

## AUSTRALIAN TREASURY RELEASED DRAFT MERGER THRESHOLDS

The Australian government has announced the proposed thresholds for the new mandatory merger control regime, however, as with earlier announcements, key details are missing.

### Australian Treasury: Less is more

The Australian Treasury has released a [consultation paper](#) (**Paper**) outlining the proposed merger notification thresholds underpinning the new mandatory merger regime set to take effect from 1 January 2026.<sup>1</sup> Like previous Treasury announcements, meaningful details have been omitted. The Paper notes such details are subject to further consultation or regulation, which as delegated law, does not require public consultation.

One of the most significant omissions is the detail of prenotification requirements. Parties are still unaware of what information they will be required to provide the Australian Competition and Consumer Commission (**ACCC**) at the outset of a filing. This lack of clarity leaves parties in the dark about the reasonableness of the merger review timelines and does not allow for substantive engagement in the consultation process.

### Proposed Monetary Thresholds

Treasury has stated that the proposed two-limb test adopts both turnover and transaction value thresholds to ensure that transactions where annual turnover does not sufficiently reflect a target's potential competitive significance in Australia are captured. This appears targeted at, for example, transactions in the digital and technology sectors where the target has de minimis turnover.

The starting point in assessing whether the monetary thresholds have been met is assessing whether the target business has a material connection to Australia. No objective test is proposed to determine whether a transaction has such a connection. Instead, it will include circumstances whereby the target is registered or located in Australia, supplying goods or services to Australian customers, or generating revenue in Australia.

Such a broad definition of material connection to Australia is worrisome, particularly for foreign investors engaging in offshore transactions which have limited turnover in Australia. Hypothetically, a transaction involving large foreign companies that do not have assets in Australia, but which generate a small portion of their global turnover in Australia, may be deemed to have a "*material connection*" to Australia. It appears Treasury may not have anticipated these types of transactions being caught by the notification thresholds as the methodology and data used by Treasury to estimate the number of acquisitions that will be captured by the proposed thresholds omits

<sup>1</sup> See [Exposed: details of Australia's new mandatory merger regime emerge from draft legislation](#), 31 July 2024

reference to potential offshore foreign transactions. Attachment A to the Paper notes that Treasury principally relied on previous ACCC acquisition data (which would not include data on offshore foreign transactions, which traditionally are not notified to the ACCC) and data from Bloomberg and Refinitiv (which focused on acquisitions involving Australian targets only). While Attachment A does note that some acquisitions of international businesses with no local presence may have been captured in the upper range of Bloomberg's data, the Paper does not substantively engage with this issue or consider how international businesses with no local presence may still generate turnover in Australia.

Once it has been determined that the target business has a "*material connection*" to Australia, if either Limb 1 or Limb 2 is satisfied notification is mandatory.

Limb 1

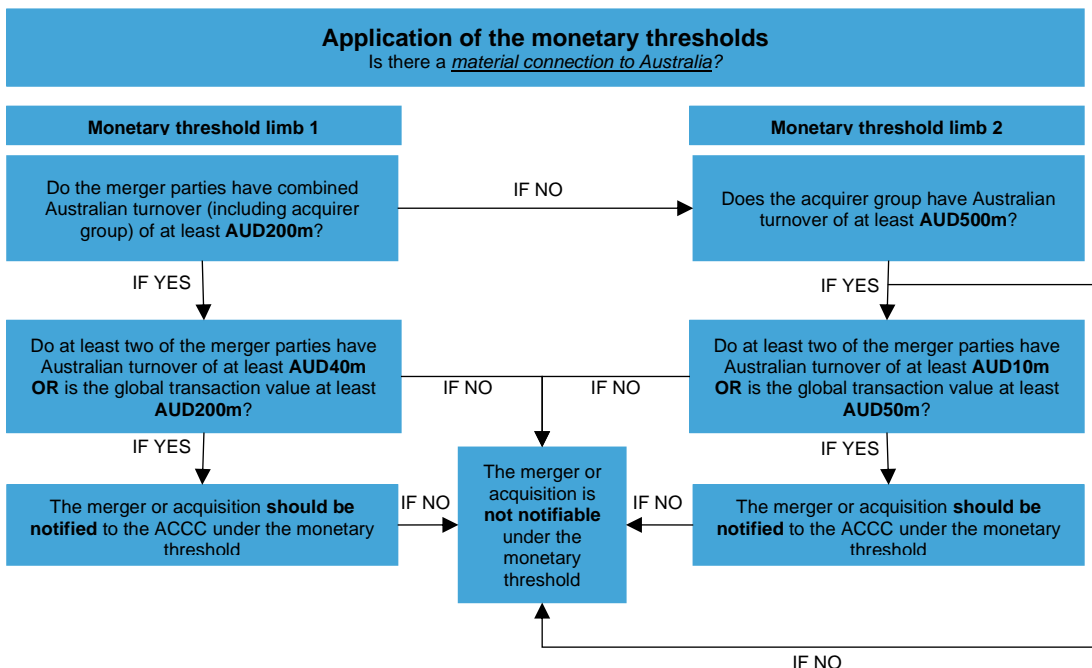
The combined Australian turnover of the acquirer group and the target is at least AUD200m (GBP102m / EUR122m / USD134m), and either:

