

Australia: Paving the way for a single mandatory suspensory merger control system

In brief

- On 10 April 2024, the Treasurer Dr Jim Chalmers MP announced a major change to Australia's merger control regime with the introduction of a new single mandatory, suspensory merger control system.
- The Australian Competition and Consumer Commission (**ACCC**) will be the key decision maker and given stronger powers to examine transactions, including serial acquisitions and mergers by businesses with substantial market power.
- The notification thresholds remain a critical unknown piece and will be subject to further consultation.
- The new merger control system is to come into effect from **1 January 2026**.

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Key takeaways

- The existing merger control regime with multiple merger clearance pathways will be simplified and replaced with a single mandatory and suspensory administrative system with the ACCC as the first instance decision-maker.
- The ACCC will have the ability to block a deal if it reasonably believes the merger would have the effect or likely effect of substantially lessening competition.
- Parties will no longer be able to seek a declaration from the Federal Court. Parties will be able to seek limited merits review of ACCC decisions from the Australian Competition Tribunal (**Tribunal**) and judicial review of Tribunal decisions from the Federal Court.
- These changes will have a significant impact on the merger control process in Australia and are likely to result in more transactions needing to be notified to the ACCC and increased cost for business.
- The setting of the notification thresholds is a critical unknown piece and are subject to consultation. In March 2023, the ACCC proposed that an acquirer or target threshold of AUD 400 million or a global transaction value threshold of AUD 35 million could be appropriate.
- While the Government has said that the new process will be faster and simpler, the proposed timelines are broadly similar to the ACCC's current indicative timelines. There are also some uncertainties with the timelines, including when the ACCC can 'stop the clock' on a review.
- The Treasury publication, the "Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy" (**Merger Reform Paper**),¹ provides further details of the proposed design of the new system.

¹ See: [Merger Reform Paper \(treasury.gov.au\)](https://www.treasury.gov.au/merger-reform).

In depth: the key changes

Merger control process

- **Mandatory notification thresholds:** It is proposed that the notification thresholds be both monetary and share of supply or market share-based. Monetary thresholds are to be the subject of further consultation and will be set with reference to such metrics as turnover, profitability or transaction value. It is also proposed that a Treasury Minister will be empowered to introduce additional notification obligations in response to evidence-based concerns for 'high-risk mergers'.
- **Serial acquisitions and notification thresholds:** In the case of serial or creeping acquisitions and rollup strategies, all mergers within the previous three years by each of the merger parties will be aggregated to assess whether a merger meets the notification thresholds, irrespective of whether those mergers were individually notifiable. Moreover, anti-avoidance measures will be introduced to ensure that merger parties do not evade their merger control obligations by structuring transactions in such a way that they are staggered or divided into smaller, unrelated transactions.
- **Notification requirements:** the ACCC will identify upfront requirements of the information that merger parties will need to provide. A 'simple' short notification form will be used for mergers that are unlikely to raise competition concerns, with a longer notification form for others.
- **Enhanced transparency:** A public register of all merger reviews will be maintained by the ACCC setting out the details of notified mergers and written reasons for decision will be published.
- **Filing fees:** There will be a filing fee payable to the ACCC for all merger notifications, which is likely to be in the range of AUD 50,000 to AUD 100,000. Exemptions from fees will be available for smaller businesses.
- **Proposed timelines:** The proposed timelines are subject to consultation and are intended to provide more certainty to merger parties in transaction and integration planning:
 - For 'Phase I' reviews, the ACCC will have 30 working days to make a determination, with the ability to issue a fast-track determination after at least 15 working days if no competition concerns are identified. The ACCC will only be able to refer a merger to a Phase II review if it has a reasonable basis to consider that the merger raises concerns.
 - For 'Phase II' reviews, the ACCC will have a further 90 working days to investigate and make their decision (i.e. a determination within 120 working days).
 - As discussed below, where a merger is denied at Phase II, parties can make an application for the merger to be approved on public benefit grounds. Treasury has stated an indicative review timeline for these applications to be around 50 working days.
 - These timelines will be able to be extended in certain situations, for example by agreement, if there are delays in responding to information requests or if remedies are offered.

If the ACCC does not issue a determination within the prescribed timelines, the merger may be implemented.

- **No call-in powers:** The ACCC will be unable to 'call-in' mergers that fall below the prescribed notification thresholds, but may investigate such a merger for alleged breach of any other provisions in the competition legislation. Merger parties are permitted to voluntarily notify those transactions that fall below prescribed notification thresholds.

