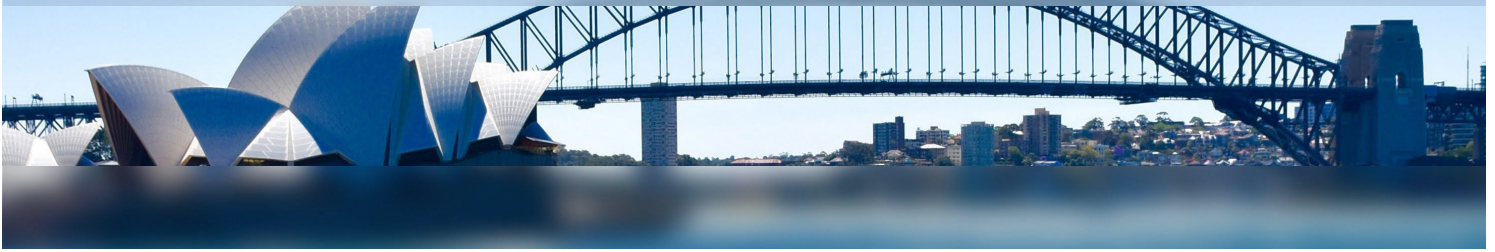


# CLIFFORD CHANCE



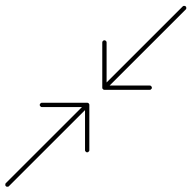
## READY, SET, GO! BILL CONTAINING MAJOR REFORMS TO AUSTRALIA'S MERGER CONTROL REGIME RELEASED BY TREASURY

On 10 October 2024, the Australian Government introduced into Parliament the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* ("**Bill**"), following a number of months of consultation on the Exposure Draft (please see [here](#), [here](#), and [here](#) for our previous briefings that provide further background on the proposed regime and our insights on the Exposure Draft).

### Key changes

The Bill contains material changes from the Exposure Draft reflecting stakeholder feedback. An overview of the key points of the Bill and the Government's recent announcements are set out below:

#### Unified Process



The Bill introduces a **single mandatory and suspensory administrative merger clearance regime** to replace the existing informal merger review and the merger authorisation processes, which will come into effect on 1 January 2026. Unless an exemption applies, transactions that meet the notification thresholds must be notified to the Australian Competition and Consumer Commission ("**ACCC**") and cannot proceed unless the ACCC grants clearance (or the prescribed time period expires). Penalties for failure to notify include up to 30% of adjusted turnover for the preceding year.

#### Notification Thresholds



Following consultation, **market share thresholds appear to have been removed** from the revised regime. Monetary thresholds will be formally set out in subordinate legislation which is yet to be released. We understand transactions will be notifiable if the target business has a **material connection to Australia** (which the Government has indicated to include "carrying on a business in Australia" or "have plans to carry on a business in Australia"), and satisfies one of the following three tests:

##### Test 1 (for medium to large sized mergers):


- a. Combined Australian turnover of the merger parties (including acquirer group) is at least **AUD 200 million**; **AND**
- b. Either the Australian turnover is at least **AUD 50 million** for each of at least two of the merger parties **OR** the global transaction value is at least **AUD 250 million**.

**Test 2 (for very large acquirers):**

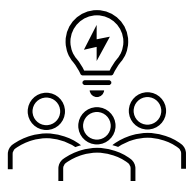
- a. Acquirer group's Australian turnover is at least **AUD 500 million**; **AND**
- b. The Australian turnover is at least **AUD 10 million** for each of at least two of the merger parties.

**Test 3 (serial acquisitions):**

To address serial / creeping acquisitions, a **three-year cumulative turnover threshold** will also apply. This will enable the ACCC to consider the cumulative effect of transactions even where the target business operates in different geographic areas as compared to the businesses previously acquired. This test will operate in addition to those above and a transaction will be notifiable if the following criteria are met:

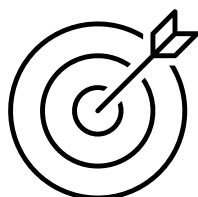
Three-year cumulative turnover threshold	For medium to large sized mergers	For very large acquirers
	<p><b>An acquisition is notifiable if:</b></p> <ul style="list-style-type: none"> <li>a. Combined Australian turnover of the merger parties (including acquirer group) is at least <b>AUD 200 million</b>; <b><u>AND</u></b></li> <li>b. The cumulative Australian turnover from acquisitions in the same or substitutable goods or services over a 3-year period is at least <b>AUD 50 million</b>.</li> </ul>	<p><b>An acquisition is notifiable if:</b></p> <ul style="list-style-type: none"> <li>a. Acquirer group Australian turnover is at least <b>AUD 500 million</b>; <b><u>AND</u></b></li> <li>b. The cumulative Australian turnover from acquisitions in the same or substitutable goods or services over a 3-year period is at least <b>AUD 10 million</b>.</li> </ul>
<ul style="list-style-type: none"> <li>• Acquisitions below <b>AUD 2 million</b> Australian turnover would be excluded</li> </ul>		

