



Australian Government
The Treasury



Competition
Review

Impact Analysis

Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy

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Executive Summary

The problem

Mergers and acquisitions are important for building a more productive and dynamic economy. They allow businesses to achieve greater economies of scale, and to access new resources, technology and expertise.

A merger or acquisition can occur when there is an acquisition of a business or asset. Merger control is about maintaining competitive market structures that lead to better outcomes for consumers. While most mergers and acquisitions are unlikely to raise competition concerns, some can harm competition, allowing businesses to raise prices and not pass on economic gains to consumers. Australia's merger control system plays a crucial gatekeeper role in preventing these mergers from harming consumers and the wider economy.

Against this backdrop, new analysis shows that competition in Australia has been declining since the 2000s. There is evidence emerging that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries. Discouraging anti-competitive mergers and acquisitions, and stopping those that try to proceed, is crucial for maintaining downward pressure on the cost of living and creating a stronger, more competitive and more productive economy.

On 23 August 2023, the Government announced a Competition Review to provide advice on how to improve competition across the economy, with a focus on reforms that would increase productivity, reduce the cost of living and/or lift wages. In particular, the Government asked the Competition Taskforce established within the Department of the Treasury (Treasury) to assess whether Australia's current approach to merger control was effective. That is, whether it readily enables beneficial mergers and acquisitions to proceed while ensuring that mergers and acquisitions which may pose substantial competition risks are stopped and, to the extent that Australia's approach to merger control could be improved, the options available for reform and their benefits and risks.

Consultation

Between 20 November 2023 and 19 January 2024, Treasury undertook public consultation on potential options to reform Australia's approach to merger control (2023–24 Merger Reform Consultation).¹ In response, the Competition Review received 46 non-confidential written submissions, and held 9 roundtables attended by 42 organisations across Sydney, Melbourne, Brisbane and online. An Expert Advisory Panel – members of which are Kerry Schott, David Gonski, John Asker, Sharon Henrick, John Fingleton, Danielle Wood and Rod Sims – also contributed their views.

Feedback from stakeholders was clear: Australia's current ad hoc approach to merger control is unfit for a modern economy and is lagging behind best practice in comparable countries. For business, some uncontentious mergers are subject to delays, uncertainty, and added costs – with only limited guidance provided on the ACCC's views. For the wider community, the current approach is not transparent nor accessible. For the Australian Competition and Consumer Commission (ACCC), the current merger approval process can impede its ability to effectively and efficiently detect and prevent anti-competitive mergers. The ACCC often has to deal with inadequate notification of

¹ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, accessed 6 August 2024.

mergers, insufficient information, and a reactive, adversarial approach from some businesses, with limited capacity for economic evidence to be presented in court.

Reform options considered

Taking into account the feedback received, 4 options for reform were considered, including the status quo. Three of these options (Options 2, 3, and 4) introduce a mandatory and suspensory system, and 2 of these options replace the existing model of judicial enforcement with an administrative system (Options 2 and 3):

- **Option 1 (status quo)** – Australia currently has a prohibition on acquisitions of shares or assets that would have the effect, or be likely to have the effect, of substantially lessening competition (SLC) in any market. These are reviewed through one of three pathways: voluntary informal merger review; voluntary merger authorisation; or Federal Court of Australia (Federal Court) proceedings.
- **Option 2 (mandatory and suspensory administrative system with an extended SLC test)** – introduces a single mandatory and suspensory administrative merger control system that will replace the multiple voluntary pathways of the status quo. A merger will be permitted to proceed, unless the ACCC is satisfied that it is likely to SLC, including if it creates, strengthens, or entrenches substantial market power. Merger parties may also, following the competition assessment, seek the merger to be approved if the ACCC is satisfied the merger would result, or be likely to result, in a benefit to the public that outweighs the anti-competitive detriment of the merger.
- **Option 3 (mandatory and suspensory administrative system with a satisfaction test)** – this is an alternative version of Option 2 in that it also introduces a mandatory and suspensory administrative merger control system. It differs from Option 2 in that mergers and acquisitions can only proceed if the ACCC is satisfied a merger is not likely to SLC including if it creates, strengthens, or entrenches substantial market power. Like Option 2, merger parties may also seek approval on public benefit grounds.
- **Option 4 (mandatory and suspensory judicial enforcement system with an SLC test)** – this is an alternative version of Option 1 that would replace the voluntary informal merger review with a mandatory and suspensory system, and retain the existing model of judicial enforcement with the SLC test. Option 4 would retain a separate merger authorisation process.

Preferred option

Option 2 is the recommended option. This option strengthens Australia's merger control approach by improving the ACCC's ability to effectively and efficiently detect, review and act against anti-competitive mergers and acquisitions. Mandatory notification requirements would mean that mergers and acquisitions more likely to impose risks for the economy must be notified to the ACCC. Suspensory timeframes for review and upfront information requirements will enhance predictability and certainty for stakeholders.

As the administrative decision-maker, the ACCC will maintain a public register of all merger reviews, undertake the legal, data and economic analysis required to assess a merger and publish reasons for its determinations. The improved transparency around the economic objectives of merger control enhances community understanding, improving effectiveness in the longer term.

The benefits of an efficient and effective merger control system are significant. Applying analysis from overseas to Australia would imply benefits of between \$340-732 million per year.² Greater certainty and speed will reduce costs and facilitate valuable investment in pro-competitive and benign mergers. Consumers and businesses, along with the broader community, will be better informed and more confident that the ACCC has the toolkit to perform its gatekeeper role, prevent anti-competitive mergers and maintain competitive markets in Australia.

While it is not possible to precisely quantify the benefit of increased competition, illustrative modelling undertaken jointly by the Reserve Bank of Australia (RBA) and Treasury highlights the potential value, suggesting that Australia's Gross Domestic Product (GDP) could be 1-3 per cent higher if we returned to the level of competition that prevailed in the early 2000s.³ In today's dollars, that is approximately \$30-80 billion each and every year.

² Note: Savings given in millions of local currency at current prices. Australian savings extrapolated from 2021-22 UK and US figures. Sources: Office for National Statistics; Competition & Markets Authority; Bureau of Economic Analysis; Federal Trade Commission; Australian Bureau of Statistics; Treasury; Refinitiv.

³ Dr Steven Kennedy PSM, Secretary to the Treasury, *Post-Budget economic briefing: Address to the Australian Business Economists*, 30 May 2024, accessed 10 June 2024.

Background on merger control

A merger or acquisition can occur when there is an acquisition of a business or asset. Mergers and acquisitions can provide an important way for firms to achieve economies of scale and scope, diversify risk and exit businesses. They can enhance competition if these efficiencies are passed onto consumers via lower prices, improved product quality, range, or service. Mergers and acquisitions can also be a key means for assisting the economy to structurally adjust to economic challenges, such as the rise of the care economy, rapid transformation to net zero and the growth of the digital economy.

The overarching policy objective of Australia's merger control system is to promote competition that enhances the welfare of Australians, consistent with the object of the *Competition and Consumer Act 2010* (Cth) (CCA).

Merger control is the legal system and underlying process that enables a competition authority to consider mergers that could be harmful to competition and, if necessary, amend or prevent harmful mergers.

Merger control thus plays a critical gatekeeper function, maintaining competitive market structures that lead to better outcomes for consumers. Ideally, merger control regimes would target those mergers that are anti-competitive and allow mergers and acquisitions that are pro-competitive or benign to proceed.

Australia's merger control system

Merger control has been in place in Australia since 1974. Currently, there are 3 voluntary processes by which proposed mergers may be subject to a competition assessment in Australia.⁴

- ACCC informal merger review – a non-legislative process that enables merger parties to manage regulatory risk and seek the ACCC's non-binding view on whether a merger is likely to SLC. The ACCC's informal view provides an assurance that the ACCC does not intend to take court action to stop a proposed merger from proceeding (based on the information available at the time of the decision).
- ACCC merger authorisation – a formal legislative process that allows the ACCC, and the Australian Competition Tribunal (Tribunal) on review, to provide businesses with immunity from court action under competition law for a proposed merger if it is satisfied that the merger would not be likely to SLC or that it is likely to result in a net public benefit.
- Federal Court proceedings – a process in which the ACCC, merger parties or third parties can seek orders relating to the merger. The ACCC can seek an injunction to restrain the merger prior to completion, divestiture post-completion, an order that a completed merger is void where the vendor is involved in contravening section 50, and impose penalties. Merger parties may seek a declaration that a merger does not SLC. Third parties may seek a declaration and/or damages. Such relief is at the discretion of the Federal Court and the evidentiary burden of proving the case is usually on the party seeking the orders.

Most mergers that are notified to the ACCC are considered through the ACCC's informal merger review process (99% in the 2022–23 financial year).⁵ Informal merger reviews are either undertaken through a confidential pre-assessment or public review process. In the past 5 years, 93 per cent of

⁴ More information: The Treasury, Australian Government, *Merger Reform Consultation Paper - Appendices*, November 2023, p 5, accessed 9 May 2024.

⁵ Australian Competition and Consumer Commission (ACCC) data from The Treasury, Australian Government, *Merger Reform Consultation Paper - Appendices*, November 2023, p 8, accessed 9 May 2024

ACCC informal merger reviews were pre-assessed, with the length of reviews ranging from 2 to 16 weeks and an average of slightly more than 3 weeks.⁶

A public informal review involves market inquiries and submissions from affected parties such as competitors and customers. The ACCC will issue a Statement of Issues and extend the review if it considers the merger may raise competition concerns. Timelines depend on the complexity of the review. However, indicative ACCC timeframes are approximately 6-12 weeks for mergers that do not require further consideration (Phase 1), with an additional 6-12 weeks where a Statement of Issues is published (Phase 2).⁷

In practice, in the 2023 calendar year, Phase 1 reviews took on average 59 business days (or under 12 weeks) and Phase 2 reviews took on average 133 business days (or over 26 weeks).⁸ These timeframes exclude any periods where the ACCC suspended the review while waiting for information from the merger parties and any confidential pre-assessment review time.

If the ACCC opposes the merger and it is not voluntarily abandoned, the ACCC must commence proceedings in the Federal Court to stop the merger.

⁶ ACCC data from The Treasury, Australian Government, *Merger Reform Consultation Paper - Appendices*, November 2023, p 9, accessed 9 May 2024.

⁷ ACCC, Australian Government, *Informal Merger Review Process Guidelines*, September 2013, p 4, accessed 6 June 2024.

⁸ ACCC data from The Treasury, Australian Government, *Merger Reform Consultation Paper - Appendices*, November 2023, p 9, accessed 9 May 2024

1. What is the problem you are trying to solve and what data are available?

What is the problem?

The Government asked the Competition Taskforce, established within Treasury, to assess whether Australia's merger control system is fit for purpose.⁹ This was in response to the ACCC raising concerns about Australia's approach to merger control¹⁰ and evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries,¹¹ and the rate of entry of new companies falling.¹²

Treasury consulted a diverse range of stakeholders seeking information and views about the current approach to merger control and the assessment of whether a merger is likely to be anti-competitive.¹³ As noted above, the feedback from stakeholders¹⁴ was clear: Australia's current 'ad hoc', voluntary merger process is unfit for a modern economy. It lags behind best practice recommendations from the Organisation for Economic Co-operation and Development (OECD) and International Competition Network, and processes in comparable countries.

Concerns with the current approach to merger control in Australia included:

- For business, some uncontentious mergers are subject to delays, uncertainty, and added costs – with only limited guidance provided by the ACCC.
- For the wider community, it is often difficult to engage with the ACCC's merger reviews. The current approach is not transparent nor accessible.
- For the ACCC, the current approach can impede its ability to effectively and efficiently detect and prevent anti-competitive mergers.

These problems are described further below.

Australia's approach to merger control is unfit for a modern economy

Limited ability to detect and prevent anti-competitive mergers

The current voluntary approach to merger control can impede the ACCC's ability to effectively and efficiently detect and prevent anti-competitive mergers. The ACCC often has to deal with inadequate

⁹ The Hon Dr Jim Chalmers, Treasurer, and the Hon Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment, '*A more dynamic and competitive economy*', Australian Government, 23 August 2023, accessed 5 March 2023

¹⁰ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, accessed 5 March 2024

¹¹ The Treasury, Australian Government, *Background Note: Economic literature relevant to mergers*, 2023, accessed 5 March 2024.

¹² House of Representatives, Standing Committee on Economics, *Better Competition, Better Prices: Report on the inquiry into promoting economic dynamism, competition and business formation*, March 2024, p 26, Australian Parliament, accessed 3 June 2024

¹³ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, accessed 5 March 2024.

¹⁴ Submissions are available at *Merger Reform consultation, Submissions*, treasury.gov.au website.

notification of mergers, insufficient information, and a reactive, adversarial approach from some businesses, with limited capacity for economic evidence to be presented in court.

The ACCC submitted that increasingly it is not directly notified of all the mergers that require scrutiny. While the identity and effect of these non-notified mergers is unknown, the examples provided by the ACCC demonstrate that there are unscrutinised mergers occurring that raise serious competition concerns.¹⁵ These include Petstock (the second largest speciality pet retail chain in Australia), which completed a large number of acquisitions between 2017 and 2022 without directly notifying the ACCC, Qantas' acquiring 19.9 per cent of Alliance Airlines in 2019, Primary Health Care acquiring Healthscope's pathology business in Queensland without notifying the ACCC in 2015.¹⁶

Petstock

During the ACCC's review of Woolworths' proposed acquisition of a 55 per cent interest in Petstock, the second largest specialty pet retail chain in Australia, ACCC became aware of a large number of acquisitions completed between 2017–2022 by Petstock. After investigation, the ACCC identified significant concerns that 4 transactions (involving over 50 retail stores) have had an impact on national and state-wide chain-on-chain competition, as well as competition in multiple local areas. In December 2023, the ACCC accepted proposed divestiture undertakings that were offered by Petstock to address the competition concern.

Primary Health Care

In February 2015, the ACCC received complaints about the completed acquisition of Healthscope pathology assets. The ACCC considered that the acquisition removed a significant third player in Queensland, leaving just two major full-service pathology providers in that state. The change in market structure would be likely to result in increased prices and reduced service levels for pathology services in Queensland. The ACCC investigated the completed acquisition and in June 2016 accepted an undertaking for divestiture of the pathology assets to restore a competitive market structure in Queensland.

The Competition Taskforce has developed new data assets including Australia's first economy-wide database for tracking the impact of mergers and acquisitions. The database uses comprehensive Australian Bureau of Statistics (ABS) administrative microdata on worker flows between all Australian businesses to estimate the number of mergers and acquisitions each year. Preliminary results from this data indicate there are around 1,500 mergers annually.¹⁷ This means that only around one-fifth of all mergers and acquisitions in the economy are notified to the ACCC. It also shows that most target firms are medium-sized businesses, while mergers and acquisitions are disproportionately made by very large firms (the largest 1% of firms make around half of all acquisitions).¹⁸

The current approach relies on businesses voluntarily notifying proposed mergers to the ACCC. Consequently, the mergers considered by the ACCC are determined by the commercial risk appetite of merger parties, rather than a whole-of-economy risk-based approach to assess mergers posing the greatest competitive risks or harm to competition and the economy.

¹⁵ These examples are detailed in ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, pp 69-70, accessed 24 May 2024.

¹⁶ ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, pp 67-68, accessed 24 May 2024.

¹⁷ The Treasury, Australian Government, *'Tracking mergers in Australia using worker flows'*, p 1, accessed 5 March 2024.

¹⁸ The Treasury, Australian Government, *'Tracking mergers in Australia using worker flows'*, p 4, accessed 5 March 2024.

The data available shows that the ACCC has considered 330 mergers each year on average over the past 10 years.¹⁹ Data provided by the ACCC shows that for merger assessments commenced in the 2022–23 financial year, 233 of the 366 mergers considered by the ACCC were also subject to approval from the Foreign Investment Review Board (FIRB). The ACCC became aware of 186 of these 233 mergers exclusively via FIRB referral.²⁰ Of those referred by FIRB, 6 per cent were returned to FIRB on the basis that the ACCC did not view the referral as necessary, only a very small proportion of mergers progressed to a public review, and the remainder raised no competition issues.²¹ This suggests the ACCC is reviewing a significant number of low-risk mergers.

The ACCC's ability to effectively and efficiently assess mergers relies on the willing compliance of the merger parties and their advisors, which the ACCC submitted has diminished significantly in recent years.²²

There is no legislative basis for the ACCC to prescribe information requirements for merger parties seeking informal merger review. Merger parties may therefore be selective about what and how much information they provide to the ACCC. The ACCC submitted this creates information gaps, which impacts its ability to accurately and efficiently form a view on whether or not to approve a proposed merger.²³ There is also no restriction on merger parties introducing new information or evidence later in the ACCC's review or if the matter proceeds to court. Consequently, merger parties may only provide limited information upfront that suggests there are no, or limited, competition issues and only provide further information once requested to do so.

