Tech Council
of Australia

Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

Tech Council of Australia Submission

October 2024

techcouncil.com.au

1. Introduction

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

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

The TCA supports the Government's goal for Australia's merger regime to be 'faster, simpler and stronger'. The TCA also supports the intention in the explanatory memorandum that the process would be a 'streamlined process for the review of acquisitions [that] will enhance efficiency, predictability and transparency for businesses, stakeholders and the community'.[1]

The TCA welcomes many of the amendments that have been made to the Bill in response to the TCA's concerns since the Exposure Draft legislation was consulted on, including:

- Changes to the way that serial acquisitions are assessed so that they focus on horizontal acquisitions rather than acquisitions made in unrelated markets
- The removal of the market concentration threshold
- Changes made to the assessment of public benefits, and
- Rolling back changes to the definition of a substantial lessening of competition that apply beyond merger assessment and review.

However, the TCA is concerned that there are still certain key elements of the Bill that means it does not deliver on a merger regime that will be faster, simpler or stronger, nor is it likely to result in a streamlined process that enhances efficiency, predictability and transparency for businesses. The Bill raises several key concerns for the tech sector, including in relation to:

- Changes to the SLC test
- Notification thresholds, in particular that they are still likely to significantly over-capture merger and acquisition notifications that must be made to the ACCC, that do not require sufficient nexus to Australia, and the breadth of the ministerial powers for additional thresholds
- The capacity for significant delays in the assessment of mergers and acquisitions by the ACCC
- The penalty regime for failing to notify mergers and acquisitions to the ACCC, and
- Third party appeal rights.

[1] Explanatory Memorandum: Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

Treasurer Jim Chalmers noted that these reforms 'are the biggest reforms to merger settings in almost 50 years'.[2] We agree. We consider that the changes contained in the Bill are fundamental changes to the operation of markets and property rights in Australia, and in this context, consider it of critical importance to Australia's tech sector and the broader economy to ensure that these reforms are well-targeted and reduce complexity and uncertainty in Australia's merger regime and its administration.

Getting Australia's merger laws right will ensure that Australia is an attractive place to start and found a tech company, and to ensure that we Australia's tech successes can scale into globally competitive companies that compete on the international stage. ch

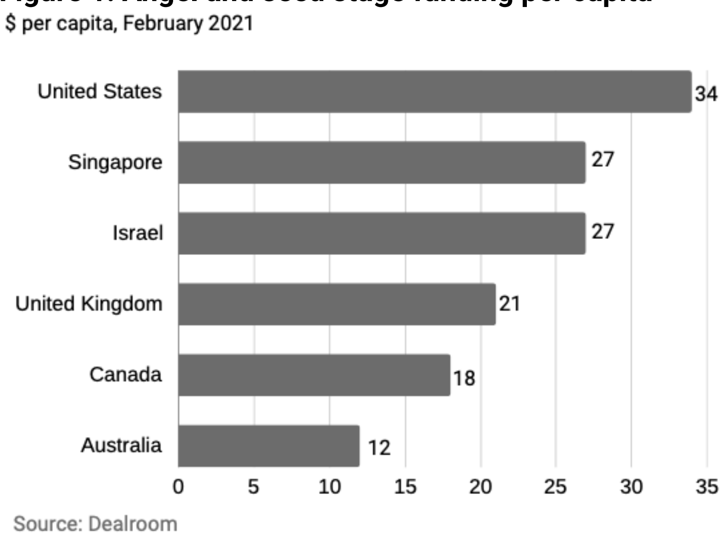
The TCA has concerns that some of the issues in the Bill increase the complexity and uncertainty of Australia's merger regime and its administration. This will have a significant impact on Australia's tech sector, which has produced disruptive technology companies that have enhanced and promoted competition.

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

An effective merger control regime is critically important for the whole economy and to ensure incentives exist for innovative products and services delivered at the lowest cost to consumers. Mergers and acquisitions are a particularly important part of the tech sector landscape, especially in Australia. Mergers and acquisitions have allowed Australian companies to scale to become globally competitive tech companies and provide incentives for innovation to startups. A merger regime that blocks, prevents or substantially delays pro-competitive or neutral mergers and acquisitions will reduce competition in the long term, where it disincentivises innovation and entry into new markets.

