PRIVATE EQUITY IN AUSTRALIA: UPCOMING MANDATORY MERGER LAWS AND FOREIGN INVESTMENT CHANGES

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Private Equity in Australia: Upcoming Mandatory Merger Laws and Foreign Investment Changes

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WHAT'S ON THE AUSTRALIAN REGULATORY HORIZON?

In this publication, we provide an overview of certain upcoming changes for private equity funds and their investors (both Australian and foreign) investing in Australia.

The key takeaways are set out below.

New Mandatory Merger Control Regime

- A new mandatory merger control notification regime will be introduced effective from 1 January 2026, with transitional provisions starting from 1 July 2025.
- Draft Guidelines by the Australian Competition and Consumer Commission (ACCC) and draft Determinations by the Australian Government have been released for consultation. However, there remains uncertainty about several matters, including how a "change of control" and calculation of monetary thresholds are intended to operate in a private equity context. Future government Determinations may clarify these issues. We are working with industry to make submissions to the government to clarify these issues in a manner that does not "chill" investment.
- The government has also published draft notification forms under the draft Determination which require merger parties to specify whether their Sale and Purchase Agreement (SPA) contains any goodwill protection provisions (including noncompetes and restraints of trade). The ACCC will now have the power to declare that the existing "goodwill exemption" to the cartel conduct provisions under the *Competition and Consumer Act 2010* (Cth) (CCA) does not apply if it considers that a particular noncompete, restraint of trade or other goodwill protection provision was not necessary for the protection of the purchaser in respect of the goodwill of the target business.

Foreign Investment Framework–Updates for Foreign Private Equity Funds and Foreign Investors

- It is currently unclear how the new merger regime (and the ACCC) will interact with the foreign investment framework (and Foreign Investment Review Board (FIRB) processes), including the interaction between the FIRB and ACCC waiver regimes–detailed guidance is yet to be released.

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- The final stage of Treasury's new Foreign Investment Portal (the Portal) is expected to launch by the end of May 2025, after which the entire FIRB application process (including communications with Treasury) will be facilitated electronically through the Portal.
- Treasury recently released updated the *Guidance Note 12–Tax Conditions*, which interestingly removed the "standard tax conditions" but included more examples of tax conditions that may be imposed by the Australian Taxation Office (ATO) and Treasury on a case-by-case basis. In addition, it includes an updated tax checklist which the ATO now expects to be answered at the same time as lodging the FIRB application (rather than the current practice of seeking to defer this to after lodgement). Treasury has also updated Guidance Note 10–Fees to introduce a refund/credit scheme for filing fees in an unsuccessful competitive bid.

Next Steps

We will continue to update you on further developments in relation to the new merger control and foreign investment regime, including release of the subordinated merger legislation, which will, amongst other things, determine the final monetary thresholds by which merger notification will be required.

UPCOMING MANDATORY MERGER NOTIFICATION LAWS

In Australia, the merger control regime is underpinned by section 50 of the CCA, which prohibits mergers or acquisitions that would substantially lessen competition (SLC Rule) in any market in Australia.

While at present it is not compulsory for acquisitions to be notified to the ACCC, the Australian Government has passed the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* (Cth) (the Act) such that as of 1 January 2026, a new mandatory and suspensory merger control regime will be introduced.

Under the new regime:

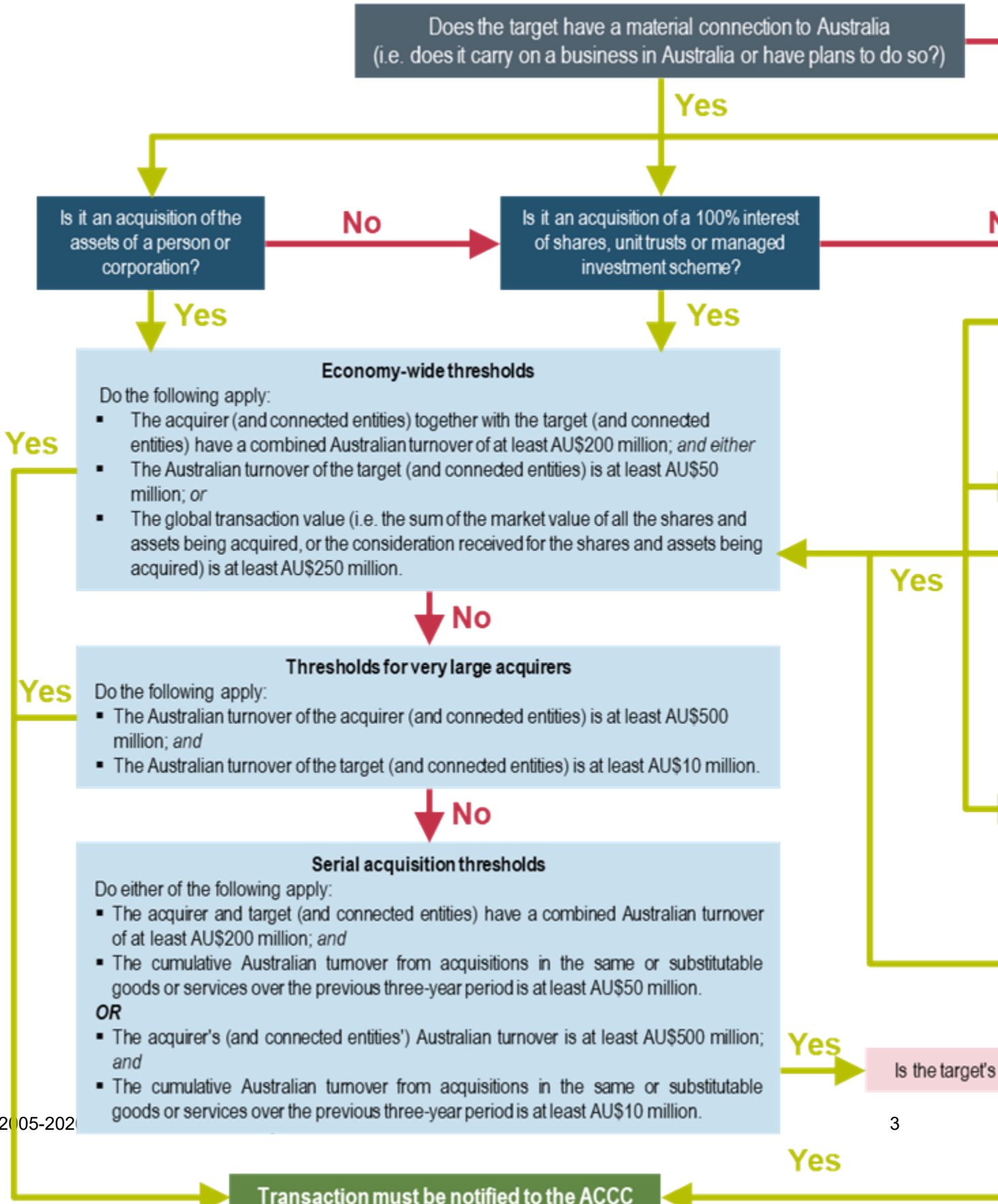
- Any acquisitions of shares, assets, units and other defined interests involving a "change of control" that meet certain monetary thresholds (outlined further below) will be required to be notified to the ACCC and approved (i.e. determined that they do not breach the SLC Rule) prior to completing.
- The SLC Rule has been broadened to encompass scenarios where a merger or acquisition results in the "creation, strengthening, or entrenchment of a substantial degree of market power", not just a lessening.

Businesses can use the Clearance Procedure voluntarily from 1 July 2025, and it will be mandatory from 1 January 2026.

