19 January 2024

Mr. Jason McDonald
Competition Taskforce
The Treasury
Langton Crescent
Parkes ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Jason,

RE: Merger Reform Consultation Paper

Endeavour Group Limited (Endeavour) welcomes the opportunity to participate in, and contribute to, the Taskforce's consideration of merger reform.

Endeavour has reviewed and deliberated on the discussion paper, and has applied its experience to set out a number of considerations to help inform an efficient and effective merger regime appropriate for Australia.

By way of background, under the current information notification process, Endeavour has itself submitted numerous notifications and engages constructively with the ACCC on both hotel and bottleshop acquisitions (with acquisition value generally ranging from $900K to $20M).

We are happy to further discuss any aspect of this submission. Our contact information is below.

Regards,

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Executive Summary

Endeavour supports the periodic review of policy setting to ensure regulatory regimes are fit for purpose and Australian consumers and businesses alike are not disadvantaged. Endeavour is supportive of merger reform and recognises there are opportunities to "modernise" the current regime and thereby reduce some of the current challenges and uncertainties.

Endeavour respectfully submits that careful consideration of each of the proposed elements is required to ensure the regime is fit for purpose for the Australian market. Further, we urge Treasury to consider the cumulative effect or impact of the individual elements being considered given the potential to fundamentally alter the operation of the merger regime and the implications for businesses like ours and future investment decision making.

Equally, it is important that individual elements are considered on their own merits, and not tied to other proposals. We respectfully submit that any recommendations are carefully tailored to meet the Government's broader economic policy agenda of productivity growth and do not attempt to change or achieve more than is necessary to do so in a balanced way.

Evidence of the current concerns, including the extent to which the current merger regime has contributed to any loss of productivity and innovation need to be rigorously tested. Similarly, relying on a small handful of examples, which in the context of the thousands of completed and notified mergers could be classified as outliers or exceptions to the norm, should also be treated with caution.

We note that the Consultation Paper has appropriately broken the considerations into two categories:

1. Changes to the merger control process; and
2. Changes to the merger control test.

We have used those categories as well as the consultation questions when structuring our submission below.

Our high-level comments on the key elements of the "process" and "test" are as follows:

<u>Process:</u>

1. The merger review process needs to embody clarity and certainty to enable competitive and informed investment/commercial decisions – not one with added uncertainty.
2. Endeavour supports, in principle, a mandatory notification regime on the basis there is clarity on timelines and an appropriate information request framework, appropriate thresholds for notification, a confidential 'waiver' process for mergers that may technically meet the thresholds but do not pose any material competition issues, and transparency across the process and decision making.
3. The regime should not presume that merely having market power and extending that power will automatically result in substantially lessening of competition (SLC) thereby requiring blocking of the proposed merger.
4. If an administrative-decision making model is adopted, there must be a full merits review available, alongside judicial review by the Federal Court.

<u>Test:</u>

1. Endeavour's view is that the current SLC test is appropriate, effective and should remain the relevant test and no presumptions added based on existing market power. The test is already capable of broad application and the ACCC has shown its willingness to apply a broad application when applying the test, e.g. in determining

relevant market definition. The Merger Guidelines, however, could be improved to detail the factors decision makers consider when applying the SLC test. Updating the guidelines would be an efficient and effective way to address some of the issues raised by the ACCC for process improvement at the outset.

2. Reversing the onus of the test has broader implications that need to be carefully considered. Further, concern remains that the merger parties would be subject to the ACCC's subjective discretion as to being 'positively satisfied' that the merger will not result in substantial lessening of competition and err on the side of blocking a transaction if it remains unsatisfied or uncertain.
3. The current test embeds the 'precautionary principle' in an appropriate way - 'likely' to result in SLC not that it necessarily will (and further, 'likely' has been interpreted to mean a 'real chance', not 'more likely than not').
4. The suggestion of including a 'series' of acquisitions is one which is difficult to comment on given the lack of detail provided. However, this is something challenging to define and Endeavour would be concerned that this could lead to confusion on the definition of what is a connected or series of acquisitions would be, and risks unintended consequence.

