Six months in

Navigating Australia's new merger regime

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MinterEllison

Contents

Australia's new mandatory merger control regime has now been fully operational for six months. Since commencing on 1 January 2026, the regime has reshaped the way that merger filings are managed in Australia, introducing mandatory notification obligations, a suspensory standstill, and a level of regulatory process that has required significant adjustment for deal teams and their advisers. This update draws on the MinterEllison team's experience in navigating the regime, in both global and domestic transactions, through waiver, Phase 1 and Phase 2 review processes.

The regime has introduced considerable complexity, largely regarding thresholds and exemptions. Merger parties have encountered, and will continue to experience, teething problems as the ACCC embeds new processes. While some changes to the regime have recently been introduced into Parliament, the structure and operation of the regime will continue to present substantive issues.

This update includes a detailed overview of our key reflections regarding the new regime, including some practical challenges that have arisen. Businesses and advisers should understand that:

1. Despite the complexity of the new regime and regulatory over-capture, the ACCC is continuing to review transactions efficiently, and the pre-engagement process is being used reasonably flexibly, in a way that is generally 'right-sized' to each specific deal.
2. Planning and preparation are critical. The new regime can be navigated efficiently, provided that work is done early to plan for the clearance process and ensure that sufficient information is being gathered and frontloaded with the ACCC to enable it to make a decision quickly.
3. The Government has recently introduced changes to the regime which are designed to amend some issues that had been identified in earlier consultation processes. If passed, the changes will address *some* of the drafting ambiguities that are resulting in over-capture of transactions. Other issues will be deferred, likely until the formal 12-month review of the new regime.

The ACCC is beginning to test aspects of the new regime, blocking the first transaction in recent weeks (in the grocery sector, which is sensitive and highly politicised in Australia). It is a further reminder about the need for structured and early planning in order to navigate the new regime.

Regime at a glance

By way of brief recap, the regime replaces Australia's former voluntary and informal merger clearance process with a mandatory and suspensory regime. As outlined in our previous updates, key features include:

1. **Mandatory notification:**

   Acquisitions of shares or assets that are "connected with Australia" and meet certain monetary thresholds must be notified to the ACCC, unless an exemption applies.

2. **Suspensory effect:**

   If parties complete a notifiable acquisition without first obtaining ACCC clearance or a waiver, the transaction will automatically be deemed void under Australian law, and the parties may be exposed to significant civil penalties (reforms are currently before Parliament to adjust this aspect of the regime so an acquisition can only be deemed void on the application of the ACCC).

3. **Filing pathways:**

   Depending on the nature of the transaction, parties may seek approval via a waiver, or a shortform or longform notification. Waivers are intended for the most straightforward matters and, if granted, remove the need to notify an acquisition, even where the monetary thresholds are met. Whether a longform or shortform notification is required depends on the complexity of the deal and likelihood of substantive competition concerns.

4. **Statutory timeframes:**

   The ACCC operates within fixed statutory timeframes (albeit with some ability to extend). The ACCC has up to 25 business days to make a decision on notification waivers. Phase 1 reviews have a 30-business day timeframe (with a 15-business day minimum review period). Where the ACCC is satisfied that a substantial lessening of competition could occur, Phase 2 involves a further 90-business day review period, supplemented by stop-the-clock / extension powers. There is a separate 50-business day timeframe for Phase 3 (or public benefit) reviews.

5. **Additional thresholds from 1 April 2026:**

   For the acquisition of shares, the regime includes a control exemption (the effect being that notification is not required where the acquirer does not obtain control or where it already controlled the target). However, amendments introduced by the Government at the end of 2025 mean that from 1 April 2026, notification has also been required where monetary thresholds are met and the acquisition results in the acquirer's voting power increasing from 20% or below to more than 20%, or from below 50% to 50% or more, irrespective of whether the acquirer obtains or already has control over the target.

   Separate thresholds have also commenced in relation to discrete asset acquisitions that do not involve all or substantially all of a business.

Six months in: Key observations

General timelines

Decision timing is the primary metric by which the ACCC will be judged, and the ACCC had made commitments that it intended to review around 80% of transactions within 20 business days. The ACCC is highly motivated to ensure that the regime moves efficiently and is seen by stakeholders to not be unduly delaying transactions.

