BCA
Business Council of Australia

# Submission to Merger Reform consultation

January 2024

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# 1. Executive summary

The Business Council of Australia (BCA) believes that Australia's merger control regime has served Australia well. The low-cost and flexibility of the current model works well, particularly in times of dynamic change. We consider there are opportunities to improve the merger control regime but that these changes can be adequately accommodated within the existing regime and do not require radical change.

### Our position

The BCA does not accept that a case supporting radical change to the existing merger control regime has been established including proposals to amend the merger test, merger factors and the judicial enforcement model. Accordingly, Option 3 is strongly opposed and although Option 1 provides for voluntary clearance, the reversal of the onus for the clearance test is unsatisfactory.

That said, subject to a well-calibrated and evidence-based threshold and other essential safeguards, the BCA does not oppose the introduction of mandatory notification for certain mergers to the Australian Competition and Consumer Commission (ACCC). It is appropriate that the ACCC has visibility to support its activities to investigate mergers that raise competition concerns.

This submission makes clear that the existing merger control regime strikes the right balance overall but acknowledges that there may be acceptable amendments to the existing regime to assist the regulator's oversight by requiring certain mergers that have a greater risk of raising competition issues being brought to the regulator's attention. However, the implementation and operation of changes must be finely-tuned so as not to fundamentally undermine the economy-wide benefits that mergers deliver, which the consultation accepts, and which the government is seeking to achieve through merger control. Further consultation will be essential to navigate these risks.

Proposed Option 2 in the Treasury consultation paper aligns with the BCA's position and we contend that the United States and Canadian merger control regimes provide the best point of reference for refining Australia's model.

We believe that the retention of the judicial enforcement regime and merger test, in combination with a well-calibrated and expeditious mandatory notification process, will enable the government to maximise the economy-wide benefits of merger review. If appropriately calibrated, this model could provide procedural guard rails to limit the delay on businesses whilst providing clear mechanisms for the regulator to obtain the necessary information for assessment purposes.

Finally, noting the regulator's decision has a significant impact on the freedom of businesses to deal with their assets, preserving the judicial enforcement model is appropriate. . The judicial enforcement model has worked well, and the evidence does not support the criticisms made in relation to its effectiveness.

### There is not a case for radical change to Australia's merger control regime

There is no evidence that the existing merger control regime is contributing to any economic weakness in Australia. The Productivity Commission's recent analysis of industry concentration highlighted that there are limited areas where concentration has increased since 2006 and that, in any event, concentration is not necessarily an indicator of weak competition or poor consumer outcomes[1]. Further, an IMF staff analysis of corporate concentration and merger law noted that mergers were not the main driver of increased concentration[2].

Mergers are overwhelmingly not anticompetitive, and this is reflected in the ACCC's own statistics showing that around 93 per cent of mergers that are considered by the ACCC are cleared at pre-assessment[3]. Even in the

[1] Commonwealth, *Inquiry into promoting economic dynamism, competition and business formation*, House of Representatives Standing Committee on Economics, 15 September 2023, Dr Alex Robson, Deputy Commissioner, Productivity Commission, p 55.
[2] Ufuk Akcigit et al (2021), *Rising Corporate Market Power: Emerging Policy Issues*, IMF Staff Discussion Note, March 2021, p 5.
[3] The Australian Government the Treasury (2023) *Merger Reform Consultation Paper: Appendices*, November 2023, Parkes, p 5.

absence of a mandatory notification regime, Australia has high merger notification rates even considering that assessment is voluntary. For example, in 2022-23, 305 mergers were notified to the ACCC compared to 356 to the European Commission in 2023.[4]

The use of an objective evidentiary standard to review whether a merger may contravene our competition law regime is consistent with the underlying basis of our competition laws (that conduct is permissible unless it is shown to contravene our competition law regime) and also affords due process with respect to the serious penalties attached to breaches of merger law.

Businesses take their compliance with section 50 seriously, along with other prohibitions against anticompetitive conduct contained in Part IV of the *Competition and Consumer Act 2010* (Cth) (CCA). The consequences for breaching section 50 are serious and include substantial pecuniary penalties and risk of divestiture.

In addition to significant court-ordered penalties for alleged breaches of section 50, the ACCC is able to use a range of hard and soft enforcement and regulatory tools to aid its investigation of and to address potentially anticompetitive mergers including:

- acceptance of enforceable undertakings, including to not complete the transaction while it investigates a merger;
- the ability to seek interim injunctions to prevent a merger from proceeding while the court considers it;
- the power to compel the provision of extensive information and documents; and
- soft regulation through both process and substantive merger guidelines.

BCA members note that ACCC views conveyed by the ACCC formally and informally during the informal merger clearance process significantly influence commercial decision making and frequently result in the decision not to proceed with a transaction. The number of decisions that receive a 'red light' from the ACCC following its market inquiries process therefore *understates* the number of deals that the ACCC prevents from completing.

The BCA notes that the impact of the various proposals cannot be fully interrogated without understanding the totality of the package of reforms that government wishes to adopt. For example, it may be tempting to consider elements of the ACCC's proposal in isolation, however it is the cumulative impact of these proposals that will disproportionately impact the merger environment and the economy more broadly.

### Any proposed amendments must be capable of delivering net economy-wide benefits

Increased competition is an admirable and important objective. However, ensuring our competitiveness as an international investment destination is equally important. The government needs to carefully weigh any proposed changes to the merger control regime with the likely economic impact on business at a time where the economy is already under considerable pressure and amidst considerable structural transitions including the transition to Net Zero emissions and an ageing population. Radical changes to the structure of merger administration – which offers the regulator substantial discretion subject to limited oversight – puts investment and economic dynamism at risk.

The BCA has long advocated for measures to improve Australia's competitiveness at a global level to improve our attractiveness as a destination for global capital and increase productivity and growth to support Australia's living standards. The rest of the world is on the hunt for people and capital. If we can't stay competitive, investment and jobs will go elsewhere and we will be less productive. The result will be an erosion of both Australian security and real wage growth, and therefore quality of life. An Australia which is not actively competing with other nations for innovation, growth and investment is a poorer Australia, with poorer Australians. It is no coincidence that Australian business confidence, even with recent improvement in

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[4] Australian Competition and Communications Commission (2023), Annual Report 2022-23, ACCC, Canberra, p2 and Kirkland & Ellis (2024), 2024 EU Antitrust and FDI Update, 17 January 2024, https://www.kirkland.com/publications/kirkland-alert/2024/01/2024-eu-antitrust-and-fdi-update.

December, remains in negative territory and is well below the long run average according to the December 2023 NAB Monthly Business Survey.

A symptom of Australia's waning attractiveness as an investment destination is that we have been a net exporter of capital since the middle of 2019. Also, US direct investment in Australia has averaged only $1 billion per year since the passage of the US Tax Cuts and Jobs Act (TCJA) at the end of 2017, in which the US corporate tax rate was lowered. This compares to nearly $10 billion per year in US direct investment on average before 2018. Over the year to September 2023, Australia saw net foreign direct investment (FDI) outflow of 0.6 per cent of GDP.

