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# Mandatory Merger Clearance Coming to Australia: What it Means for M&A

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# Key Takeaways

- From 1 January 2026, Australia will adopt a *mandatory and suspensory merger clearance regime* for acquisitions/mergers *above certain revenue thresholds for the merger parties:*
    - This means that going forward there needs to be immediate consideration of the Australian revenues of the Acquirer group and the target
- *The definition of "acquisition" is broad.* Subject to certain exceptions, it includes ANY acquisition of shares or any assets, including real property, IP, goodwill, unit trusts etc. Even partial acquisitions in excess of 20% interest can trigger a requirement for clearance
- *The ACCC is expecting that 80% of applications will be determined by the ACCC within 15-20 business days.* There will also be a process for seeking waivers from this clearance regime – more details to come.

  However, *where the proposed acquisition raises substantive issues the (statutory) timelines are lengthy – up to six months,* or longer in the event the party seeks to submit that the acquisition results in public benefits and hence should be cleared:
    - The process also envisages pre-filing engagement with the ACCC – this is likely to be relevant in all circumstances, particularly where parties are seeking a waiver or clearance in the shorter 'Phase 1' Period
    - Advisors and parties need to factor-in these timelines - as well as early engagement with competition lawyers in order to seek to reduce timelines for clearance
- Watch this space – *ACCC will issue guidelines in the next few weeks* & parties need to consider this new regime from mid-2025 if their transactions will not complete until after 1 January 2026

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# Contents

# Background to Legislative Reforms

# ACCC Efforts Over the Years

*"The Australian approach to merger control is out of step with most merger regimes internationally, under which mergers are required to be notified as part of a formal assessment regime and must obtain clearance before they can proceed."*

Rod Sims, ACCC Chair (2011-2022), 27 August 2021

- The ACCC has long advocated for reforms to Australia's merger control regime
- In 2021, then-ACCC Chair Rod Sims 'started the debate', highlighting four areas of concern:
  - The process for merger parties to seek ACCC clearance
  - The legal test and merger factors
  - How the law treats acquisitions by firms with substantial market power
  - Changes to deal with acquisitions by large digital platforms

# Merger Reform Consultation – ACCC Concerns

In January 2024, the ACCC submitted that the current merger control regime was inadequate in a number of respects:

- **Non-notification of mergers:** Voluntary regime dependent on the willingness of merger parties to notify the ACCC. On average, the ACCC was notified of 330 of the 1,000-1,500 mergers which took place each year over the past decade
- **Inadequate / insufficient information being provided:** Voluntary nature of current regime leads to late notification to the ACCC (if any), and the provision of inadequate / insufficient information
- **'Gaming' of the system:** Merger parties threatening to complete mergers even where ACCC has asked them not to / has foreshadowed potential competition law concerns

# Merger Reform Consultation – ACCC Concerns Cont.

- **Current model defaults to approval:** ACCC has difficulty gathering evidence regarding the competitive harms of a transaction that has not yet occurred. Consumers bear the risk of harm where anti-competitive mergers are not prevented due to evidentiary challenges
- **Challenges with serial acquisitions:** Individual acquisitions may not trigger a merger notification or cause SLC, but SLC may occur cumulatively due to acquisitions over time
- **Lack of cost recovery:** Significant costs associated with an enforcement-based regime. Preparing for and engaging in Federal Court litigation is an uncertain and expensive process for the ACCC and merger parties
- **International outlier:** Australia is only one of three OECD countries that doesn't have a mandatory suspensory regime. In global deals, merger parties prioritise complying with mandatory and suspensory regimes

# Passing of Legislation

- In August 2023, the Treasurer announced a Competition Review, which included a review of the effectiveness of, and ways to improve, Australia's current merger rules and processes
- In April 2024, the Government announced that it would develop a reformed merger regime, governed by a mandatory and suspensory administrative system
- In August-September 2024, the Government consulted on the notification thresholds for the upcoming regime and proposed various potential monetary and market concentration thresholds
- On 28 November 2024, Parliament passed the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024*