- At least two of the merger parties' Australian turnover is at least AUD40m (GBP20m / EUR24m / USD26m); or
- The global transaction value is at least AUD200m (GBP102m / EUR122m / USD134m).

Limb 2

The Australian turnover of the acquirer group at least AUD500m (GBP256m / EUR305m / USD 336m), and either:

- At least two of the merger parties' Australian turnover is at least AUD10m (GBP5m / EUR6m / USD6m); or
- The global transaction value is at least AUD50m (GBP25m / EUR30m / USD33m).



To assess whether a transaction meets the monetary thresholds above, all acquisitions by the acquirer group within the previous three years in the same product/service market are proposed to be aggregated. Such an approach is out of step with international practice and arguably unnecessary in circumstances where market share thresholds would capture such activity.

As the turnover of acquired entities becomes part of the turnover of the acquirer group, logically this cumulative three-year review period can only apply to the global transaction value thresholds. This is also worrisome for foreign investors: small cumulative acquisitions of businesses in foreign jurisdictions (each with de minimis turnover in Australia) may not require merger or FDI filings in any of those respective jurisdictions but may require a merger filing in Australia.

The Paper does not provide any context around how the acquirer group turnover will be calculated. The Paper notes that "*Businesses may also establish holding or shell companies in the course of a transaction.... In determining the value of an acquirer's business, the focus should therefore be on the substance, rather than the form*". If the regulations set out that acquirer group turnover should be calculated in a similar manner to calculating the turnover of concerned undertakings in the EU, there will be significant implications for global investment funds with Australian turnover in excess of AUD200m. Especially as the concept of control under the new Australian merger regime is significantly broader than the "decisive influence" test adopted in the EU.

### **Market Share Threshold**

In addition to the monetary thresholds, market share thresholds seek to capture transactions which provide for any increase in market share above 25% of either "affected" horizontal markets or "adjacent" non-horizontal markets. This introduces a new concept that market share thresholds can be met where parties do not compete in the same horizontal market(s). If either Limb 1 or Limb 2 of the market share thresholds are satisfied, notification is mandatory. Inclusion of a market share threshold in a mandatory notification regime is, however, at odds with ICN recommended practice.