Australia is already a challenging place for tech companies to scale. Australia falls behind on early-stage funding, with less invested per capita in Australia, compared to the US, Singapore, Israel, the UK and Canada, as demonstrated below

Figure 1: Angel and seed stage funding per capita[3]



[2] Treasurer's address to the Bannerman Competition Lecture, 10 April 2024
[3] Tech Council, Shots on Goal, July 2023, p.19

Further, the probability of success for a firm drops significantly, compared to the US, from Series B funding rounds onwards.[4]

Startups in Australia face a range of regulatory barriers to scaling and attracting investment, including:

- The requirements under the Corporations Act that private companies may only have a maximum of 50 shareholders. Once that maximum is reached then companies must become public companies, attracting a range of significant compliance obligations for the company.
- Foreign investment review processes, which limits the attractiveness of Australian startups as a target for foreign investors, as a process which lacks transparency, captures many deals, and results in delays and inefficiency.

In the context of merger reforms, which impact the attractiveness of Australia as a place to attract investment and start and scale a tech company, we also urge the review of other regulatory barriers to attracting investment in Australia's tech ecosystem.

Notwithstanding these challenges, Australia has experienced significant growth in its tech sector over the past ten years. With an increase in VC investment into Australia's tech sector increasing 18-fold between 2014 and 2022, which has enabled the growth of Australia's tech sector.[5] Continuing to attract VC investment into Australia's tech sector is vital to the long-term success and competitiveness of Australia's tech ecosystem.

Startups in Australia have four long-term options available to them:

- Remain privately held
- List on a stock exchange by way of IPO
- Be acquired by way of merger or acquisition, or
- Exit/leave markets entirely.

Competition in the tech sector thrives where startups can attract investment to foster their growth. Investors choose to invest in startups on the basis that those investments will eventually result in returns. In order for investors to materialise returns, companies typically need to proceed to an IPO, or be acquired / sold. There are a range of hurdles to companies realising returns by way of an IPO, and as a consequence, mergers and acquisitions are a critically important way for investors to materialise returns on tech investments.

The venture ecosystem is young in Australia relative to the U.S. and Europe. Australia has not developed the depth in funding markets between venture funds and growth equity/ secondary funds that you see in those other regions.[6] As such, the vast majority of exits and instances of realised returns have been through strategic acquirers as opposed to financial investors. In order for venture funds to continue to raise funds to invest in startups, they need to show returns, relative to the risk inherent in early stage tech development.

The option to sell a company is also important to founders and their motivations for creating a startup. Strategic acquirers offer founders the opportunity to realise their equity value, provide additional funding for further product development, help unlock distribution opportunities for their product, and leverage the acquirer's governance, functions and

[4] Tech Council, Shots on Goal, July 2023, p.6
[5] Tech Council, Shots on Goal, July 2023, p.11
[6] Shots-on-Goal-vF.pdf (techcouncil.com.au), page 19

expertise. The ability to divest companies is also a key strategy for large, established firms that are changing business strategy, and this can have significant pro-competitive effects.

The ability to be acquired, and realise returns, is critically important to investors and founders of tech startups in Australia. A major venture capital firm in Australia reports that of its portfolio companies, 14% have exited. Of these exits:

- Less than 10% have proceeded to an IPO
- More than 70% have been acquired by another company
  - Of those acquired, 20% were acquired by local strategic sponsors, and 80% were acquired by international strategic sponsors, of which almost 90% kept the product IP and 10% was to acquire the customers of the target.
- More than 20% of exits have been the result of a company exiting entirely from markets, with no merger or acquisition.

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

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

While a merger regime that clears anti-competitive mergers can risk harm to consumers, it is equally important to acknowledge that merger regimes that block pro-competitive or neutral mergers, or that discourage parties from contemplating mergers, also have a significant impact on consumers. Blocking pro-competitive mergers and increasing regulatory risk would likely result in more companies failing, removing innovative products and services from markets, fewer incentives for new startups, and reduced investment in Australia compared to other countries. Ultimately, this would reduce competition from which consumers benefit and have broader consequences across the Australian economy.

It is also possible that the introduction of reforms to merger laws may cement the strength, size and competitive position of businesses who have been able to pursue more acquisitions in the past that they would otherwise be able to under a stricter regime. This could restrict the growth for emerging firms to compete with these incumbents.

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

3. Concerns about changes to the SLC test

The proposed changes to the merger test include a change to the definition of substantial lessening of competition (**SLC)** for the purposes of merger assessment to include 'creating, strengthening or entrenching a substantial degree of power'.