# Thresholds for Mandatory Clearance

# Mandatory Notification Thresholds: General Application

- The regime will have *monetary thresholds which, if met, require merger parties to notify the ACCC* of the transaction (transactions are only notifiable where the target carries on business in Australia, or has plans to do so)
- These notification thresholds will be set out in subordinate legislation, but will initially be as follows:

| Economy-wide Monetary Threshold | Monetary Threshold for Very Large Acquirers |
|---|---|
| Parties *must notify* a transaction to the ACCC if:<br>• The merger parties (including the *acquirer group*) have a combined Australian turnover of at least *AU$200 million* ***and either***<br>• The Australian turnover is at least *AU$50 million for each of at least two of the merger parties;* ***or***<br>• The global transaction value is at least *AU$250 million* | There is an additional, lower monetary threshold targeted at *very large acquirers*. Merger parties must notify a transaction to the ACCC if:<br>• The *acquirer group's* Australian turnover is at least *AU$500 million* ***and***<br>• The Australian turnover is at least *AU$10 million for each of at least two of the merger parties* |

# Mandatory Notification Thresholds: Serial Acquisitions

- It is also proposed that there will be separate mandatory notification thresholds designed to address *serial (repeated) acquisitions*

| Medium to Large Acquirers | Very Large Acquirers |
|---|---|
| Merger parties *must notify a transaction* to the ACCC if:<br>• The *merger parties* (including the *acquirer group*) have a combined Australian turnover of at least $200 million ***and***<br>• The *cumulative Australian turnover from acquisitions* in the same or substitutable goods or services *over the previous three-year period is at least AU$50 million* | There is an additional, lower monetary threshold targeted at very large acquirers. Merger parties must notify a transaction to the ACCC if:<br>• The *acquirer group's Australian turnover* is at least *AU$500 million* ***and***<br>• The *cumulative Australian turnover from acquisitions* in the same or substitutable goods or services *over the previous three-year period is at least AU$10 million* |

This means:

- ***As at 1/1/26, you need to consider acquisitions from 1/1/23 onwards***
- ***HOWEVER, if the acquisition in question is of a business with a turnover*** *below AU$2 million,* ***the Serial notification is not required.***

# Possible Additional Notification Requirements

The Government is considering two additional methods through which notification/clearance will be required

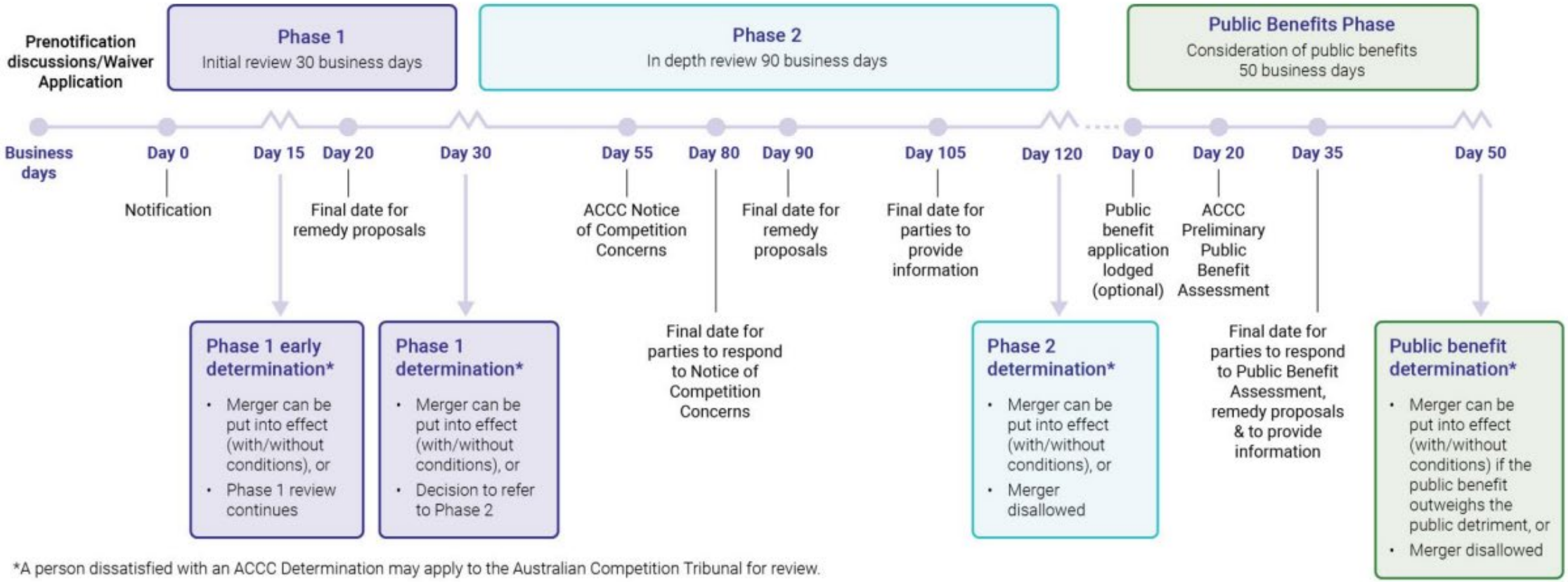
- An acquisition will be required to be notified if it belongs to a class of acquisitions determined by the Minister (intended to capture acquisitions that are capable of harming competition/consumers):
    - The example in the EM is of serial acquisitions of nascent competitors in an industry
    - The Government has indicated a designation for mandatory notification for:
        - All supermarket mergers
        - Interests of 20% or more if one of the parties has a turnover of more than AU$200 million
- A targeted screening tool to capture acquisitions below the monetary thresholds in select industries/sectors/regions. All acquisitions of those designated categories would need to be registered with the ACCC – and may be required to provide information to the ACCC. The acquisition would then need to be formally notified if the ACCC requests notification within five-10 days of the notice