Merger control assessment

- **Reasonable belief and substantial lessening of competition:** The concept of "reasonable belief" is incorporated into the merger assessment test, such that the ACCC must permit a merger to be implemented unless the ACCC reasonably believes that the merger would have the effect, or be likely to have the effect of substantially lessening competition. In its assessment, the ACCC will also consider whether the merger creates, strengthens or entrenches substantial market power in a market.
- **Replacement of s 50(3) merger factors with merger 'principles':** The merger factors will be replaced with the merger 'principles' and the ACCC will be required to take into account considerations such as:

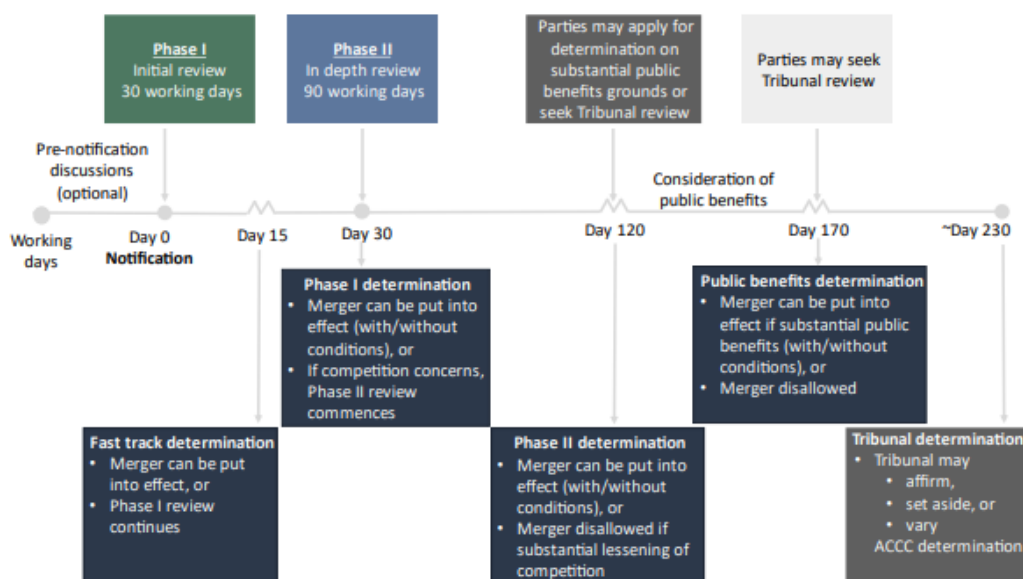
- the need to maintain and develop effective competition in view of such factors as structure of markets, conditions of competition, and actual or potential competition from entities carrying on business in Australia, whether located in Australia or elsewhere; and
- the market position of merger parties and their economic and financial power, including commercial relationships, alternatives available to suppliers and users, their respective access to supplies, inputs including data, or markets, barriers to entry, supply and demand trends for goods and services, the interests of intermediate and ultimate consumers and the development of technical and economic progress provided it is to the consumers' advantage.
- Approval of mergers on public benefits grounds:** If the ACCC does not approve a merger following a 'Phase II' determination, the merger parties may apply to the ACCC for approval on the grounds that the merger would result, or be likely to result, in a substantial benefit to the public which outweighs the anti-competitive detriment of the merger. This would replace the current authorisation process which permits the ACCC to authorise mergers on public benefit grounds.

Review and penalties

- Review of ACCC merger decisions:** Merger parties may apply to the Tribunal for a limited merits review of the final determination of the ACCC. The Tribunal will be able to substitute the ACCC's decision for a 'correct or preferable decision' but the review will be limited to the information before the ACCC (subject to the Tribunal being able to seek additional clarifying information or allowing the parties to present new information or evidence that was not in existence at the time of the ACCC's determination).
- More limited role for Federal Court:** Judicial review of the Tribunal decision will be available in the Federal Court of Australia. However, parties can no longer seek a declaration from the Federal Court that a merger is not likely to result in a substantial lessening of competition.
- Penalties for failure to notify:** Penalties will apply to the entity concerned and the executives for failure to notify a notifiable merger or for engaging in prior implementation of a notifiable merger.

The new merger control process

- The Government's Merger Reform Paper published the below diagram illustrating the new process and timelines:²



² See page 7 of the Merger Reform Paper.

What does this mean for you?

- The Government's proposed changes will have a significant impact on the merger control process in Australia and are likely to result in more transactions needing to be notified to the ACCC and increased cost for business.
- Merger parties will need to allow for more time to prepare their initial submission to the ACCC, as certain information must be provided to the ACCC upfront. There is also likely to be a 'pre-notification' engagement process with the ACCC before a notification is formally lodged and the timelines commence.
- The loss of the ability for merger parties to go directly to the Federal Court for a declaration, as well as the limited appeal rights to the Tribunal, will also mean that more information will need to be provided to the ACCC at the outset.
- The greater transparency into ACCC decision making (including publication of ACCC decisions and reasons for these) is welcome news for business.
- Interested parties and stakeholders will have the opportunity to make submissions during Treasury and ACCC consultations.

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