The voluntary nature means that merger parties can proceed to complete, or threaten to complete, the merger before the ACCC has finalised its review. The ACCC cited three instances where this has occurred in recent years – Virtus' proposed acquisition of Adora (2021); Qube's acquisition of Newcastle Agri Terminal (2021), and an example of an unnamed large retailer (year not specified).²⁴

There is also limited capacity to use and present economic evidence in court. For example, Dr Rhonda Smith and Professor Deborah Healey submitted in relation to the cause of the problem with the current approach that the primary issues are *'the requirement for evidence to conform with the Evidence Act 1995 when it is alleged that a merger will substantially lessen competition, and the approach of courts to the reception of economic evidence in merger cases. Providing evidence of the alleged substantial lessening of competition resulting from a merger, and particularly a digital merger, to a standard that satisfies the Evidence Act is extremely difficult, if not impossible. The merger is yet to occur so there is no direct factual evidence concerning the effect of the merger.'*²⁵

The challenges faced by the ACCC to effectively and efficiently detect and prevent anti-competitive mergers and acquisitions have significant consequences, including flow on costs for consumers (which can include end-consumers as well as other businesses) from higher prices, reduced quality or service, and decreased levels of innovation. Even small increases in prices resulting from anti-competitive mergers can be harmful for consumers. For example, the ACCC's ex-post review of Caltex's acquisition of Milemaker found that petrol prices in local areas near the Milemaker sites had

¹⁹ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, p 8, accessed 5 March 2024.

²⁰ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, p 8, accessed 13 May 2024.

²¹ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, p 22, accessed 13 May 2024.

²² ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, p 4, accessed 11 June 2024.

²³ ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, p 63, accessed 11 June 2024.

²⁴ ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, pp 69-70, accessed 24 May 2024.

²⁵ Dr Rhonda Smith University of Melbourne and Professor Deborah Healey UNSW Law and Justice, *Treasury Submission re Merger Reform*, p 2, accessed on 28 May 2024.

increased by around 0.8 cents per litre (or around 0.5%) costing motorists around \$6 million per annum.²⁶

Ex-post review of Caltex's acquisition of Milemaker

Caltex acquired the Milemaker retail petrol business in 2017. This involved Caltex taking over the operation of 46 retail petrol sites, 33 of which were in Melbourne. Prior to the acquisition, Caltex operated around 7 per cent of the sites in Melbourne and Milemaker operated around 4 per cent.

The ACCC did not oppose the acquisition, concluding "... that there are a number of other vigorous and effective price competitors in fuel retailing in Melbourne who are larger than Milemaker and who compete more directly with Caltex on a local site basis".

In 2021, the ACCC undertook an ex-post review of the acquisition focusing on the effect on retail petrol prices. This involved comparing retail petrol prices observed prior to the acquisition with petrol prices observed after the acquisition.

The ACCC's analysis indicated that Caltex changed the pricing approach at the Milemaker sites from aggressive price discounting to a less aggressive and more accommodating strategy. This reduced the competitive influence that the Milemaker sites had on other retail petrol sites in the vicinity. The ACCC estimated that the acquisition had the effect of increasing petrol prices in local areas near the Milemaker sites by around 0.8 cents per litre, costing motorists around \$6 million per annum.

Dr Graeme Woodbridge (former ACCC chief economist) contends that changes to merger control that make it more or less permissive will mostly affect mergers that are 'close calls' or are on the enforcement margin.²⁷ Dr Woodbridge's analysis estimated this is around 7 mergers a year in Australia, based on the market characteristics of mergers considered by the ACCC between 2020 and 2023.²⁸

Dr Woodbridge observed that erroneously allowing anti-competitive mergers comes at an economic cost. He stated '*under most circumstances, competition enhances welfare through driving productivity growth and economic efficiency more broadly. Competition ensures the pursuit of profits works in favour of the many, including consumers and workers, rather than the few. Allowing anticompetitive mergers foregoes these gains*'.²⁹

Dr Woodbridge contends that the most valuable and the most reliable evidence of the effects of mergers on the enforcement margin comes from published studies that examine the effects of completed mergers. While Dr Woodbridge acknowledges these studies suggest that mergers can have significant effects on prices in both directions, the majority of mergers analysed resulted in

²⁶ The ACCC's ex post review involved analysis of time of day petrol pricing data for almost all retail petrol sites in Melbourne for the period 2015 to 2019. This enabled the ACCC to assess the effect of the acquisition (which occurred in May 2017) on regular unleaded petrol prices, ACCC, Australian Government, *Ex post review of merger decisions 2022*, p 11, accessed on 24 June 2024; ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, p 6, accessed 5 March 2024.

²⁷ ACCC, Australian Government, *Second submission to Treasury on merger reform- Attachment B: Report by Dr Graeme Woodbridge*, 31 January 2024, p 13, accessed 12 June 2024.

²⁸ ACCC, Australian Government, *Second submission to Treasury on merger reform- Attachment B: Report by Dr Graeme Woodbridge*, 31 January 2024, p 14, accessed 12 June 2024.

²⁹ ACCC, Australian Government, *Second submission to Treasury on merger reform- Attachment B: Report by Dr Graeme Woodbridge*, 31 January 2024, p 15, accessed 12 June 2024.

higher prices. Dr Woodbridge observed that price increases are more likely in concentrated markets.³⁰

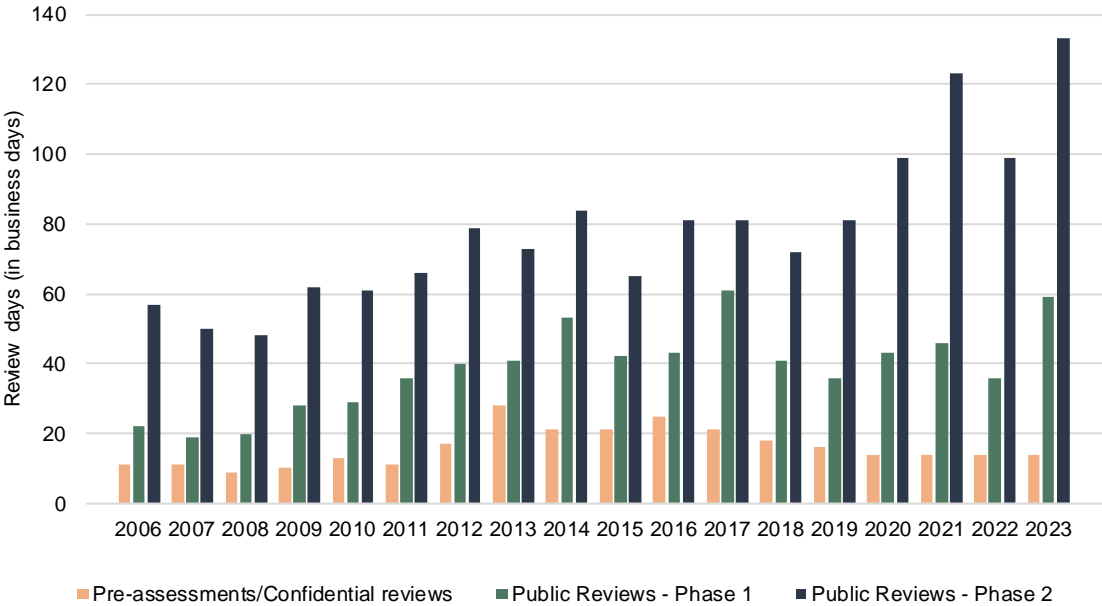
Uncertainty, delay and added costs

For business, some uncontentious mergers are subject to delays, uncertainty, and added costs. The current informal review process does not have a legislative basis, and the ACCC is not bound by legislated timelines and processes.

Business stakeholders raised concerns that this created considerable uncertainty, with the Business Council of Australia (BCA) identifying this as a key issue. The BCA submitted *‘The absence of time limits for considering a merger clearance application is one of the most challenging aspects of the current regime. A lengthy clearance process can delay commercial decisions, time parties out from deals and impose significant costs on business, including small and family businesses on the sell-side of a transaction’*.³¹ The opportunity cost of this uncertainty and delay can be significant and impact on financing requirements for businesses.

As well as being uncertain, the timelines for merger reviews have increased over recent years as shown in Figure 1 below. The time taken for Phase 1 public reviews has increased from 22 days in 2006 to 59 days in 2023. Similarly, the time taken for public reviews has increased from 57 days in 2006 to 133 days in 2023 (which exceeds the ACCC’s stated performance measure of 120 business days for Phase 2 reviews as outlined in the ACCC’s Annual Report 2022-23).³² This does not include periods when the timeline was suspended while the ACCC waited for information from the parties.

Figure 1. Average length of ACCC informal reviews



Note: Calendar year. The duration is in business days, excluding any timeline suspensions while the ACCC awaits information from the merger parties. Timeline suspensions were not recorded for confidential reviews prior to 2018. For the purposes of this analysis, merger assessments include matters that are withdrawn or where no decision is reached. Source: ACCC.

³⁰ ACCC, Australian Government, *Second submission to Treasury on merger reform- Attachment B: Report by Dr Graeme Woodbridge*, 31 January 2024, pp 15-16, accessed 12 June 2024.

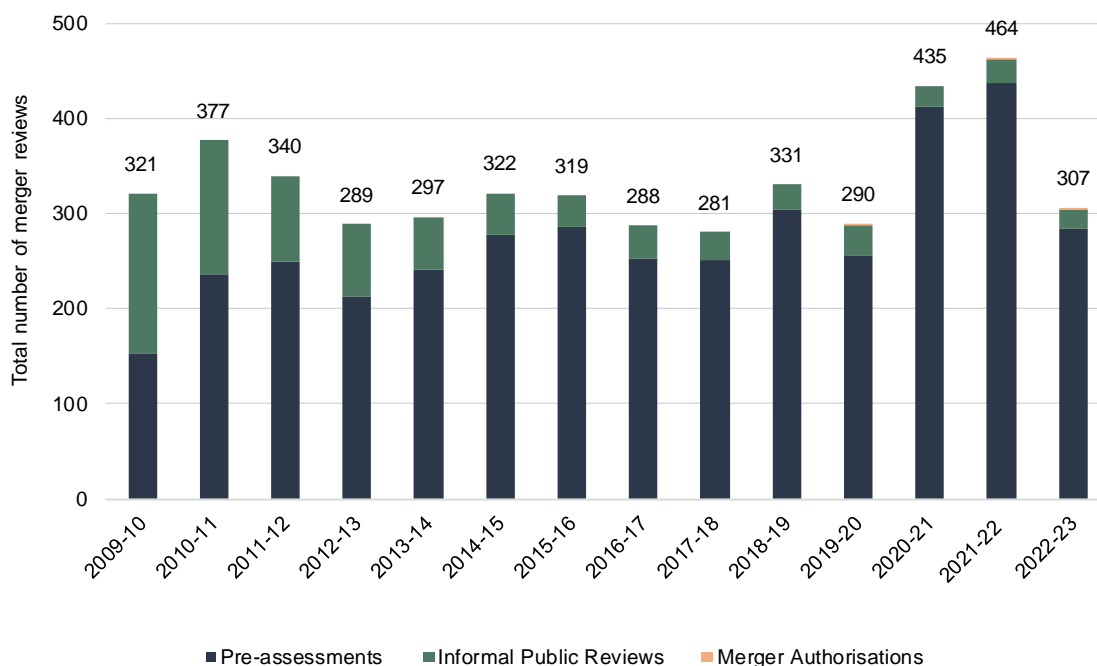
³¹ Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, p 19, accessed 23 May 2024.

³² See ACCC, Australian Government, *Annual Report 2022-23*, October 2023, p 67, accessed 24 May 2024.

Lack of transparency and difficult to engage

For businesses, suppliers, consumers, and interested members of the public, the current approach provides limited guidance or precedent and lacks transparency. Only 10 per cent of mergers reviewed by the ACCC are conducted publicly, with the remaining 90 per cent being confidentially pre-assessed (see Figure 2).

Figure 2. Number of ACCC merger reviews per year since 2009-10



Note: Financial year. Source: ACCC. Merger Authorisations are limited to applications made to the ACCC after 2017 where the ACCC became the first instance decision maker.

The ACCC has also not substantively updated its guidance on the assessment of merger reviews since 2008. Consequently, there can be a lack of clarity around the ACCC's substantive approach to merger assessments, including on new or novel competition issues. The lack of clarity makes it difficult for merger parties to self-assess when notification is required, and if they do notify, to understand the type of information the ACCC will need to undertake its assessment. This may result in merger parties gathering and supplying unnecessary information (which increases costs) or delays to the review while they compile information the ACCC requires. There is also limited transparency about the information the ACCC considers in making its decision, and the process for assessing a merger. This is a result of the limited number of mergers that are made public each year, and is a feature of a judicial enforcement regime.

The adversarial nature of the judicial enforcement model means that all interactions between the ACCC and merger parties are under the spectre of potential litigation. This imposes additional cost and procedural requirements, and can disincentivise engagement with affected market participants, including the merger parties, customers and suppliers. The Council of Small Business Organisations Australia submitted that *'In any judicial enforcement model, including the current model, COSBOA agrees that court proceedings are time and resource intensive.'*³³

³³ Council of Small Business Organisations Australia, *Merger Reform Submission*, January 2024, p. 3, accessed 26 June 2024.

The ACCC noted that the ‘...required level of admissible evidence needed to prove that the transaction would breach section 50 if it proceeds may not exist due to the uncertainty about the future or is difficult to obtain because of the information asymmetry that exists between the merger parties and the ACCC and/or the reluctance of third-party witnesses (such as customers) to appear in court.’³⁴

Public communication by the ACCC may also be impeded, reducing community understanding of the purpose and goals of merger policy.

Court proceedings can also be difficult and resource intensive particularly for parties who are comparatively under-resourced, such as consumer groups, small businesses, and third-party witnesses. As a result, third parties who may be affected by a merger may be deterred from participation due to a reluctance to appear in court, fear of retribution, and/or costs.³⁵ CHOICE and Consumers Federation of Australia noted that ‘Consumers and consumer advocates are even more resource constrained than regulators, and there will inevitably be a limit to their capacity to engage with merger control processes...Consumer advocates typically cannot engage with Tribunal or court based processes without funding support.’³⁶

Treasury also heard from stakeholders (including consumer and small business groups) that the ACCC’s practice of reviewing most mergers confidentially compromises their ability to meaningfully engage with the ACCC’s merger reviews, as these matters do not appear on the public register. These stakeholders advocated for increased transparency to ensure third parties affected by a merger are aware the ACCC is undertaking a review and provide them the ability to make submissions to the ACCC.³⁷

The Australian Small Business and Family Enterprise Ombudsman submitted that ‘a pertinent example is the Woolworths’ purchase of PDF Food Services. Most small businesses would have been unaware of the proposal, and many may not have appreciated future secondary impacts of this acquisition, notably the limiting of supplier options outside the already-concentrated major supermarket sector’.

The ACCC also publishes limited reasoning for its merger assessments. In the past 10 years, there have been 67 instances where the ACCC has released a public competition assessment setting out its views. This is only 2 per cent of all reviews, and 17 per cent of all public reviews.³⁸ For mergers which the ACCC had indicated it would oppose, this may be because the ACCC was concerned about prejudice to later enforcement action.³⁹

The lack of transparency means prospective merger parties do not have a good understanding of the likely substantive analysis the ACCC may undertake, the process, and ultimately the likely outcomes. In turn, this limits the capacity for anti-competitive mergers to be deterred before they are proposed. A lack of transparency also hampers accountability and decreases confidence in the merger control system for stakeholders and the broader community.

³⁴ ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, p 64, accessed 26 June 2024.

³⁵ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, p 14, accessed 31 May 2024.

³⁶ CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, pp 3-4, accessed 26 June 2024.

³⁷ Australian Small Business and Family Enterprise Ombudsman, *Submission to the Treasury Competition Review on Merger reform options*, April 2024, p 1, accessed 12 June 2024 and CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, p 3-4, accessed 12 June 2024.

³⁸ Numbers obtained from ACCC, *Public informal merger review register* [online public register], accessed 23 May 2024

³⁹ ACCC, Australian Government, *Submission to Treasury on merger reform*, 20 December 2023, p 8, accessed 10 June 2024.

Lack of cost recovery

The operational cost of merger control is currently funded by the public and not based on cost recovery. The ACCC's informal merger reviews do not require the payment of fees. Each merger authorisation application requires payment of a \$25,000 fee (not based on cost recovery) and there have only been 7 such applications since November 2017.

To ensure efficient resource use across the economy, subject to the ACCC operating an efficient merger control system, mergers and acquisitions should pay the costs they individually impose on the community for assessing that risk. This also means the current approach may not meet the requirements of the Australian Government Charging Framework and the cost recovery principles that stipulate that an identifiable group or individual creating a specific demand for a specific regulatory activity should pay fees.⁴⁰ Under the current voluntary system, any cost recovery fee may disincentivise notification. These incentives change under a mandatory notification and cost recovery system.

The total cost to the ACCC and Australian taxpayers to administer the merger control system are significant. For example, the ACCC estimates the average cost to undertake an informal public review is below \$500,000, and in the 2022–23 financial year there were 23 reviews of this nature, equating to a total cost of \$11.5 million. The costs for litigated mergers are much larger, which the ACCC estimated costs more than \$5 million per merger.