# Timelines and Process Changes

# Current Model and Changes to Timelines

- Under Australia's current regime, mergers can either be reviewed through the ACCC's informal merger review process (99% in FY22), or the formal merger authorisation process
- The informal merger review process can involve either a confidential 'pre-assessment' (approx. 93% over the last five years), or a public review process. Indicative ACCC timelines are:
    - *For confidential pre-assessment,* ***six-12 weeks****.* In practice, in 2023, the average duration of this phase was 59 business days; and
    - *For public reviews*, where a Statement of Issues is published, an ***additional six-12 weeks****.* In practice, in 2023, this phase took an average of 133 business days (over 26 weeks)
- Under the current regime, *the ACCC is not bound by legislated timelines* and processes. Business stakeholders have stated that this leads to delays, uncertainty and added costs (even for uncontentious mergers)

# Key Timeframes Under the new Merger Regime




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

# Phase 1 (& the Waiver Process)

- Phase 1 provides the ACCC with *30 business days (six weeks)* to conduct an initial review of any potential competition concerns
- Where the ACCC does not identify any competition concerns, it may issue a 'fast track' determination *15 business days* after notification of the merger has been received from the merger parties (at the earliest)
    - The initial 15 business day period is designed to enable stakeholders to engage with the ACCC and make submissions regarding the merger.
- The merger parties have up to *20 business days* to offer certain conditions (i.e. commitments or undertakings) to the ACCC to remedy any potential competition concerns, unless the merger is subject to a Phase 2 review
- The ACCC expects that the vast majority of its determinations will be in Phase 1 & that ~80% of mergers will be determined in 15-20 business days

**BUT NOTE the following:**

# Phase 1 (& the Waiver Process) Cont.

***Note:*** The Phase 1 timeframes apply once the formal application has been lodged.

- *In practice*, the regime envisages informal engagement between the parties and the ACCC prior to the lodgement of the formal application – which can itself be for a considerable period
- It is also envisaged that there will be a '*waiver process*', under which an acquirer may apply to the ACCC for a determination that a proposed acquisition is not required to be notified
    - The application will need to comply with requirements set by the Minister in a legislative instrument (not yet published) – but in making a determination about a potential waiver, the ACCC must consider:
        - The objects of the CCA
        - The interests of consumers
        - The likelihood of notification thresholds being met if the acquisition were put into effect, and
        - The likelihood that the acquisition would have the effect of SLC if completed
- We expect that in the case of application of waivers and where parties wish to have their applications determined in 15-20 days, there will need to be considerable pre-filing engagement with the ACCC
- ***Fees:*** There are fees envisaged for making a filing. The EM states that the fees are likely to be between *AU$50-$100k* (there is likely to be an initial fee and then a fee if a Phase 2 review is required)