Any changes to Australia's merger control regime should be targeted toward, and necessary for, the objectives outlined by the Treasurer in releasing Treasury's Merger Reform consultation paper in November 2023: to "deliver benefits to the economy and to consumers while providing certainty to business", through a merger regime that will "enable beneficial mergers" which "drive improvements in productivity, put downward pressure on prices and deliver more choice for Australians" while "mitigating those that would substantially harm competition."[5]

The consultation paper raises a range of potential reform options, including proposals put forward by the ACCC. The BCA and its members consider that the ACCC's proposals would work against the productivity-enhancing flow of capital, risking benefits of mergers identified by the Treasurer, including driving economic growth by "re-tooling businesses, bringing in new technologies and achieving economies of scale" and supporting competition by making businesses "more sustainable and giving them the scale to enter new markets."[6]

# 2. Key recommendations

1. That the Competition Taskforce notes that the existing merger review framework works well overall and does not require radical reform. The existing competition law concerning mergers has served the community well and remains durable and sufficiently flexible to address emerging competition concerns. While there are opportunities to improve the operation and efficiency of the merger control regime, these changes can be adequately accommodated within the existing regime and do not require radical change.
2. That any proposed changes to Australia's merger control regime must be finely calibrated to maximise economy-wide benefits without materially increasing the regulatory burden on businesses and discouraging investment. Measures to reform Australia's merger control regime's operation must be subject to very careful consideration to ensure that the changes do not increase the regulatory burden on business and discourage investment at a time when investment is essential, and Australia's global competitiveness is at risk. While the consultation paper canvasses proposals to amend individual elements of the merger control regime, it is the cumulative impact of these proposals that will disproportionately impact the merger environment and the economy more broadly. Accordingly, the impact of the proposed reforms need to be considered holistically and not individually.
3. The merger test must remain unchanged. That is, only mergers that are likely to substantially lessen competition should be prohibited. A subjective 'satisfaction' standard is out of step with approaches in overseas jurisdictions which consider whether a transaction raises competition concerns by applying objective tests. The current approach requires the ACCC to develop a credible theory of harm and support it with evidence to an orthodox standard and could expect it to be tested properly by the Tribunal or the Federal Court. This is appropriate in circumstances where regulatory intervention in a deal interferes with the legal right of Australian companies to transact freely. Interference with that legal right should be a matter of facts and law that can be tested in a court. It should not be a matter of regulatory discretion,

[5] Chalmers, J., 'Nation's productivity demands fairness in merger process', *The Australian*, 20 November 2023, https://www.theaustralian.com.au/commentary/nations-productivity-growth-demands-fairness-in-merger-process/news-story/20c13760e6d6bd953ce965e8a70b8def.
[6] See ibid.

subject only to extremely limited forms of review (e.g. limited merits review, and judicial review for error of law).

4. Merger factors should not be amended and the SLC test should not be expanded. The list of merger factors contained in Section 50(3) is not exhaustive and the ACCC has sufficient flexibility under the existing regime to lead evidence to demonstrate that a transaction is likely to substantially lessen competition. Augmenting the existing and well-understood substantial lessening of competition test with an assessment of whether an acquisition entrenches, materially increases or materially extends a position of substantial market power would be a redundant and potentially problematic reform. The ACCC could also amend its merger control guidelines to reflect factors that it considers are likely to substantially lessen competition and has previously done so. The BCA notes that the current merger guidelines have not been substantively amended since they were introduced in 2008 (with only relatively minor updates made following the Harper Review).

5. The current limited merits review in the merger authorisation regime should be amended to allow for full merits review. The BCA does not support the current limited merits review framework in the merger authorisation regime, as it eliminates the proper testing of evidence through examination and cross-examination of lay and expert witnesses. It is not a truly independent and objective review mechanism, because it is bound to the way in which the ACCC ran the primary investigation, and is limited to the information the ACCC sought and considered.

   If an administrative decision-making model is adopted, the system must ensure that any appeal decision is able to take into account all the circumstances of the application in order to make the correct decision in favour of a competitive outcome rather than to assess the 'correctness' of the ACCC's initial decision influenced by the ACCC's investigation. We therefore strongly recommend that parties are able to seek a full merits review of the ACCC's decision, including rights to adduce additional evidence and to cross-examine witnesses. Further, the evidence does not support the criticisms made in relation to its effectiveness.

6. Subject to a well-calibrated and evidence-based threshold and other essential safeguards, the BCA does not oppose the introduction of mandatory notification and suspension for certain mergers. However, if this approach is taken, it will be essential to ensure that there is robust and effective consultation on the specifics of the regime before it is introduced.

   The items below are key issues to consider, but should the Taskforce recommend the implementation of a mandatory and suspensory regime[7], the BCA urges that such a recommendation be 'in principle' initially subject to a detailed consultation on implementation.

   The level of potential risk in a mandatory and suspensory regime is largely dependent on the calibrations of the regime and it will be crucial for those calibrations to be carefully tested before introduction.

   a. *Businesses don't face increased regulatory burden and are provided procedural fairness:* This will necessitate strict requirements around timeliness, transparency and procedural fairness noting specific requirements could be tailored to the complexity of the transaction.

      i. *Statutory time limits:* Similar to the approaches taken in the United States and Canada, the BCA prefers that a 30-day statutory time limit is set for both Phase 1 and Phase 2 assessment with a proposed merger deemed as cleared if the regulator does not call it in for Phase 2 consideration by the conclusion of the Phase 1 statutory time limit. Notifications should be deemed cleared if parties do not receive a request for further information to move through Phase 2 within the statutory time limit.

      ii. *Upfront information:* Any compulsory notification forms must not be overly burdensome for merger parties to complete and should reflect the more simplified and streamlined versions in overseas jurisdictions, which reflect efficiency improvements made over time. Treasury should

[7] Whether within the existing judicial enforcement model, or as part of a shift to an administrative model.

engage with the development of streamlined forms such as those used in foreign jurisdictions that have previously undergone the introduction of a mandatory regime (e.g. PNG, European Union, China, Japan and Korea).

iii. *Fast-track clearance for non-issue transactions:* To best manage the fact that a mandatory regime will inevitably "over-capture" (because, as the ACCC notes, the significant majority of notified mergers will be cleared), it is critical that there be an efficient and confidential mechanism to waive non-issue transactions. The regime should enable parties to provide a short-form 'notification' and the ACCC should, similar to its current confidential pre-assessment process, be able to conduct a confidential review with the result of confirming that the acquisition can proceed without a public filing.

iv. *Preserving the strengths of the existing informal clearance pathway:* That the ability to engage early and confidentially with the ACCC is preserved and that requirements are proportionate to the complexity of the matter. As well as minimising burden in relation to acquisitions that pose little to no competition concerns, maintaining the ability to engage confidentially and efficiently with the ACCC is critical to preserve, amongst other things, competitive tension in contested bid processes.

v. *Thresholds:* Careful consideration and analysis of thresholds is undertaken to ensure that only mergers reasonably likely to be contentious are captured, with limited call-in powers confined to those matters which are nationally significant and where the right to call in a matter is time-limited once the deal is announced (for example, Canada has a one-year period where non-notifiable transactions can be investigated)[8]. Thresholds should be appropriately evidence-based and have regard to current Australian based revenue/nexus to Australian context. Further detailed considerations are set out in Section 4.1.5.

b. *Merits review and the Federal Court:* Full merits review must be available to provide adequate regulatory accountability and ensure that the merger clearance decisions are supported by all relevant evidence.

The Federal Court should also maintain its residual jurisdiction to make declarations and to conduct judicial review of ACCC and Competition Tribunal decisions.