**Control Test**



Acquisitions of shares and assets that do not give "control" or result in a change of control will not need to be notified. The definition of "control" was amended in the Bill to closely align with the definition of "control" in s50AA of the *Corporations Act 2001* (which turns on the **"practical influence" or capacity to determine the financial and operating policies of a body corporate**). A deeming provision that an entity will not have control if it is under a legal obligation to exercise its influence for the benefit of others will not apply to acquirers that are special purpose vehicles. The Bill does not adopt the rebuttable presumption of control that was included in the Exposure Draft.

**Targeted Thresholds**



It is also proposed that the Minister may make a determination that requires **certain mergers to be notified irrespective of the monetary notification thresholds**. A targeted screening tool is being contemplated to capture acquisitions below notification thresholds in select concentrated regions and sectors, such as **supermarkets, fuel, liquor, and oncology radiology**. The Government also intends to empower the ACCC to review acquisitions of interests in private or unlisted companies, if one of the parties to the transaction has turnover of more than **AUD 200 million**.

## Exemptions



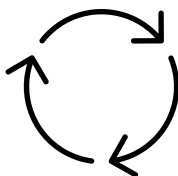
Acquisitions of interests in **listed companies, registered schemes, unlisted companies with more than 50 members** will not need to be notified if more than 20% voting power is not acquired. **Internal restructures** involving related bodies corporate or conducted through a trust or partnership will be exempted as will ordinary business transactions other than those involving patents. An exemption may also apply for some **property transactions** (subject to further consultation). **Surprise hostile takeovers** will be able to be confidentially reviewed and listed on the public register after 17 business days. This will allow the ACCC to make a **confidential decision** if the transaction is not likely to raise concerns. The Bill does not adopt the exemptions for the temporary holdings of shares of acquisitions contained in the Exposure Draft.

## Notification Waiver Process



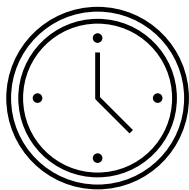
The Bill introduces a notification waiver process where parties to an acquisition can **apply to the ACCC for a waiver** of the obligation to notify an acquisition that would otherwise be required to be notified (on a **case-by-case basis**). In granting a notification waiver the ACCC will consider relevant matters including the likelihood that the acquisition would meet notification thresholds and/or substantially lessen competition. For example, a notification waiver may be granted for acquisitions that have minimal competitive overlap or no vertical integration.

## Changes to the Substantive Test



Contrary to the Exposure Draft, changes to the "substantial lessening of competition" ("**SLC**") test to include additional factors as to whether the transaction creates, strengthens or entrenches a substantial degree of market power **will apply only to the merger provisions** and not the *Competition and Consumer Act 2010* more broadly. For transactions that cannot be cleared on the basis of the SLC test, parties may apply for consideration under the "**public benefits**" test (where public benefits outweigh public detriments), which will now remain unchanged from the test currently applied under the existing merger authorisation process, following a decision by the ACCC not to grant clearance.

## Review Timelines and Process



The Bill sets out review timeframes for **Phase 1 (30 business days), Phase 2, (90 business days), the public benefit phase (50 business days) and timeline for tribunal review**. The ACCC will retain scope to extend timelines in limited circumstances. There may also be less flexibility regarding the timing and consideration of remedy proposals under the new process. Please see the **Annexure** for further details around review timeframes.

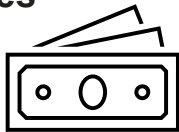
The ACCC will require a **complete notification in order for the clock to start**. It remains unclear at this stage what information and documents will need to be included. The **ACCC will also be able to "stop the clock"** 10 business days after issuing a compulsory statutory request for information if the parties do not respond within this period or if the parties are late to respond to an informal information request. All notified acquisitions will be published on an **ACCC public register** with the exception of a small range of acquisitions which will not be made public for a temporary period (such as surprise hostile takeovers unless withdrawn or certain voluntary transfers under the *Financial Sector (Transfer and Restructure) Act 1999*).