# Phase 2

- If the ACCC is satisfied that the acquisition could (i.e. there is a 'possibility'), in all circumstances, have the effect or likely effect of SLC in any market, the ACCC may decide that the merger should be subject to a Phase 2 review – where the ACCC may undertake in-depth legal and economic analysis
- The Phase 2 determination period is **90 business days (a further 18 weeks)**, commencing immediately after the Phase 1 review
- A **Phase 2 review notice** must explain why the ACCC considers that the merger could result in SLC, by reference to the ACCC's 'theories of harm', and the matters which the ACCC intends to investigate prior to making a determination
- The ACCC will not make a determination if the Phase 2 fee has not been paid and will cease considering the merger if the fee has not been paid by its due date
- Within **25 business days** after the start of the Phase 2 review period, or as soon as practicable thereafter, the ACCC may provide the merger parties with a written 'notice of competition concerns'

# Phase 2 – Notice of Competition Concerns

- A *Notice of Competition Concerns* must set out the ACCC's preliminary assessment of why a merger, if put into effect, would have the effect or likely effect of SLC
- The notice must set out the grounds upon which the ACCC has made that assessment, including evidence and other material upon which those arguments are based
- Merger parties then have *25 business days* after receiving the notice of competition concerns to make oral or written submissions to the ACCC in relation to the grounds set out in the notice. The merger parties may request additional time to make these submissions if required:
    - The ACCC may only consider submissions made by the merger parties after this period if the merger parties have requested, and the ACCC has granted, an extension
    - This is intended to provide the ACCC with sufficient time to assess, consider and take into account the submissions ahead of making its determination
    - A time extension for merger party submissions will extend the Phase 2 determination process by an equal period

# Public Benefit Application

- *If, after Phase 2, the ACCC determines that a merger must not be put into effect,* or may proceed subject to certain conditions, the merger parties may make a *public benefit application* – the application must be made within *21 days* of the ACCC's determination
- The ACCC then has a further *50 business days (10 weeks)* to issue a public benefit determination, (unless extended)
    - ACCC must issue an initial Preliminary Public Benefit Assessment within *20 business days* of receiving the public benefit application, or as soon as practicable after that date
    - Merger parties then have *15 business days* to make oral or written submissions in relation to the preliminary assessment, unless they request an extension to make submissions
- A public benefit application must *not* be granted, unless the ACCC is satisfied that the merger, if put into effect, would in all circumstances:
    - Result or likely result in a public benefit
    - That public benefit would outweigh the detriment to the public that would or likely would result from the merger
- The ACCC must give the merger parties a written notice of its determination, and a written statement of its reasons for making the determination

# Extension of Time Frames

- The legislative timeframes for ACCC merger review may be altered in certain circumstances. The ACCC's deadline for determination is tied to the effective notification date
- *Notifications which are materially incomplete or misleading* are taken to have never had an effective notification date. This applies only in Phase 1
- *Notifications which are incomplete or misleading but for which additional information and documents have been provided* are taken to have been effectively notified on the date that the additional information or documents are given. This applies only in Phase 1 (where, as above, the transaction is deemed to have no effective notification date)
- *Where there has been a material change of fact,* the date of effective notification may be changed by the ACCC to the date that it becomes aware of the change in fact. This applies in both Phases 1 and 2:
    - Notifying parties have an ongoing obligation to notify the ACCC of any material changes of facts in the notification until the ACCC makes a determination (e.g. the immediate or short-term exit of a major competitor)