This is not only critical to procedural fairness but is also likely to result in greater efficiency, as parties would not feel the need to front-load the initial review process with all information that could potentially be relevant to a potential future Tribunal decision.

c. *Effect of clearance:* The effect of a decision to clear a transaction should protect merger parties from litigation under section 50 of the CCA and is an appropriate trade-off given the additional burden of a mandated and suspensory regime.

d. *Public benefits test:* That the public benefits test is included in the competition assessment (either under s 50 or that the current availability of authorisation is maintained) to enable transactions to proceed in those cases where they give rise to other public benefits that outweigh competition concerns.

e. *FIRB:* Competition assessments for the purposes of FIRB reviews be streamlined (or removed from the FIRB process) in light of any mandatory and suspensory regime.

f. *Filing fees* are not introduced noting that the mandatory and suspensory scheme is predicated on economy wide benefits. To the extent that filing fees are introduced on a cost-recovery basis, that an appropriate discount is provided to merger parties reflecting the suggestion that such review is for the community's benefit. Filing fees should not be set at a level that disincentivise smaller transactions.

[8] Innovation, Science and Economic Development, 'Overview of the merger review process', Government of Canada, 16 January 2024, https://ised-isde.canada.ca/site/competition-bureau-canada/en/mergers-and-acquisitions/overview-merger-review-process.

7. A judicial enforcement model is the appropriate model for Australia's merger control regime noting that the penalties and remedies available for breaching section 50 are substantial and appropriately considered through the judicial enforcement model.
    a. An "enforcement" model is the appropriate model for Australia's merger control regime noting that mergers involve legal rights that are properly assessed by a court. An administrative model is discretionary and lacks the rigour of the Federal Court process and an orthodox, evidentiary standard.
    b. A judicial review model helps to ensure adequate regulatory accountability, and this is important when attracting foreign direct investment into Australia given the importance of legal certainty, predictability and review rights to investors considering opportunities in Australia.
    c. Further, retaining the enforcement model does not necessarily preclude other reform. For example, introducing a mandatory and suspensory notification system (with the safeguards discussed above) is not dependent on shifting to an administrative model.
8. Putting aside amendments to the existing merger control regime, there is considerable scope to improve the way mergers are considered more generally, including informal clearance processes, call-in of merger and post-completion enforcement investigations, to increase business confidence and address concerns raised by the ACCC. Areas where improvements could be made include:
    a. Information requirements
    b. Timeliness
    c. Procedural fairness – including greater transparency
    d. Accountability
    e. Resourcing
9. Post-merger review – Post-merger review is a valuable mechanism for improving the quality of assessments made by the regulator under a given merger control framework as illustrated by the Lear Report[9]. It is recommended that the institutional settings and framework underpinning post-merger reviews is reassessed to maximise their value. In particular, it is strongly recommended that periodic post-merger reviews are undertaken by an agency independent of the ACCC. The balance of post-merger reviews should continue to focus on systemic issues rather than individual cases.

# 3. Current merger control regime

## 3.1 Existing data does not support radical change to Australia's merger control regime

The BCA has regularly identified waning productivity, dynamism, and investment as fundamental economic challenges in the Australian economy. Arresting these declines is essential to positioning the Australian economy for success. While the BCA is supportive of consideration of ways to improve Australia's competitiveness, we are concerned to ensure that any consideration of proposals to amend Australia's merger law regime is evidence-based. The material presented in the consultation paper is not conclusive that there is a need to significantly change Australia's merger control regime.

The merger consultation paper identifies increased concentration as a key concern in the Australian economy and points to academic literature in overseas jurisdictions. However, IMF staff note that the rise in mergers and

[9] E Argentesi et al (2019), *Ex-post assessment of Merger Control Decisions in Digital Markets - Final Report*, Lear Economics Consultancy, 2019, report to the UK Competition and Markets Authority.

acquisitions (internationally) is not the main driver of rising market power and declining business dynamism[10] and that increased market share of firms exhibiting high markups were often connected to higher productivity.[11] The benefits of mergers in delivering benefits to consumers through efficiencies was recognised in the Dawson Review and more recently in the Lear Report (UK).[12] The consultation paper also highlights these benefits.[13]

The material presented by Treasury, including the international references, does not clearly identify merger laws as a cause of any decline in competition. For example, the analysis in the Australian context relies on aggregate indicators which "suggest a deterioration in competition in Australia since the early 2000s"[14] but fails to demonstrate that this deterioration has arisen directly as a result of Australia's merger control regime. Notably, the paper acknowledges that there is no evidence in the Australian context concerning the economic impact of mergers[15]. Further, as the paper identifies, the same deterioration has occurred in "many other advanced economies"[16], many of which have elements of the ACCC's preferred merger regime in operation.

In addition to the lack of a clear correlation between merger law and economy wide competitive conditions, or of the effect of differences between merger regimes on those conditions, the paper presents no evidence as to how the ACCC's merger law reforms would translate into material improvements to competition.

The Productivity Commission has urged caution in interpreting aggregate indicators noting "much of the contemporary research shows that when measured at an aggregate level, competition and business dynamism in Australia has declined. But economy-wide metrics give only partial and sometimes spurious insights into the drivers of competition in individual markets".[17] Further, the Productivity Commission recently concluded that "at the industry level, our analysis of concentration dynamics show that most Australian industries are not concentrated and very few became concentrated between 2006 and 2021. Moreover, the distribution of concentration measures across industries have been relatively stable over that period, so the claim that the Australian economy as a whole is becoming more concentrated does not seem to hold up."[18] It is also notable that the recent analysis of the Productivity Commission was excluded from the high-level literature review included as part of the consultation paper.

Even in instances of markets where there has been an increase in concentration or even a highly concentrated market, competition is not immediately arrested. "The relationships between market power and measured market concentration is far from conclusive. First, market concentration is not necessarily associated with low competition and high market power. For instance, an increase in competition can lead to a reallocation of resources towards larger firms implying higher market concentration but lower markups. Second, to measure market concentration accurately, one needs precise market definitions which are difficult to construct in cross-industry studies. Industry codes used in the literature are usually much broader than product markets and macroeconomic patterns of market concentration seem to be very sensitive to the definition of local versus national product markets." [19]

[10] Akcigit et al (2021), *Rising Corporate Market Power: Emerging Policy Issues*, IMF Staff Discussion Note, March 2021, p 5.
[11] Ibid at 7.
[12] Focusing on isolated metrics on competition does not give the full picture of economic welfare. As the Dawson Review concluded, "Section 50, together with other provisions of Part IV, focuses on the maintenance of competition in markets. However, competition is not an end in itself. Section 50 serves the object of enhancing the welfare of Australians through increasing economic efficiency. The achievement of economic efficiency is an important goal because it is reflected in high productivity which in turn is important in sustaining economic welfare." This is consistent with a significant recent report – the 2019 Lear Report of Ex-Post Assessment of Merger Control Decisions in Digital Markets (commissioned by the UK Competition and Markets Authority) which concluded that even despite some missed opportunities in the regulator's assessment of proposed mergers, consumers have likely benefited from efficiencies (see E Argentesi et al p xiii).
[13] The Australian Government the Treasury (2023) *Merger Reform Consultation Paper,* November 2023, Parkes, p 4.
[14] Ibid at 12.
[15] Ibid at 12.
[16] Ibid at 4.
[17] Productivity Commission 2023, Submission to the Inquiry into promoting economic dynamism, competition and business formation, Canberra, p5.
[18] Robson, A. (2023), Standing Committee on Economics inquiry into promoting economic dynamism, competition and business formation, public hearings, Hansard, 15 September 2023, p 55.
[19] J Stiebale & F Szücs 2022, *'Mergers and market power: evidence from rivals' responses in European markets'. RAND Journal of Economics*, November, pp 681-682.