Evidence is emerging that competition is declining in Australia

There is evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries.⁴¹ This reduction in competition is likely to have contributed to Australia's declining productivity performance over a long period. The OECD in its recent economic survey of Australia has also noted evidence that '*a growing body of evidence links excessive concentration and market power with a range of poor economic outcomes*'.⁴² In Australia, stakeholders have also raised concerns about serial acquisitions, particularly by large retailers.⁴³

In response to the 2023–24 Merger Reform Consultation, CHOICE and the Consumers' Federation of Australia noted that '*Australia has many markets that are highly concentrated; supermarkets, airlines, banking, telecommunications, energy and insurance are all markets where a few dominant companies provide most Australians with essential products and services... Consumers pay the price of highly concentrated markets, including through higher prices, poor customer service and lower product and service quality*'.⁴⁴

Similarly, the Master Grocers Australia noted that '*10 of the 20 largest industry classes in Australia are highly concentrated*' and that '*the Australian economy has become more concentrated over time,*

⁴⁰ Department of Finance, Australian Government, *Implementing the Charging Framework (RMG 302)*, 21 June 2023, accessed 5 March 2024.

⁴¹ Iris Day, Zac Duretto, Patrick Hartigan and Jonathan Hambur '*Competition in Australia and its impact on productivity growth*', Treasury Round Up, October 2022, pp 15-16, accessed 5 March 2024.

⁴² OECD, *OECD Economic Surveys: Australia 2023*, 2023, p 57, accessed 28 October 2023.

⁴³ ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, p 9, 61, 67, accessed 5 June 2024 and MGA Independent Business Australia, *Reviving concentrated markets with merger reform – Response to the Treasury consultation paper on merger reform*, 19 January 2024, p 7-8, accessed 5 June 2024.

⁴⁴ CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, p 1, accessed 5 March 2024.

with the average four-firm concentration ratio increasing by 2.2 percentage points from 2001-2 to 2018-19'.⁴⁵

The Office of the Australian Information Commissioner (OAIC) observed that lack of choice can have negative impacts on non-price factors of competition such as privacy.⁴⁶ For example, studies by the OAIC have shown that privacy is the third most important factor among Australians when choosing a product or service, coming only after quality and price.⁴⁷

Evidence from overseas suggests that too many anti-competitive mergers have been allowed to proceed in those countries and that '*merger enforcement has been too lax over the past 25 years*'.⁴⁸ There is also evidence that declining firm entry rates have contributed to a reduced rate of convergence to the productivity frontier within industries, and that the rate of convergence is slower within industries that have experienced the largest increases in markups.⁴⁹

Despite evidence of falling competition in Australia and the views of some stakeholders, there is a lack of evidence attributing mergers to the decline. A key benefit of the proposed reforms is to provide the information and incentives for data analysis to develop such evidence, along with the flexibility to adjust regulatory settings to respond to high-risk mergers over time.

⁴⁵ MGA Independent Businesses Australia, *Reviving concentrated markets with merger reform – Response to the Treasury consultation paper on merger reform*, 19 January 2024, p 2, accessed 6 March 2024.

⁴⁶ Office of the Australian Information Commissioner, *OAIC submission to Merger Reform Consultation Paper*, January 2024, p 2, accessed 5 March 2024.

⁴⁷ Office of the Australian Information Commissioner, Australian Government, *Australian Community Attitudes to Privacy Survey*, p 13, accessed 27 June 2024.

⁴⁸ C Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 2019, *Journal of Economic Perspectives*, 33 (3): pp 69-93, 77, accessed 28 October 2023.

⁴⁹ D Andrews, J Hambur, D Hansell and D Wheeler, '*Reaching for the Stars: Australian Firms and the Global Productivity Frontier*', The Treasury, Australian Government, 2022, Working Paper No 2022-01, ISBN 978-1-925832-41-9, accessed 28 October 2023.

2. What are the objectives, why is government intervention needed to achieve them, and how will success be measured?

What are the objectives?

The overarching policy objective of Australia's merger control regime is to promote competition that enhances the welfare of Australians, consistent with the object of the CCA.⁵⁰ An efficient and effective merger control regime should seek to achieve its policy objective at the lowest cost possible and in a timely manner, with appropriate powers and resources for the ACCC.⁵¹

Ideally, mergers and acquisitions that are pro-competitive (or do little or no competitive harm) should proceed, while anti-competitive mergers and acquisitions should be blocked. In practice, this goal is challenging to achieve, given it is hard to predict the future effects of a proposed merger or acquisitions. A merger control system must balance risk tolerance to maintain market conditions that promote investment, innovation and growth to advance the interests of consumers, businesses and our economy.

In modernising Australia's merger control system, the objectives are to promote competition, protect consumers and provide greater predictability by increasing transparency and a single streamlined system. The new system should simplify and speed up the process for mergers, consistent with the national interest, and give the ACCC stronger powers to identify and scrutinise mergers and acquisitions that pose the greatest risk to competition, consumers and the economy. To achieve this, the new system needs to be faster, stronger, simpler, more targeted and more transparent.

Why is government intervention needed to achieve them?

Critical to Australia's merger control system is the adequate scrutiny of potentially anti-competitive mergers and acquisitions before they take place. Once an anti-competitive merger or acquisition occurs, the market structure changes and the effects can be long-lasting. The risk of anti-competitive mergers and acquisitions proceeding is an ongoing intrinsic risk to consumers and the economy that necessitates a merger control system.

This risk is not unique to the Australian economy. All OECD and G7 members have systems to control mergers and acquisitions, recognising that the maintenance of competition is important to the functioning of an economy.

As discussed in Question 1, the current approach to merger control in Australia is not fit for purpose. Reforming the key elements of Australia's system of merger control — notification, assessment, decision making and review — requires legislative change to the CCA.

Constraints and barriers to achieving the objectives

There are several potential constraints and barriers to reforming Australia's merger rules to promote competition, protect consumers and provide greater certainty by streamlining the approvals process.

⁵⁰ *Competition and Consumer Act 2010* (Cth) s2.

⁵¹ Productivity Commission (PC), Australian Government, '*On efficiency and effectiveness: Some Definitions*', Staff research note, PC, Australian Government, 2013, accessed 27 October 2023.

Predicting the likely outcomes of an acquisition and its effect on competition poses a significant challenge given the uncertainty about the future. This can be further exacerbated by information asymmetry between the ACCC and the merger parties, which may lead to an incorrect decision by the ACCC. To this end, the system is designed to strengthen integrity and incentivise compliance with notification and review requirements, ensuring the ACCC has sufficient information to conduct reviews efficiently and effectively.

Further, to assist the ACCC in its role as an administrative decision-maker and ensure explicit emphasis is placed on economic methodology and analysis of competitive effects, the ACCC will set out its findings on material facts, with reference to the evidence or other material on which those findings were based, and the reasons for all determinations, commensurate with the substantive review undertaken.

While the ACCC will not be bound by previous determinations, this will facilitate transparency and predictability in the administrative system. It will also shape the boundaries of merger control over time as a body of previous determinations, including the economic and legal reasoning, will develop over time to guide stakeholders. The ACCC will be expected to consult on, issue and periodically update substantive guidance on its assessment of mergers and acquisitions.

The new, streamlined merger system will involve significant change, including for business, advisors, the ACCC and the Tribunal. In particular, a shift in capabilities and practice by the ACCC will be required to support the change from enforcement action in court to more data- and economics-led administrative decision-making.

To facilitate this change, new performance standards will be set for the ACCC for merger assessments, including timeliness, guidance and reasons for determinations. In addition, an independent expert adviser will advise Treasury and the ACCC on implementing the new merger control system effectively, including advice on ACCC capabilities, practice, systems and resourcing.

The level of scrutiny required to maintain an efficient and effective check to prevent anti-competitive mergers may also be subject to contest by businesses given the strengthening of ACCC's powers. It is expected that, in the early years of the new system, there may be more contested decisions as the boundaries of the system are tested and novel issues are explored. This may impact on the ACCC's ability to continue to process merger reviews, requiring flexibility and adaptability.

As noted above, the new system introduces a mandatory obligation on parties to acquisitions above certain thresholds to notify proposed acquisitions before putting them into effect. To ensure the notification thresholds are set with respect to evidence of the risk of potential harms to the community over time, they will be regularly reviewed and set out in subordinate legislation, with additional targeted notification requirements set by a Treasury Minister, providing flexibility to update or calibrate them over time. This ensures that the new system is risk-based, and targets mergers and acquisitions most likely to result in harm to competition and consumers, while reducing the overall compliance burden on businesses.

Further, the ACCC will utilise data to investigate and take action for non-notified anti-competitive mergers and acquisitions, alongside its broader enforcement mandate. Accordingly, the notification thresholds may need to be recalibrated. Treasury will also undertake a statutory review to evaluate the functioning of the system 3 years after commencement, which will include a review of the notification thresholds.

How will success be measured?

The Government has outlined its expectations for how the ACCC will promote a competitive, dynamic and inclusive economy and modern, well-functioning markets that work for consumers.⁵² The Government's expectation is that the ACCC will deliver the Government's merger reforms through:

- a risk-based approach with resources prioritised to managing or stopping mergers most likely to harm the community
- making use of data and economic analysis to enhance merger review and to identify risks to the community, and
- increased transparency and guidance to the community on merger activity and areas of ACCC concern to enhance community understanding and administrative predictability.

The key metrics to track the success of the reform are the number of mergers that go ahead that have anti-competitive effects (reflecting the quality of the ACCC's assessments) and the speed of ACCC assessments. Evaluating the success of this reform will be measured through:

- analysis of ACCC reporting on acquisition activities (linked to the new mergers and acquisition database) and ex-post review of decisions to evaluate whether ACCC determinations, supported by robust legal and economic analysis, correctly identify acquisitions that would have the effect, or be likely to have the effect, of SLC, including if they create, strengthen or entrench a position of substantial market power in any market
- mandatory notifications to capture mergers and acquisitions of concern through notification thresholds that are appropriately calibrated to capture mergers which would have greatest impact on consumers and the economy if anti-competitive, and
- timeliness for ACCC determinations (including reasonable pre-notification periods and properly justified extensions to time periods).
 - All (100%) acquisitions considered by the ACCC will be disclosed to the public compared to less than 10 per cent under the status quo. Further, the ACCC will provide reasons for 100 per cent of decisions, compared to only 2 per cent of all mergers assessed or 17 per cent of public reviews under the status quo.
 - Reduction of Phase 1 review times from an average of 75 days to 30 days for the anticipated majority of notified acquisitions (60% reduction). And reduction of the total of Phase 1 and Phase 2 review times from an average of 192 days in the status quo to 120 days (37% reduction).

Detailed implementation and evaluation approach, activities and associated data points are outlined in Question 7.

⁵² ACCC, Australian Government, *Statement of Expectations and Statement of Intent*, 2024, accessed 12 June 2024.

3. What policy options are you considering?

Treasury has considered a range of options for reforming Australia’s approach to merger control, which includes the options presented below as part of the net benefit analysis and a number of other general options, including a non-regulatory option. These options take into account the information and views Treasury received from the consultation process undertaken between November 2023 and January 2024.

- Option 1 – the status quo.
- Option 2 – a mandatory and suspensory administrative system with an extended SLC test.
- Option 3 – a mandatory and suspensory administrative system with a satisfaction test.
- Option 4 – a mandatory judicial enforcement system with a SLC test.

Option 1 – Status Quo

Option 1 makes no change to the existing approach to merger control with the Federal Court as the first-instance decision maker, and the ACCC providing a view as to whether it intends to commence proceedings. This would retain the 3 voluntary processes by which proposed mergers may be subject to a competition assessment described under the heading ‘Background to merger control’ above.⁵³

Option 2 – Mandatory and suspensory administrative system with an extended SLC test

Option 2 would introduce a single mandatory and suspensory administrative merger control system. Under this option, the ACCC will be the first-instance administrative decision-maker. Option 2 brings Australia in line with members of the G7 and the OECD. Six members of the G7 (France, Germany, Italy, Japan, United Kingdom and the European Union) and around three quarters of OECD members have administrative merger control systems (including other advanced economies such as Spain, Norway, Denmark, Sweden and South Korea).

Notification requirements

A corporation or person that is a party to acquisitions above certain thresholds (monetary, market concentration or additional targeted notification requirements) will be required to notify the ACCC of the proposed acquisition.⁵⁴ An acquisition must not be put into effect until the ACCC has determined that it may be (with or without conditions).

Monetary thresholds are set by reference to typical business metrics such as turnover (sales revenue), transaction value or the value of assets. Market concentration thresholds would ensure mergers below the monetary thresholds but which otherwise present risks to competition will be notified to the ACCC.

Over time, the notification thresholds are expected to average an overall volume of mandatory notifications similar to current volumes, with around 300 to 500 annual notifications projected using existing available data (based on the proposed notification thresholds outlined in the Merger Notification Thresholds consultation paper).⁵⁵ In setting these notification thresholds, regard will be

⁵³ More information: The Treasury, Australian Government, *Merger Reform Consultation Paper - Appendices*, November 2023, p 5, accessed 9 May 2024.

⁵⁴ Mergers and acquisitions below the notification thresholds may also be voluntarily notified to the ACCC. Such mergers and acquisitions would be subject to the same administrative system as above-the-threshold mergers and acquisitions.

⁵⁵ The Treasury, Australian Government, *Notification Thresholds Consultation*, August 2024, accessed 30 August 2024.

given to confidential data from the ACCC about its historical public reviews, early insights from the Government's merger database (based on the ABS Business Longitudinal and Analysis Data Environment (BLADE)), the *Foreign Acquisitions and Takeovers Act 1975* (Cth) application data, other public mergers data and the approach of other jurisdictions. The notification thresholds will be set in subordinate legislation and subject to periodic review with respect to the risk of potential harm to the community over time.

In addition, a Treasury Minister will be given the power to introduce additional targeted notification requirements, if there are evidence-based concerns about high-risk acquisitions, avoiding the need to lower the economy-wide notification thresholds and reducing the incidental capture of benign mergers within the notification thresholds. The ACCC may also investigate mergers and acquisitions which are not required to be notified for breach of any other relevant provisions of the CCA.

Option 2 would introduce calibrated upfront information requirements to ensure merger parties provide relevant information to the ACCC and mitigate the need for subsequent requests and possible delays. Merger parties will be required to submit a 'simple' shorter notification form for mergers unlikely to raise competition concerns, and a more detailed longer notification form for others.

All merger and acquisition notifications will be accompanied by a fee, based on cost recovery principles.⁵⁶ Indicatively, Treasury expects this to be around \$50,000–100,000 for most mergers and acquisitions (further detailed in Question 4 and [Attachment A](#)). An exemption from fees will be available for small business so that the fees are not a disproportionate burden for those businesses.

Process

All mergers and acquisitions considered by the ACCC will be listed on an ACCC public register, with brief information including the names of the merger parties, a short description of the merger and affected products and/or services, review timeline and ACCC's determination and reasons. Subordinate legislation will set out what other information or documents are to be included, and the time they are to be included, on the register.

The system will set timelines for the ACCC's merger and acquisition review. Review timelines, broadly consistent with international best practice, are: a 'Phase 1' review period of 30 working days, with the option of a fast-track determination after at least 15 working days if no concerns are identified by the ACCC; and a more in-depth 'Phase 2' review period of 90 working days. It is expected that the ACCC will determine that the vast majority of mergers (80-90%) may be put into effect within 20 working days.

These time periods may be extended by the ACCC in appropriate circumstances and subject to procedural safeguards, for example if false or misleading information are provided, remedies are offered by the merger parties, by mutual agreement or if requested information is not promptly provided.

The substantive test

Under Option 2, the ACCC must determine that an acquisition may be put into effect unless the ACCC is satisfied that the merger or acquisition would have the effect, or be likely to have the effect, of SLC in any market, including if the merger or acquisition creates, strengthens or entrenches a position of substantial market power in a market.

To respond to concerns regarding serial or creeping acquisitions and roll up strategies, the cumulative effect of all mergers within the previous 3 years by the merger parties may be

⁵⁶ Department of Finance, Australian Government, [Australian Government Cost Recovery Policy](#), 2023, accessed 12 June 2024.

considered as part of the assessment of the notified merger, regardless of whether those mergers were themselves individually notifiable.

Merger parties may, following the ACCC's Phase 2 determination, seek approval from the ACCC on public benefit grounds. The ACCC may approve the acquisition if it is satisfied the merger would result, or be likely to result, in a benefit to the public which outweighs the anti-competitive detriment of the merger.

Review of decisions

ACCC determinations setting out the outcome of its competition assessment and/or public benefits assessment will be subject to limited merits review by the Tribunal upon application by merger parties or interested parties (if the Tribunal is satisfied that the interested party has a sufficient interest).

In its review, the Tribunal cannot have regard to material that was not before the ACCC when it was making its determination. However, there are some exceptions, including information the Tribunal requests from the ACCC, information that was not in existence at the time of the ACCC's determination, and information for the sole purpose of clarifying existing information.

Certain administrative decisions made by the ACCC during its merger review and/or public benefits assessment will be subject to review, either internally or by the Tribunal (depending on the nature of the primary decision-maker).

Judicial review of Tribunal decisions will be available in the Federal Court.

Option 3 – Mandatory and suspensory administrative system with a satisfaction test

Option 3 is a variation to Option 2. Like Option 2, Option 3 would also introduce mandatory notification of acquisitions above certain thresholds (as for Option 2).

However, the ACCC would only grant clearance if it is satisfied the merger is not likely to SLC. Internationally, the only other jurisdiction that has this type of satisfaction test is New Zealand, where the New Zealand Commerce Commission must, if voluntarily notified of a merger, be satisfied that a merger is not likely to SLC.