# Changes to Substantive Law

# Mandatory & Suspensory Administrative Regime & the Role of the ACCC

- Unlike Australia's current, voluntary merger clearance regime, the Bill introduces a single mandatory and suspensory administrative regime
- This means that mergers which exceed the thresholds *must not be completed without receiving approval from the ACCC.* Acquisitions which are put into effect / completed prior to the ACCC granting approval will be *void*
- The ACCC will become the primary merger clearance decision maker. Currently, it does not have the power to 'block' transactions on its own accord – it must seek orders and declarations from the Federal Court. There will no longer be a right for merger parties to have mergers determined by the Federal Court
- Merger parties and third parties with sufficient interest may seek merits review in the Australian Competition Tribunal (ACT). The ACT:
    - Will make its own findings of fact and decisions based on the information which was before the ACCC. It may also allow a person to provide new information, documents and evidence which it is satisfied was not in existence at the time of the ACCC's determination
    - May also require the ACCC to give information, make reports and provide assistance to the ACT
    - Is empowered to consult with consumer associations and consumer interest groups in making its decision

# What is an “Acquisition” That may be Notifiable

- *The merger provisions apply very broadly.* They apply to any acquisitions of:
  - *Shares* in the capital of a corporate/body corporate; or
  - *Any assets* of a corporation or a person. This includes acquisitions of:
    - *Any kind of property/interest in property* - real, legal or equitable such as:
      - Options for land
      - Contractual rights such as leases
      - Intellectual property rights
  - interests in other assets:
    - Goodwill or an interest in goodwill
    - An interest in a partnership or an assets of a partnership.
- *HOWEVER,* there are exceptions:
  - Acquisitions in the ordinary course of business are excluded – as long as they are not acquisitions of land or patents
  - For ‘simple’ land acquisitions involving residential property development or by any business that is primarily engaged in buying, selling or leasing property and which does not intend to operate a commercial business (other than leasing) on the land – unless the acquisition is otherwise captured by the notification requirements – more detail to come

# What is an "Acquisition": Partial Shareholdings & "Control"

- In the event of acquisitions of partial interests, particularly of shares, the legislation states that an acquisition is ***not*** required to be notified if it does not result in the acquirer:
  - Having control within the meaning of s 50AA of the *Corporations Act,* or
  - The acquirer controlled the body corporate immediately *before* putting the acquisition into effect
- 'Control' is a question of substance, not form – s 50AA of the *Corporations Act* refers to the capacity of one entity to determine the outcome of decisions about another entity's financial and operating policies:
  - A determination of control will consider the practical influence that one can exert and any practice or pattern of behaviour affecting the body corporate's financial and operating policies
- In practice this is likely to relate to acquisitions of interests in unlisted companies that are less than 20%, due to the other provisions/statements from Government as follows:

# What is an “Acquisition”: Partial Shareholdings & “Control”

- **Unlisted companies:** The Government has announced that it will use its designation power to ensure that purchases of shares in an unlisted corporation of more than 20% will require notification if one of the merging parties has Australian turnover of more than $200 million
- **Listed companies:** In relation to listed companies / Chapter 6 entities, an acquisition of shares in the capital of a body corporate ***are not*** required to be notified if:
    - The body corporate is a Chapter 6 entity
    - The acquisition ***does not*** result in any person’s voting power in the body corporate increasing:
        - From 20% (or below) to more than 20%
        - From more than 20% to less than 100%
- ***Note:*** A Chapter 6 entity is:
    - A listed company
    - An unlisted company with more than 50 members
    - A listed registered scheme

# Change to the Substantial Lessening of Competition (SLC) Test

- The analytical or substantive test for illegality is whether the acquisition will have the effect of SLC in an Australian market
- The new merger regime slightly amends the SLC test. The legislation now states that an acquisition *may* have the effect of SLC if it would, in all the circumstances, have the effect or likely effect of ***creating, strengthening or entrenching a substantial degree of power in the market***
- This specific mention of *creating, strengthening or entrenching a substantial degree of power in a market* is intended to clarify that even an incremental change in market power may still amount to SLC if the acquisition strengthens the acquirer's ability to act with a degree of freedom from competitive constraints
- The ACCC may treat the effect of an acquisition as being the combined effect of that acquisition *and earlier acquisitions*
- This is intended to allow the ACCC to take into account the impact of serial acquisitions by the acquirer, which individually may not SLC, but may have the effect of SLC when considered as a whole