Risk and design principles for Australia's merger control regime

Consultation Question 1 - Are these the appropriate principles to use when considering reform of Australia's merger control regime? Are there any others?

Endeavour agrees with the risk design principles set out in the Consultation Paper, as well as the guidance provided by the OECD on the powers of the competition authorities and the merger notification and review procedures.

Any reform should recognise and build on the strengths of the current law and process. The ACCC has a track record of administering an effective merger clearance regime and Endeavour supports the ACCC having the information it needs, to obtain that information in a timely manner, and to conduct its assessment in a reasonable timeframe.

Elements of the proposals for reform go beyond the reasonable requirements for an effective merger regime for Australia and risks a miscalibration in the policy response. However, we welcome some changes to the current process and discuss those further below.

Emerging concerns

Consultation Question 3 - What concerns about the current system should be considered in the design of a new regime?

The Consultation Paper and other submissions raise several emerging concerns and we agree with some of those concerns. However, while some examples are provided, these must be viewed within the broader context of the thousands of mergers completed over that same period and caution must be taken to ensure changes don't result in an overly burdensome and complex process to seek to address unique or specific areas of concerns involving a very small number of acquisitions.

Australia ultimately needs a "fit for purpose" merger regime for Australian markets and whilst it can consider taking elements from overseas jurisdictions, it should not combine all to make it so difficult to compete and innovate in Australia – i.e. Treasury should be careful of unintended consequences of harming markets and consumers through a reform package that, while reflecting elements from individual jurisdictions, ends up with a total package that is not reflective of any international standard.

In that context, this consultation takes place against the background of a merger clearance regime which is flexible and largely effective: 93% of mergers were 'pre-assessed' by the ACCC in 2022-23 requiring no public review, and there is no public record of a merger completing or threatening to complete in 2022-23 without ACCC clearance.

During the 2023 Financial Year the ACCC opposed two matters in the informal review process, following which the parties abandoned the transactions, and denied authorisation in two matters in the statutory authorisation process, both of which were appealed with the Tribunal upholding the ACCC's decision in one and the other heard by the Tribunal over December 2023.

While Endeavour agrees that the community should not bear the cost or risk of clearly anti-competitive mergers, it is important that

1) we fully understand the extent to which such mergers are occurring today, in the context of thousands of mergers which occur each year; and
2) Treasury considers the cumulative impacts of the proposals and scrutinises closely any suggestion that merger parties, consumers, the community and the broader economy do not suffer if mergers which do not raise or are unlikely to SLC, are either discouraged from being attempted, or are blocked, materially delayed or abandoned because of unwarranted regulatory intervention.

The current informal review process reflects more than two decades of practice and convention and provides for rigorous assessment and testing of complex issues. There is, however, the opportunity to improve the process which, in Endeavour's view, would have a positive impact on investment decision making by businesses, by providing greater clarity and certainty of these decision-making processes:

- Clear expectations of the information required to be submitted to enable a decision to be made, including ensuring that information request is relevant to the applicable transaction and particular circumstances. This would ensure that information provided is accurate and complete and alleviate any concerns (should they exist) that parties are deliberately withholding information or providing inaccurate information.
- Clarity and adherence to timelines.
- Updating the substantive Merger Guidelines to include all relevant factors, including connected agreements and arrangements. Something we would be happy to engage with Treasury on if useful.

Consultation Question 6 - Is Australia's merger regime skewed towards clearance'? Would it be more appropriate for the framework to skew towards blocking mergers where there is sufficient uncertainty about competition impacts?

There is a suggestion that the current system is skewed towards a default of allowing mergers to proceed because the process for obtaining a Court ruling is too arduous. Yet there are no public examples of transactions completing following the ACCC raising concerns, and very few where a party has sought to even challenge the ACCC's decision. This is because, in effect, the ACCC is the decision maker today with an appeal mechanism which is rarely utilised.

