The Turnaround Management Association (Australia) - Submission to Treasury on New Merger Control Regime

About TMA

The Turnaround Management Association (**TMA**) is the peak membership association for professionals in turnaround management and corporate restructuring globally with over 10,000 members across 54 chapters globally.

The Australian chapter of TMA, TMA Australia, has approximately 1,000 members nationally, comprising leading restructuring professionals, advisors, lawyers, bankers and private capital providers, including all the major insolvency firms. The TMA Australia website is at www.turnaround.org.au

TMA Australia makes this submission to the Treasury in relation to the new mandatory merger control regime captured in the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* (**Amending Act**), including the exemptions to the notification requirement set out in the *Competition and Consumer (Notification of Acquisitions) Determination 2025* (**Determination**).

TMA Australia welcomes the opportunity to comment on the Determination. TMA Australia understands that specific further changes to the Determination have been foreshadowed by Treasury on 15 October 2025, and are under preparation although not publicly available at this stage.[1] Given the very short window for providing feedback to Treasury and the imminent commencement of the new regime, this submission is focused only on issues of critical concern arising from the Determination.

Summary

The proposal in section 2-21 of the Determination will result in unintended consequences that are in direct conflict with other Commonwealth laws and Government policy. The effect of this conflict would be to:

1 cause a flood of notifications to the Australian Competition and Consumer Commission (**ACCC**) by external administrators and receivers;[2]

2 restrict voluntary administrators from being able to comply with the object of the voluntary administration regime, due to insufficient funding and time to undertake the mandatory notification process for sales of assets of companies to which they are appointed, and also impact receivers in achieving the best sales in accordance with their duties where they have insufficient time and funding to continue trading. This would have the flow-on effect of diminishing the value of assets in the market, thereby reducing competition and reducing proceeds available to be paid to employees and creditors – which may cause further insolvencies; and

3 increase the likelihood of redundancies/reduced returns to employees of companies in voluntary administration and receivership.

[1] https://ministers.treasury.gov.au/ministers/andrew-leigh-2025/media-releases/refinements-exemptions-proposed-new-merger-regime

[2] According to the Australian Securities and Investments Commission insolvency statistics, 13,413 companies entered external administration in the 2025 financial year to 31 May 2025, of which 10.5% were voluntary administration (approximately 1,408 companies). See ASIC Corporate Insolvency Update – Issue 36 | ASIC at: https://www.asic.gov.au/about-asic/corporate-publications/newsletters/asic-corporate-insolvency-update/asic-corporate-insolvency-update-issue-36/#:~:text=Our%20insolvency%20statistics%20show%20that,same%20period%20in%202023%E2%80%9324.

TMA Australia recommends that section 2-21 of the Determination be expanded to address sales conducted by external administrators and receivers of companies in voluntary administration, liquidation and receivership. The existing prohibition on any transaction that would have the effect or likely effect of substantially lessening competition in a relevant market, under section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), would continue to apply to such sales.

Object of the Voluntary Administration regime

Australia's voluntary administration regime is the standard path through which formal insolvencies proceed in Australia. Importantly, the voluntary administration regime allows for the rehabilitation or rescue of a company.[3] This regime seeks to prioritise employees remaining employed (with little disruption to their employment, and often with full transmission of service on a change of control transaction to avoid crystallising redundancy and other entitlements), and to maximise the return to creditors.

Section 435A of the *Corporations Act 2001* (Cth) (**Corporations Act**) relevantly provides, in relation to the voluntary administration regime in Part 5.3A of the Corporations Act that:

> The object of this Part….is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

The statutory timeframe for voluntary administration

Part 5.3 of the Corporations Act provides a statutory framework to enable the company to trade on under the control of the administrator, generally to enable a going concern sale or recapitalisation, often via a deed of company arrangement (**DOCA**). The framework includes (for example) extensive moratoria on creditors and owners and lessors of property used or occupied by the company in administration from enforcing their rights.

Given the constraints on third parties in their dealings with the company in voluntary administration and the overarching purpose of Part 5.3A, the statutory framework anticipates that the voluntary administration regime will be quick: section 439A of the Corporations Act requires the second meeting of creditors in a voluntary administration (being the meeting at which the future of the company will be decided) ordinarily be convened within 20 business days and held within 25 business days from the commencement of the administration.[4] The short time frame of the voluntary administration process is required to ensure as little disruption as possible to stakeholders and 'business as usual' trading.