# Other issues: Restriction to protect Goodwill

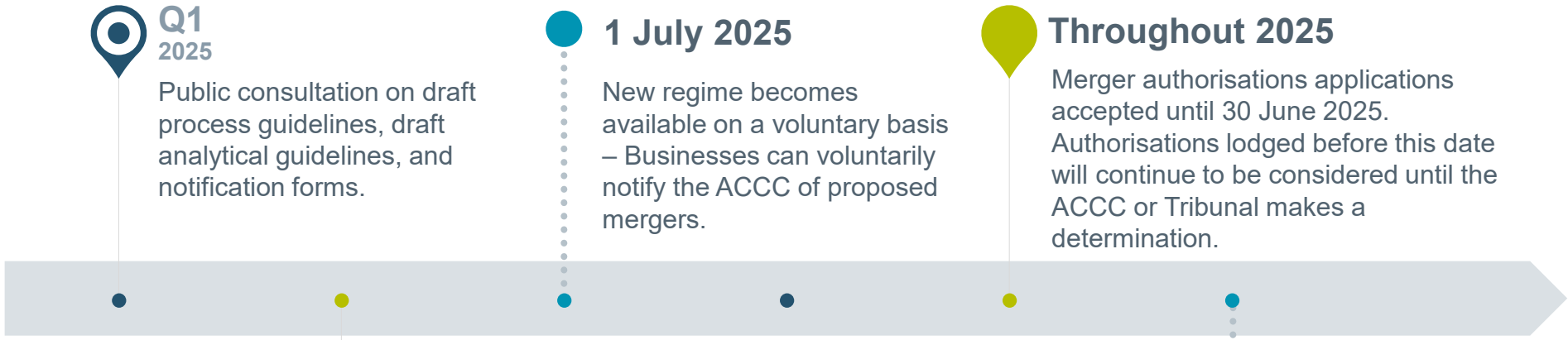
- The new merger regime *retains the goodwill exemption* from consideration under the other competition law provisions of the CCA, restrictions imposed by the acquirer on the target in a contract/SPA where the restriction is ***"solely for the protection of the purchaser in respect of the goodwill of the business"***
- ***However,*** the acquirer will now be ***required*** to notify the ACCC of the provisions/restrictions in business sale contracts to protect goodwill
- *The ACCC will have the power to declare that the goodwill exemption does not apply* to a restriction if it is satisfied that the provisions are not necessary for the protection
- This is a significant change. As a practical matter, close regard will need to be had to the scope of such restrictions and the acquirer will need to be prepared to make submissions regarding the need for and scope of any such restrictions. It also gives visibility to the ACCC such that if issues regarding the restrictions are not resolved, the ACCC can take action under the CCA

# Other Issues: Penalties

- The new merger regime will include pecuniary penalties for:
  - Failing to notify the ACCC of a notifiable merger/gun jumping
  - Failing to suspend completion of the acquisition prior to the ACCC's determination
  - Knowingly or recklessly providing false or misleading information to the ACCC or the ACT
- The maximum penalties for these contraventions are consistent with the other maximum civil pecuniary penalties in the CCA – being the greater of:
  - AU$50 million
  - Three times the value of the benefit obtained and reasonably attributable to the breach
  - If the above cannot be determined, 30% of adjusted turnover during the breach turnover period (a minimum of 12 months)

# Next Steps in 2025 and 2026

# Timeline - 2025



**Q1 2025**

Public consultation on draft process guidelines, draft analytical guidelines, and notification forms.

**1 July 2025**

New regime becomes available on a voluntary basis – Businesses can voluntarily notify the ACCC of proposed mergers.

**Throughout 2025**

Merger authorisations applications accepted until 30 June 2025. Authorisations lodged before this date will continue to be considered until the ACCC or Tribunal makes a determination.

ACCC to publish guidance on transitional arrangements, including what to expect in lead up to mandatory notification commencing.

