The End of the Handshake: Why the Merger Game Just Changed

21 JANUARY 2026 | COMPETITION AND CONSUMER LAW

Click to open document in a browser

Contributed by

Dr Brett Davies
Tax partner, Legal Consolidated Barristers & Solicitors; Adjunct professor, the University of WA

In the high-stakes world of corporate finance, we often get lost in the takeover jargon. We talk about "synergies" and "accretive value." But for the average Australian, what does this actually mean?

To start from ground zero: a merger is effectively a corporate marriage. Two companies combine their assets, staff, and operations to become a single, more powerful entity. On paper, this sounds like good business. It can lower costs and improve efficiency.

However, there is a dark side. If two large competitors merge, they can become a monopoly. When one company holds all the cards, it can dictate prices to suppliers and families.

This is where the Australian Competition and Consumer Commission (ACCC) steps in. The ACCC is the market's referee. Its job is to ensure that business ambition does not crush the "fair go."

The Historical Context of Approving Mergers in Australia: The "Voluntary" Flaw

For decades, the process of notifying this referee was effectively a handshake. While s 50 of the *Competition and Consumer Act 2010* (Cth) (CCA) has long prohibited deals that substantially lessen competition, the mechanism for pre-completion notification and clearance was largely voluntary.

As of 1 January 2026, that era was over.

The regulator fought an uphill battle under the old system. This is illustrated by the landmark Metcash case (*ACCC v Metcash Trading Ltd* (2011) ATPR ¶42-380; [2011] FCAFC 151).

When Metcash proposed buying Franklins, the ACCC argued it would crush competition. It lost. The Full Federal Court held the ACCC failed to establish the "counterfactual"—effectively, the regulator could not prove, on the balance of probabilities, that a more competitive alternative would occur if the merger was blocked.

This case exposed the practical height of the evidentiary bar. It meant that companies could engage in "killer acquisitions"—buying small competitors before they became a threat—without facing any mandatory pre-completion review.

The New Australian Merger Rule: Permission, Not Forgiveness

The Competition and Consumer (Notification of Acquisitions) Determination 2025 (Cth) and Part IVA of the CCA turned the new framework into reality.

The new laws flip the dynamic. Notification is now mandatory and suspensory under the rules, with completion prohibited until clearance is granted.

Transparency is the default. All notified acquisitions will appear on a new public ACCC acquisitions register, listing the parties, status, and outcomes. The days of the quiet, informal chat are gone.

The Australian government has adopted a phased approach to the last minute changes to the new merger laws under the Competition and Consumer (Notification of Acquisitions) Amendment (2025 Measures No 1) Determination 2025 (Cth), which was registered on 18 December 2025:

- 1 January 2026: The majority of the new merger laws started on a compulsory basis.

• Transition Window: Critically, share acquisitions that do not result in control are exempt from notification until 31 March 2026.
• 1 April 2026: The full suite of rules apply, including specific new thresholds for discrete asset acquisitions and voting power thresholds for share acquisitions where the acquirer does not control the corporation immediately after the acquisition, or the acquirer already controlled the corporation before the acquisition.

The regime uses a sophisticated tiered threshold system:

1. General test (Large merged firms): Notification is required if the acquisition is connected with Australia, and no exceptions apply, and the combined Australian revenue of the merger parties and their connected entities (counting the target's connected entities only if they are being indirectly acquired) is # $200 million AND either:

• The Australian revenue of the target and its connected entities being indirectly acquired is # $50 million; OR
• The global transaction value is # $250 million (or $200 million from 1 April 2026 for discrete asset acquisitions).
2. Very large acquirers: If the Australian revenue of the acquirer and its connected entities # $500 million, the threshold drops significantly. They must notify if the Australian revenue of the target and its connected entities being indirectly acquired is # $10 million (or if cumulative serial Australian revenue is # $10 million, or in the case of discrete asset acquisitions from 1 April 2026, the transaction value # $50 million) if the acquisition is connected with Australia, and no exceptions apply.
3. Serial acquisitions (explained below)
4. Designated supermarket corporations (Coles and Woolworths): Strict rules apply specifically to Coles, Woolworths and their connected entities. They must notify all acquisitions of supermarket businesses. They must also notify land acquisitions exceeding 1,000m^2 of gross lettable area (if built) or 2,000m^2 (if vacant), unless specific exemptions like lease renewals apply.