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To date, waivers are being processed in around **12** business days (on average)

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Phase 1 notifications have (on average) been determined in approximately **18** business days.

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In relation to notifications specifically, over **100** notifications have been cleared in Phase 1.

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7 transactions have been referred for a Phase 2 review of which one has been cleared (with divestments), one has been blocked, two have been abandoned, and three remain subject to ongoing ACCC review.

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2 of those transactions still being reviewed in Phase 2 are historic, and have already been blocked under the previous informal regime.

The ACCC's practices are continuing to develop

Pre-notification engagement is being tailored

While not a legal requirement, the ACCC has actively encouraged parties to initiate pre-notification engagement before lodging a formal notification.

The ACCC has acknowledged that the nature and extent of pre-notification engagement will differ depending on the transaction. For straightforward matters, it expects this process can be completed within as little as two weeks. For acquisitions where competition concerns may be raised, the ACCC considers it appropriate (and in the interests of the parties) to make contact at least four weeks prior to an expected formal lodgement date.

In practice, the pre-notification engagement process has proved valuable in identifying and resolving issues before lodgement, enabling parties to refine their filings and supporting materials to reduce the likelihood of delay once the statutory clock begins. However, the time required has varied significantly between transactions.

In some cases, pre-notification engagement has involved only minor clarificatory requests for information over a period of days to weeks. In other complex transactions, the ACCC's enquiries during pre-engagement have been far more extensive, encompassing detailed requests for information, document production, and market testing at a level that has, in some matters, closely resembled a confidential pre-assessment under the previous regime before the statutory clock has started. With that in mind, parties should treat pre-engagement as a substantive phase of the process, particularly if the transaction is complex. While it is valuable, we are monitoring for any signs of it extending over time to become a de facto review that occurs before the statutory timeframe.

The process for receiving feedback is evolving

There are other processes that are evolving that are not expressly provided for under the statutory regime. For example, the ACCC has started providing parties with summarised market feedback at or around 'Day 18'. This resembles the market feedback letters that were often provided to notifying parties under the former regime.

In circumstances where the ACCC is now an administrative decision-maker, there will inevitably be differing opinions about the extent of information that needs to be provided in this process – balancing the need for merger parties to have sufficient detail to respond and protecting third party confidentiality claims. This feedback process is a welcome development in terms of transparency, giving parties visibility of the ACCC's thinking and lines of interest and inquiry being tested.

The waiver process

The waiver pathway has proven to be relatively streamlined. The ACCC has indicated that it does not expect to engage in back-and-forth with merger parties or raise requests for information in respect of waivers (and this has been borne out in practice). In other words, the ACCC expects to be able to make its decision based on the waiver application alone. This has important implications for how parties approach their filings. In short, all relevant supporting material must be included at the outset, so that the ACCC is best placed to grant a waiver based on the written materials that are before it.

In practice, our experience is that some merger parties are electing to pursue a formal filing rather than a waiver:

1. To avoid the timing impact in the event a waiver application is refused, and a formal notification is required.
2. In response to a perception that waiver applications are less likely to be entertained in relation to certain sectors.

The fact that the waiver process does not allow for material 'back and forth' has meant that advisers are erring on the side of including more detail in waiver applications. The effect is that, in practice, the time and cost of preparing a waiver can often be similar to what is required in preparing a straightforward shortform filing.

Over-capture because of drafting uncertainties

In addition to matters of process, the regime is – as expected – capturing a significant volume of transactions that do not raise substantive competition concerns.

While over-capture was expected and is a necessary feature of a mandatory regime, the extent of the over capture is notable. It is a product of three compounding factors:

1. Broad notification obligations
2. Severe consequences for non-compliance (including automatic voiding of transactions under Australian law), and
3. Some drafting ambiguities that make it difficult for parties to confidently conclude that the regime is not engaged or that an exemption applies. In these circumstances, we are seeing parties across the market adopt relatively conservative positions and notify or seek a waiver in cases of doubt.