Like Option 2, merger parties may also, following the competition assessment, seek approval from the ACCC for the merger on public benefit grounds. Option 3 would be subject to the same process for the review of decisions as Option 2.

Option 4 – Mandatory and suspensory judicial enforcement system with a SLC test

Option 4 would introduce a mandatory notification and suspensory system which requires mandatory notification to the ACCC of mergers and acquisitions above certain thresholds (as for Option 2). In addition, the ACCC would have the ability to call-in mergers which are below the thresholds. Option 4 would retain merger authorisation and the judicial enforcement model (as exists under the status quo) with the Federal Court as the first-instance decision-maker. Option 4 would be broadly based on the approach taken in the United States and Canada.

At the end of the formal assessment process following notification to the ACCC, if the ACCC believes the merger is likely to SLC and parties do not voluntarily abandon their proposal, the ACCC would need to commence court action to prevent the merger proceeding. In those court proceedings, to

stop the merger proceeding, the ACCC would need to prove to the Federal Court on the balance of probabilities that the proposed merger is likely to SLC.

Unlike the status quo, there would not be an ability for parties to seek an informal merger review.

Other options considered

Voluntary formal clearance

A voluntary formal clearance system was also considered. It would allow businesses to voluntarily notify an acquisition and the ACCC could grant legal immunity from court action under the prohibition against anti-competitive mergers in section 50 of the CCA if it is satisfied the acquisition would not be likely to SLC. If the ACCC had concerns, it would need to commence Federal Court proceedings to prevent the merger.

Treasury does not consider that a voluntary formal clearance system, or a variation of this, meets the objectives of the proposed reform. This is because it is unclear that it would address concerns about the non-notification of acquisitions, and merger parties would have minimal incentives to cooperate with the ACCC's review, particularly in circumstances where the ACCC commenced proceedings in the Federal Court to stop the acquisition.

Non-regulatory option

Treasury also considered options which would not require legislative reform. One option was that the ACCC maintain a more extensive, proactive intelligence gathering function to detect and prevent anti-competitive acquisitions before they occur. Another option considered was requiring the ACCC to publish a (voluntary) notification form on its website to better articulate the information the ACCC considers is necessary to facilitate the efficient and effective review of an acquisition.

Treasury considers that these non-regulatory options would, at best, be a partial solution. This is because these options would only result in marginal improvements over the status quo as they are unlikely to materially address the concerns identified by stakeholders in response to the 2023–24 Merger Reform Consultation, particularly as the ACCC already has a proactive intelligence gathering function.

The ACCC would still need to seek an injunction in the Federal Court if it is to prevent the acquisition going ahead, which can be challenging with possibly limited information about the proposed acquisition. If the acquisition has completed, the ACCC must seek an order for divestment in the Federal Court – and it may not be possible to restore competition to its pre-completion state. A voluntary notification form would not sufficiently address the issues of inadequate notification outlined above.

4. What is the likely net benefit of each option?

Option 1 – Status Quo

The status quo, including the current challenges with the approach to merger control, is described in Question 1. This is the baseline against which benefits for the other options are measured.

Number of mergers

As set out in Question 1, the number of mergers and acquisitions considered by ACCC is on average 330 a year. The total number of mergers and acquisitions in the Australian economy is estimated to be around 1,500 a year.

Of the mergers and acquisitions not considered by the ACCC, there is no method to measure the quantum of how many of these mergers and acquisitions raise substantial competition concerns. This is due to the current voluntary notification system and lack of a comprehensive database of merger and acquisition activity in Australia.

However, examples from the ACCC show there are multiple instances of non-notified mergers that raised competition concerns. The ACCC identified 6 examples over the past 8 years (some of these examples involve multiple mergers),⁵⁷ so Treasury estimates that there is at least one meaningful merger each year that is not notified. However, as the number of mergers not notified is unknown, this number could be higher.

Harm from mergers not considered

The direct detriment to the Australian economy from non-notified mergers and acquisitions is not possible to measure, as the identity, number and effect of these mergers and acquisitions is unknown. If the mergers and acquisitions could be identified, the OECD recommends that the direct static consumer harm from a SLC could be calculated by multiplying the size of the ex-ante turnover of all the firms in the affected market by an expected price increase, and the number of years it is likely to endure.⁵⁸ Treasury has estimated a range of the direct static consumer harm on an assumption of a 5 per cent price increase enduring for 2 years, and then on the basis of a 10 per cent price increase enduring for 5 years in Table 1 below. The lower bound of 2 years reflects the conservative assumptions adopted by overseas agencies such as the US Federal Trade Commission and the UK Competition and Markets Authority in undertaking similar exercises.⁵⁹ The upper bound of 5 years reflects that mergers result in changes to market structures that can have long lasting effects. The range of 5-10 per cent is indicative of a level of concern that a merger or acquisition may substantially lessen competition, noting that the precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and in some markets an increase in price that is very small in magnitude may nonetheless be substantial.

⁵⁷ ACCC, Australian Government, *Second submission to Treasury on merger reform*, 31 January 2024, pp 67-68 (Attachment C), accessed 5 March 2024. The ACCC provides 6 examples of mergers not notified to the ACCC in recent years. They include a large number of acquisitions by Petstock, Qantas acquiring 20 per cent of Alliance Airlines, Primary Healthcare's acquisition of certain pathology assets from Healthscope, as well as mergers in the software, manufacturing and agricultural sectors.

⁵⁸ OECD, *Guide for helping competition authorities assess the expected impact of their activities*, April 2014, accessed 5 March 2024.

⁵⁹ United Kingdom Competition and Markets Authority (CMA), *Impact assessment report 2022 to 2023*, 11 July 2023, accessed 5 March 2024 and United States, Federal Trade Commission, *Annual Performance Report for Fiscal Year 2022 and Annual Performance Plan for Fiscal Years 2023 to 2024*, accessed 5 March 2024.

Table 1. Estimated harm from mergers and acquisitions

Affected market	Estimate of harm
An assumption of a 5% price increase enduring for 2 years results in:	
if the affected market is worth \$10 million	the estimate of the harm would be \$1 million
if the affected market is worth \$100 million	the estimate of the harm would be \$10 million
if the affected market is worth \$1 billion	the estimate of the harm would be \$100 million
An assumption of a 10% price increase enduring for 5 years results in:	
if the affected market is worth \$10 million	the estimate of the harm would be \$5 million
if the affected market is worth \$100 million	the estimate of the harm would be \$50 million
if the affected market is worth \$1 billion	the estimate of the harm would be \$500 million

The most prominent example of non-notification raised by the ACCC (Petstock’s acquisition of a large number of pet stores) took place in a market with revenue in Australia of \$3.7 billion in 2023.⁶⁰ As an illustration, using the assumptions above, this could result in harm of \$370 million to \$1.8 billion if this type of merger proceeds undetected and results in a SLC that leads to a price increase of 5 to 10 per cent enduring for between 2 and 5 years.

Time taken to assess a merger

Under the status quo, the average duration of Phase 1 in 2023 was 59 working days (with the minimum being 33 and the maximum being 100). The average duration of Phase 2 in 2023 was 133 working days (with the minimum being 118 and the maximum being 148), not including periods where the timeline was suspended while the ACCC waited for information from the merger parties and any confidential pre-assessment review time.

The average duration of Federal Court proceedings is 316 calendar days.⁶¹

Cost for businesses

The estimated costs for businesses under the status quo are detailed in Tables 2a and 2b below. The methodology and assumptions for these estimates are set out in [Attachment A](#).

Table 2a. Estimated direct costs to business under the status quo (informal review)

Description of activity	Estimated cost per merger (approximate)
Consider notification	\$30,000
Prepare a notification	\$38,000 for simple notifications \$166,000 for non-simple notifications \$490,000 for complex notifications
The costs incurred in Phase 1	\$250,000
The costs incurred in Phase 2	\$1 million

⁶⁰ ACCC, Australian Government, [Submission to Treasury on ACCC preliminary views on options for merger control process](#), 20 December 2023, p 3, accessed 5 March 2024.

⁶¹ This is calculated on the basis of the 3 section 50 cases heard by the Federal Court in the past 15 years: ACCC v Metcash (2011); Vodafone Hutchinson v ACCC (2020); ACCC v Pacific National (2020). For each case, the duration is measured from the first application to the date of the final decision (including any appeal).

The costs incurred in proposing remedies	\$168,000
The costs incurred in Federal Court Proceedings	\$11 million ⁶²

Table 2b. Estimated direct costs to business under the status quo (merger authorisation)

Description of activity	Estimated cost per merger (approximate)
Consider notification	\$30,000
Prepare a notification	\$69,000 for simple notifications \$290,000 for non-simple notifications \$2.4 million for complex notifications
The costs incurred in Phase 1	\$800,000
The costs incurred in Phase 2	\$1.9 million
The costs incurred in proposing remedies	\$410,000
The costs incurred in review by the Tribunal	\$5.6 million

The total annual direct cost to business of informal review and merger authorisation under the status quo (assuming 300 informal review notifications and one merger authorisation application per year) is estimated to be \$160.2 million.

There is no data that informs the average dollar cost of delay for business. However, submissions suggest it is significant. For example, as noted above, the BCA submitted that: *'A lengthy clearance process can delay commercial decisions, time parties out from deals and impose significant costs on business, including small and family businesses on the sell-side of a transaction.'*⁶³ Indicatively, every ten basis points of additional financing costs on the total value of mergers over the time taken for ACCC assessment of public reviews in 2023 suggests such costs of the current system could be around \$19 million.⁶⁴

Cost for the ACCC

The average cost to the ACCC to conduct an informal public review is under \$500,000.⁶⁵ In the past 10 years, the ACCC has averaged 32 informal public reviews per year. The average cost for the ACCC for Federal Court proceedings is typically above \$5 million per merger.⁶⁶

Transparency

In the past 10 years, on average only 10 per cent of ACCC informal reviews have been made public (with 90 per cent of reviews made using the pre-assessment process, where no information is publicly released identifying the acquisition or the basis for the assessment).

⁶² This figure is an estimated average based on costs ordered by the Federal Court in *Vodafone Hutchinson v ACCC* (2020) and *ACCC v Pacific National* (2020).

⁶³ Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, p 19, accessed 5 March 2024.

⁶⁴ Based on Treasury analysis of confidential transaction value data provided by the ACCC, and calculated on the basis of the average phase 1 duration of 59 days and average phase 2 duration of 133 days. In the case of pre-assessments, the transaction value data period covers 1 October 2022 to 29 November 2023 and was adjusted to reflect a 12 month period on the basis of a 14 day average duration for pre-assessments.

⁶⁵ Based on estimates supplied by the ACCC.

⁶⁶ Based on estimates supplied by the ACCC.

In the past 10 years, there have been 67 instances where the ACCC has released a public competition assessment setting out its views. This is only 2 per cent of all reviews, and 17 per cent of all public reviews.⁶⁷

The largely confidential nature of the process, the lack of reasons for ACCC assessments, and the fact that the merger guidelines have not been substantively updated since 2008, provides little guidance for merger parties in preparing their applications. In turn this increases the costs of notification because merger parties do not readily understand the type of information the ACCC will need to undertake its assessment, and may expend time and money gathering and supplying unnecessary information to the ACCC. The absence of broader guidance also means businesses may commit time and money towards acquisitions that the ACCC are likely to block – better guidance helps businesses to make informed choices at an earlier stage of buying or selling a business or asset.

Advantages

Notwithstanding the problems described in Question 1, there are some advantages to the current approach that can be considered when comparing an alternative system. These include that voluntary notification permits a business to self-assess whether the merger is likely to SLC, and choose whether to notify the merger to the ACCC (reducing direct incurred costs by not notifying) or seek a declaration in the Federal Court.

The informal merger review also has the advantage of being flexible, it does not prescribe information requirements and has no filing fee. Additionally, some businesses value the ability to obtain a confidential informal view from the ACCC.⁶⁸

The status quo also has the advantage of retaining a judicial enforcement model that provides consistency with the approach taken for the enforcement of other provisions of the CCA.

Option 2 – Mandatory and suspensory administrative system with an extended SLC test

Benefits

Preventing competition from being eroded and providing better outcomes for consumers, businesses and the economy

For consumers and businesses of all sizes, an effective merger control system prevents anti-competitive mergers and supports competition, putting downward pressure on prices and delivering more choice.

This benefit arises from Option 2 by improving the ACCC's ability to effectively and efficiently detect and prevent anti-competitive mergers. Mandatory notification requirements mean that merger parties cannot choose to avoid scrutiny of mergers above certain thresholds, applying a risk-based approach to review. Under this option, identifying and assessing the potential impact of mergers would become more routine given the need for such data in setting the notification thresholds and other regulatory instruments mitigating risks to the community.

The suspensory nature of the new system coupled with the upfront information requirements reduces the ability for businesses to engage in strategic behaviour and prevents businesses

⁶⁷ Numbers obtained from ACCC, *Public informal merger review register* [online public register], accessed 23 May 2024.

⁶⁸ See, for example, Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, p 9, accessed 10 June 2024.

threatening to complete mergers and acquisitions before the ACCC has undertaken its assessment. This will make the ACCC a more effective decision-maker, putting it in a stronger position to detect and prevent anti-competitive mergers.

The robustness and quality of decision making will also be improved through making the ACCC the expert, first-instance decision-maker. As an administrative decision-maker, the ACCC will gather all relevant information and evidence, analyse this material, weigh up relevant considerations and set out objective, factual findings and other considerations in its reasons for decision. Necessary economic rigour will be applied to the assessment of mergers, supported by information and evidence without being limited by the rules of admissibility under the *Evidence Act 1995* (Cth). This, in conjunction with review by the Tribunal, will improve merger outcomes, in that it will mitigate the risk of harmful mergers and acquisitions being cleared and benign mergers not proceeding.

The quantum of the benefit of preventing anti-competitive mergers is difficult to estimate in dollar terms. Evidence from overseas shows that the order of magnitude of these benefits may be in the hundreds of millions or billions of dollars per year. For example, the UK Competition and Markets Authority (CMA) estimates that in the financial years 2020–21 to 2022–23, the UK merger control system saved consumers GBP 2 billion in total, at an average of GBP 652.2 million per year (this does not include the significant but difficult to measure benefits of deterrence).⁶⁹ The United States Federal Trade Commission (FTC) estimates its merger and conduct enforcement activities saved consumers US\$3.1 billion (five-year rolling average) alone, which does not account for merger enforcement activity undertaken by the US Department of Justice who also shares jurisdiction on mergers and acquisitions.⁷⁰

In the Australian context, such estimates would need to be adjusted to reflect the smaller size of the Australian economy. The US and UK estimates represent 0.013 per cent and 0.028 per cent of their respective GDP. Applying this range to Australia would imply benefits of between \$340-732 million,⁷¹ although some measure of this benefit is already achieved under the status quo.

As outlined in Question 1, there is evidence that the intensity of competition has weakened across many parts of the economy, accompanied by increasing market concentration and markups in many industries. Illustrative modelling undertaken jointly by the RBA and Treasury highlights the potential value of competition, suggesting that Australia's GDP could be 1-3 per cent higher if we returned to the level of competition that prevailed in the early 2000s. In today's dollars, that is approximately \$30-80 billion each and every year.⁷² While merger control is not the only variable that affects competition, a significant number of mergers and acquisitions do take place each year.⁷³

⁶⁹ United Kingdom Competition and Markets Authority (CMA), *Impact assessment report 2022 to 2023*, 11 July 2023, accessed 5 March 2024. The CMA did not publish a figure for the costs incurred for merger control specifically but noted that the average annual total consumer saving as result of the CMA's principal tools in 2020/21-2022/23 was £2713.8m and the average annual total costs were £105.1m for a total benefit/cost ratio of 25.8:1.

⁷⁰ United States, Federal Trade Commission, *Annual Performance Report for Fiscal Year 2022 and Annual Performance Plan for Fiscal Years 2023 to 2024*, accessed 5 March 2024. For the relevant period, the data includes 18 merger matters, and 2 competition enforcement cases. The FTC does not disaggregate the benefit to consumers between mergers and competition enforcement cases.

⁷¹ Note: Savings given in millions of local currency at current prices. Australian savings extrapolated from 2021-22 UK and US figures. Sources: Office for National Statistics; Competition & Markets Authority; Bureau of Economic Analysis; Federal Trade Commission; Australian Bureau of Statistics; Treasury; Refinitiv. The estimates assume the benefits are proportional to GDP and excludes consideration around differing population size, consumer spending, market structure and concentration, regulatory approach, which may mean the benefits in Australia would be far greater than in the UK and US.

⁷² Dr Steven Kennedy PSM, Secretary to the Treasury, *Post-Budget economic briefing: Address to the Australian Business Economists*, 30 May 2024, accessed 10 June 2024.

⁷³ The Treasury, Australian Government, *'Tracking mergers in Australia using worker flows*, p 1, accessed 13 June 2024.