## Review by the Tribunal



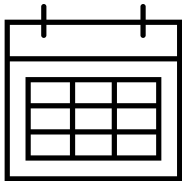
The Australian Competition Tribunal ("**Tribunal**") may undertake a **limited merits review** to affirm, set aside or vary a decision by the ACCC. Under the Bill, the Tribunal has also been empowered under new rules to **seek further information, documents and evidence in prescribed circumstances**, including where a notifying party was not given a reasonable opportunity to make submissions to the ACCC in respect of new information relevant to the ACCC's decision, where the Tribunal requires further information to clarify existing information or where there is new relevant information available that was not in existence at the time of the ACCC's decision (amongst others).

## Fees



There will be **filing fees** for all notifiable transactions (with some exceptions for small businesses). These are not set out in the Bill, but the Government has indicated that fees will likely be in the range of **AUD 50,000 to AUD 100,000**.

## Timing



The new regime is proposed to **take effect from 1 January 2026** (noting the 3-year lookback period). Merger parties will have the **ability to notify the ACCC on a voluntary basis from 1 July 2025** before mandatory notification commences on 1 January 2026. Merger parties can continue to apply for merger authorisation until 30 June 2025, and may continue using the informal regime until 31 December 2025. Where informal clearance has been granted between 1 July 2025 and 31 December 2025 and the acquisition is put into effect within 12 months of receiving clearance, merger parties will not be required to notify under the new regime.

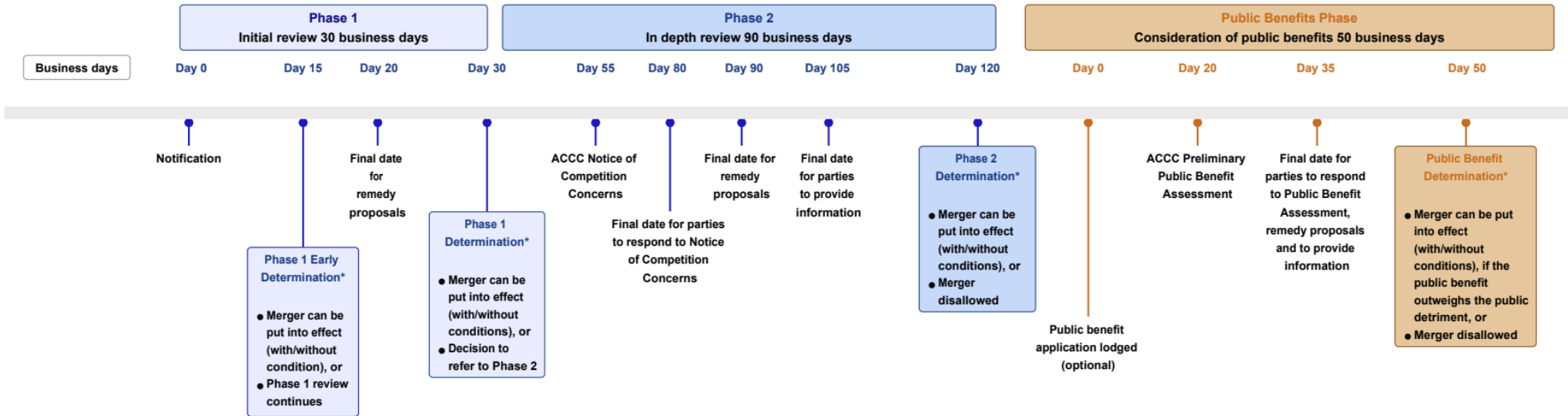
## What's next?

As the Bill contemplates the use of **further legislative instruments** and designation of powers to the Minister / other entities to give effect to the regime, there remain a few areas of uncertainty. In parallel with the introduction of the Bill, the ACCC has indicated in its *Statement of Goals for Merger Reform Implementation* its intention to publish consultation drafts of the Process Guidelines and Analytical Guidelines. The **ACCC has indicated that it will consult on the notification forms**, which will describe the information and data required by the ACCC to conduct its assessment, and on draft process and analytical guidelines in the first quarter of 2025.

If you would like to discuss any aspect of the proposed merger reforms, including how it may affect your business, please do not hesitate to get in touch.

# Key Timeframes

Pre-notification discussion /  
Waiver Application



\*A person dissatisfied with an ACCC Determination may apply to the Australian Competition Tribunal for review.

## CONTACTS



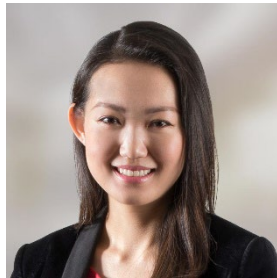
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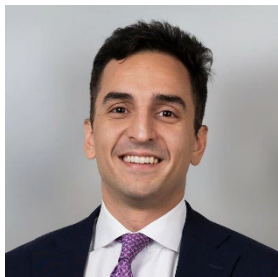
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