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

The change to the SLC test to focus on 'creating, strengthening or entrenching' substantial market power is likely to lead to a bias towards blocking transactions involving large firms, even where the transaction involves a very small increase in market share or does not have any impact on competition. The consideration of mergers should continue to focus on the competitive effect of the acquisition, regardless of the size of the acquirer (or target).

Recommendation 1: retain the existing SLC test, with the consideration of whether the acquisition creates, strengthens or entrenches substantial market power forming part of the holistic assessment of the transaction.

Alternatively, if the definition of SLC is changed to include 'creating, strengthening or entrenching a substantial degree of power', then there should be a clear qualification that would avoid a very small increase in market share being used to justify blocking a transaction.

4. It is vital that thresholds are set appropriately

Monetary thresholds risk over-capture

We consider that the proposed monetary thresholds will significantly over-capture pro-competitive mergers and acquisitions. This has serious consequences for tech companies seeking merger clearance, and consequences for the timeliness of merger review outcomes in circumstances where the ACCC is resource-constrained, and has a broad set of powers to extend merger timelines. Appropriately targeted merger thresholds should have both reasonable jurisdictional limits, and involve a targeted approach to ensure that ACCC resources and scrutiny are focused on transactions that have the capacity to genuinely affect competition in Australian markets.

Firstly, we consider that it is important that monetary thresholds are based on Australian turnover rather than global transaction value. The thresholds being consulted on risk considerably over-capturing deals with no significant impact in Australia, with either limb capturing a very large number of companies, ensuring that most, if not all, acquisitions they make will be notifiable.

Any monetary thresholds should also clearly define what is considered to be 'Australian turnover' – for example, whether Australian turnover includes turnover generated from license fees paid for IP that is registered in Australia, or whether it refers to revenue generated from Australian customers/users. In the case of Australian tech companies, most have a global user base in which the majority of revenue is generated from global sales and customers, however, the IP is held and generated in Australia. Monetary thresholds which apply to revenue generated from IP held and generated in Australia would disincentivise innovation and growth of Australian tech companies. The definition of 'turnover' should also exclude revenue received through government grants or funding programs, which particularly affects capital-intensive, deep technology companies, and will ensure that merger laws do not undermine the operation of other government policies.

The monetary thresholds are such that large acquirers will have to notify every single acquisition that they make. This is likely to have a significant impact on the tech sector. In technology sector many extremely small startups focus on developing a 'feature' (rather than a standalone business) that the feature can be implemented into an existing technology service. Small startups are founded with the express aim of selling to an existing technology firm, and limiting the ability for startups to be acquired will make Australia a less attractive market for small to medium scale mergers and acquisitions, with devasting impacts on Australia's local tech sector. The ability for an existing technology company to incorporate new features for existing services is an important source of innovation in the tech sector. Restricting the ability and incentives for existing technology firms to acquire small start-ups significantly impacts startups incentives to innovate and the likelihood that their innovations are made available to consumers. That is, existing technology firms deploy innovations quickly across their customer base in a way that cannot be achieved by a startup.

As a result of this dynamic, we consider that the thresholds should distinguish between target and acquirer, so that acquisitions of a target that has Australian turnover below a certain threshold are excluded. International examples of thresholds that distinguish between target and acquirer are below:

- Canada - one of the thresholds is if the target has assets in Canada whose book value exceeds CAD93M (~$100M AUD), or annual gross revenues in/from Canada generated from such assets exceeding CAD93M.
- Japan - for notification of share acquisitions, one limb is where the acquiring group's consolidated domestic sales in Japan exceeds JPY20B (~$200M AUD).
- Poland - transaction is exempt from notification if the target's turnover in Poland was below €10M in any of the 2 preceding years (~$16.4M AUD).

The proposed thresholds also fails to take account of different asset classes and impact this will have on the efficient operation of the proposed mandatory notification regime.

Across the Australian economy there are a very diverse range of transactions. Not only is there a very diverse range of transactions but different sectors of the economy have very different parameters. For example, certain asset classes such as commercial land, leases and property involve: 1) very substantial numbers of transactions; and 2) very high transaction values. At the same time, there is no shortage of alternatives in this assets class and therefore the risk of competitive harms is generally low. The proposed low transaction thresholds will therefore unreasonably capture the large number of land, lease and licence transactions that occurring daily and are part of many corporations' ordinary course of business.