Reducing cost of delays through shorter and more certain timelines

Shorter timeframes for merger assessments will bring significant direct and indirect benefits for merger parties, but these are difficult to estimate in dollar terms as they are merger specific. Indirect benefits include reduced finance (funding/holding) costs, and deterioration in asset or business value due to uncertainty and delays (e.g., key staff leaving). Submissions to the 2023-24 Merger Reform Consultation make clear that a lengthy clearance process can delay commercial decision-making and impose significant costs on business.⁷⁴ For example, the Tech Council of Australia submitted that: *'Delays in regulatory approval for mergers has [sic] enormous commercial implications, with delays or the expectation of long regulatory delays capable of killing deals.'*⁷⁵

As merger and acquisitions are time-sensitive, prompt decision-making is critical. To support prompt reviews, statutory timelines will be set for ACCC reviews. Option 2 reduces Phase 1 from an average of 75 days to 30 days (a 60% reduction). It also reduces the total of Phase 1 and Phase 2 from an average of 192 days in the status quo to 120 days (a 37% reduction). Legislating these timeframes increases certainty for business and reduces transaction costs, which will assist merger parties' planning.

Increasing transparency

Merger parties, interested stakeholders and the community will benefit from increased transparency. All mergers considered by the ACCC under Option 2 will be disclosed to the public (in comparison to less than 10% under the status quo). The ACCC will need to provide reasons for 100 per cent of decisions under Option 2. This is compared to the status quo where the ACCC has released a public competition assessment setting out its reasons for only 2 per cent of all mergers assessed or 17 per cent of public reviews.⁷⁶

Greater transparency improves prospective merger parties' understanding of the merger control processes and likely outcomes. By doing so it may have a deterrence effect whereby fewer anti-competitive mergers are proposed. Overseas analysis shows that the effects of deterrence can be significant albeit very difficult to measure precisely.⁷⁷ For merger parties, transparency also increases confidence in the process.

For interested stakeholders, transparency ensures confidence in the ACCC's decision making and broader community awareness. By disclosing all mergers under Option 2, this will provide interested stakeholders with the opportunity to engage by making submissions to the ACCC or providing information, documents, data or other evidence that facilitates more informed and rigorous decision making by the ACCC.

Risk-based

The ACCC will be notified of those mergers most likely to impact Australian consumers if they are anti-competitive. This will ensure regulatory resources (and cost) are appropriately targeted based on risk to competition and consumers. This will be achieved by the application of monetary and market concentration thresholds to determine whether an acquisition must be notified. A Treasury Minister will also be given the power to introduce additional targeted notification requirements, avoiding the need to lower the economy-wide thresholds and reducing the incidental capture of benign mergers within the thresholds. These notification thresholds will be subject to consultation before being set in subordinate legislation, and will be regularly reviewed with respect to evidence

⁷⁴ Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, p 19, accessed 23 May 2024.

⁷⁵ Tech Council of Australia, *Merger reforms Consultation: Tech Council of Australia submission*, January 2024, p 7, accessed 10 June 2024.

⁷⁶ Information taken from the ACCC, *Public informal merger review register* [online public register], accessed 23 May 2024.

⁷⁷ Competition and Markets Authority, *Impact Assessment 2022 to 2023*, July 2023, accessed 10 June 2024.

of the risk of potential harms to the community over time. A statutory review of the new merger system, including the notification thresholds, will take place 3 years from commencement of the new system, supported by annual ACCC reporting on merger activity, ex post merger analysis and data analytics (please refer to further details in Question 7).

Cost recovery

The fees imposed will be based on cost recovery principles, reflecting the resources required by the ACCC to efficiently carry out the review of a merger or acquisition and scaled to reflect the complexity and risk of the merger. The fees will be paid into consolidated revenue, rather than accruing directly to the ACCC. These costs are a transfer as they shift costs from the public to the merger parties. Under the status quo, the ACCC estimates the average cost to undertake an informal public review is under \$500,000 and in the 2022–23 financial year, there were 23 reviews of this nature. The total cost for the ACCC to consider these mergers is \$11.5 million, which does not include pre-assessment matters or litigated matters. The cost for litigated mergers is larger, which the ACCC estimated costs more than \$5 million per merger.

Costs

Compared to the status quo, Option 2 will impose some one-off establishment costs on businesses. Businesses undertaking a merger and competition lawyers and economists will have to familiarise themselves with the new system. To minimise this burden, the Government has adopted an approach that allows businesses and practitioners sufficient transition time.

Legislation is expected to be introduced into Parliament in 2024, with the ACCC expected to consult on guidelines and notification forms in 2025, ahead of the new system becoming mandatory from 1 January 2026. This sequential approach will afford businesses, advisors and the community a longer period over which to incur the time cost of familiarisation and have some discretion about when to incur these costs, mitigating some of the burden. The familiarisation costs are estimated to be around \$235,000 for relevant businesses, law firms and other specialist advisors.

Option 2 will also impose ongoing regulatory costs on businesses in the form of administrative (labour costs for business) and substantive costs (purchase costs for legal and economic consultant fees).

These costs per merger are summarised in Table 3 below, with further detail on the costed activities and costs per merger, including total costs, detailed in [Attachment A](#).

Table 3. Estimated direct costs to business under Option 2

Description of activity	Estimated cost per merger (approximate compared to informal review under status quo)
Consider notification	-\$8,000
Prepare a notification	+\$30,000 for simple notifications +\$120,000 for non-simple notifications and +\$720,000 for complex notifications
The costs incurred in Phase 1	-\$40,000
The costs incurred in Phase 2	+\$880,000
The costs incurred in proposing remedies	+\$240,000
The costs incurred for any public benefit consideration	N/A (not in status quo)

The costs incurred in any review by the Tribunal (excluding any fees).

-\$5.5 million (compared to costs incurred in Federal Court Proceedings)

The annual cost under Option 2 (assuming 300 notifications per year) is estimated to be \$10.8 million above the status quo (which Treasury estimates to have a total annual cost of \$171 million).

A significant proportion of these costs are already incurred in the status quo (93% based on Treasury estimates). In some instances, some of these individual costs may be lower than the status quo. This is because some businesses may have been unnecessarily seeking ACCC views under the status quo (due to lack of certainty) and for these businesses' costs will decrease. The increased efficiency of the streamlined Tribunal process will also reduce costs for businesses seeking review of decisions.

Unlike the status quo, fees would be imposed on businesses (with an exception for small businesses so that the fees are not a disproportionate burden for those businesses) for notifiable mergers and acquisitions. The fees will reflect the resources required by the ACCC to efficiently carry out the review of a merger or acquisition. Indicatively, Treasury anticipates this would be around \$50,000–100,000 for most mergers.⁷⁸ Assuming 300 notifications per year, this amounts to \$15–30 million per annum (not including Phase 2).

Budget Paper No. 2 of the 2024-25 Budget outlines that future cost recovery fee arrangements with estimated fees of \$90.5 million over 3 years from the 2025–26 financial year have been held in the Contingency Reserve pending the finalisation of the policy and implementation details of the new merger system. In the absence of fees these costs would be borne by the ACCC and ultimately the public.⁷⁹ The fees will be set in subordinate legislation to enable them to be updated as necessary to reflect changes in the economy and be more responsive to the experience of businesses subject to the fees. Treasury will undertake consultation on the proposed fees.

The regulatory burden of Option 2 (compared to the status quo) is set out in Table 4 below. The underlying methodology for these calculations is provided at [Attachment A](#).

Table 4. Regulatory cost estimate – Option 2

Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs (annual)
Total, by sector	\$10.8	\$ NIL	\$ NIL	\$10.8

The regulatory cost estimate is sensitive to the number of mergers reviewed. As outlined in Question 3 above, the notification thresholds are expected to average an overall volume of mandatory notifications similar to current volumes, with around 300 to 500 annual notifications projected using existing available data. However, these projected number of notifications are subject to a substantial margin of error. This reflects limitations in the available historical data, which is partly the result of the limited visibility of merger activity that Australia's voluntary notification system has provided to date. In particular, the data relied upon in our projected notifications are incomplete, and do not fully cover acquisitions of, for example, patents, land or minority interests. The substantial margin of error in projected notifications also reflects the uncertainty in future merger activity in Australia, which will depend greatly on underlying market conditions that are difficult to predict even a year in

⁷⁸ Based on preliminary ACCC resourcing and activity-based costing 2024-25 Budget estimates.

⁷⁹ The Australian Government's 2024-25 Budget, *Budget Paper No. 2*, p 178, accessed 11 June 2023.

advance. Moreover, there may be additional transactions that parties choose to voluntarily notify even when not required to do so by the notification thresholds.

Taking the above limitations with projected number of notifications into account, if the assumed number of mergers are 500 notifications per year, the estimated total cost would be \$267 million (an increase of \$96 million from the estimated total cost of \$171 million for 300 notifications).

Treasury has given consideration to non-regulatory costs (such as impacts merger control may have on cost of funds or finance options for merger parties). However, it is considered that they will not have meaningful detrimental impacts compared to the status quo.

Net Benefit

Option 2 generates significant benefits by preventing competition from being eroded and providing better outcomes for consumers and businesses; reducing the cost of delays through shorter and more certain timelines; making the system more risk-based; and increasing transparency.

These benefits are not able to be quantified in dollar terms, but are significant, with estimates that Australia's GDP could be 1-3 per cent higher from stronger levels of competition. In today's dollars, that is approximately \$30-80 billion each and every year (although as noted above, merger control is not the only variable which affects competition).⁸⁰ Applying overseas estimates of the benefits gained from effective and efficient merger control (adjusted for the size of the Australian economy) implies benefits of \$340-732 million per year (although, as noted above, some measure of this benefit is already achieved under the status quo). Both measures are well in excess of the estimated total cost of Option 2 of \$171 million.

Additionally, compared to the status quo (which Treasury estimates to have a total annual cost of \$160.2 million), the incremental benefits will also outweigh the incremental costs, which Treasury estimates to be \$10.8 million per annum. For a net benefit to occur, the system under Option 2 only needs to prevent one additional merger that results in a 5 per cent price rise in a market the size of \$200 million that endures for a year (which Treasury estimates would be associated with harm of \$10 million).⁸¹ Treasury considers there to be significant net benefits in Treasury's estimation.

Option 3 – Mandatory and suspensory administrative system with a satisfaction test

Option 3 shares many of the same features, benefits and costs as Option 2. The principal difference between the options is the standard for which mergers and acquisitions are permitted or opposed.

Benefits

Option 3 is likely to achieve benefits similar to Option 2 by preventing competition from being eroded and providing better outcomes for consumers and businesses; reducing the cost of delays through shorter and more certain timelines; making the system more risk based and increasing transparency. Further, it could encourage merger parties to invest more in outlining the likely impact on competition, potentially resulting in even less anti-competitive mergers to proceed.

⁸⁰ Dr Steven Kennedy PSM, Secretary to the Treasury, *Post-Budget economic briefing: Address to the Australian Business Economists*, 30 May 2024, accessed 10 June 2024.

⁸¹ Refer to Table 1 above.

Costs

However, Option 3 alters the calculus for the benefits as it imposes a more onerous and restrictive standard of review, increasing the risk of a chilling effect where more pro-competitive or benign mergers are deterred or blocked. This would increase the costs of moving to an administrative decision-making model.

In response to the 2023–24 Merger Reform Consultation, many stakeholders objected to the perception that the requirement to satisfy the ACCC that a merger is not likely to SLC before approving a merger ‘reversed the onus of proof’; effectively introducing a presumptive ‘ban’ on mergers. AustralianSuper noted *‘It would also create the rebuttable presumption that the merger is negative, unlawful and should not be approved.’*⁸² Treasury heard from stakeholders that this element could introduce systematic bias, increasing the number of rejected mergers every year. The Law Council of Australia submitted that *‘In circumstances where the vast majority of mergers do not raise competition concerns, it is not appropriate to require the ACCC to be ‘satisfied’ as a mandatory requirement that transactions are not anti-competitive.’*⁸³ The Tech Council of Australia further noted that *‘If the onus of proof is reversed, it is much more likely that transactions with any uncertainty about the future will be rejected as they cannot show that the transaction will not SLC.’*⁸⁴

Treasury also heard concerns that ‘reversing the onus’ may reduce the need for detailed legal and economic analysis required to assess the inherent risks and uncertainty associated with a merger. The Business Council of Australia submitted *‘A subjective ‘satisfaction’ standard is out of step with approaches in overseas jurisdictions which consider whether a transaction raises competition concerns by applying objective tests.’*⁸⁵ The Tech Council of Australia further noted *‘The ACCC has compulsory information gathering powers which it uses in the course of its reviews to gather information from both merger parties and a range of third parties. The ACCC uses this material to build its case that the acquisition will result in an SLC, where that is relevant. Reversing the onus of proof will require merger parties to provide evidence to the ACCC that the acquisition will not SLC, but merger parties do not have the same ability to procure evidence from third parties (either other industry participants, or third parties who may hold key data relevant to the assessment of the acquisition).’*⁸⁶ In addition, the Law Council of Australia submitted that *‘This combination of features would be likely to make any Australian model based on an ‘administrative’ standard more uncertain, costly, less flexible and more time consuming for global and local business.’*⁸⁷

Under Option 3, mergers and acquisitions in some new and emerging markets (such as new technologies) may also find it more difficult to satisfy such a test. The Tech Council of Australia submitted that *‘If the onus of proof is reversed, it is much more likely that transactions with any uncertainty about the future will be rejected as they cannot show that the transaction will not SLC.’*⁸⁸ As indicated above, Dr Rhonda Smith and Professor Deborah Healey submitted that *‘Providing evidence of the alleged substantial lessening of competition resulting from a merger, and particularly a digital merger, to a standard that satisfies the Evidence Act is extremely difficult, if not impossible.’*

⁸² AustralianSuper, *AustralianSuper submission to Treasury Merger Reform Consultation Paper dated November 2023 (Consultation Paper)*, January 2024, p 4; accessed 26 June 2024.

⁸³ Law Council of Australia, *Response to Competition Review Merger Reform Consultation Paper*, January 2024, p 5, accessed 26 June 2024.

⁸⁴ Tech Council of Australia, *Merger reforms Consultation: Tech Council of Australia submission*, January 2024, p 8, accessed 26 June 2024.

⁸⁵ Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, p 4, accessed 26 June 2024.

⁸⁶ Tech Council of Australia, *Merger reforms Consultation: Tech Council of Australia submission*, January 2024, p 8, accessed 26 June 2024.

⁸⁷ Law Council of Australia, *Response to Competition Review Merger Reform Consultation Paper*, January 2024, p 5, accessed 26 June 2024.

⁸⁸ Tech Council of Australia, *Merger reforms Consultation: Tech Council of Australia submission*, January 2024, p 8, accessed 28 August 2024.

*The merger is yet to occur so there is no direct factual evidence concerning the effect of the merger.*⁸⁹ It could send a 'chilling effect' on business investment and innovation, particularly in such new and emerging markets, and negatively impact growth. Australia would also be a global outlier – the only mandatory and suspensory jurisdiction in the world with this more onerous and restrictive standard for merger control.⁹⁰

Compared with Option 2, it likely imposes additional costs on businesses in expending resources to meet the more onerous standard of satisfying the ACCC. These costs are borne by all merger parties in satisfying the ACCC, and disproportionately so for benign or pro-competitive mergers and acquisitions.

These costs per merger are summarised in Table 5 below, with further detail on the costed activities and costs per merger, including total costs, detailed in [Attachment A](#).

Table 5. Estimated direct costs to business under Option 3

Description of activity	Estimated cost per merger (approximate compared to informal review under status quo)
Consider notification	-\$8,000
Prepare a notification	+\$65,000 for simple notifications +\$260,000 for non-simple notifications +\$1,324,000 for complex notifications
The costs incurred in Phase 1	The same
The costs incurred in Phase 2	+\$1,078,000
The costs incurred in proposing remedies	+\$240,000
The costs incurred for any public benefit consideration	N/A (not in status quo)
The costs incurred in any review by the Tribunal (excluding any fees).	-\$5.5 million (compared to costs incurred in Federal Court Proceedings)

The annual cost under Option 3 (assuming 300 notifications per year) is estimated to be \$83.7 million above the status quo.

The key driver of the cost differences between Option 2 and Option 3 are the assumptions on the cost of notification, the number of mergers that will proceed to Phase 2, the number of mergers that will be considered on public benefits grounds, and the number of mergers that will be reviewed by the Tribunal, cumulating in higher indirect costs to businesses from longer timeframes. This is because disproving the existence of a SLC is more difficult for businesses to satisfy.⁹¹

The effect of this is that it is likely less mergers would be resolved in Phase 1 (Treasury estimates 30 mergers moving to Phase 2, compared with 15 mergers under Option 2), more merger parties seeking approval on public benefits grounds in situations where the ACCC was not able to be satisfied that a merger would not SLC (Treasury estimates 4 mergers per year considering public

⁸⁹ Dr Rhonda Smith University of Melbourne and Professor Deborah Healey UNSW Law and Justice, *Treasury Submission re Merger Reform*, p 2, accessed on 26 June 2024.

⁹⁰ New Zealand, which has a voluntary merger control system, has adopted this standard.

⁹¹ The Treasury, Australian Government, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, 10 April 2024, p 19 (Attachment B), accessed 13 May 2024.

benefits, compared with 2 mergers under Option 2), and more applications for review by the Tribunal (Treasury estimates 6 reviews per year, compared with 4 reviews under Option 2).

The regulatory burden of Option 3 (compared to the status quo) is set out in Table 6 below. The underlying methodology for these calculations is provided at [Attachment A](#).