Thresholds–When Notification is Required

Set out on the next page is a flowchart which illustrates which transactions must be notified to the ACCC under the new regime:

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Does the target have a material connection to Australia (i.e. does it carry on a business in Australia or have plans to do so?)
Yes
Is it an acquisition of the assets of a person or corporation?
No
Is it an acquisition of a 100% interest of shares, unit trusts or managed investment scheme?
Yes
Yes
Economy-wide thresholds
Do the following apply:
The acquirer (and connected entities) together with the target (and connected entities) have a combined Australian turnover of at least AU$200 million; and either
The Australian turnover of the target (and connected entities) is at least AU$50 million; or
The global transaction value (i.e. the sum of the market value of all the shares and assets being acquired, or the consideration received for the shares and assets being acquired) is at least AU$250 million.
Yes
No
Thresholds for very large acquirers
Do the following apply:
The Australian turnover of the acquirer (and connected entities) is at least AU$500 million; and
The Australian turnover of the target (and connected entities) is at least AU$10 million.
Yes
No
Serial acquisition thresholds
Do either of the following apply:
The acquirer and target (and connected entities) have a combined Australian turnover of at least AU$200 million; and
The cumulative Australian turnover from acquisitions in the same or substitutable goods or services over the previous three-year period is at least AU$50 million.
OR
The acquirer's (and connected entities') Australian turnover is at least AU$500 million; and
The cumulative Australian turnover from acquisitions in the same or substitutable goods or services over the previous three-year period is at least AU$10 million.
Yes
Is the target's
Yes
Transaction must be notified to the ACCC
Yes

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Source: James Gray, K&L Gates LLP

As set out above, whether a transaction must be notified to the ACCC essentially depends on whether it results in a "change of control", and if so, whether it meets certain monetary thresholds. Set out below is some additional detail on the change of control requirements and the monetary thresholds, noting that there remains uncertainty about how these are intended to operate in a private equity scenario.

Future government Determinations may clarify these issues. We are working with industry to make submissions to the government to clarify this issue in a manner that does not "chill" investment.

Control Threshold

A "change of control" is enlivened in respect of acquisitions of full or partial interests in shares, unit trusts and managed investment schemes. Acquisitions that do not result in a change in control are not required to be notified.

"Control" will be defined having regard to section 50AA of the *Corporations Act 2001* (Cth) (Corporations Act)–i.e. as being the capacity to determine the outcome of decisions about an entity's financial and operating policies.

We note that there is a degree of certainty regarding "control" issues. While the Act provides a "safe harbour" from the notification requirements for acquisitions of interests of less than 20%, the government has also foreshadowed that it intends to use its designation powers to require transaction parties to notify the ACCC of acquisitions of less than 20% of the voting rights in private/unlisted companies, where one of the parties to the transaction has an Australian turnover of more than AU$200 million.

This issue was not addressed in the Consultation Draft of the Determination published by the government on 28 March 2025, which otherwise provided considerable detail about the Mandatory Regime, including the information and documentary requirements that will be required to be provided to the ACCC. For more detail about the Determination, click here. Future government Determinations may clarify this issue.

Acquirer Turnover Thresholds

More generally, there is uncertainty as to how the acquirer "turnover thresholds" will be assessed for the economy-wide, large acquirer and serial acquirer thresholds for private equity investments, particularly in relation to:

- Taking into account the turnover of "connected entities" (being associated entities for the purposes of section 50AAA of the Corporations Act and entities controlled by a principal party for the purposes of section 50AA of the Corporations Act) to calculate acquirer turnover in a private equity fund context given these Corporations Act concepts do not necessarily fit neatly with private equity fund structures, which may also include cross-shareholdings and cross-directorships.
- The creation of a "new" fund for the purposes of industry or deal-specific investments.
- Certain changes to the limited partners of a private equity fund (including secondaries) after a primary portfolio acquisition.
- Where the fund is seeking to acquire interests/minority interests in entities.

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Again, future government Determinations may clarify this issue (e.g. to have regard to the turnover of the specific portfolio company or specific fund only).

For exits which meet the notification thresholds, private equity funds and investors should anticipate longer approval timelines and increased regulatory oversight and cost, potentially influencing deal structuring and exit strategies.