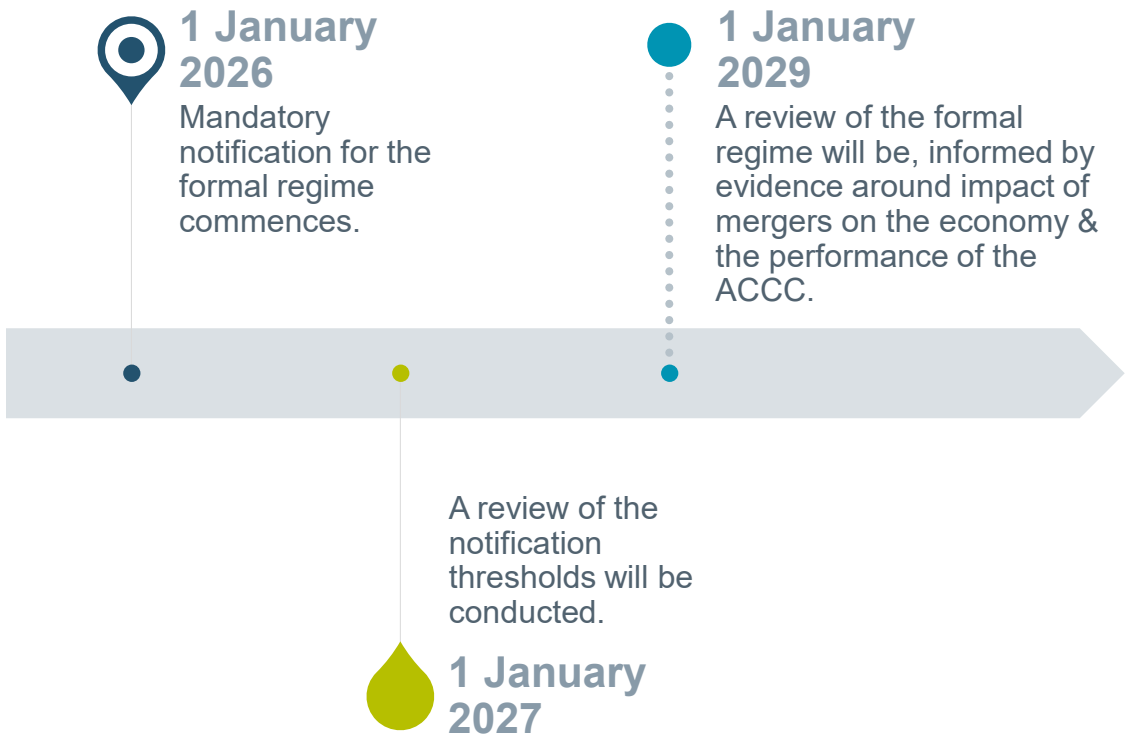
**Q2 2025**

For informal reviews ongoing as at 31 December 2025, the ACCC will continue engaging with merger & third parties as the review transitions into the new regime.

For mergers the ACCC does not object to in the informal system completed between 1 July 2025 – 31 December 2025, and are completed within 12 months of the decision, these will not require notification under the formal regime.

**2025 - 2026**

# Timeline 2026 and Beyond




## Practical Implications

For late 2025 transactions, voluntary notification under the new regime will prevent delays if clearance isn't secured before the new regime begins. Parties should also update transaction documents to address ACCC-related requirements.

New merger authorisation and informal clearance applications can no longer be made after 30 June 2025 and 31 December 2025, respectively.

# Immediate Actions

- **Stay Informed:**
  - ACCC will shortly publish draft guidelines and transitional arrangements
  - Participate in public consultations to seek to ensure streamlined practical implementations
  - Understand whether your business/industry falls into the class determination of “high risk mergers”
- **Understand Notification Thresholds/Evaluate Current and Upcoming Transactions:**
  - Consider revenue thresholds in the context of each upcoming deal – including the cumulative effect of earlier deals
  - Identify deals that may complete *after 1 January 2026*
  - Consider voluntary notification from 1 July 2025 to avoid delays
  - Adjust timelines to accommodate potential pre-notification requirements
- **Consider Cumulative Effect of Recent Transactions:**
- Keep good records of your previous three years’ acquisitions and their material competitive impacts (given the ACCC can review these when assessing new transactions), even if they were not individually notified

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