Table 6. Regulatory cost estimate – Option 3

Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs (annual)
Total, by sector	\$83.7	\$ NIL	\$ NIL	\$83.7

Net Benefit

Option 3 is a mandatory, suspensory and administrative system and will achieve some of the same benefits as discussed in Option 2 through effective and efficient merger control bringing about stronger levels of competition. However, compared to Option 2, it imposes a more onerous and restrictive standard of review increasing the risk of a chilling effect where pro-competitive or benign mergers are deterred or blocked, which may mitigate some of these benefits. It will also increase the costs of notification, and result in longer timeframes.

Compared to the status quo (which Treasury estimates to have a total annual cost of \$160.2 million), the incremental costs is estimated to be \$83.7 million per annum more than the status quo. For a net benefit to occur, the system under Option 3 would need to prevent one additional merger that results in a 5 per cent price rise in a market the size of \$2 billion that endures for a year (which Treasury estimates would be associated with harm of \$100 million).⁹²

Option 4 – Mandatory and suspensory judicial enforcement system with a SLC test

Benefits

Option 4 will achieve some of the same benefits discussed under Option 2, to the extent they relate to the introduction of a mandatory and suspensory merger system.

The benefits from retaining a judicial enforcement model includes more rigorous legal analysis and consistency with the approach taken for the enforcement of other provisions of the CCA, and an objective and independent judicial forum where the ACCC has to establish in court that the merger is likely to SLC to stop a merger.

Another benefit is that businesses and advisors are familiar with the Federal Court and established practice.

Costs

Compared to Option 2, these benefits are likely to be diminished due to the longer timeframes along with significant additional cost. As occurs in the status quo, a first instance decision from the Federal Court would result in businesses incurring costs in the range of \$11 million for each merger.

⁹² Refer to Table 1 above.

Additionally, there may be less scope for economic evidence to be presented in the Federal Court as submitted by Dr Rhonda Smith and Professor Deborah Healey⁹³ and voiced by the ACCC. At the same time, there will be higher participation barriers for affected third parties – competitors, suppliers or consumers⁹⁴ – because of the expense of participating in judicial proceedings, which will likely necessitate incurring the cost of legal representation.

There will also be less transparency due to the lack of published reasons for each merger. For mergers the ACCC had indicated it would oppose, the lack of published reasons may be because the ACCC was concerned about prejudice to later enforcement action. Transparency in merger control is desirable because it helps business and advisors understand the boundaries of permissible mergers, shaping business behaviour over time. Under Option 2, all mergers assessed by the ACCC would have reasons provided for each decision. Under Option 4, only a very small number of mergers (less than 1%) would have detailed reasons in the form of a court judgment.

These direct costs per merger are summarised in Table 7 below, with further detail on the costed activities and costs per merger, including total costs, detailed in [Attachment A](#).

Table 7. Estimated direct cost to business under Option 4

Description of activity	Estimated cost per merger (approximate compared to informal review under status quo)
Consider notification	-\$8,000
Prepare a notification	+\$30,000 for simple notifications +\$120,000 for non-simple notifications +\$720,000 for complex notifications
The costs incurred in Phase 1	-\$40,000
The costs incurred in Phase 2	+\$878,000
The costs incurred in proposing remedies	+\$240,000
The costs incurred in any review by the Federal Court (excluding any fees)	+\$45,000

The annual direct cost under Option 4 (assuming 300 notifications per year, and 1 merger authorisation) is estimated to be \$22.1 million above the status quo.

A key driver of the total costs under Option 4 is that both business and the ACCC will need to expend additional costs on litigation, which are likely to be higher than costs in an administrative system.

The regulatory burden of Option 4 (compared to the status quo) is set out in Table 8 below. The underlying methodology for these calculations is provided at [Attachment A](#).

Table 8. Regulatory cost estimate – Option 4

Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs (annual)
Total, by sector	\$22.1	\$ NIL	\$ NIL	\$22.1

⁹³ Dr Rhonda Smith University of Melbourne and Professor Deborah Healey UNSW Law and Justice, *Treasury Submission re Merger Reform*, p 2, accessed on 26 June 2024.

⁹⁴ Council of Small Business Organisations Australia, *Merger Reform Submission*, January 2024, p. 3, accessed 13 June 2024, CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, pp 3-4, accessed 13 June 2024.

Net Benefit

Option 4 is a judicial enforcement model that requires mandatory notification. Option 4 will partially achieve the benefits of more effective merger control described in Option 2 to the extent that they relate to the mandatory notification of mergers. These benefits are expected to exceed the costs of \$182.3 million.

Compared to the status quo (which Treasury estimates to have a total annual cost of \$160.2 million), the incremental benefits will also outweigh the incremental costs, which Treasury estimates to be \$22.1 million per annum more than the status quo. For a net benefit to occur, the system under Option 4 would need to prevent one additional merger that results in a 5 per cent price rise in a market the size of \$400 million that endures for a year (which Treasury estimates would be associated with harm of \$20 million).⁹⁵

⁹⁵ Refer to Table 1 above.

5. Who did you consult and how did you incorporate their feedback?

Consultation paper

Between 20 November 2023 and 19 January 2024, the Competition Taskforce publicly consulted on options for modernising Australia's approach to merger control.⁹⁶

The 3 broad options outlined in the consultation paper draws from experience globally.⁹⁷ A range of stakeholders representing small and large business, farmers, consumer groups, legal profession, and academics, were invited to suggest alternative options or variations of these options and outline their benefits and risks, as well as provide views on whether the existing approach should be retained.

- **Option 1** – a voluntary formal clearance regime could be introduced, where businesses could choose to notify a merger and the ACCC could grant legal immunity from court action under the prohibition against anti-competitive mergers in section 50 of the CCA if satisfied the merger would not be likely to SLC.
- **Option 2** – a mandatory and suspensory regime could be introduced, with compulsory notification of mergers above a threshold. Transactions would be suspended for a period while the ACCC conducts its assessment. To prevent an anti-competitive merger, the ACCC would need to prove to the court that the merger would be likely to SLC.
- **Option 3** – a mandatory formal clearance regime could be introduced, with compulsory notification of mergers above a threshold and allowing the ACCC to 'call-in' transactions below the threshold where there are competition concerns. The ACCC would only grant clearance if it was satisfied the merger was not likely to SLC. Clearance would provide formal immunity from court action under section 50 of the CCA.

Options to reform the merger control test were also consulted on. These were:

- **Option A** – modernise the list of matters that the ACCC may, and the court must, consider when assessing the impact of mergers on competition (known as the 'merger factors' in section 50(3) of the CCA). Alternatively, the test could be simplified by removing the merger factors from the legislation.
- **Option B** – the SLC test could be expanded to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.
- **Option C** – related agreements between merger parties (such as non-compete agreements or agreements concerning supply of goods or services post-merger) could also be considered as part of the consideration of the effect of the merger on competition.

Each of the options to reform the merger control test could be implemented alone, together, or along with the options to reform the merger control process.

The public consultation included 9 roundtables attended by 42 organisations across Sydney, Melbourne, Brisbane and online, and 46 non-confidential written submissions.⁹⁸

⁹⁶ The Treasury, Australian Government, *Merger Reform Consultation Paper*, November 2023, accessed 23 March 2024.

⁹⁷ See OECD (Organisation for Economic Co-operation and Development), *OECD Competition Trends 2021 – Volume II: Global Merger Control*, 2021, p 12, accessed 29 October 2023.

⁹⁸ Submissions are available at *Merger Reform consultation, Submissions*, treasury.gov.au website.

An Expert Advisory Panel – members of which are Kerry Schott, David Gonski, John Asker, Sharon Henrick, John Fingleton, Danielle Wood and Rod Sims – also contributed their views.

How feedback was incorporated

The consultation indicated that there was support from a range of stakeholders for reform of Australia’s approach to merger control.⁹⁹

- Consumer groups,¹⁰⁰ agribusinesses,¹⁰¹ small businesses,¹⁰² retail¹⁰³ and grocery industry groups¹⁰⁴ and academics¹⁰⁵ support a mandatory and suspensory administrative merger control system to give the ACCC the tools it needs, and reform to capture mergers that create, strengthen or entrench substantial market power.
- Consumer groups highlighted adverse consumer outcomes in highly concentrated sectors – grocery, banking, telecommunications, energy, insurance, and the digital economy.¹⁰⁶ Consumer groups and small business also strongly supported giving the ACCC the tools it needs to efficiently prevent harmful mergers and advocated for increased transparency to facilitate engagement with ACCC merger reviews.¹⁰⁷
- Farming groups raised concerns about market concentration in supply chains, with limited options for buying inputs and selling products impacting their ability to sell produce at competitive prices.¹⁰⁸ Farming groups advocated for increased transparency to facilitate engagement with ACCC merger reviews.¹⁰⁹
- Academics highlighted the significant evidentiary challenges for the ACCC to prevent anti-competitive mergers in court and lack of economic analysis.¹¹⁰
- Retail and grocery industry groups suggested reform focused on targeting concentrated markets, the dominant supermarkets, serial acquisitions and greater analysis of both price and

⁹⁹ The Treasury, Australian Government, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, 10 April 2024.

¹⁰⁰ CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, p 3, accessed 13 June 2024.

¹⁰¹ National Farmers’ Federation, *Submission to Competition Review consultation on merger reform*, January 2024, p 2, accessed 13 June 2024.

¹⁰² Council of Small Business Organisations Australia, *Merger Reform Submission*, January 2024, p. 3, accessed 13 June 2024, Australian Small Business and Family Enterprise Ombudsman, *Submission to the Treasury Competition Review on Merger reform options*, April 2024, p 2, accessed 13 June 2024.

¹⁰³ Retail Guild of Australia, *Addressing retail dominance through merger reform*, January 2024, p 12, accessed 13 June 2024.

¹⁰⁴ MGA Independent Businesses Australia, *Reviving concentrated markets with merger reform – Response to the Treasury consultation paper on merger reform*, 19 January 2024, p 11, accessed 13 June 2024.

¹⁰⁵ Emeritus Professor Stephen Coronos, *Consultation paper: Merger Reform*, December 2023, pp 1-2, accessed 13 June 2024, Dr Rhonda Smith University of Melbourne and Professor Deborah Healey UNSW Law and Justice, *Treasury Submission re Merger Reform*, pp 3-4, accessed on 13 June 2024.

¹⁰⁶ CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, p 1, accessed 13 June 2024.

¹⁰⁷ CHOICE and Consumers Federation of Australia, *Submission to the Competition Taskforce consultation paper on merger reform*, January 2024, p 4, accessed 13 June 2024.

¹⁰⁸ National Farmers’ Federation, *Submission to Competition Review consultation on merger reform*, January 2024, pp 1-2, accessed 13 June 2024.

¹⁰⁹ National Farmers’ Federation, *Submission to Competition Review consultation on merger reform*, January 2024, p 2, accessed 13 June 2024.

¹¹⁰ Emeritus Professor Stephen Coronos, *Consultation paper: Merger Reform*, December 2023, p 4, accessed 13 June 2024; Dr Rhonda Smith University of Melbourne and Professor Deborah Healey UNSW Law and Justice, *Treasury Submission re Merger Reform*, pp 2-3, accessed on 13 June 2024.

non-price effects of anti-competitive mergers.¹¹¹ They also noted that any reform should minimise regulatory burden.

- Large businesses and the legal profession generally preferred the flexibility and voluntary nature of the existing approach with the Federal Court as the decision-maker¹¹² but acknowledged improvements could be made,¹¹³ in particular to timeliness, transparency and certainty.¹¹⁴

As noted above, there was significant stakeholder opposition to the satisfaction test included in Option 3 above.

The stakeholder feedback was used to inform the development of the options considered in this analysis, with the Government's response outlined in more detail in [Attachment B](#).

Exposure draft and other consultation

Exposure draft of *Treasury Laws Amendment Bill 2024: Acquisitions* was released for public comment on 24 July 2024. The exposure draft sets out the framework of the new system including:

- notification and timelines
- definition of acquisitions
- test to be applied for considering competition impacts and public benefits
- procedural safeguards.

Consultation on the proposed amendments to the CCA also occurred with states and territories, with a vote conducted with states and territories on the proposed reforms, as required by intergovernmental competition agreements (1995 *Intergovernmental Conduct Code Agreement*).

Subordinate legislation will be implemented for some elements of the proposed system following the passage of the legislation. These elements include setting the mandatory notification thresholds and fees, which will be subject to separate consultations. Once consultations are completed and stakeholder feedback is considered, Treasury will prepare the necessary supporting subordinate legislation.

As outlined above, there will be an appropriate transition period between legislation passing and commencement to allow for businesses to adjust and for new systems and guidance to be developed.

¹¹¹ Retail Guild of Australia, *Addressing retail dominance through merger reform*, January 2024, p 11, accessed 13 June 2024.

¹¹² Law Council of Australia, *Response to Competition Review Merger Reform Consultation Paper*, January 2024; Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, pp 2, 9, 19, accessed 13 June 2024.

¹¹³ Law Council of Australia, *Response to Competition Review Merger Reform Consultation Paper*, January 2024, p 1; Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, pp 2, 9, 19, accessed 13 June 2024.

¹¹⁴ Business Council of Australia, *Submission to Merger Reform consultation*, January 2024, pp 19, accessed 13 June 2024; Arnold Bloch Liebler, *Submission to Treasury on the Merger Reform Consultation Paper*, January 2024, pp 1-2, accessed 13 June 2024.

Status of the Impact Analysis at each major decision point

Table 9. Impact Analysis (IA) at each major decision point

Decision point	Timeframe Due	Status of the IA
Treasurer announced a Competition Review	23 August 2023	Undeveloped
Merger Reform consultation paper	November 2023	Undeveloped
Office of Impact Assessment (OIA) authority	7 December 2023	OIA agreement to prepare an Early Assessment Impact Assessment for the Government decision on elements of the merger system
Government decision on key elements	March-April 2024	Draft partial IA considered as part of the Government decision, noting subject to further stakeholder consultations
OIA 1st Pass Final assessment	June-September 2024	First pass assessment IA completed. Consultation with stakeholders conducted. OIA first pass assessment comments addressed in the IA and certification letter for second pass.
OIA 2nd Pass Final assessment	September 2024	IA for second pass assessment presented to OIA
Final policy decision to proceed with proposal	October 2024	To be informed by an IA that had been through a final assessment by OIA

6. What is the best option from those you have considered and how will it be implemented?

What is the best option from those you have considered?

Option 2 is the recommended option – a mandatory and suspensory administrative merger control system. A single, streamlined merger control system will enhance efficiency, predictability and transparency for businesses, stakeholders and the community, and removes the scope for strategic behaviour by merger parties. It will ensure the ACCC is significantly better equipped to detect, review and act against those mergers that SLC.

Treasury considered the impact of allowing the status quo (Option 1) to continue. However, retaining the status quo would not address the feedback received from stakeholders that the current ‘ad hoc’ merger process is unfit for a modern economy. Further, Option 1 does not meet community expectations that the ACCC can detect and stop anti-competitive mergers.

Compared to the Option 2 (preferred), Option 3 also strengthens Australia’s merger control system by introducing a mandatory and suspensory administrative merger system. However, requiring merger parties to satisfy the ACCC that the merger is not likely to SLC introduces a restrictive and onerous standard, significantly increasing the cost on all merger parties. With a stronger, better-equipped ACCC under Option 2, there are currently insufficient grounds for adopting Option 3.

Option 4 (mandatory and suspensory judicial enforcement system with a SLC test) will achieve some of the same benefits as under Option 2 (preferred). However, risks include uncertain and lengthy timeframes due to the nature of the judicial process, lack of transparency, less scope for economic analysis, along with significant additional costs (as compared to both Option 1 and Option 2).

How will it be implemented?

The Government recognises a new merger control system involves significant change, including for business, advisors, the ACCC and the Tribunal.

Legislative change

The merger reform will be principally implemented through amendments to the CCA and associated subordinate legislation, following public consultation on the draft legislation.¹¹⁵

Subject to the Government’s legislation prioritisation process and available drafting resources, legislation is expected to be introduced into the Parliament in the 2024 Spring sittings, ahead of commencement on 1 January 2026. Subordinate legislation will also be implemented for key elements of the proposed system following the passage of the legislation. These elements include setting the mandatory notification thresholds and fees.

Prior to parliamentary consideration, pursuant to the 1995 *Intergovernmental Conduct Code Agreement* (‘the Agreement’), the Commonwealth is required to consult with States and Territories for a 3-month period on the proposed changes to the CCA, followed by a 35-day voting period. Amendments to the CCA are subject to the approval of a majority of votes of the Commonwealth,

¹¹⁵ The Treasury, Australian Government, *Reforming mergers and acquisitions – exposure draft*, 24 July 2024.

States and Territories. The Commonwealth has 2 votes and each State and Territory has one vote. The Commonwealth also has a casting vote. Any jurisdiction that does not vote within the 35-day voting period will be taken to have voted in favour of the amendment.

The ACCC

The ACCC will be given the resources and mandate to act as the merger system steward to promote and maintain competitive markets in Australia. A shift in capabilities and practice will be required to support the change from enforcement action in court to more data- and economics-led administrative decision-making. To facilitate this change, new performance standards will be set for the ACCC for merger assessments, including timeliness, guidance and reasons for determinations.

