Tech Council of Australia

Reforming mergers and acquisitions – exposure draft consultation

Tech Council of Australia Submission

August 2024

techcouncil.com.au

1. Introduction

Thank you for the opportunity to make a submission on the exposure draft legislation for the Government's proposed reforms to Australia's merger regime. The Tech Council of Australia (TCA) recognises the importance of strong competition laws as a foundation for economic growth and driver of innovation across all industries. In particular, we recognise the importance of merger laws and their role in clearing pro-competitive mergers with minimal delay or disruption to the transaction, while preventing anti-competitive mergers and acquisitions. Competitive markets result in enhanced choices, reduced costs and improved quality for consumers.

The TCA is Australia's peak industry body for the tech sector. The tech sector is a key pillar of the Australian economy and is Australia's seventh largest employing sector. The TCA represents a diverse cross-section of Australia's tech sector, including startups, scale-ups, venture capital funds and global tech companies.

The TCA supports the Government's goal for Australia's merger regime to be 'faster, simpler and stronger'. The TCA also supports the intention in the explanatory memorandum that the process would be a 'streamlined process for the review of acquisitions… that will enhance efficiency, predictability and transparency for businesses, stakeholders and the community'.[1] However, the TCA is concerned that the exposure draft does not deliver on a merger regime that will be faster, simpler or stronger, nor is the merger regime set out in the exposure draft likely to result in a streamlined process that enhances efficiency, predictability and transparency for businesses. The exposure draft raises several key concerns for the tech sector, including in relation to:

- Changes to the assessment of mergers:
    - Changes to the established merger test and legal standards
    - The threshold for public benefits being raised
    - Changes to the factors that the ACCC may have regard to
    - Changes to the assessment of serial acquisitions
- Changes to the merger review process:
    - Lack of clarity around the definition of a notifiable acquisition, and no indication of how thresholds will be set for what acquisitions are notifiable
    - The ability for the ACCC to delay the statutory timeframes for review and the sequential approach to the assessment of public benefits creating unjustified delays
    - Broad third-party appeal rights
- Other issues that introduce uncertainty and risk into Australia's merger regime:
    - The significant complexity introduced by the exposure draft legislation
    - The lack of workable transition provisions

[1] Exposure Draft Explanatory Materials: Treasury Laws Amendment Bill 2024: Acquisitions

The TCA also has significant concerns about the short consultation period with respect to the significant, whole of economy reforms contained in the exposure draft. In announcing the Government's response to the merger reforms consultation, Treasurer Jim Chalmers noted that these reforms 'are the biggest reforms to merger settings in almost 50 years'.[2] We agree. We consider that the changes contained in exposure draft are fundamental changes to the operation of markets and property rights in Australia, and in this context, consider that there is an imperative that the consequences of these reforms are considered through extensive public consultation.

The TCA has significant concerns that these issues increase the complexity and uncertainty of Australia's merger regime and its administration. This will have a significant impact on Australia's tech sector, which has produced disruptive technology companies that have enhanced and promoted competition. Introducing new concepts, terms and legislative complexity will lead to legal uncertainty and risk that Australia's merger regime is likely to dampen investment into Australia's startup ecosystem, with investment likely to be driven overseas, either because investors are worried that they will be subject to Australia's merger regime or because the merger regime will likely limit their opportunities to realise returns from their investments in the future.

Introducing uncertainty and risk in Australia's merger regime is also likely to create an environment in which there are not sufficient incentives for startups to be founded. Where startups fail, they are more likely to exit markets altogether without innovative products and services staying in the market (such as through merger or acquisition).

2. Mergers and acquisitions are a key feature of the tech sector in Australia

As set out in our earlier submission, an effective merger control regime is critically important for the whole economy and to ensure incentives exist for innovative products and services delivered at the lowest cost to consumers. Mergers and acquisitions are a particularly important part of the tech landscape, especially in Australia, and provide incentives for innovation. A merger regime that blocks, prevents or substantially delays pro-competitive or neutral mergers and acquisitions will reduce competition in the long term, and disincentivise innovation and entry into new markets.

In order for investors to materialise returns from their investment in tech start-ups in Australia, companies typically need to proceed to an IPO, or be acquired / sold. There are a range of hurdles (including economic uncertainty) to companies realising returns by way of an IPO, and as a consequence, mergers and acquisitions are an important way for investors to materialise returns on tech investments.