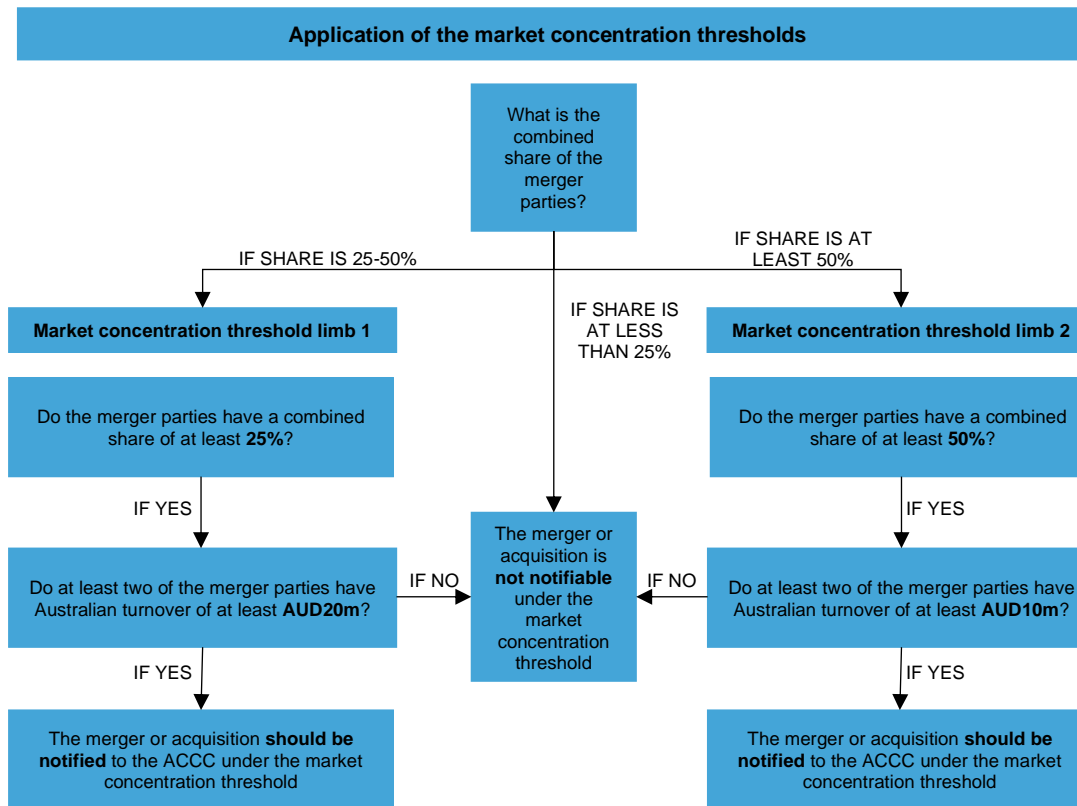
The proposed Market share thresholds are as follows:

#### Limb 1

- The combined market share / share of supply of a good or service in Australia of the merger parties is at least 25%; and
- At least two of the merger parties' Australian turnover is at least AUD20m.

#### Limb 2

- The combined market share / share of supply of a good or service in Australia of the merger parties is at least 50%; and
- At least two of the merger parties' Australian turnover is at least AUD10m.



Markets can be hotly contested. The Paper attempts to eliminate any contest by asserting that parties should consider the "market definition most likely to raise competition concerns". However, it remains to be seen how the ACCC will consider and determine whether the market share thresholds are satisfied. There is also a lack of clarity with respect to how either the monetary or market share thresholds will apply to consortium bids.

### Additional Targeted Notification Thresholds

The Paper notes that ministerial determinations involving prior stakeholder engagement and supported by evidence-based advice, will establish additional industry-specific thresholds to capture smaller transactions in sectors deemed "high risk" by the Minister. This approach aims to avoid altering the broader economy-wide notification thresholds, thereby capturing transactions unlikely to raise competition concerns. These determinations will apply for up to five years unless new advice is received, addressing enduring competition risks in certain markets.

### Notification waiver process

Treasury is also considering establishing a notification waiver process to allow merger parties to obtain confirmation that a transaction does not meet the notification thresholds and that no filing is required.

The waiver would provide the parties with certainty over the need to file thus protecting the parties from potential pecuniary penalties and the risk that the transaction be void in law.

The proposed process provides the ACCC 30 business days to consider and determine a waiver. In an attempt to provide parties with more clarity, the

waiver application and decision will be published on the ACCC's public register (excluding waiver applications for on-market bids). If the ACCC fails to make a decision in respect of a waiver application within 30 business days, the merger parties (or non-merger parties with a sufficient interest in the transaction) would be able to seek a review by the Australian Competition Tribunal (**ACT**).

Just like material details surrounding the prenotification requirements, scarce details have been provided in respect of the waiver process. Most notably, the information required for the waiver process, whether the ACCC will be able to stop the clock if information requests are issued, and the timelines in respect of a review by the ACT.

### **Summary**

Overall, the Paper raises more questions than answers. While the new regime is geared toward establishing the ACCC as an administrative decisionmaker to assist in providing certainty to businesses in the longer term, the absence of detail in the short term delivers uncertainty as to the form, application and overall timing of the proposed new regime.

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