to the proposed regime under s.45 or s.46 of the CCA.

The proposed monetary threshold limbs for notification require greater clarity around the rules for the calculation of turnover for the purposes of notification. As proposed, the four notification limbs will result in the notification of many more transactions than are likely raise competition concerns. The proposed thresholds are defined by reference to "at least two of the merger parties," which could lead to an expansive interpretation capturing offshore joint ventures. A technical filing is required where the parents have Australian turnover above the thresholds but the target has none. Technical filings create burdens on business to submit based on transactions with no bearing on the Australian market.

BCA members are concerned about the potential chilling effect of a low turnover threshold on property transactions. In the consultation to date, there has not been a clear argument as to why the ordinary course of business exemption for land transactions should be removed except that philosophically there is a desire to assess these transactions. The over-capture of the property transactions (including the acquisition or lease of greenfield sites or other premises in the ordinary course of business) will have a corrosive effect on investment by impacting the proper functioning of property markets. Parties best placed to provide economies of scale and capital for investment and to deliver essential services, housing and infrastructure that communities demand will likely be placed at a competitive disadvantage in fast paced land auction processes. Businesses may choose not to participate entirely due to the regulatory burden, meaning sites remain undeveloped or underdeveloped. Such an approach runs counter to efforts across the federation to speed up planning and development processes to better service local communities and provide affordable housing. The BCA recommends that Treasury undertake further work to better target the transactions of concern rather than rolling all freehold and leasehold land acquisitions into the merger regime. Given that overseas regimes do not typically capture property transactions of this sort, there are no precedents to inform how this might work.

3.3 Serial acquisitions

The proposed serial acquisition provisions are significantly out of step with other mandatory and suspensory notification regimes in comparable jurisdictions – none of which have an economy-wide serial acquisitions included in their notification thresholds. Even Germany has only a targeted version of this proposal, based on industry-specific declarations by the German competition regulator which requires the notification of all acquisitions if certain conditions are met (the "Remondis" amendment to the German Competition Act, referencing a specific case).

The serial acquisition provisions are unnecessary given that the ACCC will already assess the combined turnover of the merged entity in a way that accounts for prior acquisitions. The ACCC is also able to have regard for historical acquisition activity as part of its substantive merger assessment.

The serial acquisition provisions will, in effect, greatly lower the notification threshold for those firms engaged in multiple acquisitions over time. For a private equity firm or a large infrastructure investor, the effect of these provisions will be to effectively deny any de minimis threshold.

Further, serial acquisitions will often cover a range of product, service or geographic markets that are unrelated from a competition perspective and reflect normal patterns of business growth and consolidation in maturing industries. Growth through acquisition may be indistinguishable from organic growth in terms of long-run market concentration, but will attract more scrutiny under the proposed merger control regime. These serial acquisitions may trigger the notification threshold even though they lead to only very modest additions to market share. Serial acquisitions are often aimed at unlocking growth potential by alleviating capital constraints or improving operational performance in ways that ultimately benefit consumers. Serial acquisitions facilitate the combination of complementary assets and capabilities that promote increased innovation and competition, again to the benefit of consumers.

The German model of industry-specific serial acquisition notification suggests an alternative approach to the one canvassed in the consultation paper. This approach would address serial acquisitions as part of the minister's power to make determinations in relation to industry-specific notification requirements, subject to the safeguards recommended below. This would reduce the reporting burden on business making serial acquisitions that are not likely to raise competition policy concerns, while also giving the minister powers to address those concerns in specific instances based on the advice from the ACCC. As set out in the BCA's previous submission to the Treasury Taskforce on the proposed merger legislation, the provision of clear criteria and procedural safeguards for making ministerial determinations will be essential to ensure any additional thresholds are targeted, evidence-based and subject to detailed, transparent consultation.

BCA members would like to see worked examples to better understand the serial acquisitions notification requirements. The provision of worked examples is a good discipline on the formulation of the associated delegated legislation in surfacing potential unintended consequences.

3.4 Definition of control

The BCA remains concerned that the definition of control is overly complex, too prescriptive and fails to properly account for the nuances of control found in certain transactions, including minority acquisitions and changes in the level or type of control for joint ventures (e.g., negative and positive control). In addition, members note that the breadth of "control" as proposed by Treasury, and which includes for example an acquiring firm having "indirect influence" over the policy of a target company, is likely to lead to significant uncertainty and over-notification. The need to then seek clearance to establish whether the notion of control is rebuttable in any given transaction is inefficient and is likely to have a chilling and deterrent effect on transactions and investments which might otherwise improve efficiency, innovation and productivity.

The BCA recommends that the legislation adopt the definition of control set out in section 50AA of the Corporations Act, which is well understood in the business community.