## 3.2 The current merger control regime has worked well

The BCA believes that Australia's merger control regime has served the community well overall. The low-cost and flexibility of the current model works well, particularly in times of dynamic change. Australian business have decades of experience with the current process which, despite some flaws, operates flexibly and well and in the small number of cases where an ACCC decision is challenged, includes robust and independent judicial oversight. While deals are very rarely brought before the Federal Court (an indicator that the deterrent effect of the ACCC opposing a merger in its 'informal' decisions is highly effective), the fact that this is available and that an evidentiary standard applies to ACCC decision provides important rigour to the process – and therefore greater confidence to business. As noted most recently in the Harper Review, previous reviews have noted "…the current prohibition of mergers that are likely to substantially lessen competition in Australian markets is appropriate"[20].

***Mergers are generally beneficial and not ordinarily anticompetitive, and the current structure of Australia's merger control regime is appropriately focused on blocking 'likely' anticompetitive mergers.***

As currently enacted, section 50 along with the existing merger review regime strikes the right balance between enabling mergers to complete and addressing transactions that raise competition issues.

The ability of businesses to acquire, dispose, restructure and merge form an integral part of commerce and is especially important in times of disruption and transition. It forms part of the basic property right that permits people to deal with their assets freely. As noted in the ACCC's merger guidelines:

> *Mergers and acquisitions are important for the efficient functioning of the economy. They allow firms to achieve efficiencies, such as economies of scale or scope, and diversify risk across a range of activities. They also provide a mechanism to replace the managers of underperforming firms.* [21]

Our members speak of the importance of deals in supporting their growth, dynamism and ability to pivot into new markets or to build capacity to capture market opportunities.

The existing merger control framework reflects this by prohibiting only those mergers which are likely to substantially lessen competition. This logic is also consistent with the ACCC's own merger guidelines which note:

> *In the vast majority of mergers, sufficient competitive tension remains after the merger to ensure that consumers and suppliers are no worse off. Indeed, in many cases consumers or suppliers benefit from mergers. In some cases, however, mergers have anticompetitive effects.* [22]

The informal merger clearance regime complements the formal merger authorisation processes. The informal merger clearance regime has developed over time and is well-accepted and valued by merger parties. The informal process is well understood and operates in a flexible and predictable manner. Though merger parties who rely on this process are not provided formal legal immunity from prosecution under section 50, in practice the risk of prosecution is greatly reduced given the degree of assurance provided by the ACCC that it will not take action in relation to a merger in which it has informally cleared. While the option of a formal merger authorisation exists, it is seldom utilised.

The ACCC's clearance statistics also support the conclusion that the vast majority of mergers are overwhelmingly not anticompetitive. In 2022-23, more than 93 per cent of deals were cleared through pre-assessment with less than 7 per cent of deals moving to informal public review. [23]

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[20] I Harper, P Anderson, S McCluskey, M O'Bryan AC, *Competition Policy Review – Final Report,* 'Harper Review', 2015, page 65.
[21] Australian Competition and Consumer Commission, *Merger Guidelines*, 2017, p2.
[22] Ibid.
[23] Australian Competition and Consumer Commission (2023), Annual Report 2022-23, ACCC, Canberra, p69.

***Merger parties bear the risk for transactions that are in breach of Section 50, consistent with other prohibitions under Part IV of the Act***

As with all prohibited conduct under Part IV of the CCA, merger parties may be sued for breaches of Section 50 unless they have obtained an authorisation or declaration. The consequences for breaching section 50 are significant with parties facing court-ordered divestiture of assets and shares and substantial fines in addition to wider reputational and commercial consequences. The fines applicable to anticompetitive conduct (including under section 50) have only recently been increased substantially in late 2022 and now operate at the greater of $50m per contravention, three times the benefit obtained or, if that cannot be calculated, 30 per cent of relevant turnover during the period[24]. Australia's penalties are now some of the most significant in the world, having regard to the size of our economy.[25]

Feedback from our members reinforces that businesses overwhelmingly take this provision seriously and seek to engage constructively with the ACCC. This may also explain why the informal clearance process in Australia has developed and is used so successfully despite no obligation for merger parties to seek ACCC to clearance.

***The ACCC already has a range of tools available to it to address anticompetitive mergers and improve the quality and timeliness of information it receives as part of merger reviews***

The ACCC has a range of tools and levers to support effective merger control under existing law. In addition to prosecution under section 50 of the CCA the ACCC can:

- Seek a court-ordered injunction (section 80), including an interim injunction to prevent a merger from proceeding while the court considers the merger;
- Require clearance to be subject to an enforceable undertaking from merger parties (section 87B); and
- Compel the provision of information and production of documents to aid its investigation of a proposed merger (section 155).

In addition, the ACCC frequently uses both its soft authority in the form of voluntary requests for information, data and documents in addition to its statutory powers to obtain material from merger parties through the pre-assessment, informal clearance review processes and even when a deal is proactively "called-in" for review. Merger parties have the incentive to comply with these and cooperate through the process, including to give sufficient information to enable the ACCC to efficiently give informal clearance.

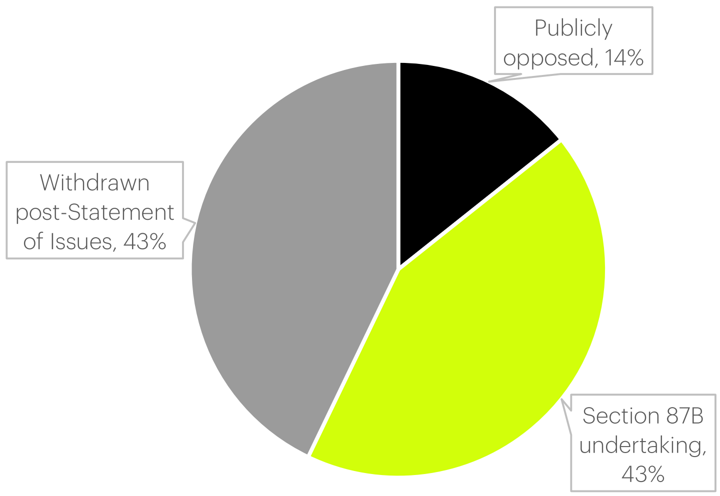
BCA members have also shared that the ACCC has substantial soft authority in practice whereby an indication that the ACCC may be headed towards an unfavourable outcome is sufficient for many commercial transactions to be withdrawn and in other cases following initial discussions with the ACCC, not even progressed.

Figure 1 shows that for those proposed mergers where the ACCC identified the proposed merger had competition issues since 2015 more than 40 per cent were withdrawn and a further 43 per cent were cleared subject to a Section 87B undertaking.

[24] Australian Competition and Consumer Commission, Fines and Penalties, https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties accessed November 2023.

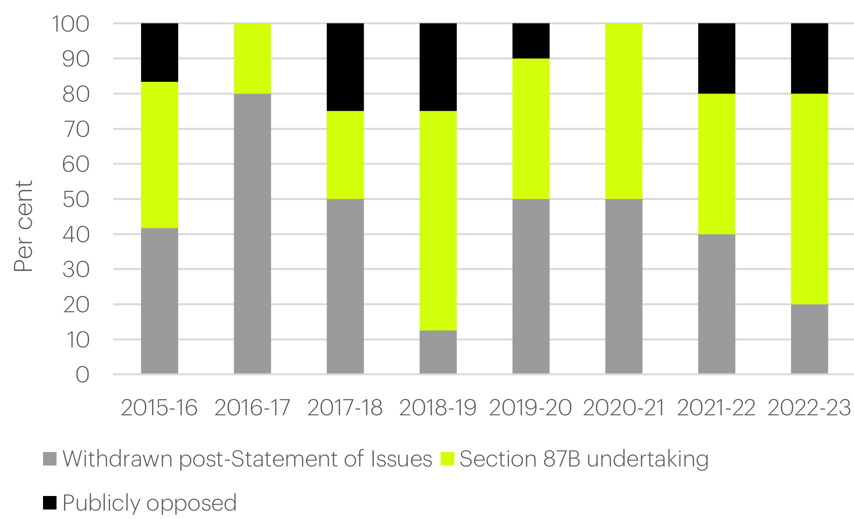
[25] In contrast, the European Union may issue a fine of up to 10 per cent of aggregate turnover for breaches of their merger control regime. In the United States merger parties may be fined up to ~$US52,000 per day for pre-merger filing notification violations and in the United Kingdom, the regulator may fine a company 5 per cent of global turnover for a failure to comply with interim measures.