The intricate details regulating whether a merger or acquisition needs to be notified to the ACCC are discussed at ¶8-031, including the thresholds, targeted notification requirement for supermarkets, control and voting power thresholds, exceptions, definitions, scope of the merger laws, progress stage or category of the acquisition, and indexing of threshold amounts. Parties to an acquisition do not need to notify if the ACCC grants a waiver: ¶8-0315.

Here is how the new merger laws hit the ground in practice.

Scenario 1: The "Creeping" Takeover Acquisition (The Roll-Up)

Consider a large national corporation buying small competitors.

• Before 1 January 2026: It buys 20 small family businesses over 3 years. Each deal is small (around $3 million each), so the ACCC is rarely notified.
• After 1 January 2026: The new rules catch "serial acquisitions", unless an exception applies. The system now looks back at all acquisitions in the same or substitutable market over the last 3 years, where the combined Australian revenue of the target and its connected entities being indirectly acquired was $2 million or more, the acquisition was not previously notified, the acquisitions were connected with Australia, and the control test is satisfied (in the case of shares) or the assets are still held (in the case of assets other than shares).

If the cumulative Australian revenue of the targets and their connected entities being indirectly acquired meets the serial threshold (treating the current acquisition and acquisitions from the past 3 years as a single acquisition) —$50 million for large merged firms or just $10 million for very large acquirers, the acquisition must be notified to the ACCC. The "roll-up" strategy now happens in broad daylight.

Scenario 2: The WA Resource Trap when it comes to mergers and acquisitions

This is where the view from Western Australia is distinct.

- The WA Risk: In Sydney, a company with under $10 million in revenue is a small business. In the Pilbara, a junior miner might have $0 revenue but sit on a $1 billion critical mineral deposit.
- The Policy Gap: While the tiered system is comprehensive, a "revenue" test can still miss the strategic value of WA resources. As a practitioner, I argue that the regime may eventually need to look beyond the profit and loss statement to the balance sheet to protect national interests.

From 1 April 2026, a transaction value test of # $50 million applies to very large acquirers, but it only applies in the case of discrete asset acquisitions, ie acquisitions of assets (other than shares) that do not have the effect that a person will/can acquire (substantially) all of the assets of a business.

Scenario 3: The Property Developer engaging in mergers and takeovers

For businesses in the property industry, the "Ordinary Course of Business" exemption is the vital lifeline.

- Exempt: The exemption applies broadly to genuine ordinary course activities, such as land acquisitions for development or commercial leases. It is assessed on the facts, including the nature of the transaction.
- Caught: However, exemptions do not cover targeted sectors like supermarkets. Even if you claim a lease is "ordinary course," if you are a major supermarket chain acquiring a site, specific rules likely pull you back into the mandatory notification zone. It is a fact-dependent test, not a blanket pass.

A Question of Fairness when it comes to stopping monopolies

The shift to a mandatory regime is not just red tape. It is about addressing the procedural limitations highlighted by cases such as Metcash.

When the rules are loose, the small players often get squeezed out.

The Commonwealth has built a robust fence. The challenge now is to implement the new laws in light of both the legal nuance and the commercial reality.

References

- Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024 (Cth).
- Competition and Consumer (Notification of Acquisitions) Determination 2025 (Cth) as modified by the Competition and Consumer (Notification of Acquisitions) Amendment (2025 Measures No 1) Determination 2025 (Cth).
- Competition and Consumer (Notification of Acquisitions—Forms) Determination 2025 (Cth).
- ACCC v Metcash Trading Ltd (2011) ATPR ¶42-380; [2011] FCAFC 151.

Explore how the new merger laws apply to Sales & leases of land ¶8-039, Intellectual property ¶8-0392, Funds and investment platforms ¶8-0393 and Charities ¶8-0391.

Delve into the new merger laws at ¶8-030. Find out about Notifiable mergers ¶8-031, Timelines & review ¶8-032, Consequences of breaching the new laws ¶8-033, Merger legal tests & clarification of the "substantially lessening competition" definition ¶8-034, Notification forms ¶8-035, Fees, register and portal ¶8-036, Transitional arrangements ¶8-037, and New law vs current law ¶8-038.

Last reviewed on 21 January 2026