Accordingly, given the limited resources that the ACCC has to review land, licence and lease acquisitions noting the very large volume of high value transactions in an asset class, the objective of a quick, efficient merger regime can only be achieved if a more nuanced approach is taken. Consideration should be given to setting a different and higher transaction threshold for certain asset class such as land, leases and the like. Given the serious consequences for a failure to notify, a higher different threshold for certain asset classes will help to avoids a deluge of applications that do not raise competitive concerns.

Accordingly, the TCA makes the following recommendations:

- **Recommendation 2:** Monetary thresholds should not reference global transaction value, instead, they should focus on the materiality of the transaction in Australia.
- **Recommendation 3:** The definition of Australian turnover should be clarified and refer only to revenue that is generated from Australian sales or customers, rather than from IP that is generated and held in Australia, but being used elsewhere.
- **Recommendation 4:** The lowest Australian turnover for targets and buyers (separately) should be at least $20 million. Rather than referring to global transaction value, if the target has less than $20 million in Australian turnover, it should not be caught by the notification thresholds.

  The reference to "global transaction value" should be deleted. If the Australian target of a global transaction is at least $20 million in Australian turnover, that is a sufficient jurisdictional trigger. Given the size of global transaction, no transaction will fail to satisfy the proposed "global transaction value" and therefore Australia is suggesting it reviews all global transaction just because there may be a small subsidiary in Australia.
- **Recommendation 5**: We recommend targeted and different thresholds for certain asset classes which should be developed through further consultation.

Targeted notification requirements introduce uncertainty into the merger process

The TCA is concerned about the ability for Treasury Ministers to set additional targeted notification requirements at their discretion. Given the importance of thresholds to the effective operation of the merger regime, it is not appropriate for Treasury Ministers to have the power to fundamentally change the operation of the regime. Instead, the ability to change the thresholds should be reserved to parliament following an appropriate public notice and consultation process, including allowing for a regulatory risk assessment to be undertaken.

Additional clarity and safeguards are needed. For example, as a minimum, an obligation should be imposed on Treasury Ministers to consult all affected stakeholders including other Government agencies and provide for reasonable timeframes for submission and a review mechanism for that decision.

We consider that there is also a significant risk that the introduction of targeted notification requirements would overlap significantly with the FIRB regime, which grants the Treasurer powers to block or impose conditions on acquisitions, based on a broad national interest test.

The TCA is concerned that this proposal introduces significant ongoing uncertainty and complexity into the administration of Australia's merger laws, and carries significant risk of the merger process being politicised.

The TCA makes the following recommendation:

- **Recommendation 6**: Treasury Ministers should not have the broad discretion to set additional targeted requirements. If the Government does maintain this discretion in the merger regime, then there should be clear procedural safeguards to ensure that additional targeted notification requirements are transparent, clear and have sufficient accountability mechanisms.

Requirements for a sufficient material connection to Australia are ineffective

The notification requirements require that, in order for a transaction to require notification to the ACCC, the transaction must meet the relevant thresholds and have a 'material connection to Australia'. The TCA is concerned that this additional test does not add anything meaningful to the proposed notification thresholds, and instead, is likely to create significant uncertainty for the Australian tech sector.

There is a lack of detail about what is a material connection to Australia. This is particularly challenging for technology markets, where Australian customers may be supplied with goods and services when they travel, or are outside of the country, and therefore may be captured even though the services are not available in Australia.

Further, the 'material connection' to Australia test introduces further uncertainty given that the Act already covers the application of the act to conduct outside of Australia and there is substantial clarifying case law on the existing test. By introducing a new test into the Act, parties and the courts will reasonably see this as a deliberate change leading to the question of what difference is intended. The additional uncertainty introduced by this test is unnecessary and does not achieve the Government's objective of a transparent merger clearance regime.

The TCA makes the following recommendation:

- **Recommendation 7**: Notifiable mergers should have a material connection to Australia in the form of a reasonable Australian turnover threshold in line with Recommendation 2 for the merging parties.