It is common for companies to make passive minority investments and structuring investments without veto rights, with the aim not to acquire control and trigger merger filing requirements. Having a presumption of control once an investment reaches a given threshold may deter companies from making minority investments in Australia which would have been non-controlling where the acquirer does not obtain any strategic veto rights. Noting that this is a rebuttable presumption, businesses would nevertheless require certainty and would appreciate a confirmation from ACCC that the presumption is rebutted before making the investment. It would be important for the ACCC to issue clarification that the absence of strategic veto rights would be sufficient to rebut such a presumption.

3.5 Notification waiver

In principle, the notification waiver provisions are a welcome addition to the proposed notification regime, but BCA members are concerned that the provisions will not provide effective relief from full notification in practice. These provisions need to be efficient and workable with clear requirements as to process, cost, and timing. As set out in the consultation paper, a number of matters remain unclear including the interplay between the waiver process, and pre-notification consultation. The likely result of this uncertainty is that merger parties will proceed to full notification from the outset rather than risk navigating these uncertainties.

The notification waiver process is only likely to be useful if faster than the review itself. Currently, the 30-day waiver process is the same as for Phase 1 review. These timelines are likely to limit use of the waiver option.

The notification waiver is unlikely to be helpful in the absence of larger target turnover exemptions, particularly in the case of multijurisdictional transactions.

The waiver process does not provide protection from anti-overlap provisions. Given a transaction with low substantial lessening of competition risk and some uncertainty about thresholds, control, or nexus, it may be more efficient to seek full review. To that extent, it is unclear when acquiring parties would be incentivised to use the waiver process and greater clarity is needed about the substantive notification requirements for the notification waiver process. BCA members remain concerned about the lack of detail in relation to pre-notification consultation requirements and availability. It is understood that more guidance will be provided in preparation for the transition, but in the meantime, stakeholders are being asked to provide substantive feedback on a proposed regime when much of the detail is not yet known.

3.6 Penalties, safeguards and additional guidance

3.6.1 Penalties for failure to notify

Penalties for failure to notify should be based on a flat fine of around $100,000 for wilful failure to notify only, plus a requirement to notify (if a deal is not closed) or with the ACCC empowered to apply to court to unwind a transaction (if deal has closed already). This would be more in keeping with other mandatory and suspensory jurisdictions penalties for non-notification.

Basing penalties on those for cartel conduct is not appropriate because the nature of the harm in failing to notify is different in having no material effect on competition. Higher penalties should be reserved for egregious breaches that have a material adverse effect on competition. Failure to notify on technical grounds should be subject to lower penalties.

Other major jurisdictions that impose a significant fine for failure to notify are tied to clear thresholds based on turnover or asset value rather than market shares, which are inherently uncertain due to the difficulties with market definition.

3.6.2 Ministerial determination of targeted thresholds

The BCA is concerned about the adequacy of the safeguard and review mechanisms around ministerial determinations of additional notification requirements. The consultation paper notes that the minister will be required to consider advice and reports from the ACCC and to consult on these determinations. The determinations will be disallowable instruments and will sunset after five years. But these provisions are not a significant constraint on the wide ministerial discretion to impose additional industry-specific thresholds, the potential proliferation of which could be expected to add further significant complexity and cost to the merger control system.

The safeguards around ministerial determinations of additional notification requirements should be strengthened to include:

- Clear criteria and materiality for when additional thresholds can be considered over and above the economy wide thresholds.
- Given the significant lead time required for many investment decisions and to finalise proposed acquisitions, parties should be given a sufficient period of notice in advance of targeted thresholds coming into effect. Targeted thresholds should be capable of "carving out" specified classes of transactions from the economy-wide thresholds where appropriate, in addition to calling in additional transactions, as appropriate.
- Mandatory requirements for the Minister to consider ACCC advice or reports; for the ACCC to consult on any advice or report provided to the Minister; and for third party stakeholder consultation.

3.6.3 Additional measures to support the performance of the new merger regime

To support the accomplishment of the government's stated objectives for a new merger control regime that is a faster, simpler and fairer merger control system, the BCA recommends that the government consider implementing additional administrative measures to support the performance of the new merger system.

In particular, the ACCC should be provided with public KPIs for average determination or waiver periods in addition to the legislated maximum determination periods and that detailed data is captured and collated on an aggregate basis for the use of section 155 notices, and "stop the clock" and "restart the clock" occurrences and where relevant, duration.

There should also be a formal consultative committee with broad business and industry representation to advise on the transition to the new merger regime and its implementation. The regulator performance consultative committee is not seen as appropriate forum for these complex and detailed matters as it has a far broader remit and membership.

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