Business decisions, including investment decisions, are not always made with perfect certainty of the outcomes. If the default is to block mergers where there is uncertainty about potential impacts, including competition impacts, this will naturally result in more mergers being blocked, or not attempted in the first place. Without evidence of current completed mergers having a materially negative competition impact it is difficult to understand why there is a need to skew to block mergers.

The fact that mergers are not inherently problematic, and instead bring significant benefits to the Australian economy and to consumers, is acknowledged by the ACCC, and noted by the Treasurer in releasing the Consultation Paper.[1] Mergers play an important role in facilitating the movement of capital across the economy; in providing a critical method or avenue for investors and owners to exit and realise value (including, for example, through family and other small businesses selling for retirement); in improving the productivity of companies (including by providing a means to instal new and better management); and in enabling innovations to be brought to scale, benefitting consumers.

There is therefore no policy justification for "skewing" a regime towards blocking M&A activity as a regular and beneficial part of Australian and global commercial activity. A policy position "skewed" towards prohibiting activity or conduct would only be justifiable where the activity or conduct is, for the most part, likely to harm.

Further, given the SLC test is inherently a forward-looking assessment (comparing the future with the merger to the future without the merger), there is necessarily uncertainty involved. A

[1] https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/articles/opinion-piece-nations-productivity-demands-fairness-merger.

regime which is deliberately skewed to blocking mergers because of that uncertainty is not appropriate or reasonable.

Consultation Question 7 - Should there be periodic evaluation of the effectiveness of Australia's merger regime, including post-merger impact evaluation? If so, how should the ACCC obtain the necessary information?

Yes, there should be periodic reviews and evaluation of the effectiveness of regimes but this does not necessarily mean that a post-merger impact regime needs to be introduced. Broad statements about challenges with the existing system including that harmful mergers go unnoticed, parties misleading the ACCC, and large operators taking advantage of the current systems and processes must be supported by evidence sufficient to allow a deep understanding of any real challenges faced under the current regime, and their true cause. Only then should a material change to the current regime be considered in order to address those challenges.

Any post-merger evaluation (whether part of a dedicated regime or not) should not create or cause new time and resource burdens on parties which have gone through a merger review process. The resources required to comply with ACCC formal and informal information gathering powers can be significant, and it would not be appropriate to impose those costs on parties post-review. The possibility of parties being subjected to a post-fact review may also dampen appetite for M&A activity, so any consideration of this issue must carefully balance perceived benefits with likely consequences and costs.

Key elements of a merger control regime

Consultation Question 13 - Should Australia introduce a mandatory notification regime, and what would be the key considerations for designing notification thresholds?

A mandatory notification of acquisitions (excluding simple property leases) with the ACCC as the effective decision maker, applying appropriate and relevant thresholds, subject to the current SLC test may, in principle, be appropriate for consideration if:

- Information requirements (including both upfront required information and likely RFIs/s155s) are clear, appropriate and relevant to the proposed transaction
- The decision making process (including issues of concern) is transparent and timely
- Timelines for decision making are clear and are adhered to
- Given that a mandatory notification system will inevitably 'over-capture', thresholds are appropriate and regularly reviewed
- Parties are able to seek a quick and confidential waiver from the ACCC where the transaction may meet the technical threshold but does not pose any material competition issues. This is particularly important for competitive bids, but also more generally to give greater certainty for businesses considering M&A in Australia that their deals can be quickly and confidentially dealt with where appropriate.
- Full merits review is available (unlike the limited merits review available in the current merger authorisation regime), and the Federal Court should retain its jurisdiction for judicial review and to make declarations under section 50.

We note that it is not necessarily the case that a mandatory notification system requires a shift from the current judicial enforcement model (in which the ACCC is the primary investigator and 'de facto' decision maker by convention) to an administrative-decision making model.

Consultation Question 14 - Should a merger regime include a 'call in' power for mergers either falling below the notification threshold or not voluntarily notified which may raise competition concerns? If so, what should the criteria for exercising such a power be?