The venture ecosystem is young in Australia relative to the U.S. and Europe. Australia has not developed the depth in funding markets between venture funds and growth equity/ secondary funds that you see in those other regions.[3] As such, the vast majority of exits and instances of realised returns have been through strategic acquirers as opposed to financial investors. In order for venture funds to continue to raise funds to invest in startups, they need to show returns, relative to the risk inherent in early stage tech development.

[2] Treasurer's address to the Bannerman Competition Lecture, 10 April 2024
[3] Shots-on-Goal-vF.pdf (techcouncil.com.au), page 19

The option to sell a company is also important to founders and their motivations for creating a startup. Strategic acquirers offer founders the chance to see realise of their equity value, provide additional funding for further product development, help unlock distribution opportunities for their product, and leverage the acquirer's governance, functions and expertise. The ability to divest companies is also a key strategy for large, established firms that are changing business strategy, and this can have significant pro-competitive effects.

Creating barriers for companies seeking exit opportunities is likely to have a material adverse effect on the venture capital and investment landscape. It may make it harder for venture funds and investors to materialise returns, decreasing the attractiveness of these funds and thereby decreasing innovation funding over the long run. A decrease in innovation funding would impact incentives for innovation, and may result in less competition in the long term by reducing incentives for startups to innovate and enter new markets.

Mergers and acquisitions also deliver economies of scale and scope to startups, for example by expanding the combined firm's product range and capability, and enhancing economic efficiency. Nascent startups, particularly in the tech sector, introduce innovative products and services to the market, but may not benefit consumers and enhance economy-wide productivity if they are not matched with the complementary products and services, funding, operational capacity, distribution and marketing capabilities that more established firms can bring.

Preserving the ability of startups to exit or grow by way of merger or acquisition is critically important to ensuring the long-term competitiveness of Australian tech markets, and to ensure the Australian economy can attract investment in its tech sector and keep pace with the dynamic acceleration of innovation in foreign jurisdictions.

3. Concerns about changes to the test

Changing the SLC test and established legal standards creates uncertainty and risk across the entire Competition and Consumer Act

The proposed changes to the merger test include a change to the definition of substantial lessening of competition (**SLC)** to include 'creating, strengthening or entrenching a substantial degree of power'. This change applies not just to the new proposed merger reforms but would apply across the entire *Competition and Consumer Act 2010* (**the Act**), which has not been explicitly called out by Government or had sufficient time for broader consultation on the effect of the changes. This is a change to a fundamental element of the Act, with significant, broad consequences.

The proposal to expand the SLC test across the Act to conduct which creates, strengthens or entrenches a substantial degree of power in the market, is overbroad. There is no prohibition in Australian law, or in other similar jurisdictions overseas, against a company being so successful that it achieves a substantial degree of power in a particular market. The prohibitions in Part IV of the Act address conduct which misuses that market power or engages in restrictive practices with a consequence that competition is substantially lessened.

In the case of day-to-day commercial conduct addressed by Part IV of the CCA, the existing SLC test has been frequently enforced and there have been no evident gaps in the ability of the ACCC to pursue restrictive trade practices and misuse of market power. The proposed widening of the SLC test runs the risk of preventing participants in markets from engaging in commonplace short-term competitive conduct out of fear that they may be considered to have a substantial degree of power in that market so that anything they do, may be regarded as “strengthening” their existing market power when considered relative to the counterfactual of doing nothing to respond to competition. It also introduces a notion that a firm in a position of market power (which may be temporary and/or obtained through superior performance) will be more constrained in how it can preserve its current business, if that conduct has the effect of ‘entrenching’ its position.

The word ‘entrenching’ is also vague and could be interpreted as merely engaging in a competitive response, however marginal that response may be. Depending on how the new s4G(2) is interpreted, it risks freezing any competitive response by companies and a consequent loss of dynamism in pricing and innovation in markets.

We also consider that the current SLC test in section 50 of the Act has proven to be remarkably effective and flexible in its application to a broad range of industries and is consistent with international merger laws. It’s meaning is understood by industry, legal practitioners and the ACCC. Tech investment is particularly at risk from experimenting with emerging theories of harm in digital markets, with this likely to have a significant dampening effect on innovation and competition. We consider that section 50 remains fit-for-purpose and applicable to a broad range of theories of harm and emerging markets.

The new test requires that the ACCC must ‘reasonably believe’ that the acquisition, if put into effect, would have the effect or likely effect of SLC in any market. The introduction of a new standard for the ACCC having a reasonable belief introduces uncertainty and risk and sets the bar too low for the ACCC rejecting mergers, which would have a significant impact. We also note that the exposure draft introduces a number of new standards to the merger review process (such as the decision to proceed to a Phase 2 determination being based on the ACCC having a reasonable suspicion that the acquisition might result in an SLC). These new standards compound the issues with complexity, length and add uncertainty to the new regime.