Personal liability

To encourage employees and contractual counterparties to supply goods and services to the company in administration, the administrator is personally liable for debts of the company incurred during the administration period for services rendered, goods bought, property leased or occupied

[3] The voluntary administration regime was used, for example, in Mosaic Brands, Virgin Australia, Regional Express, Network Ten and Arrium/OneSteel (in 2016 and in 2025), among many others. It is often the case that there will be a concurrent administration and receivership.

[4] Which time periods can be extended by court order although this involves the additional expense of an application to the Court.

and funds borrowed.[5] Receivers also bear personal liability for debts of the company incurred during a receivership.

It is the administrator's need to carefully manage cashflow of an insolvent company that leads to the practical reality of sale processes that are very quick and sale or recapitalisation documentation that contains few or no vendor warranties and minimal conditionality.

This personal liability is onerous, and it leads to rigorous cashflow control by administrators: in circumstances where the administrator cannot be confident that they will be able to trade the business through to completion of any sale or recapitalisation process on a cashflow positive basis, they will simply stop operating the business, including making employees redundant. This will often lead to claims on the Fair Entitlement Guarantee (**FEG**) program, a Commonwealth Government safety net scheme of last resort that provides assistance to eligible employees (where they cannot otherwise be paid their entitlements from the assets of the insolvent company).

New Mandatory Merger Control Regime

The Amending Act introduces new mandatory merger notification requirements to commence for transactions that complete from 1 January 2026. The new regime will require notification of any acquisition which meets the relevant notification thresholds, subject to certain exemptions in the Determination. An acquisition which is required to be notified but is not subject to an exemption may not be put into effect until it has received either a waiver or a determination from the ACCC or the Australian Competition Tribunal that it may complete, and each of those outcomes is subject to minimum statutory timeframes.

One such exemption is section 2-21, being acquisitions by a person in the person's capacity as an administrator, receiver, receiver and manager or liquidator, which do not require notification.[6] The Determination's Explanatory Statement clarifies that "*this exemption does not cover instances where an entity is acquiring shares or assets from the administrator, receiver, receiver and manager or liquidator. Such transactions are still subject to the notification requirements if thresholds are met*".

The new regime therefore requires administrators/liquidators who intend to sell the company in administration/liquidation, or receivers who intend to sell assets of the company in receivership, to participate in the mandatory ACCC notification process (principally, by ensuring any proposed acquirer has obtained the necessary ACCC waiver or determination) if the thresholds are met.

Consequences for voluntary administrations and receiverships

As noted above, on the statutory timetable the second meeting of creditors of a company in voluntary administration must be held within 30 business days of appointment. This statutory timeframe, combined with the administrator's personal liability, results in many transactions being progressed quickly, with the aim of maximising the chances of the company (or as much of possible of its business) continuing in existence.

Assuming that one of the notification thresholds in the Determination is triggered by the acquirer such that a notification (and not a waiver) is necessary, Phase 1 of the ACCC's merger notification

[5] It is possible to obtain court orders limiting this personal liability, but only where the counterparty consents and such liability is not generally able to be avoided in respect of general trading costs including wages; a similar regime applies to controllerships including receivers under Part 5.2 of the Corporations Act but without the capacity to obtain a court order to avoid the personal liability.
[6] Although these circumstances are exceedingly rare.

process is 30 business days, and Phase 2 is a further 90 business days.[7] This timing does not align with the statutory timeframes and purposes of the voluntary administration regime, and will make it more likely that administrators will be forced to bring an application before the Court seeking an extension of the convening period under s 439A(6) of the Corporations Act so that they can allow any notification by the acquirer under the new mandatory the merger process to conclude. This is the case even where there are no underlying anti-competitive red flags. The costs of such applications are ultimately borne by the creditors of the company (including employees).

Purchasers of businesses from external administrators and receivers already navigate the higher risks associated with buying a distressed business. The due diligence periods are shorter and as noted above, representations and warranties about the state of the business (ordinarily given in a solvent sale) are very much curtailed. The proposed reforms add additional cost to a potential purchaser's engagement with a sale process (not just in relation to ACCC application fees, and the time and cost involved in preparing the necessary documentation, but also in relation to background work a purchaser may need to undertake to determine whether notification thresholds are met, and to receive advice on this). The consequences may be that fewer bidders elect to participate in a sale process conducted by a voluntary administrator or receivers, leading to sub-optimal outcomes for creditors (including employees) and other stakeholders.