Endeavour would be comfortable with a call in power, noting that in our experience that is a power which is already utilised by the ACCC today.

However, and as with a mandatory and suspensory notification regime more generally, development of a call in power should be subject to extensive and robust consultation before implementation, and should be clearly defined to reduce uncertainty.

Consultation Question 16 - Should mergers be suspended for a period of time while they are reviewed?

We note that in practice, parties do not complete while the ACCC is carrying out an informal review, and there does not appear to be evidence of a systemic or significant problem in this respect.

However, and given it will not make much practical difference given parties already 'voluntarily' suspend during the ACCC's reviews, Endeavour would support mergers being suspended during that period of review.

Importantly, a suspensory system must include clear timelines for decisions to be made and that at expiry of those timelines, if no decision is made, the transaction should be permitted to complete.

The timeline must also be adhered to including setting clear expectations of information requirements and market inquiries to ensure that the timelines are not artificially paused or delayed.

As noted above, we urge any consideration of a suspensory regime to be subject to extensive and robust consultation before implementation, and should be clearly defined to reduce uncertainty.

Consultation Question 17 - Should Australia's merger control regime require the decision-maker to be satisfied that a proposed merger:
- *would be likely to substantially lessen competition before blocking it; or*
- *would not be likely to substantially lessen competition before clearing it?*

The regime should require the decision maker to be satisfied that a proposed merger would likely substantially lessen competition before blocking it.

A policy preference for the "precautionary principle" (whereby false positives are preferred to false negatives, justified on the basis that the public bears the risk of harm from anti-competitive mergers, while the opportunity cost of blocked but benign mergers sits only with the merger parties) is not a sound justification for implementing a reverse onus test, particularly in the context of a mandatory notification system with a call-in power (noting also even under the current regime there does not appear to be evidence to support the need for such a change).

Whilst it is true that Australian consumers should not "bear the risk" of anti-competitive mergers, it is critical to recognise that:
1) there is no robust evidence to suggest that the current merger regime is allowing mergers that would be likely to SLC, or that are degrading Australia's productivity and innovation;
2) Australian consumers and the Australian economy also suffer significant harm if mergers which do not, or are unlikely to, raise competition concerns are delayed,

blocked or abandoned because of regulatory intervention. That is, and as noted in response to Consultation Question 6 above, material broader economic benefits of mergers will be lost if a regime discourages M&A activity or is overly prohibitive in its approach – a cost borne not only by the merger parties but also by the public.

The current merger test embeds the "precautionary principle" in an appropriate way – through the framework of a "likely" SLC. Prohibition does not require proof that an SLC will result, even on a balance of probabilities standard. A decision that an acquisition is likely to SLC simply means that the decision-maker considers it is "likely" to do so, not that it necessarily will.

In any case, the qualifier "likely" which is embedded in the current SLC test necessarily contemplates uncertainty, particularly given the Courts' interpretation of "likely" meaning a "real chance". The decision maker only needs to be satisfied that an acquisition has a "real chance" of substantially lessening competition, this is not an absolute threshold and already captures false positives.

The proposed changes would involve a fundamental shift in Australia's approach to regulating economic activity. Currently companies can undertake any transaction unless the ACCC can reasonably show that it would substantially lessen competition. If accepted, the ACCC's proposal would mean that companies cannot implement acquisitions without permission, and this permission will not be given unless merger parties can "satisfy" the ACCC that there are no risks to competition (with limited practical ability to challenge any ACCC decision in the Federal Court or Competition Tribunal).

The combination of reversing the onus of proof, extending the legal test, an ability for the ACCC to issue "standing call-ins", and potentially limited appeal rights would make Australia a global outlier.