Recommendation 1: retain the existing SLC test in the new merger regime, and across the Competition and Consumer Act.

Threshold for public benefits is raised

The current test for authorisation requires that public benefits outweigh the public detriments (including the lessening of competition) of an acquisition. In order for an acquisition to be cleared on the basis of public benefits, there does not need to be any assessment or quantification of how much they outweigh the public detriments. This is a test that is well understood by the ACCC and legal practitioners, and while not well-known it can be explained and understood by industry.

The exposure draft legislation sets out changes to the assessment of public benefits that are likely to increase uncertainty and complexity, by including a requirement for public benefits to ‘substantially’ outweigh any public detriments. This complicates the weighing of benefits and detriments by requiring a greater degree of quantification and comparison, which significantly increases the complexity of the assessment.

Raising the threshold will likely result in the ACCC having less regard to public benefits in the context of acquisitions and limit the ability for important public benefits (such as improved productivity across the economy, or the transition to net zero) to be considered in the context of merger reviews. This is especially critical to tech markets, who are likely to be essential elements of Australia's transition to net zero, and to improve productivity across the economy and standards of living

Recommendation 2: retain the existing net public benefits test.

Relevant matters for the ACCC to have regard to

The TCA supports the ACCC having regard to a range of factors and considerations when assessing whether a merger or acquisition is likely to result in a substantial lessening of competition, and note that section 50 has proven remarkably durable in being applied broadly over a variety of contexts and considerations.

We have concerns about section 51ABX in the exposure draft being used to signal a much more interventionist approach in markets by the ACCC, with the ACCC having regard to 'the need to maintain and *develop* effective competition in markets'. Technology markets are by their nature disruptive, fast moving, and highly innovative. Predicting how effective competition can be developed in markets, particularly disruptive and fast-moving markets, can be impossible for anyone to predict with any certainty (even with a deep level of knowledge of the relevant markets). We note that the phrase was drawn from the European Merger Regulation, where it expresses a broader, European-specific objective of considering competition in the common market as a whole ("the need to maintain and develop effective competition within the common market") and alludes to the elements of the EU test ("significant impediment to effective competition"). The insertion of the phrase "develop effective competition in markets" in para 51ABX(3)(a) creates a risk the ACCC will focus on the extent to which a transaction increases competition in particular markets, rather than apply the true test of whether or not it results in an SLC.

We are strongly supportive of the relevant considerations including the extent to which 'technical innovations, economic developments and productivity gains' could result from an acquisition, however this is immediately offset by a consideration of the extent to which they would 'result in, or increase, obstacles to competition'. This inclusion is unnecessary given the other factors in the list that comprehensively ensure that the ACCC can consider any impediments to competition.

Recommendation 3: remove the reference to the ACCC developing effective competition in markets, and avoid encouraging the ACCC to take a highly interventionist approach to assessing mergers. Government should also ensure that the relevant considerations are balanced and not overly weighted towards findings that a transaction is likely to result in an SLC.

The consideration of serial acquisitions

We continue to have significant concerns about the way that the exposure draft legislation deals with creeping or serial acquisitions, and how this would apply to tech companies. Traditionally, creeping acquisitions have been considered in the context of undifferentiated assets – the acquisition over time of similar physical businesses (for example, grocery stores in a local area). In cases where tech companies have grown by acquisition, each acquisition is often differentiated, with targets providing different products and services to each other.

By referring to acquisitions in the same 'industry', the provision expands the consideration of acquisitions that may be differentiated assets in very different product and geographic markets. This may have the unintentional effect of undermining pro-competitive expansion where vertical integration improves business efficiency and results in better products and services delivered to customers at lower prices.

Limiting the ability of tech companies to make serial acquisitions would have the effect of limiting acquisitions by any tech company making multiple, differentiated acquisitions. It would also likely have the effect of widening the gap between large tech companies who have benefitted from being able to more easily make acquisitions in the past, and future competitors who will not be able to grow scale through acquisitions in the future.

Recommendation 4: the ability for the ACCC to consider acquisitions of multiple, highly differentiated assets together as a serial acquisition should be limited.

4. Changes to the merger review process

There is a lack of clarity around the definition of a notifiable acquisition, and no indication of how thresholds will be set for what acquisitions are notifiable

It is difficult to assess the impact of the proposed changes to the merger regime set out in the exposure draft legislation where there is no indication of the thresholds for merger notification that are likely to be set out by the Minister.