Private equity funds and their portfolio companies must also consider the cumulative competitive impact of their acquisitions in the immediately preceding three-year period, as the ACCC can now assess these transactions together, even if they were not individually reported. This will be particularly relevant to private equity funds and their portfolio companies engaged in "bolt-on" and "roll-up" acquisitions to existing portfolio companies to enhance value. To stay compliant, portfolio entities should track target sales generated at the time of acquisition and in the following years to determine if future deals fall within the relevant monetary thresholds and therefore require notification.

Process Changes–Clearance Timelines and Notification Fees

The new merger regime imposes statutory timelines for the ACCC's consideration of transactions. We will provide further detail on these timelines in a forthcoming Insight on the ACCC's draft Merger Process Guidelines.

Treasury has also indicated that it expects notification fees to be around AU$50,000 to AU$100,000 for most notifiable transactions. However, an exemption from fees will be available for some small businesses so that the fees are not a disproportionate burden.

These ACCC fees are in addition to any FIRB notification fees that may apply to foreign private equity funds and investors.

Transitional Arrangements

To assist businesses during this transition, the ACCC has released guidance detailing how to navigate the period leading up to the mandatory implementation. Key points include:

- Current informal review and merger authorisation processes: Businesses can continue to use the existing voluntary notification regime throughout 2025. Early engagement with the ACCC is advised to ensure sufficient time for assessment before the new regime takes effect.
- Voluntary Notification (1 July 2025–31 December 2025): From 1 July 2025, businesses have the option to voluntarily notify the ACCC under the new regime. This provides greater certainty regarding timeframes and ensures that transactions are aligned with the forthcoming mandatory requirements.

Noncompetes, Restraints and Goodwill Protection

Under current laws, noncompetes and restraints of trade included in an SPA are generally exempt from the per se cartel prohibitions to the extent its purpose is solely to protect the goodwill acquired by the purchaser (Goodwill Exemption).

The government has published a draft Determination which provides detail about the forthcoming mandatory merger regime. The draft Determination includes draft notification forms which merger parties will be required to adopt when notifying the ACCC. Notably, merger parties will be required to specify whether their SPA contains

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any goodwill protection provisions and to specify why they are necessary for the protection of the purchaser in respect of the goodwill of the business.

The ACCC will have the power to declare that the Goodwill Exemption does not apply to any goodwill protection provisions which it considers are “not necessary” for the protection of the purchaser in respect of the goodwill of the target business. A goodwill protection provision (e.g. a noncompete clause) is likely to be deemed as such if the ACCC considers that the duration or geographic scope of the provision is unnecessarily broad. Merger parties should therefore carefully consider the scope of any goodwill protection provisions that they propose to include in any SPA–and ensure that they do not go beyond what is necessary for the sole purpose of protecting the goodwill of the business.

Unnecessarily broad goodwill protection provisions which fall outside the scope of the Goodwill Exemption will expose merger parties to potential liability for engaging in cartel conduct–which is both a criminal and civil offence under the CCA. Merger parties should be aware that even if the ACCC does not object to the goodwill protection provision upon being notified of the transaction, this does not preclude the ACCC from commencing action under the anti-competitive conduct provisions of the CCA in relation to this provision at a later stage.

Interaction with FIRB Regime

FIRB and the Treasury have traditionally consulted with the ACCC about transactions notified to FIRB because competition is a factor relevant to the national interest test in Australia's foreign investment framework under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and related Foreign Investment Policy and guidance notes.

It is currently unclear how the new merger regime and the ACCC will interact with the foreign investment framework and FIRB processes, including:

- How the FIRB waiver regime will operate with the ACCC waiver regime.
- How existing FIRB waivers granted by FIRB (after consulting with the ACCC) will operate under the new merger regime.
- Whether Treasury may refer to a foreign acquisition to the ACCC for review even if that acquisition does not meet the merger thresholds.

The ACCC has noted in the ACCC's draft Merger Process Guidelines that it is currently working with the Treasury on the interaction between the foreign investment framework and ACCC's merger regime and that they will provide further guidance on how the two regimes operate together in due course.