The Government also released a Statement of Expectations (SOE) to the ACCC that outlines the Government's expectations for how the ACCC will promote a competitive, dynamic and inclusive economy and modern, well-functioning markets that work for consumers.¹¹⁶

As part of the ACCC's Statement of Intent in response to the SOE,¹¹⁷ the ACCC has committed to support the delivery of merger reform, including through a risk-based approach, making use of data and economic analysis, and increased transparency and guidance.

An independent expert adviser has been appointed to provide advice to Treasury and the ACCC on effective implementation of the new system, specifically the mandatory notification thresholds and statutory assessment timelines, as well as ACCC capability, culture, practice, systems and resourcing. This will include advice on delivering the Government's merger reforms through a risk-based approach to merger review, supporting the change from enforcement action in court to more data- and economics-led administrative decision making and increased transparency and guidance to the community to enhance community understanding and administrative predictability.

The Treasury

Treasury has been provided additional resourcing to facilitate development of the legislation and implement the new system. This included the appointment of an independent expert adviser on the implementation of the merger reforms. The adviser will provide advice to both the Treasury and the ACCC to assist effective implementation of the new system as indicated above.

The Australian Competition Tribunal

ACCC determinations under the new merger review system will be subject to review by the Tribunal upon application by the merger parties or third parties (subject to sufficient interest). Judicial review of decisions by the ACCC and Tribunal will be available in the Federal Court.

Implementation challenges and risks

Implementation of the new system has the following challenges and risks.

- The notification thresholds over-capture or under-capture (false positives and negatives).
- Anti-competitive mergers that have an appreciable effect on competition are not captured or action is taken by the ACCC under the Part IV of the CCA.
- Acquisitions are voided due to businesses not being aware of the new requirements.

¹¹⁶ACCC, Australian Government, *Statement of Expectations and Statement of Intent*, April 2024, accessed 12 June 2024.

¹¹⁷ACCC, Australian Government, *Statement of Expectations and Statement of Intent*, April 2024, accessed 11 June 2024.

- Systems and processes are not in place (for example, IT, forms, policies, procedures, and guidance is not developed and consulted on) prior to commencement of the new system, leading to the ACCC not being able to receive and efficiently assess notifiable mergers at the commencement of its new regulatory powers.
- ACCC staffing complement, resourcing, capability not sufficient to meet the needs of the new system.

To mitigate risk, a merger or acquisition that is required to be notified will be set out in subordinate legislation with additional targeted notification requirements set by a Treasury Minister. This provides the flexibility to calibrate and update them over time, ensuring that the system is risk-based and targeted at those mergers most likely to result in harm to competition and consumers, while reducing the overall compliance burden on businesses. Setting notification thresholds in subordinate legislation and a Ministerial power (following consultation, which may include advice from the ACCC) to specify additional mergers and acquisitions that must be notified offers flexibility to achieve these objectives over time.

Up until now, Australia has lacked a comprehensive database of merger and acquisition activity in Australia. This gap has made it difficult to understand trends in merger activity and evaluate the impact of mergers and merger policy on the economy. At present, the ACCC has only patchy visibility of mergers and acquisitions, based on whether companies voluntarily report such activities to the ACCC or the ACCC is informed by FIRB referrals. As noted in Question 1 above, the new comprehensive database of merger and acquisition activity will facilitate the evaluation of broader competition policies, including the calibration of the notification thresholds.

As outlined in Question 4 above, legislation is expected to be introduced into Parliament in 2024, and substantive and procedural guidance will be consulted on and published in 2025 by the ACCC, ahead of the new system being mandatory on 1 January 2026. This will facilitate transition for businesses, advisors and the community, affording a longer period over which to incur the time cost of familiarisation and have some discretion about when to incur these costs, which mitigates some of the burden.

The proposed reform would involve considerable change for the ACCC as it moves from a law enforcement approach to an administrative decision-making role. This change will require additional resources and a change in ACCC culture, capability and practice. To support this change, as outlined above, an independent expert adviser to the chair of the ACCC and Secretary of the Treasury will be appointed, to be supported by a Treasury secretariat. The independent expert adviser will provide advice to Treasury and the ACCC on effective implementation of the new system, including the ACCC's capabilities, culture and practice.

7. How will you evaluate your chosen option against the success metrics?

Treasury will undertake a statutory review to evaluate the functioning of the system 3 years after commencement. The design of the review will be supported by the Australian Centre for Evaluation. It will be informed by evidence of the new system in practice, including a better understanding of how mergers and acquisitions affect the economy and the performance of the ACCC.

This will be supported by post-implementation monitoring of the impact of the reform on an ongoing basis through annual ACCC reporting on merger activity¹¹⁸, ex-post merger analysis and data analytics.¹¹⁹ Annual ACCC reporting on merger activity will provide transparency on merger activity to raise community awareness of this activity, which will be particularly important during the early years of the new system. Ex-post merger analysis on selected matters (based on availability of information and data, the time elapsed since the merger, the unique issues raised, and the potential relevance to future ACCC investigations) will permit insights into the impacts of mergers, helping to refine and improve merger assessments and decision-making by the ACCC.

Further, as noted in Question 1 above, a merger tracking methodology will be created to build the capability to examine microdata-based methodology to track mergers and their impacts. Specifically, a new comprehensive database of merger and acquisition activity in Australia, based on the existing ABS BLADE and linked to ABS Consumer Price Index and wholesale price data, will facilitate analysis of the impact of mergers on prices, as well as wages, employment, productivity, market share, and profitability across industries.

Annual ACCC reporting on merger activity will provide transparency on key metrics associated with the new system and support integration into broader ABS administrative datasets once implementation begins. Evaluations undertaken using this comprehensive merger database will also help inform the 3-year statutory review of the effectiveness of the new merger control system.

Stakeholder consultation, interviews and surveys may be conducted to inform and supplement the quantitative analysis.

Evaluative measures

As outlined in Question 2, the key metrics to track the effectiveness of the reforms are the number of mergers that go ahead that have anti-competitive effects (reflecting the quality of the ACCC's assessments) and the speed of ACCC assessments. Both metrics would be expected to improve significantly following the implementation of the new merger system. To this end, the above data points will inform analysis of the extent to which the new merger control system has been effective in correctly capturing and identifying anti-competitive mergers (notification thresholds set at the appropriate level, and the ACCC correctly identifying and stopping mergers of concern as verified through ex-post merger reviews).

Evaluating the success of this reform will be measured through analysis of:

- ACCC reporting on acquisition activities and ex-post review of decisions
- mandatory notifications to capture mergers and acquisitions of concern, and
- timeliness of ACCC determinations.

¹¹⁸ ACCC, Australian Government, *ACCC and AER annual reports*, accessed 9 July 2024.

¹¹⁹ ACCC has conducted 2 ex post merger reviews, *Ex post review of merger decisions 2022* and *Ex post review of merger decisions 2024*, accessed 25 June 2024.

This data will also inform analysis of whether the ACCC has been effective in improving the process for merger reviews and reducing assessment timeframes (review process is streamlined, mergers are triaged to quickly differentiate those of concern from benign mergers, vast majority or 80-90 per cent¹²⁰ of mergers cleared within 20 working days).

Further, success will be measured against the degree to which merger parties and the wider community can engage with the merger control process, including assessing whether upfront information requirements are appropriately calibrated and not overburdensome.

Additionally, evaluating the measure of success will be based on the Government's SOE¹²¹ to the ACCC, through evidence of ACCC taking a risk-based approach with resources prioritised to managing or stopping mergers most likely to harm the community, making use of data and economic analysis to enhance merger reviews and identify risks to the community, and increased transparency and guidance to the community on merger activity and areas of ACCC concern to enhance community understanding and administrative predictability.

These outcomes will be measured based on the:

- qualitative and quantitative competition (and public benefits) analysis in ACCC determinations, Tribunal reviews and judicial reviews of ACCC determinations
- improvements in timeframes (including pre-notification periods) for considering a merger against current timeframes and process for merger review. This will also consider the proportion of mergers and acquisitions cleared through fast track, compared to Phase 1 or 2, and the use of timeline extensions on merger reviews
- evidence of greater transparency for the wider community with increased third-party engagement with the merger control system and the quality and transparency of the decision making as evidenced by the success of the public register
- evidence of improved outcomes for competition by preventing or remedying with commitments of anti-competitive mergers, and
- better engagement with the merger control system in terms of provision of calibrated upfront information and responsiveness to information requests that need to be made.

As outlined above, a framework for recording ACCC merger data to support BLADE analysis will be developed. The new comprehensive database of mergers and acquisition activity in Australia, as well as the integration of ABS prices data, will be critical to the assessment of harm (impact on prices and welfare, and the community), adjustments to the ACCC's regulatory focus/approach, and building relevant evidence on the effectiveness and efficiency of the new system (including calibration and updates to the notification thresholds).

Finally, the ACCC will continue to be subject to the Regulator Performance Guide.¹²² The ACCC has also agreed to reinvigorate the ACCC Performance Consultative Committee, which consists of business, legal and consumer representatives, to review and promote regulatory best practice as part of the reforms (including metrics relating to timeliness, transparency, guidance, and quality of engagement with merger parties and third parties).

¹²⁰ Based on ACCC data.

¹²¹ ACCC, Australian Government, *Statement of Expectations and Statement of Intent*, April 2024, accessed 12 June 2024.

¹²² ACCC, Australian Government, *Regulator Performance Guide*, accessed 9 July 2024.

Attachment A: Regulatory burden estimate

Methodology

The regulatory burden estimates (RBE) for each option presented capture the administrative (labour costs) and substantive compliance costs (purchased costs) for businesses for each stage of the proposed merger system, including:

- familiarisation costs
- labour and legal costs to determine whether a merger notification needs to be made
- labour and legal costs to notify a merger
- labour and legal costs as part of a Phase 1 merger review
- labour, legal and economic costs as part of a Phase 2 merger review
- labour and legal costs for any remedies or commitments
- labour, legal and economic costs as for a public benefit assessment, and
- labour and legal costs for Tribunal and other post-merger review.

The administrative costs are labour costs for businesses and include additional costs of making, keeping and providing records, costs of making and being involved in a notification and compliance costs associated with financial costs. The substantive compliance costs are generally purchased costs by business and predominately includes the costs of professional services needed to meet the regulatory requirements of the proposed options, such as legal and economic consultant fees.

The RBE does not capture the proposed merger fees and other impacts and costs outlined under each option. These activities have been represented separately and quantified as indicated.

Data and Assumptions

The administrative costs for businesses (labour costs) are based on the standard formula of Price × Quantity, being (Time required × Labour cost) × (Times performed × Number of businesses or community organisations × Number of staff).

Treasury has used a A\$150 hourly rate for labour costs, which is a Treasury estimate and takes into account senior executive involvement in merger transactions.

The formula used to calculate the substantive compliance costs (namely legal and economic consultant costs) is based on number of businesses × number of time services purchased (based on hour) × service cost per activity (hour).

Treasury has used a A\$800 hourly rate for legal costs, which is a Treasury estimate and is also broadly aligned with the hourly rate used by the United Kingdom's Competition and Markets Authority (CMA) of GBP 512 in their recent Impact Analysis for Reforms to Merger Control in 2023.¹²³

¹²³ United Kingdom Competition and Markets Authority, *Impact Analysis - Reforms to Merger Control*, 20 April 2023, p 43, accessed 23 May 2024

Treasury has used a A\$600 hourly rate for economic consultant costs, which is a Treasury estimate and is also broadly aligned with the hourly rate used by the CMA of GBP 350 in their recent Impact Analysis for Reforms to Merger Control in 2023.¹²⁴

The total number of notifications and number of merger parties is based on the anticipated overall volume of notifications to the ACCC being similar to current volumes (approximately 300 a year).

Treasury considers that each of Options 2, 3 and 4 will not impose additional regulatory burden on individuals or consumer groups, when compared to the status quo.

It is anticipated that 5 per cent of all mergers would proceed to an in-depth Phase 2 review, consistent with the current experience, and 2-4 mergers per year would raise public benefit considerations.

There are around 1,000 to 1,500 mergers annually with larger firms tending to acquire smaller firms, based on preliminary results from Treasury's *'Tracking mergers in Australia using worker flows'* modelling.¹²⁵ The midpoint of 1,250 has been used in Treasury's assumptions.

Costs in the status quo

The total annual cost of informal review and merger authorisation under the status quo (assuming 300 informal review notifications and one merger authorisation application per year) is estimated to be \$160.2 million (refer to Table 1 below). This estimate is based on:

- Labour and legal costs to determine whether to voluntarily notify a merger to the ACCC. It is estimated that approximately 1,250 businesses will be impacted, which is the middle point of the 1,000 to 1,500 mergers preliminary Treasury modelling indicated occur annually. The total annual cost for business being approximately \$36.9 million, with the estimated cost per business being \$29,500 (informal review) and \$30,250 (merger authorisation).
- Labour and legal costs to prepare and make a notification. These costs include the cost to prepare a submission with all relevant information, any early engagement with the ACCC, and any legal or economic advice. These costs assume 285 'simple' notifications will be made each year that are likely to be cleared at Phase 1. They assume 10 notifications of moderate complexity and 5 complex notifications per year. The total annual cost for business being approximately \$16.3 million, with the estimated cost per merger (informal review) to be \$38,100 for simple notifications, \$166,000 for moderately complex notifications and \$487,500 for complex notifications. And the estimated cost per merger (merger authorisation) to be \$286,000 for moderately complex notifications and \$2.4 million for complex notifications.
- Labour and legal costs for a Phase 1 merger review. These include costs to engage with the ACCC, respond to any information requests, respond to any ACCC feedback, and preparation and engagement on any simple remedies (if applicable). These costs assume 285 merger notifications will be completed at Phase 1 per year, based on the above total number of expected merger notification of around 300. The total cost for business being \$71.3 million, with the estimated cost per merger to be \$247,500.
- Labour, legal and economic costs as part of a Phase 2 merger review. These include costs to gather and submit additional information, any additional legal and economic advice, compliance with statutory information, data and document requests, preparation and attendance at compulsory examinations, and a response to a notice of competition concerns. These costs assume 15 matters per year (informal review), being 5 per cent of all notifications.

¹²⁴ United Kingdom Competition and Markets Authority, *Impact Analysis - Reforms to Merger Control*, 20 April 2023, p 43, accessed 23 May 2024

¹²⁵ The Treasury, Australian Government, *'Tracking mergers in Australia using worker flows'*, p 1, accessed 5 March 2024.

The total cost for business being \$16.7 million, with the estimated cost per merger to be \$987,000 (informal review) and \$1.9 million (merger authorisation).

- Labour and legal costs associated with any remedies as part of a merger review. These costs include costs associated with developing, proposing and modifying proposed remedies to increase the likelihood of clearance during both phases of the review process and include any legal and economic advice regarding the remedy, engagement with the ACCC and implementation costs for the remedy. These costs assume 5 matters per year (informal review), based on there being 27 mergers subject to an enforceable undertaking to remedy competition concerns since the 2015–16 financial year. The total cost for business being \$1.2 million, with the estimated cost per merger to be \$167,500 (informal review) and \$407,500 (merger authorisation).
- Labour, legal and economic costs for Federal Court proceedings. This includes costs for the preparation of an application, preparation for proceedings, filing submissions and evidence, and attendance at proceedings. This assumes 1.5 matters per year (informal review plus merger authorisation) may be subject to Federal Court proceedings, which will cost merger parties \$14 million.

Table 1. Estimated total cost to businesses under the status quo

Description of activity	Estimated total costs per year
Decision to notify	\$36,905,250
Prepare an application	\$16,302,750
Phase 1	\$71,345,000
Phase 2	\$16,670,000
Remedies	\$1,245,000
Public benefits	\$3,730,000
Review	\$13,993,750
Total	\$160,191,750

Common costs across Options 2, 3 and 4 associated with a mandatory system

Each of the options present an overall increase in regulatory burden as a result of the mandatory and suspensory proposed system for mergers, which has been considered against the broader benefits and impacts of each option as outlined in Question 4.

An assumption is that if the notification thresholds are set such that the total number of assessments by the ACCC would be similar to the number of assessments currently occurring under Option 1, the net difference in the aggregate cost to business of preparing for and being involved in a review will not increase significantly overall. For example, a business that notifies either voluntarily (Option 1, status quo) or mandatorily under mandatory systems (Options 2, 3 and 4) must still incur the cost of the assessment process prior to any judicial enforcement if required.

Of the new options presented, Option 2 represents the overall lowest RBE with the total increased cost for business being \$10.8 million. The regulatory burden costs for Option 2 are mostly common across the other mandatory merger system options. However, there are some divergent costs with Options 3 and 4 as outlined in the ‘Regulatory burden estimates that vary under Options 3 and 4’ section below.