We consider that a critical aspect of any formal merger regime is that notification requirements are clear and unambiguous. We have concerns both about the definition of what is a notifiable acquisition, and about the broad ministerial discretion to set thresholds in regulation.

With respect to concerns about the definition of what is a notifiable acquisition:

- The definition of 'control' differs from well-understood concepts of control in the *Corporations Act 2001* (Cth), which are incorporated into accounting standards in Australia, and differs from other overseas jurisdictions, such as the EU, which includes the concept of 'decisive influence'. This creates additional complexity and uncertainty for transactions generally, and for cross-border transactions (which are common in the tech sector).
- The definition of control in the exposure draft is complex and overly prescriptive, and requires a complex analysis of 'practical influence' and 'patterns of behaviour'.
- Acquisitions of land and patents would now be captured by the merger regime, even if those acquisitions occur in the ordinary course of business. The acquisition of patents, in particular, is common in the tech sector, and could significantly increase the number of non-problematic notifications made to the ACCC. This could have a significant chilling effect on every common operational activities for tech companies in Australia.

We are also concerned about the broad ministerial discretion to determine targeted thresholds, risking the merger review process becoming more uncertain and more prone to significant changes as a result of political pressures. The way that thresholds are proposed to be set in the exposure draft legislation are inconsistent with international regimes, and create considerable ambiguity. Notification thresholds must be clear and easy for businesses to apply as they are making decisions about mergers and acquisitions.

We are also concerned about the effect that poorly targeted notification thresholds could have, given the expense of formal notification and the publicity that the acquisitions would attract once notified (which will raise disclosure issues, and increase commercial risks to companies). This will create significant barriers for public companies, in particular, to consider deals and investment in Australia.

Recommendation 5: use the definition of control in the Corporations Act, and use the decisive influence test, to bring Australia into line with the EU, which will streamline cross-border transaction notifications for companies and improve regulatory harmonisation.

Recommendation 6: Limit the Minister's discretion to set threshold and ensure that thresholds that are set are clear, and not subject to frequent change. Notification thresholds should be enshrined in legislation and should be linked to clear metrics such as turnover or assets in Australia.

Recommendation 7: retain the exemption for land and patent acquisitions made in the ordinary course of business under section 4 of the Act.

The ability for the ACCC to delay the statutory timeframes for review and the sequential approach to the assessment of public benefits creating unjustified delays

The TCA is supportive of improved certainty to merger timelines, as this is a key issue in the current merger regime. Tech companies report that 'time kills deals' and that the longer a merger review takes, the higher the risk that the deal will fall over (or not occur in the first place). We agree with the policy basis for the proposed merger reforms, that a faster merger review process will lead to a stronger merger regime and promote innovation and growth in the economy.

However, we are concerned that the exposure draft legislation provides the ACCC with broad discretion to delay statutory timeframes for review, with ineffective procedural safeguards to protect against this. The ACCC's broad discretion to delay the statutory timeframes for review include in the following circumstances:

- The ACCC 'reasonably considers' an application is materially incomplete (which may potentially occur where information that was not anticipated to be in issue at the time of making an application becomes an issue later in the course of a review)
- The parties do not notify the ACCC of a material change of fact, and where the timeframes can be restarted if the change of fact is material to the ACCC's assessment
- The parties fail to respond to a request for information issued by the ACCC in the timeframe set by the ACCC – this is particularly prone to 'gaming' where onerous information can be requested in an RFI and used to justify significant delays to the timeframe, even where that information is not essential to the ACCC's assessment of a merger or acquisition
- The ACCC exercises its compulsory information gathering powers, for example, by issuing a section 155 notice, and

- The ACCC failing to publish a 'Notice of competition Concerns' when it is required to do so.

We also note that the regulations are likely to include other triggers that would further delay the merger review timeline.

While we are supportive of Treasury introducing 'procedural safeguards' to ensure that this broad discretion from the ACCC is not abused, we do not consider that this is adequately covered by the exposure draft legislation. We also consider that the timeframes set out in the exposure draft legislation are generous, and that it is inappropriate to pair long statutory timeframes with a broad discretion to further delay timeframes by the ACCC.

Once mandatory notification of mergers is introduced, the information requirements in the notification guidance material will provide the ACCC with a significant amount of information, and given the serious consequences for not providing information up-front, is anticipated will provide the ACCC with, if not all, then most of the information it will need for its review. We expect that there will be limited circumstances in which the ACCC would require further information from parties by way of section 155 notice or request for information. Notwithstanding this, the exposure draft provides the ACCC with an unfettered ability to ask for or compel further information, with serious timing consequences that are borne by the merger parties.