It is expected that an applicant will be able to decide whether to submit a FIRB or an ACCC application first (i.e. there will not be a legal requirement to notify simultaneously, though it may still make sense to do so).

FOREIGN INVESTMENT CHANGES

Recap on Australia's Foreign Investment Framework and FIRB

Background

Under Australia's foreign investment framework, foreign persons may be required or encouraged to apply for foreign investment approval prior to taking certain actions. The approval is provided by the Australian Treasurer

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and confirms that the Commonwealth of Australia does not object to a particular action. It is commonly referred to as “FIRB Approval”, as the Treasurer receives advice from FIRB when deciding whether to approve an action.

Broadly, the framework is comprised of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Foreign Acquisitions and Takeovers Regulations 2015* (Cth). Additionally, Australia's Foreign Investment Policy and guidance notes provide further commentary and guidance.

Get Legal Advice Early

Australia's foreign investment framework is complex, factually specific and continually changes. For foreign private equity investors (including sponsors, funds and their portfolio companies), Australia's foreign investment framework and rules present a threshold issue that needs to be considered across all stages of the private equity investment life cycle against Australia's foreign investment policy settings. Foreign private equity investors should seek legal advice for each and every investment into Australia to avoid breaching the foreign investment rules.

Other FIRB Updates for Foreign Private Equity Funds and Foreign Investors–Timelines, Lodgement, Tax Conditions and Fees

- FIRB has made welcome headway in shortening its response times for straightforward decisions over the last year. Treasury's new Portal is now live for compliance reporting. The final stage of the Portal is expected to launch by the end of May 2025, after which the entire FIRB application process (including communications with Treasury) will be facilitated electronically through the Portal.
- On 14 March 2025, Treasury released updated *Guidance Note 12–Tax Conditions*. These changes reflect the tax risks and tax conditions that the ATO has been focused on and has imposed when reviewing recent foreign investment applications. Of note:
  - Interestingly, the guidance note no longer sets out “standard tax conditions” but does include more examples of tax conditions that may be imposed by the ATO and Treasury on a case-by-case basis.
  - Also included is an updated tax checklist which applicants are usually requested to answer post-lodgement of a FIRB application. However, the ATO now expects that information to be included in the FIRB application itself (rather than submitted during the FIRB review process or, sometimes, within three months of completion if relevant tax information is not available). If that tax information is not included in the initial application, the applicant must disclose why and when the information will be submitted. As noted above, these recent updates to FIRB's tax guidance and the new Portal are likely to require front-loading of the provision of tax information by applicants.
- Treasury has also updated *Guidance Note 10–Fees* to introduce a refund/credit scheme for filing fees in an unsuccessful competitive bid. This is a positive development; however, care needs to be taken to ensure that relevant eligibility criteria are met by unsuccessful bidders and credits or refunds can be applied in practice. Unsuccessful bidders can elect to take a refund equal to the lesser of 75% of the fee paid or the amount of the fee minus the minimum fee amount, currently AU$4,300 (which must be requested within six months of the unsuccessful bid) or a 100% credit for a subsequent FIRB application made within 24 months of the failed bid. Decisions regarding fee refunds or credits will still be made on a case-by-case basis following application and justification of the refund/credit request by applicants. It will

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be interesting to see if the new merger regime takes a similar approach to fees for unsuccessful competitive bids.

Overall, these changes are welcome and should assist to further support a shortening of average FIRB approval times but will require more upfront planning and disclosure by foreign applicants.

WHY K&L GATES?

We will continue to update you on further developments about the new merger regime and its impact on the private equity sector, including release of the subordinated merger legislation, which will, amongst other things, determine the final monetary thresholds by which merger notification will be required.

For a more a detailed analysis of the merger notification regime, please see the Australia Antitrust, Competition, and Trade Regulation alerts previously published by K&L Gates here and here. Please contact one of our team if you wish to discuss the impacts these changes may have on you.

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