**Figure 1 Outcomes for proposed mergers publicly identified as having competition issues under informal clearance by the ACCC (2015-2023), total**




*Source: BCA using Treasury data (2023) for mergers publicly identified as having competition issues.*

**Figure 2 Outcomes for proposed mergers under informal clearance by the ACCC (2015-2022), annual**




*Source: BCA using Treasury data (2023) for mergers publicly identified as having competition issues.*

Where the ACCC has opposed mergers over the last two decades, the decision has only been challenged successfully on 8 occasions – 4 times before the Federal Court, and 4 times in the Competition Tribunal[26]. The suggestion that the current merger test and enforcement model means the ACCC lacks the ability to block deals or that it struggles to deal with difficult mergers is not supported by experience.

[26] Federal court: *Australian Gas Light Co v Australian Competition and Consumer Commission* (No 3) (2003) 137 FCR 317; 2011 - *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297; - *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49;*Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission* [2020] FCA 117. Competition Tribunal: *Qantas Airways Ltd* [2004] ACompT 9; *2014 - Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1; *Application by Sea Swift Pty Ltd* [2016] ACompT 9;*Application by Tabcorp Holdings Limited* [2017] ACompT 1.

Further, in relation to the informal regime "the ACCC sets timelines and can establish the administrative rules for submissions and information"[27]. To the extent that the ACCC believes the structure of the informal process is not working, there is an opportunity for the regulator to refine its existing processes to improve efficiency and timeliness. As Recommendation 35 of the Harper Review noted, "there should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal merger review process"[28]. There is no reason why further work couldn't include refinement of information requirements, improvements around the level of transparency available to businesses during the merger process and other procedural elements.

# 4. Comments on key issues

## 4.1.1 Merger test

The BCA is firmly opposed to the reversal of the onus proposed by the ACCC and the changed merger test to require 'satisfaction' by the ACCC as included in Option 3 in the consultation paper. There are two key reasons for our objection:

- First, the reversal of the onus and introduction of a subjective and discretionary administrative standard radically changes the balance and tenor of merger control to one which assumes mergers are intrinsically anticompetitive rather than ordinarily not anticompetitive as is supported by the more than 90 per cent clearance rates by the ACCC.
- Second, reversing the onus and placing this on the parties to a transaction is entirely out of step with overseas jurisdictions.[29]

It will also inevitably create evidentiary challenges for merger proponents attempting to prove a negative in relation to the future, made more challenging as private parties are unable to compel evidence and information as the ACCC can. The change would effectively remove the legal standard which mergers are currently assessed against for determining a breach of section 50 and require all proposed mergers to meet a discretionary standard of the ACCC's own determination.

The ACCC argues that in reversing the onus, false positives (i.e. blocked mergers that would not ultimately have a substantial lessening on competition effect) are more likely than false negatives (i.e. allowing mergers that would ultimately have a substantial lessening of competition effect), and argue that the risk is better to be borne by the merger parties than the public. As a justification, this is flawed as it assumes that economic consequences for blocking mergers if confronted by uncertainty is limited to the parties. Invariably deals that would benefit the community will be blocked, and the community will bear the cost through lack of innovation, scale, dynamism, efficiency, and potentially increased costs.

The current approach to merger control requires the ACCC to evidence why the transaction will likely substantially lessen competition, which has the benefit of applying a substantial body of well-known and developed jurisprudence. This provides both the ACCC and the parties to a transaction with a high degree of legal certainty. Certainty is, in turn, a key criterion for investing in transactions and acquisitions. This is an appropriate standard for the regulator to meet in making determinations about significant economic assets.

It is important to note that the current SLC test prohibits mergers where they are "likely" to have the effect of SLC, which has been interpreted as meaning there is a "real chance" that they will have the effect of SLC. It does not require proof that the merger *will*, even on the balance of probabilities, have the effect of SLC.

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[27] King, S., 2021, 'The Australian Competition and Consumer Commission's Proposed Merger Reforms', 21 October 2021, p4.
[28] Harper et al at 67.
[29] For example, all the jurisdictions identified in the Appendix D to the Treasury Merger Reform consultation paper including the US, UK, Canada and the European Union, have a merger test that allows mergers to proceed unless a merger is likely to be anticompetitive in contrast to the ACCC's preferred approach which is to only allow mergers to proceed that are proven to not have an anticompetitive impact. New Zealand's prohibition on mergers is similar to Australia in that mergers are prohibited if they substantially lessen competition.

The reversal of the standard will reduce the proportion of mergers cleared in Australia, but not because they are any more anticompetitive than is the case presently. The discretionary aspect of the new test would also introduce substantial and new uncertainty and risk to the Australian economic environment, potentially chilling domestic and overseas investment and compromising our ability to innovate and compete globally. It is therefore not in the interests of Australians to adopt a wholly new, untested and globally unique merger standard.

Retention of the public benefit is supported where parties are seeking authorisation for mergers, and would be essential if the reversal of the onus proceeded, but even with the inclusion of the public benefit test, the reversal of the onus is unacceptable.

Finally, when the reversal of the merger control test is considered alongside the proposal to limit the ability of the merger parties to test by a Tribunal or a Court the ACCC's conclusion, it can be seen that a material level of uncertainty will result making Australia a far less predictable and stable country for merger related transactions. This can only make Australia a higher risk and less attractive to global capital.

### 4.1.2 Merger factors

The consultation paper presents a range of options for amending the merger factors contained in section 50(3) of the CCA. The merger factors are currently non-exhaustive, and therefore do not prevent the ACCC from taking into account other issues if they arise in the context of a particular transaction. The ACCC can and does consider matters outside of the factors listed if it considers them relevant to assessing the effect on competition.

The CCA already suffers from considerable legal complexity due to the tendency in Australia to seek to codify concepts that would be best left as of general application. The Harper Review, amongst others, noted the unfortunate complexity in much of the CCA drafting of other provisions.[30] Caution should therefore be exercised when bluntly 'hard-wiring' additional merger factors without regard to the dynamics of given industries and markets. For example, at a time where government is trying to encourage local innovation, otherwise reducing the attractiveness of start-ups by impairing who can acquire them will impact innovation culture and Australia's access to innovation. Similarly, effectively prohibiting larger businesses from making further acquisitions without regard for the circumstances of the acquisition could cause unintended consequences, for example for a distressed business whose sale could only be achieved by a business with sufficient scale to financially absorb the acquisition, without which the assets and jobs may be lost or acquisitions with pro-competitive and pro-consumer benefits that can only be realised by a company with scale and sufficient resources to invest.