5. There is a high likelihood of significant delays in the assessment of mergers and acquisitions

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

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

- The ACCC 'reasonably considers' an application is materially incomplete (which may potentially occur where information that was not anticipated to be in issue at the time of making an application becomes an issue later in the course of a review)

- The parties do not notify the ACCC of a material change of fact, and where the timeframes can be restarted in Phase 1 if the change of fact is material to the ACCC's assessment
- The parties fail to respond to a request for information issued by the ACCC in the timeframe set by the ACCC – this is particularly prone to 'gaming' where onerous information can be requested in an RFI and used to justify significant delays to the timeframe, even where that information is not essential to the ACCC's assessment of a merger or acquisition, and
- The ACCC exercises its compulsory information gathering powers, for example, by issuing a section 155 notice and not receiving a response within 10 business days.

We consider that the timeframes set out in the Bill are generous, and that it is inappropriate to pair long statutory timeframes with a broad discretion to further delay timeframes by the ACCC.

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

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

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

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

6. The penalties for failure to notify should be amended

The TCA supports the introduction and implementation of penalties that incentivise compliance with notification requirements in the new merger regime, given that penalties will support the effective administration of the regime.

However, the proposed penalty for failing to notify the ACCC of a transaction which should be notified is found null and void in law, which is an extreme penalty and significantly out of step with international best practice (such as in the EU, which imposes a financial penalty).

The TCA makes the following recommendation:

- **Recommendation 9:** The penalties for failure to notify the ACCC of a transaction should involve a flat monetary penalty, and, where the transaction has already completed, it could be appropriate for the ACCC to have the power to seek an order from the Federal Court to unwind all or part of the transaction.

7. Third parties have significant appeal rights

While the TCA welcomes changes to third party appeal rights that aim to ensure that only appeals with sufficient merit may proceed, the Bill still includes significant third-party appeal rights of merger decisions which adds uncertainty to merger decisions. The changes do not eliminate the possibility of dissatisfied third-parties, such as competing bidders or competitors, from appealing an ACCC merger decision.

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

Recommendation 10: Narrow third-party appeal rights, as the right to appeal a decision of the ACCC should be limited to the notifying parties and those who are directly impacted by the acquisition.

8. Recommendations

As set out above, we make 10 recommendations:

- **Recommendation 1:** retain the existing SLC test, with the consideration of whether the acquisition creates, strengthens or entrenches substantial market power forming part of the holistic assessment of the transaction.

  Alternatively, if the definition of SLC is changed to include ‘creating, strengthening or entrenching a substantial degree of power’, then there should be a clear qualification that would avoid a very small increase in market share being used to justify blocking a transaction.

- **Recommendation 2:** Monetary thresholds should not reference global transaction value, instead, they should focus on the materiality of the transaction in Australia.

- **Recommendation 3:** The definition of Australian turnover should be clarified and refer only to revenue that is generated from Australian sales or customers, rather than from IP that is generated and held in Australia, but being used elsewhere.

- **Recommendation 4:** The lowest Australian turnover for targets and buyers (separately) should be at least $20 million. Rather than referring to global transaction value, if the target has less than $20 million in Australian turnover, it should not be caught by the notification thresholds.

  The reference to “global transaction value” should be deleted. If the Australian target of a global transaction is at least $20 million in Australian turnover, that is a sufficient jurisdictional trigger. Given the size of global transaction, no transaction will fail to satisfy the proposed “global transaction value” and therefore Australia is suggesting it reviews all global transaction just because there may be a small subsidiary in Australia.

- **Recommendation 5**: We recommend targeted and different thresholds for certain asset classes which should be developed through further consultation.

- **Recommendation 6**: Treasury Ministers should not have the broad discretion to set additional targeted requirements. If the Government does maintain this discretion in the merger regime, then there should be clear procedural safeguards to ensure that additional targeted notification requirements are transparent, clear and have sufficient accountability mechanisms.
- **Recommendation 7**: Notifiable mergers should have a material connection to Australia in the form of a reasonable Australian turnover threshold in line with Recommendation 2 for the merging parties.
- **Recommendation 8**: limit the ACCC's broad ability to delay statutory timeframes, including by:
    - Limiting the number of RFIs and section 155 notices that the ACCC can issue
    - Allow for urgent interlocutory appeal of ACCC timing decisions.
- **Recommendation 9:** The penalties for failure to notify the ACCC of a transaction should involve a flat monetary penalty, and, where the transaction has already completed, it could be appropriate for the ACCC to have the power to seek an order from the Federal Court to unwind all or part of the transaction.
- **Recommendation 10:** Narrow third-party appeal rights, as the right to appeal a decision of the ACCC should be limited to the notifying parties and those who are directly impacted by the acquisition.