Even more problematically, administrators and/or receivers may not have the runway to trade the business through the ACCC notification period. The risk/benefit analysis for administrators and receivers will need to take account of the inevitable and potentially significant and costly delays in completing any sale of the business (together with the increased exposure to personal liability through that period).

We anticipate that the delays (and cost) implicit in the new mergers process will lead to administrators and receivers more often forming the view that they do not have the resources to trade on the business until the completion of a sale or recapitalisation process, and accordingly, they may be forced to cease operating the business and make employees redundant. This is particularly the case in those types of businesses that have high revenue turnover (as the personal liability for external administrators and receivers in those appointments is more acute). Given the timing imperatives, administrators and receivers may need to undertake "fire sales" of assets, rather than going concern sales or recapitalisations which preserve both jobs and value. Alternatively, they may be forced to choose bidders offering inferior value and less execution certainty. In circumstances where the administrators do not have funding to trade the business for an extended period and the incoming purchaser is unwilling to provide such funding, the prospect of a restructure or recapitalization through a DOCA may be incapable of progression and a forced liquidation may result with no other alternative at the second meeting of creditors.[8]

This is entirely inconsistent with the objectives of the voluntary administration regime and the interests of employees, creditors and other stakeholders. A liquidation / cessation of trading, is also inconsistent with the objectives of Australia's competition and consumer laws (as the cessation of trading of that business removes a participant from the relevant market, and may have anti-competitive consequences as existing participants fill the void).

[7] In each case, assuming no requisitions or other delays, and not allowing for any time required to prepare filing materials or participate in pre-notification with the ACCC. Of course, this notification process can only commence once a sale process is sufficiently progressed to identify the actual or likely acquirer.

[8] If it would assist, and with the benefit of more time. the TMA would be happy to provide some examples to Treasury of voluntary administrations that proceeded to a successful going concern sale but would likely have proceeded to liquidation if the new mergers regime had been in place; TMA would also be happy to confirm that regular buyers of distressed assets share the concerns expressed in this submission.

Recommendation

TMA Australia submits that section 2-21 of the Determination be amended to insert the words "*or from"* after the words "*acquisitions by"* so as to exclude the sale by companies in administration, liquidation or receivership from the notification process.

By this change, the exemption in section 2-21 of the Determination would exempt relevant "acquisitions by or from" a person in the person's capacity as an administrator, receiver, receiver and manager or liquidator.

Critically, this would not have the effect that sales in formal insolvency would avoid scrutiny under the CCA altogether, as any such transactions would remain subject to the remaining provisions of Part IV of the CCA. The retention of the prohibition on any acquisition of shares or assets that would have the effect or likely effect of substantially lessening competition in any relevant market under section 50 of the CCA would still mean that any acquisitions which raised a material competitive issue or overlap would likely still need to be notified to the ACCC to ensure that an anti-competitive acquisition which was not filed was not unlawfully "put into effect" without ACCC approval.

This change would allow the voluntary administration regime to achieve its objective as set out by section 435A of the Corporations Act and enable receivers to sell property of a corporation without creating a tension with their duty under section 420A of the Corporations Act.

Other proposed reform

Although not relevant to the imminent operation of the Determination, in light of the matters raised above the TMA also recommends that, to the extent that a particular transaction to be undertaken by an administrator or receiver would have the effect or be likely to have the effect of substantially lessening competition in any market, there be an accelerated notification and approval process that applies (so as to balance the needs of compliance with section 50 of the CCA with the overarching policy considerations of Part 5.2 and 5.3 of the Corporations Act).

An expedited process for external administrations and receiverships would have the positive effect of ensuring external administrators and receivers may retire promptly, achieve a better return for creditors, and ensures greater certainty for employees and other stakeholders.

The TMA would welcome the opportunity to make more detailed submissions in support of this recommendation.

Discussion

TMA Australia would be pleased to discuss any aspect of this submission with you or provide further information. Please contact Genevieve Sexton at Arnold Bloch Leibler (gsexton@abl.com.au) or Maria O'Brien at Clayton Utz (mariaobrien@claytonutz.com) if you would like to do so.