The specific proposal to expand competition assessment to consideration of whether an acquisition would "entrench, materially increase or materially extend a position of substantial market power" is redundant and potentially problematic. Any entrenchment, material increase or material extension of market power that has a material anticompetitive effect will naturally be caught under the current substantial lessening of competition test. Conversely, any entrenchment, material increase or material extension of market power that ***does not*** have a material anticompetitive effect will not be caught under the substantial lessening of competition standard – and there is no policy justification for bluntly prohibiting an acquisition in those circumstances.

However, should the ACCC consider that a more explicit focus on particular considerations be necessary, the appropriate avenue for doing so is through its merger control guidelines, which could be updated to address circumstances where these additional factors are likely to be enlivened.

The ACCC has not substantively updated its guidelines (either substantive guidelines or the informal merger review process guidelines) since 2017. This would be an immediate and more flexible way of informing business of the ACCC's views about those transactions that it considers it needs to see (including any developing theories of harm, such as 'serial acquisitions') as well as provide clarity around the type and quality of information required when seeking clearance.

[30] Harper et al 308 and 360.

### 4.1.3 Judicial enforcement model

The application of Australia merger law regime is consistent with other areas of Part IV of the CCA. That is, the onus is on the ACCC to establish that the conduct of parties breached the relevant prohibition to an objective evidentiary standard. This is an appropriate standard for the regulator to meet concerning determinations about legal compliance and involving significant economic assets and where a decision has a significant impact on the freedom of businesses to deal freely with their assets.

Accordingly, and given the substantial consequences for contravening section 50, including significant pecuniary penalties and the divesture of shares and assets, it is appropriate for these consequences to be determined by the court as is the case for all other contraventions under the CCA.

The fines applicable to anticompetitive conduct (including under section 50) have only recently been increased substantially in late 2022 and now operate at the greater of $50m per contravention, three times the benefit obtained or, if that cannot be calculated, 30 per cent of relevant turnover during the period[31]. Although a direct comparison between Australian fines and those in other jurisdictions is difficult because of the different merger control regimes, the maximum fines available under Australian law are significant by global standards[32].

Various Australian competition experts have expressed concerns with the ACCC's proposal to remove the independent review by the Court. For example, Stephen King has noted that the ACCC "has fallen into a common trap. By failing to convince independent referees, in this case the courts, of the merits of its arguments, the ACCC has blamed the referees and wants the rules changed to remove the referees from the game"[33].

Very few mergers ultimately end up subject to a Federal Court decision. Over the last two decades, only seven section 50 cases have been brought to the Federal Court, compared to the over 1,500 mergers reviewed by the ACCC over that period. Of those seven matters, two were withdrawn before trial, and one was resolved by undertakings given to the ACCC. There is no evidence to suggest that the judicial enforcement model is 'allowing' a significant (or any) number of potentially anticompetitive mergers. In the four matters it lost in the Federal Court, the ACCC was able to put forward substantial evidence and cross-examine the merger parties' witnesses. That the Federal Court decided that the ACCC's evidence did not support its case is not a reason to abandon the judicial enforcement model.

The fact that the ACCC has failed to prevail in a small number of cases at the Tribunal or in Court should not be taken as an indication that the system as a whole is not working. For example, it is worth noting that potential mergers that are likely to have an anticompetitive effect would not typically proceed beyond the planning stage, due to the parties identifying a probability that the transaction would not be cleared. Thus the deterrent effect of the current system is not readily apparent from merger clearance requests actually filed with the ACCC.

Further, the ACCC has a range of tools and levers to support effective merger control under existing law. In addition to prosecution undersection 50, under the CCA the ACCC can:

- Seek a court-ordered injunction (section 80);
- Require an enforceable undertaking from merger parties as a condition of clearance (section 87B); and
- Compel the provision of information and produce documents (section 155).

BCA members have also shared that the ACCC has substantial soft authority in practice whereby a likely unfavourable outcome is sufficient for many commercial transactions to be withdrawn and in other cases

[31] Australian Competition and Consumer Commission, Fines and Penalties, https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties accessed November 2023.

[32] As many jurisdictions have mandatory notification regimes, the penalties for breaching a jurisdiction's merger control regime are focused on breaching notification requirements or enforceable undertakings in contrast to the Australian regime where penalties relate to engaging in anticompetitive conduct (though there are penalties for breaching undertakings). For example, the European Union may issue a fine of up to 10 per cent of aggregate turnover for breaches of their merger control regime. In the United States merger parties may be fined up to ~$US52,000 per day for pre-merger filing notification violations and in the United Kingdom, the regulator may fine a company 5 per cent of global turnover for a failure to comply with interim measures.

[33] King, S. 2021, 'The Australian Competition and Consumer Commission's Proposed Merger Reforms', 21 October 2021, p4.

following initial discussions with the ACCC, not even progressed. The number of transactions blocked by the ACCC therefore *understates* its effectiveness at preventing deals where it has concerns.

This observation was also made by Stephen King who noted that "it is far from clear that these alternative approaches lead to different outcomes, in practice, as most mergers that raise concerns for the ACCC do not lead to court actions"[34].

### 4.1.4 Merits review

Regardless of which model (enforcement or administrative) is adopted by the government, the availability of an appropriate merits review mechanism will be an essential check on the ACCC's decision making process and decisions made, noting that, even under the existing regime, very few transactions ultimately fall for resolution by the Court. BCA members have indicated that although the decision to proceed to court to challenge an ACCC decision is rare, its availability is vital, particularly for complex matters, and provides a vital discipline on the ACCC's decision-making even for those matters that are unlikely to go to court.

The BCA does not support the current limited merits review framework in the merger authorisation process, as it eliminates the proper testing of evidence through examination and cross-examination of lay and expert witnesses. The limitations placed on the Tribunal prevent it from offering a true full merits review mechanism, because it is bound to the way in which the ACCC ran the primary investigation, and is limited to the information the ACCC sought and considered.

To ensure that any appeal decision is able to take into account all the circumstances of the application in order to make the correct decision in favour of a competitive outcome rather than to assess the 'correctness' of the ACCC's initial decision influenced by the ACCC's investigation, we recommend that parties are able to seek a full merits review of the ACCC's decision, including rights to adduce additional evidence and to cross-examine witnesses. This will be critical if an administrative model is adopted.

We note that some have contended that the availability of limited merits review is designed to avoid parties 'gaming' the process by relying on material not available during the initial assessment. However, this understanding is flawed as the underlying commercial imperative is to provide sufficient material to obtain approval as quickly as possible given the risk many parties face of being timed out of deals. There may be instances where parties seek to introduce new evidence on appeal that was not provided to the ACCC at the time of the merger application as parties did not consider the evidence to be relevant or did not expect the ACCC's analysis to focus on a given market rather than intentionally withholding information from the ACCC that would otherwise help achieve merger clearance.

Perversely, limited merits review creates an incentive for parties to provide material in excess of what might meaningfully be necessary in order to maximise their position in the event of an appeal. Frontloading applications in this manner likely makes the process unnecessarily burdensome for both merger parties and the ACCC. Indeed, some members observe that the experience so far with the limited merits review process (in Telstra / TPG and ANZ / Suncorp) has shown that the restrictions have not resulted in shorter timeframes or less material before the Competition Tribunal than had been the case with the full merits review process prior to the Harper Review amendments in 2017. Those amendments should be reversed, and full merits review should be reintroduced.

Even if an administrative model is adopted, such that the ACCC is the default statutory decision maker, there is no reason to remove the Federal Court's jurisdiction to make declarations in relation to section 50. One benefit of retaining the ability to seek declaration at the Federal Court is to provide a degree of contestability for the duration of the ACCC's consideration of proposed mergers where the timeline for consideration has become drawn out. The Federal Court must also maintain its jurisdiction for judicial review of the ACCC and Competition Tribunal's administrative decisions.