The RBE for Option 2 includes:

- One-off familiarisation costs for law firms with specialist competition practices, as well as for medium and large businesses with the intention of pursuing a merger or acquisition. The one-off familiarisation costs are common to each of the Options 2, 3 and 4, but are not applicable to Option 1.
 - Treasury estimates the total one-off familiarisation costs for business and law firms to be around \$235,000, with the estimated cost per business to be around \$750 and around \$16,000 per law firm.
- Labour and legal costs to determine whether a notification needs to be made. This includes costs to consider the new notification thresholds, gather initial information, including on substantial market power and the 3-year cumulative effect, and decide whether a merger meets the relevant thresholds. These additional costs are common to each of the options noting that higher costs are incurred in the status quo for businesses to assess whether they should voluntarily notify the ACCC of any proposed merger.
 - It is estimated that approximately 1,250 businesses will be impacted, which is the middle point of the 1,000 to 1,500 mergers preliminary Treasury modelling indicated occur annually. The total annual cost for business being \$26.9 million, compared to the status quo of \$36.9 million, with the estimated cost per business to be \$21,500.
- Labour and legal costs to prepare and make a notification. These costs include the cost to prepare a submission with all relevant information, any early engagement with the ACCC, and any legal or economic advice. These costs are common to each of the options and are higher than the status quo due to the additional upfront information requirements, with higher total costs as part of Option 3 as outlined below.
 - These costs assume 285 ‘simple’ notifications will be made each year which are likely to be cleared at Phase 1. They assume 10 notifications of moderate complexity and 5 complex notifications per year. The total annual cost for business being \$28.4 million, compared to the status quo of \$16.3 million, with the estimated cost per merger to be \$68,500 for simple notifications; \$286,000 for moderately complex notifications and \$1.2 million for complex notifications.
- Labour and legal costs for a Phase 1 merger review:
 - These include costs to engage with the ACCC, respond to any information requests, respond to any ACCC feedback, and preparation and engagement on any simple remedies (if applicable). These costs are common to each of the options, with higher total costs as part of Option 3 as outlined below, but lower overall costs compared to the status quo due to the status quo requiring further follow up as part of the Phase 1 review process currently.
 - : These costs assume 285 merger notifications will be completed at Phase 1 per year, based on the above total number of expected merger notifications of around 300. The total cost for business being \$59.1 million, compared to the status quo of \$71.3 million, with the estimated cost per merger to be \$207,500.
- Labour, legal and economic costs as part of a Phase 2 merger review:
 - These include costs to gather and submit additional information, any additional legal and economic advice, compliance with statutory information, data and document requests, preparation and attendance at compulsory examinations, and a response to a notice of competition concerns. These costs are common to each of the options, with higher total costs as part of Option 3 as outlined below.

Remedies	\$2,037,500
Public benefits	\$3,730,000
Review	\$22,550,000
Total	\$170,960,000

Regulatory burden estimates that vary under Options 3 and 4

Options 3 and 4 are estimated to have higher regulatory costs compared to Option 2 and the status quo.

Option 3 represents the overall highest RBE due to the additional regulatory burden created from the satisfaction element as part of the merger control test.

In particular, the RBE for Option 3 reflects an increase in the number of notifications that proceed to Phase 2, remedies, public benefits and review stages due to the satisfaction test. The RBE for Option 3 also reflects an increase in the costs of preparing a notification, engaging in Phase 1 and Phase 2 reviews and settling remedies, due to the increased time required to satisfy the ACCC at each of these steps. In all cases, Treasury has assumed the number of notifications that would reach each stage is double that of Options 2 and 4 (except the review stage), leading to significantly higher costs overall for this option.

- The total increased cost for business from Option 3 being \$83.7 million, compared to Option 2 of \$10.8 million, with:
 - the cost to prepare simple notifications being \$102,750, moderately complex notifications being \$429,000, and complex notifications being around \$1.8 million
 - the cost for Phase 1 to be \$247,500 per merger, which is higher than Option 2
 - the cost for Phase 2 to be \$2.1 million per merger, which is higher than Option 2
 - the cost for any proposed remedies to be \$407,500 per merger, which is the same as Option 2, and
 - the cost for review by the Tribunal to be \$5.6 million per merger, which is the same as Option 2.

Table 3. Estimated total cost to businesses under Option 3

Description of activity	Estimated total costs per year
Familiarisation costs	\$235,000
Decision to notify	\$26,875,000
Prepare an application	\$42,630,000
Phase 1	\$66,825,000
Phase 2	\$61,950,000
Remedies	\$4,075,000
Public benefits	\$7,460,000
Review	\$33,825,000

Total \$243,875,000

Option 4 represents a modest increase in the RBE compared to the status quo and Option 2 due to the additional regulatory burden costs associated with seeking judicial review of an ACCC determination.

- In particular, the RBE for Option 4 reflects a change in the costs of post-merger reviews from no avenue to seeking review by the Tribunal, leading to an overall increase in costs from legal fees and process related to seeking a review of a decision by the merger parties in the Federal Court, as well as slightly higher costs for the other stages due to the retention of the merger authorisation process.
 - The total increased cost for business from Option 4 being \$22.1 million, compared to Option 2 of \$10.8 million, with the cost for review by the Federal Court to be \$11.2 million per merger, which is higher than Option 2 and Option 3.

Table 4. Estimated total cost to businesses under Option 4

Description of activity	Estimated total costs per year
Familiarisation costs	\$235,000
Decision to notify	\$26,905,250
Prepare an application	\$29,766,750
Phase 1	\$68,766,250
Phase 2	\$27,975,000
Remedies	\$2,445,000
Public benefits	\$3,730,000
Review	\$22,440,000
Total	\$182,263,250

ACCC resourcing and merger review fees

ACCC resourcing

Under Options 2 and 3, the ACCC will be the expert first instance administrative decision-maker. Additional funding and staffing are required by the ACCC to support the operation of the new merger system, including the additional ongoing administrative elements attached and greater economic expertise in decision making. These administrative elements include making formal merger decisions within set timelines, maintaining a public register of notified mergers and publishing reasons for decisions.

Merger review fees

Under Options 2, 3 and 4, fees on merger notifications will offset the ACCC's costs. Currently informal merger reviews do not have fees imposed and a \$25,000 fee applies for merger authorisation applications.

Therefore, with each of the proposed options, except for the status quo, all merger notifications will be accompanied by a cost-recovery fee. Indicatively, Treasury expects this to be around \$50,000–100,000 for most mergers, with an exemption for small business.

The fees will ensure the ACCC is properly resourced to undertake its expert administrative decision-making role.

Impacts of ACCC resourcing and merger review fees

Fees would impose a direct financial cost on businesses notifying a merger to the ACCC (except small businesses, which will be exempt).

Benefits of ACCC resourcing and merger review fees

The shift to administrative decision-making, rather than judicial enforcement, will ensure the ACCC is better placed to protect consumers and competition in our economy.

Attachment B: Merger reform consultation — stakeholder feedback and Australian Government response

Elements of a merger control system adopted		
Element	Stakeholder consultation feedback	Australian Government response
Notification		
Targeted mandatory notification thresholds	<p>Current approach gives rise to uncertainty for businesses about when to notify; concern that the ACCC is not adequately notified of mergers.</p> <p>Clear thresholds would provide more certainty but must be calibrated.</p>	<p>The person or people acquiring control of the business or assets will – if the thresholds are met – be required to notify the ACCC of a ‘merger’.</p> <p>Thresholds will be monetary and supply/market share-based, balancing regulatory burden with potential harm to competition.</p> <p>There will also be a Ministerial power to introduce additional targeted notification thresholds in response to evidence-based concerns regarding certain high-risk mergers.</p> <p>Mergers below the thresholds may also be voluntarily notified to the ACCC. Such mergers would be subject to the same administrative system as above-the-threshold mergers.</p> <p>The ACCC will not have the ability to ‘call-in’ mergers below the thresholds for review, but the ACCC may investigate a below-the-threshold merger for breach of any other relevant provisions of the CCA as only notified mergers will receive the benefit of anti-overlap provisions.</p>
Upfront notification requirements	<p>Information requirements should be clearer and proportionate, and merger parties are best placed to provide information to facilitate efficient and effective assessment.</p>	<p>Notification requirements calibrated to likelihood that transaction raises competition concerns; enables ACCC to properly undertake its review and to efficiently and promptly differentiate benign mergers.</p>
Fees	<p>Cost is currently borne by the public and ACCC needs to be appropriately resourced.</p>	<p>All merger notifications accompanied by a fee (subject to consultation). An exemption from fees will be available for small business. This ensures ACCC is appropriately resourced and funding is responsive to need.</p>
Suspensory timelines supporting prompt review	<p>ACCC should have sufficient time to review mergers before completion.</p> <p>ACCC currently not bound by timelines in informal review process which creates significant uncertainty for businesses and for market participants to engage.</p> <p>Delays in merger reviews can be very costly for businesses.</p> <p>Robust, clear time frames would provide more certainty.</p>	<p>Mergers are time sensitive, and prompt decision-making is critical. Clear review timelines are an important procedural safeguard and will assist merger parties in transaction planning and interested stakeholders to engage with the ACCC’s review.</p> <p>Acquirer must receive determination from the ACCC before closing notifiable transaction.</p> <p>Indicative timelines (subject to consultation):</p>

Elements of a merger control system adopted		
Element	Stakeholder consultation feedback	Australian Government response
		<ul style="list-style-type: none"> Phase I: 30 working days Phase II: 90 working days Option of fast-track determination if no concerns identified after 15 working days Approval for public benefits: 50 working days <p>Time periods may be extended in limited circumstances. If no ACCC determination within a certain time period, transaction will be permitted to proceed.</p>
Assessment		
A stronger, expert administrative decision-maker	Administrative decision-making can be quicker, more accessible for third parties, more transparent and draw on economic expertise more easily than judicial enforcement.	<p>ACCC will be the expert first-instance administrative decision-maker with responsibility to determine whether a merger may be put into effect, with or without conditions.</p> <p>Delivering better outcomes: mergers will be assessed by an expert agency, with engagement and information from stakeholders and supported by rigorous legal and economic analysis. It will enhance accountability, accessibility and transparency of merger review.</p>
Transparency and predictability	<p>Current informal approach is not transparent.</p> <p>Publishing information about mergers reviewed by the ACCC would lead to greater predictability, confidence in ACCC decision-making and broader community awareness.</p>	<p>Information about all mergers considered by the ACCC will be listed on a public register.</p> <p>The ACCC will set out the findings on material facts, with reference to the evidence or other material on which those findings were based, and the reasons for all decisions commensurate with the substantive review undertaken. This will facilitate transparency and predictability in the administrative system and shape the boundaries of merger control over time as a body of previous determinations, including the economic and legal reasoning, will develop.</p>
Test for decision-maker to apply including 'merger factors'	<p>'Substantial lessening of competition' test is the appropriate framework, but concerns with the requirement to 'prove' the counterfactual in forward-looking merger assessments.</p> <p>Reviews could substantially benefit from more rigorous economic and legal analysis.</p> <p>Usefulness of the 'merger factors' is somewhat limited; updating guidance to reflect current economic thinking would be more helpful for businesses, advisors and others.</p>	<p>The ACCC will be empowered to protect competition and consumers.</p> <p>ACCC must determine that a merger can be put into effect (with or without conditions) unless it considers the merger would have the effect, or be likely to have the effect, of substantially lessening competition in any market, including (but not exclusively) if the merger creates, strengthens or entrenches a position of substantial market power in any market.</p> <p>Merger factors to be replaced with principles, focused on the conditions for competition, also to address concerns with the counterfactual.</p>

Elements of a merger control system adopted		
Element	Stakeholder consultation feedback	Australian Government response
		ACCC will be expected to update and periodically review its guidance.
Substantial market power amendment to 'substantial lessening of competition' test	Concerns about market power in concentrated sectors, such as supply chains. Acquisitions by firms with substantial market power should be captured by the 'substantial lessening of competition' test.	The ACCC will be empowered to protect competition and consumers. Clarify that the existing 'substantial lessening of competition' test includes if the merger creates, strengthens or entrenches a position of substantial market power in any market.
Related agreements	Related agreements by the merger parties should be taken into account.	The principles ensure related agreements by the merger parties may be taken into account in the ACCC's assessment.
Public benefits	Ability to consider public benefits should be retained.	If ACCC disallows the merger, approval may be sought if the merger would result, or be likely to result, in a public benefit which outweighs anti-competitive impact. Allowing the ACCC to consider whether an otherwise anti-competitive merger raises substantial and meaningful net public benefits is important as our economy responds to significant structural shifts including the rise of the care economy, rapid transformation to net zero and the growth of the digital economy.
Serial acquisitions	Concerns about whether a single acquisition, which does not result in material changes in market concentration or competitive dynamics but over time forms part of a strategy of consolidation, can be appropriately assessed under the current law.	All 'mergers' within the previous three years by the merger parties may be considered as part of the review of the notifiable merger (and will be aggregated for the purpose of assessing whether a merger meets the notification thresholds). This is a targeted measure to address concerns that some businesses are engaging in anti-competitive roll up strategies that increase prices and reduce quality and choice for consumers yet minimise unintended impacts on Australia's vibrant start-up and small-and-medium enterprise sector.
Review and penalties		
Review of administrative decisions and procedural safeguards	Reviews of decisions would benefit from greater economic and business expertise; it is important that review processes are accessible to stakeholders likely to be affected by a merger such as consumer groups. Reviews of merger decisions are time-sensitive.	ACCC decisions subject to limited merits review by the Australian Competition Tribunal with time limits. The Tribunal, with its independent economic, business and legal expertise, will improve the quality and consistency of ACCC decisions and promote good decision-making by the ACCC based on sound economic and legal principles. The Tribunal is able to conduct proceedings expeditiously and with as little formality as required for proper consideration of the issues which will minimise cost and facilitate participation by affected stakeholders, including supporting consumer groups.

Elements of a merger control system adopted		
Element	Stakeholder consultation feedback	Australian Government response
		The fair, accountable and improved administration of the merger system benefits merger parties, interested stakeholders and the Australian community. In addition to the availability of complaints mechanisms, the ACCC is subject to the Regulator Performance Guide.
Penalties	Significant penalties would deter strategic behaviour and encourage compliance.	Substantial penalties (monetary and/or divestiture) for non-compliance for entities concerned/officers responsible for merger, on application by the ACCC in Federal Court.

Elements of a merger control system not adopted		
Element	Consultation feedback	Australian Government response
Notification		
Informal system	Current system provides flexibility but creates significant uncertainty about timing and outcome, is costly for businesses due to time delay, less transparent and information requirements can be unclear.	Clear timeframes and performance metrics to hold the ACCC accountable. Information requirements to ensure the ACCC is provided with information to facilitate the efficient and effective review of mergers.
Voluntary notification	Allows self-assessment but gives rise to more uncertainty than overseas systems that have clear mandatory notification requirements; risk is that the ACCC is not notified of potentially anti-competitive mergers	Unclear that it would address concerns about non-notification of mergers. Merger parties would have minimal incentives to cooperate in a judicial enforcement system.
Call-in power	A call-in power would create uncertainty for businesses; the current system allows the ACCC to investigate any merger in Australia; smaller transactions or mergers in local markets may still raise competition concerns.	Targeted notification thresholds to provide clarity for businesses and target mergers most likely to raise risks to competition.
Section 50 and declarations in the Federal Court	Multiple pathways facilitate strategic behaviour.	Streamline into a single simpler mandatory and suspensory administrative system. Retain the substantial lessening of competition test, incorporated into a stronger administrative system.
Assessment		
Decision-maker must not grant approval unless satisfied the merger is not likely to substantially lessen competition	Merger parties would have the incentive to promptly provide relevant information to the ACCC. However, this test would substantially increase the burden of proof on merger parties, even mergers that are unlikely to pose risks to the community, imposing additional risks and costs on all mergers.	The ACCC will need to be satisfied that certain facts exist before disallowing the merger.

Elements of a merger control system not adopted		
Element	Consultation feedback	Australian Government response
	Disproving the existence of a substantial lessening of competition may be difficult and impractical for businesses to satisfy, particularly those in emerging markets.	
Review		
Judicial enforcement	<p>Federal Court proceedings have significant cost and timing implications for merger parties, third parties and the ACCC.</p> <p>Less transparent than an administrative system with less precedent available.</p> <p>Third parties may be affected by a merger but are currently deterred from participation due to reluctance to appear in court, fear of retribution, or cost.</p>	<p>Replace the current ad hoc approach with a stronger, simpler, more efficient, risk-based and transparent administrative system that enables market participants, such as customers and small businesses, to be heard in merger reviews.</p>
Full merits review	<p>It is important to incentivise parties to provide information upfront to the ACCC.</p> <p>Not limiting reviews of ACCC decisions to the investigatory record that was before the ACCC would ensure quality and robust regulatory processes.</p> <p>Full merits review would take longer than limited merits review and mergers are time-sensitive.</p>	<p>The Tribunal's review of ACCC determinations is limited as it will be based on the material before the ACCC. However, the Tribunal may seek clarifying information, and the Tribunal may allow the parties to present new information or evidence which was not in existence at the time of the ACCC's determination.</p> <p>A fast-track review by the Tribunal may alternatively be sought, based only on the material before the ACCC. With a fast-track review, the Tribunal would be bound by the findings of fact made by the ACCC.</p> <p>Limited merits review will allow for reconsideration of the ACCC's determination, subjecting it to scrutiny and review. Limited merits review, rather than full merits review, appropriately balances procedural fairness by allowing for a change of circumstances to be taken into account and ensures merger parties have the incentive to place relevant information before the ACCC. This mitigates the risk of strategic behaviour. Limited merits review also, importantly in a merger situation, reduces the time required to review an ACCC determination.</p>