It is also important to note that the consequences for breaching s 50 (or defending a s 50 action in the Federal Court) are material. Companies considering M&A activity in Australia spend significant time and effort in considering whether a deal would potentially raise material competition concerns, and take the consequences of contravening s 50 seriously. We would expect that clear evidence of a significant number of anticompetitive mergers being attempted or completed would be necessary to justify a system that "skews" towards blocking mergers. To the contrary, the fact that the vast majority of mergers are cleared by the ACCC indicates that companies currently do not attempt M&A activity that would be likely to contravene s 50.

Consultation Question 18 - Should Australia's substantial lessening of competition test be amended to include acquisitions that 'entrench, materially increase or materially extend a position of substantial market power'?

The existing framework does not skew toward clearance and it would be problematic and counterproductive to adopt a presumptive approach that a merger should be blocked on the basis that a merger party has substantial market power and that the transaction will result in an extension or entrenchment of that power (however these terms might be defined). The review must be subject to the SLC test. The SLC test is well understood by merger and acquisition experts and is the key evaluative legal standard across the competition provisions of Part IV of the *Competition & Consumer Act 2010.*

It is difficult to see any benefit the proposal would bring to the evaluative SLC analysis:

1. any entrenchment, increase or extension of market power that has a material anticompetitive effect on competition will naturally be caught under the SLC standard/test.

2. any entrenchment, increase or extension of market power that does not have a material anticompetitive effect on competition will not be caught under the SLC standard – and there is no policy justification for prohibition in those circumstances and it should not be a presumption that any increase, extension or entrenchment will or will likely result in SLC.

The proposal, which is ultimately a "presumption", is unnecessary, and risks replacing careful, tailored and robust assessment of particular market dynamics with a blunt assessment. Merely having market power and extending it does not necessarily mean it will automatically result in SLC. Consideration could be given to assessing this element as part of a weighting rather than automatically presuming harm.

There is no impediment to the ACCC issuing updated Merger Guidelines which expressly refer to the effect on competition that a material entrenchment, increase or extension of market power may bring in the context of the SLC test.

Consultation Question 21 - Should additional procedural fairness safeguards be introduced if Australia moved more towards an administrative merger control regime? If so, what?

If an administrative decision-making model is adopted, it is critical that merger parties are afforded the ability to seek full merits review by the Competition Tribunal. As with Federal Court proceedings under the judicial enforcement model, it is likely that reviews of the ACCC's decisions will be rare and will only occur for significant transactions where there are complex assessments in dispute. In those circumstances, and recognising the important role of the ACCC as the regulator and first-instance decision maker, it is vital that the protection of a full merits review is available and that the decision is ultimately reviewed independently.

The current limited merits review framework in the merger authorisation regime does not provide this level of independence, because (unlike in Federal Course proceedings) it is limited to consideration of material before the ACCC and is largely shaped by the way in which the ACCC ran the investigation.

A full merits review enables the examination and cross-examination of lay and expert witnesses and allows for the objective and truly independent review of all available evidence by the reviewing decision maker.

Further, the Federal Court should retain its jurisdiction in relation to judicial review of the administrative decisions, and should retain its jurisdiction to make declarations under s 50.

SUMMARY

Endeavour recommends further exploration and understanding of the cumulative effect of the merger proposals are completed in order to construct a regime that is fit for purpose for the Australian market.

A combination of mandatory notification, call-in powers, and a reverse-onus test with additional and broader factors carries a material risk of discouraging merger and acquisition activity in Australia and there is a concern that it is reactive to theoretical rather than real risks. The combination of these features is not reflective of international standards, and any recommendations that the Taskforce is considering should bear in mind the risk of making Australia an unattractive 'outlier' among comparable jurisdictions.

The potential impact to economic conditions and business confidence should be equally considered if these changes were made to create a fully informed discussion. Improvements are welcomed but it should also be acknowledged that there will be costs associated with

implementing changes. It should not be lost that acquisitions, including by parties who may arguably have a degree of market power, can bring a range of benefits including new and increased range or choices and lower prices for consumers, more efficiencies including supply chain efficiencies and help drive innovation, including through greater investment, access to greater expertise and resources, and combination with other businesses/services.