This is being impacted by:

1. **Connection to Australia:** Parties are only required to notify transactions where the target is “connected with Australia”. Under the new regime, this will be satisfied where the target “carries on business in Australia”. That concept is not defined in the legislation. Parties have therefore turned to prior case law addressing that concept in relation to other prohibitions. Historically, Australian courts have approached this question having regard to all relevant circumstances surrounding the entity and its activities. This includes whether the entity has a physical presence, employees or assets in Australia, whether it conducts regular commercial activities in Australia, and the degree of control it exercises over any Australian operations. The breadth of this concept means that offshore targets may be taken to carry on business in Australia even in the absence of a local presence and employees (or there is at least some uncertainty as to whether the target is carrying on business in Australia).
2. **Joint control:** Under the new regime, there is a notification exemption for transactions that do not result in a change of control. An entity will be taken to control another entity if it has the capacity to determine the outcome of decisions regarding that entity's financial and operating policies. Importantly, an acquirer can be taken to jointly control a target with its 'associates'. As the term 'associates' is broadly defined, there continues to be uncertainty as to whether joint control arises in various contexts. Notably, while a carve-out has been introduced so that genuine minority shareholder protection rights are not included for the purpose of calculating 'Australian revenue' and when considering voting power, that carve-out is still yet to be included in the Act. Legislation has recently been introduced to address this issue.
3. **Breadth of the "asset" definition:** The regime not only applies to acquisitions of shares and interests in trusts and managed investment schemes, but also to acquisitions of "assets". Under the regime, "assets" includes any kind of property, and a legal or equitable right that is not property. This broad definition has caused significant issues. Parties to a wide range of commercial transactions face uncertainty as to whether they are acquiring an "asset" capable of triggering the notification obligation where monetary thresholds are met. This is necessitating screening of a range of interests in partnerships, discrete assets, options / rights etc.
4. **The scope of some exemptions remains unclear:** Several exemptions under the regime are unnecessarily complex and unclear in terms of their intended scope. This is, for example, evident in the application of the regime to structures commonly used in real estate and funds sectors. The regime includes an exemption covering acquisitions of land undertaken for the purpose of developing residential premises or operating a land development or management business, which the Government extended to acquisitions in land entities (rather than directly in land). The land entities exemption is intended to ensure that acquisitions of interests in entities holding land are treated consistently with direct land acquisitions. In practice, the framing of this exception has led to uncertainty regarding the application to structures commonly used in these types of investments.

Given the severe consequences of failing to notify, the issues described above are channelling parties towards notification or waiver applications, even where the relevant acquisition does not give rise to any conceivable competition concerns. That is undoubtedly the intention of the regime. However, the extent of the 'over capture' and the added cost imposed on merger parties is a matter that will (and should) be carefully tested as part of the review of the regime. By way of illustration, Treasury had initially modelled that the ACCC would receive around 300–500 notifications per year under the new regime. In the first six months, around 150 notifications have been lodged, alongside almost 250 waiver applications, suggesting there may be around double the volume of filings expected.

The ACCC's reasons – transparency and some (limited) precedential value

As part of the new regime, the ACCC is required to provide reasons for its determinations that are published on the public acquisitions register. While the ACCC has been doing this, the extent of its reasons has varied. For transactions where the ACCC is comfortable that no issues arise, the description of the transaction and reasons are high-level. This will be driven by a desire to ensure that statutory deadlines are met.

In practice, the ACCC is adopting a tailored approach – providing only brief reasons for transactions that do not raise any competition concerns (and, in all cases, not engaging substantively with jurisdictional / threshold questions), while reserving detailed reasoning for more complex matters. This includes matters progressing to Phase 2, as well as complex matters resolved in Phase 1.

It is understandable that the ACCC will 'cut its cloth' for each matter in circumstances where entirely unproblematic transactions are required to be notified. However, the acquisition register does not provide meaningful insights for most transactions about how the ACCC has approached issues of market definition, or complex issues arising in relation to the thresholds and exemptions. While the ACCC is necessarily balancing time and resourcing demands, this approach is limiting the value of the register to merger parties and advisers and will likely continue to result in over-capture.

