

# Government's Merger Reform Proposals 2024

In April 2024, the Australian Government announced its intention to introduce major reforms to Australian merger laws, to commence from 1 January 2026.

### **GOVERNMENT'S PROPOSED REFORMS TO MERGER REVIEW PROCESS**

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**Formal mandatory suspensory clearance model** – Shift from the current *voluntary* informal clearance model to a *formal mandatory and suspensory* clearance model with the Australian Competition and Consumer Commission (ACCC) the first instance decision maker, in line with other OECD jurisdictions

Mandatory notification based on materiality thresholds – All proposed mergers above set materiality thresholds based on monetary value and market share (which have yet to be outlined) would need to be notified to the ACCC

Suspension of merger transactions pending clearance – Completion of transactions will be prohibited unless and until merger clearance is granted by the ACCC or the Australian Competition Tribunal (Tribunal) on review

Filing fees and upfront information requirements – Filing fees are expected for most transactions to be around \$50,000-\$100,000 per application (scaled to reflect complexity and risks). Parties will need to meet the ACCC's upfront information requirements in order to commence review **Creeping acquisitions now captured** – The cumulative effect of all mergers within the last three years by the acquirer or the target will be aggregated for the purposes of assessing whether a merger meets the notification thresholds, irrespective of whether those mergers themselves were individually notifiable

**Timelines** - Mergers may proceed within 30 days of notification ('Phase I'), with some fast-tracked to 15 days. The ACCC will have 90 working days to review an application where concerns are raised ('Phase II'), and if it does not make a decision in that time, the merger can automatically proceed

**Public benefit test retained** – If the ACCC's determination is that the transaction is not allowed to proceed on competition grounds the parties may seek approval from the ACCC on public benefit grounds

Appeals and review – ACCC denials of merger clearance will be reviewable by the Tribunal on a limited merits basis with judicial review available in the Federal Court

## **GOVERNMENT'S PROPOSED REFORMS TO SUBSTANTIVE MERGER TEST**



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**Broadening of SLC test** – The current prohibition on mergers which 'substantially lessen competition' (SLC) in a relevant market under s 50 of the *Competition and Consumer Act 2010* (Cth) (CCA) will be amended to make it clear that the SLC

test includes if the merger creates, strengthens or entrenches a position of substantial market power in any market. This is designed to address not only incremental changes resulting from mergers but also entrenchment of dominant positions in markets, as well as creeping acquisitions

**SLC test to be applied on the ACCC's 'reasonable belief'** – A merger will proceed unless the ACCC "reasonably believes" that it would have the effect, or be likely to have the effect of SLC in any market. This is a change from the current test which is focused on whether the merger is likely to SLC on the balance of probabilities

**Merger test to be supplemented with competition principles, replacing the 'merger factors' in s 50(3)** – To ensure emphasis is placed on economic methodology and analysis of competitive effects such as:

- ➔ the need to maintain and develop effective competition within markets; and
- ightarrow the market position of the businesses concerned and their economic and financial power



**Thresholds still to be determined:** Proposed materiality thresholds have not yet been finalised. The ACCC has previously proposed deals involving companies with a turnover threshold of \$400 million or a global transaction value of \$35 million to trigger the proposed notification requirements (see Freedom of Information disclosure log submitted by the ACCC to Treasury in March 2023)

No change to the onus of proof: The ACCC petitioned for the onus of proof to be shifted onto parties to establish positively to the ACCC's (or Tribunal's) satisfaction that an SLC is not likely to occur, which critics labelled as essentially creating a 'presumptive ban' on mergers. This reform has not been adopted by government and the ACCC must apply the SLC test based on its "reasonable belief"

**Limited review of ACCC decisions:** Parties' sole recourse to challenge the merits of a decision by the ACCC is to the Tribunal, which can only conduct a "limited" merits review based on the information before the ACCC, effectively removing the traditional evidence giving process where both the ACCC and the merger parties call witnesses and test evidence through cross-examination in court



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**Impact on M&A activity and trends:** The mandatory regime may place increased transaction costs and regulatory burdens on M&A activity, including delays, increased deal risks and complexity

**Businesses will need to overcome practical hurdles:** Businesses contemplating merger activity will need to build in the new mandatory regime into their transaction processes, completion timeframes and terms, ensuring sufficient time and resources to apply for and obtain relevant approvals



# WHAT'S NEXT? - WATCH THIS SPACE!

→ A comprehensive process of stakeholder consultation will occur. Key details of the new regime need to be fleshed out and refined, including materiality thresholds and finalisation of statutory review periods

→ The government will then introduce legislation to implement the changes to Australia's merger control regime. The changes are intended to take effect from 1 January 2026, subject to the passage of the legislation through Parliament

→ LexisNexis Practical Guidance will provide further updates and analysis on any developments including draft legislation, consultation terms of reference and submission deadlines

on the current merger control regime under the CCA, see our comprehensive topic on Mergers in **Practical Guidance Competition**  $\mathring{}_{k}$  including our Guidance Notes: The prohibition in section 50 and Mergers in Digital Markets.

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