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Government Announces Australia to Have a Mandatory and Suspensory Merger Control Regime

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IN BRIEF

In a move that has long been advocated for by the Australian Competition and Consumer Commission (ACCC), the Australian government has announced sweeping reforms to Australia's competition law merger control regime.

The proposed reforms just announced by Treasurer Dr Jim Chalmers will introduce (amongst other things):

- A requirement that merger parties notify the ACCC of proposed acquisitions/mergers, if they cross a nominated threshold (which is yet to be determined but will involve a transaction value and share of supply or market share);
- A prohibition on such mergers being completed without receiving approval from the ACCC;
- Statutory timelines for the ACCC's review of the merger, with the timeline provided for a substantive review being up to 120 business days (about five and a half months), although applications that the ACCC considers are not likely to raise competition concerns are to be cleared within 30 business days (about six weeks);
- A requirement that parties provide standardised and upfront information and documents as part of the application;
- A fee to recover costs from the merger review process, which is expected to be between AU$50,000-AU$100,000 for the majority of mergers;
- An increased level of transparency by way of a public register which will contain details of all mergers notified to the ACCC and the regulator's reasons for all decisions; and
- Scope for administrative review of all ACCC decisions by the Australian Competition Tribunal (ACT), thus providing a more streamlined and efficient merits review process.

The changes will also seek to address concerns regarding "serial" or "creeping" acquisitions, by providing that the cumulative effect of all the parties' acquisitions in the previous three years will be taken into account for the purposes of assessing whether a merger meets the notification thresholds – and substantively whether the merger is likely to substantially lessen competition (SLC).

The announcement has been accompanied by an information paper titled "Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy".

The ACCC has stated that it "welcomes" the reforms, with ACCC Chair Gina Cass-Gottlieb stating that they will "benefit Australian consumers and businesses of all sizes, as well as the wider economy".

Following further consultation this year regarding the thresholds for mandatory clearance, the government will introduce legislation to give effect to these changes, with an effective starting date for the new regime to be 1 January 2026.

We elaborate on a number of aspects of this landmark reform below.

MANDATORY CLEARANCE FOR MERGERS OVER CERTAIN NOTIFICATION THRESHOLDS

Australia's current merger clearance regime is voluntary, meaning that it does not place any express obligation on merger parties to notify the ACCC of proposed acquisitions.

The reforms will replace the voluntary system with a single mandatory and suspensory regime, under which mergers that reach certain the government argues will "ensure the ACCC is better placed to protect consumers and competition in our economy".

The ACCC will thus become the first decision-maker, marking a shift from judicial enforcement to administrative decision-making that the government argues will “ensure the ACCC is better placed to protect consumers and competition in our economy”.

The mergers that will be required to be notified to the ACCC are those that reach certain "notification thresholds", which are yet to be determined.

Treasury indicated that the thresholds will be "both monetary and share of supply or market share-based". Cass-Gottlieb stated that the thresholds will be set to ensure that the ACCC has the opportunity to review "the mergers that matter". Interestingly, in a 2023 submission to Treasury, the ACCC indicated that a transaction value of AU$35 million may be an appropriate threshold.

Parties may also elect to notify the ACCC of mergers that do not reach the notification thresholds – if they do so the new regime will apply. The ACCC has also previously submitted that it should have a "call-in" power for mergers below the thresholds that the ACCC considers may raise competition concerns – but this has been rejected by the government.

CHANGES TO THE SUBSTANTIAL LESSENING OF COMPETITION TEST

The substantive test for mergers to be prohibited under the *Competition and Consumer Act 2010* (CCA) will remain whether the ACCC reasonably believes that the merger would have, or would be likely to have, the effect of SLC in a market in Australia (the SLC test). However, under the new administrative test, it is the ACCC that is the first instance decision maker, as opposed to the present position in which the ACCC must apply to the court seeking such an order.

However, the upcoming legislation will modify the test. Notably, the reforms will expressly introduce a new component to SLC test, namely that if a merger "creates, strengthens or entrenches a position of substantial market power in any market", it will SLC.

Further, the operation of the test, including the "guidance" for the ACCC, will be altered in that the current set of "merger factors" in section 50(3) of the CCA will now include, and the ACCC will need to consider:

- The necessity of developing and maintaining competition, taking into account the structure of relevant markets, conditions for competition, and actual/potential competition from businesses operating in Australia; and
- The market position of the relevant businesses and their power in economic and financial markets, including factors such as substitutes, barriers to entry and technological developments.

Additionally, as stated above, to respond to concerns regarding "serial" or "creeping" acquisitions (including acquisitions of nascent but smaller competitors) the legislation will provide that the cumulative effect of all of the parties' acquisitions in the previous three years will be taken into account for the purposes of assessing whether a merger meets the notification thresholds – and substantively whether the merger is likely to SLC.

OPTIONS IF THE ACCC CONSIDER THE MERGER WILL SLC: PUBLIC BENEFITS AND MERITS REVIEW

The single mandatory and suspensory regime that will be in place involves, at first instance, the ACCC only being able to undertake a "purist" SLC analysis (i.e. not taking account of efficiencies or other benefits that may, on balance, outweigh the SLC concerns).

If, at the end of the substantive SLC assessment (titled a Phase II review), the ACCC determines that the merger is likely to result in an SLC, the parties may seek to obtain approval on the basis that the merger would, or would be likely to, result in "a substantial benefit to the public which outweighs the anti-competitive detriment of the merger".

The Treasury has contended that this two-stage assessment provides more "exit points" for parties – but the sequential nature of this process is likely to unnecessarily lengthen the process in those instances where the parties seek to submit on the "public benefits" resulting from the merger. As is set out below, there is a further 50 business day process envisaged for this additional consideration.

Finally, merger parties (or in limited instances third parties) will have the ability to apply to the ACT for a merits review of the ACCC's determination.

ACT reviews are likely to be more streamlined and timelier than the current position, in which the Federal Court can more holistically consider the market effect of a merger (on application by the ACCC or the parties). Contrastingly, the ACT's review will be a more limited merits review, in that it is restricted to considering the "papers" before the ACCC, without scope for the parties to introduce new evidence (unless there are material changes in circumstances) or cross examine witnesses etc.

APPROVAL PROCESS AND TIMELINES

The new merger regime will set timelines for the ACCC's review process, which are expected to be finalised at some point this year. However, Treasury has released indicative stages for the process, as summarised in the table below:

Initial Review (Phase I)	For straightforward transactions where the ACCC decides there are no competition concerns, approval may be granted within 30 working days (about six weeks). Options for "fast-track" determinations will be available if the ACCC identifies no concerns within 15 working days (about three weeks).
In-depth Review (Phase II)	Following the initial review, if a transaction presents "reasonable" competition concerns, the ACCC will undertake a lengthier review process of an additional 90 working days (about four months).
Public Benefits Review (if sought by the parties)	When the ACCC reaches a determination after its in-depth review, parties may then seek another determination on public benefit grounds (as mentioned above). Treasury has provided an indicative timeline of 50 working days for this stage (about 10 weeks).
ACT Review (if sought by the parties)	Parties may seek review from the ACT after the ACCC releases a determination (either from its initial in-depth review or public benefit review). The ACT's review will be based only on the material already provided to the ACCC, and will take up to 90 calendar days (however, this period may be extended where necessary).

NEXT STEPS

Even though the reforms are not proposed to come into effect until 1 January 2026, given their potential significance, we recommend that businesses involved in the mergers and acquisitions space closely monitor any further developments regarding the reforms, and ensure that they familiarise themselves with the amendments prior to their commencement.

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