Goodwill restraints – a growing area of focus

A feature of the new regime that has not received a great deal of attention is the ACCC's power to declare that the goodwill exemption in the Act does not cover a restraint in a transaction document. In effect, this allows the ACCC to "switch off" the protection that would otherwise shield non-compete and non-solicitation restraints from scrutiny under the competition provisions in the Act, requiring parties to then consider the extent of any enforcement risk that might arise under the Act.

In our experience, the ACCC is carefully testing the scope of restraints, particularly in relation to the boundaries of local markets, and whether a restraint is reasonably necessary to protect the goodwill that is being acquired in the target. This represents a significant shift. The scope and duration of restraint clauses need to be carefully tested, and parties must be aware that restraints may become a focus during an ACCC review.

Parties need to be mindful of this when structuring restraints and should be prepared to substantiate why it is that a restraint is necessary in the circumstances.

An open dialogue will lead to further changes

Positively, both the Government and the ACCC have demonstrated a willingness to listen to feedback and refine the regime's operation. In addition to the more substantive legislative reforms noted below, the ACCC has been actively updating its FAQs and engaging with practitioners on administrative pain points.

For example, the 14-calendar day standstill that applies after a transaction has been cleared (designed to allow for review applications to be made to the Australian Competition Tribunal) has, in practice, required parties to contact the Tribunal directly to confirm that no application has been lodged before proceeding to completion. The ACCC has acknowledged this issue and is looking at ways to streamline the process.

These are encouraging signs that process issues will be progressively addressed.

Looking ahead

Dealmakers and global advisers should be mindful that the new Australian regime continues to evolve – both in terms of substance, but also the process that is being adopted by the ACCC. Key upcoming developments to watch for include:

1. **A change to automatic voiding:**
   Recent draft legislation introduced into Parliament will replace the automatic voiding of non-notified acquisitions that are put into effect with a voidable model, under which such an acquisition can only be declared voided on application by the ACCC to the Federal Court. This represents a sensible adjustment to the impact of the regime and helps resolve unintended consequences that have not been fully tested as a result of the current model where an acquisition is deemed void.

2. **Refinements to joint control and associates:**
   In addition to the above, the bill before Parliament will address the broad operation of the joint control concept and the definition of "associates" for the purposes of the control exemption. Specifically, the proposed amendments exclude relationships that would not ordinarily be used to control or influence the strategic commercial behaviour of a target entity (e.g., where parties have genuine minority shareholder protection rights). It also provides new powers for the Minister to determine classes of agreements, rights or matters relevant to a person being considered an associate for the purpose of joint control and the control exemption.

3. **Threshold and filing fees review:**
   A 12-month review of the notification thresholds and filing fees is anticipated, providing an opportunity to pause and assess whether the current settings are appropriately calibrated.

Practical guidance for deal teams

Allow adequate time for pre-engagement	Treat pre-notification as a substantive phase of the regulatory process and factor it into deal timetables from the outset.
Front-load your notification	Comprehensive, well-supported filings at the point of lodgement will reduce the risk of delay and minimise a protracted ACCC RFI process.
Conduct threshold and exemption analysis early	The breadth and complexity of the notification thresholds and exemptions demand early attention and should be carefully considered by buy-side *and sell-side*.
Calibrate goodwill restraints carefully	Ensure non-compete and non-solicitation restraints are proportionate, clearly referable to the goodwill that is being acquired, and supported by evidence. Be prepared for the ACCC to scrutinise these provisions. Be ready to substantiate.
Draft conditions precedent carefully	Transaction documents should account for realistic regulatory timelines, including pre-engagement, stop-the-clock delays, and the 14-day post-clearance standstill. Parties also need to consider the impact of a protracted ACCC review timeline, including the material fees associated with a Phase 2 review. This may include termination rights to manage the risk of a Phase 2 (even where that risk is remote).
Monitor ongoing reforms	The regime is still evolving, and further changes (both administrative and substantive) are expected. In particular, legislation currently before Parliament to shift from automatic voiding to a voidable framework, and refinements to the joint control rules, will (if passed) have practical implications for how deal risk is assessed and managed.

Six months in

Australia's new merger control regime is bedding down but continues to present challenges. Businesses should ensure they are accounting for the practical realities of the regime and stay alert to the changes ahead. For advice on how the regime applies to your specific transaction, please contact our team.

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