This is likely to have serious consequences for mergers and acquisitions in Australia, create uncertainty, and make Australia a less attractive place to invest.

Recommendation 8: limit the ACCC's broad ability to delay statutory timeframes, including by:

- Limiting the number of RFIs and section 155 notices that the ACCC can issue
- Allow for urgent interlocutory appeal of ACCC timing decisions

Broad third-party appeal rights

The exposure draft legislation includes broad third-party appeal rights of merger decisions which adds uncertainty to merger decisions. While the explanatory materials provide some guidance, it does not eliminate the possibility of dissatisfied third-parties, such as competing bidders or competitors, from appealing an ACCC merger decision.

Broad third-party appeal rights are likely to undermine the goals that the new merger regime be faster and stronger. Third parties have the ability to engage with the ACCC during the merger review process, and this is the more appropriate forum for their concerns and views to be heard. Limiting third-party appeal rights incentivises better participation in the ACCC merger review process, avoids overburdening the Tribunal, and ensures that merger clearance remains efficient and effective.

Recommendation 9: Narrow third-party appeal rights, as the right to appeal a decision of the ACCC should be limited to the notifying parties and those who are directly impacted by the acquisition.

5. Other issues

The exposure draft introduces considerable complexity to Australia's merger regime

The TCA understands that the introduction of a formal regime is likely to result in increased length and complexity in the legislation governing mergers and acquisitions. However, we are concerned that the exposure draft is long, dense and complex, and unlikely to be capable of comprehension by industry.

This further increases uncertainty and risk to the merger regime with limited understanding or awareness of the merger regime beyond competition lawyers. Simplified, clearer, and easier to comprehend legislation will promote compliance with the new regime, foster trust between Government and industry and facilitate accountability (for both Government and merger parties).

Recommendation 10: the exposure draft should be significantly shortened and simplified, with an emphasis on the use of plain language, avoiding repetition and logically organising the legislation so that it is structured in a way that guides readers.

The lack of workable transition provisions

The exposure draft legislation appears to contemplate that any acquisition that completes after 1 January 2026 will be subject to the new merger regime, even if the acquisition was signed prior to 1 January 2026, or is being considered by the ACCC through the current informal merger clearance process prior to then.

This has significant practical implications for parties wishing to enter into deals around the time of the new merger regime coming into force. This could result in a large backlog of clearance notifications once applications for the new regime commence, or have a chilling effect on mergers and acquisitions in Australia in 2025 (in particular).

Recommendation 11: acquisitions that are notified prior to 1 January 2026 should be excluded from the operation of the new regime and the ACCC should continue to offer informal assessment of these acquisitions if requested by parties.

6. Recommendations

As set out above, we make 11 recommendations:

Recommendation 1: retain the existing SLC test in the new merger regime, and across the Competition and Consumer Act.

Recommendation 2: retain the existing net public benefits test.

Recommendation 3: remove the reference to the ACCC developing effective competition in markets, as this signals a highly interventionist approach that should be avoided. Government should also ensure that the relevant considerations are balanced and not overly weighted towards findings that a transaction is likely to result in an SLC.

Recommendation 4: the ability for the ACCC to consider acquisitions of multiple, highly differentiated assets together as a serial acquisition should be limited.

Recommendation 5: use the definition of control in the Corporations Act, and use the decisive influence test, to bring Australia into line with the EU, which will streamline cross-border transaction notifications for companies and improve regulatory harmonisation.

Recommendation 6: Limit the Minister's discretion to set thresholds.

Recommendation 7: retain the exemption for land and patent acquisitions made in the ordinary course of business under section 4 of the Act.

Recommendation 8: limit the ACCC's broad ability to delay statutory timeframes, including by:

- Limiting the number of RFIs and section 155 notices that the ACCC can issue
- Allow for urgent interlocutory appeal of ACCC timing decisions

Recommendation 9: Narrow third-party appeal rights, as the right to appeal a decision of the ACCC should be limited to the notifying parties and those who are directly impacted by the acquisition.

Recommendation 10: the exposure draft should be significantly shortened and simplified, with an emphasis on the use of plain language, avoiding repetition and logically organising the legislation so that it is structured in a way that guides readers.

Recommendation 11: acquisitions that are notified prior to 1 January 2026 should be excluded from the operation of the new regime and the ACCC should continue to offer informal assessment of these acquisitions if requested by parties.