[34] Ibid at 3.

### 4.1.5 Mandatory and suspensory regime

As reflected earlier in this submission, the BCA believes that improvements to the merger control regime can be achieved within the existing regime rather than through a formal and mandatory merger clearance process. There is a significant risk that the regulatory burden will result in elongated transaction timelines and increased transaction risk. As identified above, the ACCC is already in a position to implement these improvements within its existing powers which is also arguably a quicker process than seeking to implement statutory reforms of the nature proposed by the ACCC.

Concerning mandatory notification however, the BCA acknowledges that the ACCC will be more confident in its role relating to mergers if a well-designed and executed mandatory notification scheme is established. To that end, the BCA does not oppose the introduction of a mandatory notification scheme subject to a well-calibrated and evidence-based threshold and other essential safeguards.

A poorly designed mandatory notification regime risks wasting public (and private) resources on reviewing transactions that do not present competition issues, consumes ACCC resources that could better be devoted to assessing mergers that present competition issues. Further, it risks undermining the economic benefits hoped to be obtained through adopting a mandatory notification requirement in addition to having potentially significant consequences for investment and innovation in Australia.

If a mandatory notification scheme is introduced, the design of key elements must be carefully calibrated to reduce the regulatory burden on business (cost, time and uncertainty) and maximise the economy-wide benefits by quickly enabling non-contentious mergers and scrutinising mergers that may be anticompetitive. For example, setting the threshold for notification too low will harm merger parties, swamp the regulator and undermine the economy-wide benefits of merger review. Conversely, setting the up-front information requirements too high, or failing to scale the requirements to the complexity of the transaction is likely to significantly increase the costs of preparing and undertaking a mandatory notification even if the proposed merger is unlikely to present competition issues.

The BCA suggests that as it expects the ACCC to retain its ability to consider mergers below any mandatory notification threshold, policymakers must not overreach in setting a low threshold and over-capturing merger activity.

The duration of the ACCC's consideration of a proposed merger should also be scaled to the complexity of the competition issues presented by the merger with firm statutory limits. For example, the United States and Canada have similar time frames for consideration of mergers – both Phase 1 and Phase 2 are 30 calendar days. We think a similar approach should be adopted in Australia and that merger review (following an initial pre-notification period) not be longer than merger authorisation (90 days) if the effect of notification is suspensory.

Though public reviews do not provide a complete picture of the duration of the ACCC's current assessment of mergers, the length of time the ACCC has taken to consider mergers raises real concern about the risks of adopting mandatory notification in practice. For example, and as noted by the consultation paper, in only one instance has the ACCC met its 90-day statutory timeframe for merger authorisations, the average period was 171 days and the longest 260 days.[35] Whilst *average* informal merger clearance timelines have extended considerably since 2006, with Phase 1 public reviews averaging just shy of 60 business days (~3 months) and Phase 2 public reviews more than 120 business days (+6 months) excluding any 'stop the clock' events where merger parties are required to provide additional information.[36]

It will be essential to ensure there is robust and effective consultation on the specifics of any proposed changes to the regime before it is introduced. The items below are key issues to consider, but should the Taskforce recommend the implementation of a mandatory and suspensory regime (whether within the existing judicial enforcement model, or as part of a shift to an administrative model) the BCA urges that the recommendation be

[35] The Australian Government the Treasury (2023) *Merger Reform Consultation Paper: Appendices*, November 2023, Parkes, p8.
[36] Ibid at 9.

put at an 'in principle' level initially, with the specific mechanisms to be informed by extensive consultation and testing before the regime is implemented. The level of potential risk in a mandatory and suspensory regime is largely dependent on the calibrations of the regime and it will be crucial for those calibrations to carefully tested before introduction.

- *Businesses don't face increased regulatory burden and are provided procedural fairness:* This will necessitate strict requirements around timeliness, transparency and procedural fairness noting specific requirements could be tailored to the complexity of the transaction.
  - *Statutory time limits:* Similar to the approaches taken in the United States and Canada, the BCA prefers that a 30-day statutory time limit is set for both Phase 1 and Phase 2 assessment with a proposed merger deemed as cleared if the regulator does not call it in for Phase 2 consideration by the conclusion of the statutory time limit. Notifications should be deemed cleared if parties do not receive a request for further information to move through Phase 2 within the statutory time limit.
  - *Upfront information:* Any compulsory notification forms must not be overly burdensome for merger parties to complete and should reflect the more simplified and streamlined versions in overseas jurisdictions, which reflect efficiency improvements made over time. Treasury should engage with the development of streamlined forms such as those used in foreign jurisdictions that have previously undergone the introduction of a mandatory regime (e.g. PNG, European Union, China, Japan and Korea).
  - *Fast-track clearance for non-issue transactions:* To best manage the fact that a mandatory regime will inevitably "over-capture" (because, as the ACCC notes, the significant majority of notified mergers will be cleared), it is critical that there be an efficient and confidential mechanism to waive non-issue transactions. The regime should enable parties to provide a short-form 'notification' and the ACCC should, similar to its current confidential pre-assessment process, be able to conduct a confidential review with the result of confirming that the acquisition can proceed without a public filing.
  - *Preserving the strengths of the existing informal clearance pathway:* That the ability to engage early and confidentially with the ACCC is preserved and that requirements are proportionate to the complexity of the matter. As well as minimising burden in relation to acquisitions that pose little to no competition concerns, maintaining the ability to engage confidentially and efficiently with the ACCC is critical to preserve, amongst other things, competitive tension in contested bid processes.
  - *Thresholds*: Careful consideration and analysis of thresholds is undertaken to ensure that only mergers reasonably likely to be material are captured, with limited call-in powers confined to those matters which are nationally significant and where the right to call in a matter is time-limited once the deal is announced. Thresholds should be appropriately evidence-based and have regard to current Australian based revenue/nexus to Australian context. Design of thresholds should take account of the following considerations:
    - Control: Thresholds must be carefully thought through and circumscribed so that mandatory notification is only required where there is an acquisition of control of a business. Thresholds must not therefore be linked to the acquisition of assets alone, rather there must be a two-pronged approach which requires: 1) the acquisition of shares or a business; and 2) the acquisition of control in order to enliven a mandatory and suspensory regime, as is the case in overseas jurisdictions. This approach is likely to be most effective in isolating transactions which may affect the competitive dynamics in a market where the acquired interest could be used to affect competition.
    - Turnover: Many mandatory regimes overseas contain a two-part minimum turnover threshold, requiring assessment of both the turnover of the acquiring (typically larger) party to the transaction as well as the turnover of the target (typically smaller) party. The former threshold is set to an appropriately significant quantum, and the latter is set to a smaller minimum to avoid

capturing de minimis transactions and/or those that are unlikely to have a material impact on competition. It would not be appropriate for the proposed merger regime to consider only the turnover of the larger party as this does not provide a sufficiently meaningful indicia for the likelihood of the transaction substantially lessening competition.

- Market share: Market shares should not form part of the threshold for mandatory notification as they can create uncertainty and the need for expert assessments and evidence prior to notification. It is often difficult and expensive for businesses to define market share, and there is no guarantee that the parties' assessments will be accepted by the regulator. It is members' experience that in the UK,the regulator can adopt specific, arbitrary and very narrow market definitions to put pressure on parties to engage with the notification process.
- Global transaction value: Careful consideration should be given as to whether global transaction value alone should be used as a threshold for the assessment of merger notification requirements in Australia. Depending on how such a criteria is structured, a threshold incorporating global transaction value has the potential to pose a significant risk of consistently capturing merger and acquisition activity that has low or no relevance to the Australian economy, and disincentivising businesses that operate in multiple jurisdictions from delivering products and services in Australia if doing so could impact proposed mergers that are largely outside the Australian jurisdiction.
- The attendant risk of uncertainty, inefficiencies and cost burden for businesses in engaging with the ACCC should be avoided, noting that there is no or negligible upside to the goal of effective regulation.
- Overlap: Where the activities of merging parties do not present market overlap such that there is no combination of market power arising from the transaction, there should be no mandatory filing requirement. There must also be a de minimis overlap exception or carve out in the legislation tied to asset thresholds or revenue in the relevant jurisdiction.

- *Merits review and the Federal Court:* Full merits review must be available to provide adequate regulatory accountability and ensure that the merger clearance decisions are supported by all relevant evidence.

  The Federal Court should also maintain its residual jurisdiction to make declarations and to conduct judicial review of ACCC and Competition Tribunal decisions.

  This is not only critical to procedural fairness but is also likely to result in greater efficiency, as parties would not feel the need to front-load the initial review process with all information that could potentially be relevant to a potential future Tribunal decision.
- *Effect of clearance:* The effect of a decision to clear a transaction should protect merger parties from litigation under section 50 of the CCA and is an appropriate trade-off given the additional burden of a mandated and suspensory regime.
- *Public benefits test:* That the public benefits test is included in the competition assessment (either under s 50 or that the current availability of authorisation is maintained) to enable transactions to proceed in those cases where they give rise to other public benefits that outweigh competition concerns.
- *FIRB:* Competition assessments for the purposes of FIRB reviews be streamlined (or removed from the FIRB process) in light of any mandatory and suspensory regime.
- *Filing fees* are not introduced noting that the mandatory & suspensory scheme is predicated on economy wide benefits. To the extent that filing fees are introduced on a cost-recovery basis, that an appropriate discount is provided to merger parties reflecting the suggestion that such review is for the community's benefit. Filing fees should not be set at a level that disincentivise smaller transactions.

### 4.1.6 Other opportunities to enhance the existing merger framework

Separate to the topics outlined above in response to the consultation, the BCA considers that there are opportunities within the existing merger framework to improve processes for considering proposed mergers. For example, concerns have been expressed about the timeliness and transparency of the merger review process".[37] For reference, the Dawson Review noted that "the speed and efficiency of the current informal merger clearance process are generally regarded as being its greatest strengths. The weakness of the system are evident in the absence of an effective mechanism for review and the absence of reasons for the ACCC's decisions, which hinders the development of a body of precedent to assist in the making of consistent and predictable determinations".[38]

The BCA believes that there are areas where improvements can be made to the voluntary merger clearance scheme which would improve confidence in it, benefiting both merger parties and the ACCC. Key areas include:

- Information requirements – greater clarity from the ACCC as to what information is required to be included as part of review applications, proportionate to the potential for competition concerns, will increase the quality and timeliness of information provided to the regulator and otherwise reduce the risk of frustration and confusion from merger parties and the regulator arising from multiple and iterative requests for further information. This could be supported by improved guidance material (such as updated informal merger review process guidelines), screening tools and/or application form specifying requirements.
- Timeliness – While the ACCC has system-wide targets for timeliness in responding to clearance requests under the existing framework, there is considerable variation in how timely individual transactions are dealt with and can take considerable time to review. The absence of time limits for considering a merger clearance application is one of the most challenging aspects of the current regime. A lengthy clearance process can delay commercial decisions, time parties out from deals and impose significant costs on business, including small and family businesses on the sell-side of a transaction.

  Firm deadlines limiting the duration that the ACCC can review a merger application would be one way of improving the confidence and engagement of merger parties in the clearance process and enhancing commercial decision-making.

  To enable this, it would likely be necessary to limit circumstances for extending review timelines and should include the consent of the parties (with a cap on the extension period), and limit the ability for market participants to make submissions after a due date or raise new issues after making substantive submissions (save for exceptional circumstances).

  Ideally, a firm deadline would include a deemed right to proceed to completion if a decision hasn't been rendered within the statutory timeframe (unless extended by consent). Alternatively, there should be a pathway for applications to be escalated if the review is not completed within the timeframe or follow process.
- Procedural fairness – in particular, merger parties should be provided with adequate access to the information relied on by the ACCC in making its decision, including economic reports/analyses, and a meaningful opportunity to respond to and address the issues raised by third parties and competition concerns identified by the ACCC. This should include the ability to respond to a draft of the ACCC's decisions and reasons but shouldn't be confined to a draft decision as early feedback or periodic engagement can assist merger parties address emerging competition concerns in an efficient manner.

  To support improved procedural fairness, consideration should be given to mandating the timing for the provision of this information. Procedural fairness is particularly problematic in the context of the merger authorisation review process, where the limited merits review procedure does not provide merger parties an

[37] Harper et al 66.
[38] Dawson, p68.

adequate opportunity to understand and properly test before the Competition Tribunal the ACCC case against a deal.

- Accountability - Consideration should also be given to improving benchmarking arrangements for merger clearance processes. As Appendix A of the consultation paper notes, the "mean average timeframes for informal public reviews have increased since 2006". Improved (new and existing) metrics including root-cause analyses would enable identification of systemic issues and improve transparency around regulator performance.
- Resourcing – The ACCC should be appropriately resourced to carry out its functions under the existing merger control regime which will help the ACCC and also assist consumers and businesses realise the benefits of mergers.
- Post-merger review – Post-merger review is a valuable mechanism for considering an improving the quality of assessments made by the regulator under a given merger control framework as illustrated by the Lear Report concerning merger control in digital markets[39]. Caution must be exercised in undertaking and interpreting such reviews as market dynamics are influenced by many variables independent of matters known during a proposed merger's assessment.

  It is recommended that the institutional settings and framework underpinning post-merger reviews is reassessed to maximise their value. In particular, it is strongly recommended that periodic post-merger reviews are undertaken by an agency independent of the ACCC. The balance of post-merger reviews should continue to focus on systemic issues rather than individual cases.

# 5. Conclusion

Australia's merger control regime has worked well overall and provided the ACCC the tools needed to ensure mergers comply with Australia's competition law framework. The case for radical change, including amending the merger test, has not been made and is not supported by the BCA and will leave Australia out of step with international jurisdictions.

The BCA does not oppose the discrete proposal to require mandatory notification for proposed mergers above a well-calibrated and evidence-based threshold. The BCA recognises that this will provide the ACCC with enhanced visibility over mergers and sufficiently responds to the key concerns that have been raised in the consultation.

The careful design and implementation of mandatory notification will be critical to ensuring the economy-wide benefits mergers deliver, such as innovation and the release of capital, are maintained. A poorly designed mandatory notification scheme risks wasting public (and private) resources that do not present competition issues, consumes ACCC resources that could be better devoted to assessing mergers that present competition issues and risks undermining the economic benefits hoped to be obtained through adopting a mandatory notification requirement.

To conclude, a comprehensive consultation should be undertaken once the government's proposed amendments are determined. The BCA acknowledges the consultation that the Competition Taskforce has undertaken to date on this important issue.

[39] E Argentesi et al (2019), *Ex-post assessment of Merger Control Decisions in Digital Markets - Final Report*, Lear Economics Consultancy, 2019, report to the UK Competition and Markets Authority, accessed January 2024.

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