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Submitted Electronically via CompetitionTaskforce@treasury.gov.au

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Taskforce Members:

Re: Consultation on Merger Reform

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The MSG was founded in 2001. The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Guiding Principles for Merger Notification and Review* ("Guiding Principles") and the *Recommended Practices for Merger Notification Procedures* ("Recommended Practices") of the International Competition Network ("ICN").[2] As you know, the Australian Competition and Consumer Commission ("ACCC") is a founding and leading member of the ICN.

The Group's work to date has included submissions to competition agencies and governments in more than twenty jurisdictions (e.g., Australia, Brazil, Canada, China, European Union, France, Germany, India, Japan, Spain, the United Kingdom, the United States, and many others). With respect to Australia, the Group last provided a submission in response to the Treasury's Competition Policy Review in 2014.

The Group applauds the Treasury and the ACCC for their ongoing effort to improve the merger control process in Australia, and in particular for consulting with stakeholders on these important issues. The Group appreciates the opportunity to provide these comments in response to the Treasury's consultation on important reforms to the Australia's merger control regime. We hope that this submission, which draws upon the Group's very substantial experience with

[1] BHP, Cisco Systems, Procter & Gamble.

[2] International Competition Network, *Guiding Principles for Merger Notification and Review*, available online at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf; International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf .

multinational merger transactions, will prove useful to the Treasury and the ACCC. As explained in detail below, the Group supports modest reforms and modernization of Australia's merger control regime, but the Group has significant concerns about the proposed "satisfaction" test.

1. General Comments

The Group agrees with the Treasury that a "risk-based" approach to merger reform[3] should be considered, as well as its observation that "a merger control regime must balance its risk tolerance for allowing anti-competitive mergers to proceed against the risk of blocking mergers that are pro-competitive (or that do little or no competitive harm)."[4] In the Group's respectful view, in seeking to find an appropriate balance between the risk of false positives and false negatives in reforming Australia's merger control regime, the Treasury should keep in mind the following four important considerations.

First, as recognized by the Recommended Practices, the vast majority of merger transactions do not raise material competition concerns and may be pro-competitive.[5] This is consistent with the ACCC's own enforcement record. From 2015-16 and 2022-23, out of 2,710 informal merger reviews, only 63 or 2.3% resulted in formal opposition by ACCC, binding remedies, or withdrawal by the merger parties.[6]

Second, while a merger control regime is based on a policy objective of promoting competition and preventing the economic costs of anti-competitive mergers, false positives and false negatives have economic costs. As the Consultation Paper rightly recognizes, "both allowing anti-competitive mergers and blocking pro-competitive mergers can lead to lower output, higher prices, lower quality and less innovation". [7]

Third, while "allowing anti-competitive mergers means that merger parties benefit at the expense of consumers",[8] the economic costs of blocking or deterring competitively benign or pro-competitive mergers are borne by both merger parties and consumers, without any beneficiaries.

Fourth, a merger control regime imposes significant burdens on merger parties and consumes significant enforcement agency resources. To minimize such burdens on merger parties and to promote the efficient use of agency resources, a merger control regime should attempt to focus on mergers that are likely to raise competition concerns.

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[3] Consultation Paper, p 4.

[4] Consultation Paper, p 10.

[5] Recommended Practices, IV.B. Comment 1, V.A. Comment 1.

[6] Consultation Paper, Appendix A, p 7.

[7] Consultation Paper, p 29.

[8] Consultation Paper, p 29.

The remainder of the Group's comments reflect these general considerations.

2. Australia's Existing Voluntary Regime is Effective

In the Group's respectful view, Australia's existing voluntary regime has been effective in identifying the merger transactions that raise competition concerns. As the ACCC's enforcement statistics show, the ACCC has reviewed a substantial number of transactions and has taken focused enforcement actions in a small number of cases. As the Consultation Paper, acknowledges, enforcement action on mergers that were completed without notifying to the ACCC appears to be rare.[9]

The combination of (i) a voluntary notification regime, (ii) the jurisdiction to investigate and challenge all merger transactions (including those not voluntarily notified to the ACCC), and (iii) the possibility of significant penalties being imposed on any merger parties found to have breached section 50 of the *Competition and Consumer Act*, provides strong incentives for merger parties to self-assess their competition risks and proactively notify and engage with the ACCC where they recognize the possibility of competitive concerns.

A voluntary regime also has the advantages of allowing merger parties to avoid the unnecessary burden of making a filing and undergoing a review where they self-assess that there are not significant competition concerns, which in turn allows the ACCC to avoid dedicating unnecessary resources to reviewing unproblematic mergers.

3. The Proposed "Satisfaction" Test is Inappropriate for a Merger Control Regime

The Consultation Paper proposes a "satisfaction" test under which a notified merger can proceed only if the ACCC is satisfied that the merger is not likely to substantially lessen competition and grants clearance.[10] We understand that this proposed test essentially seeks to extend the existing merger authorisation process to apply to all mergers notified to the ACCC. This test reverses the burden of proof and put the onus on merger parties to demonstrate that their merger transaction is not likely to cause competitive harm to the market.

In the Group's respectful view, this proposed "satisfaction" test is inconsistent with a proper risk-based approach to merger control and is also inconsistent with the approach in other major jurisdictions.[11]

By putting the onus on merger parties to prove the lack of competitive harm, the proposed "satisfaction" test effectively treats merger transactions as a presumptively harmful activity. Such a presumption is inconsistent with the fact that the vast majority of merger

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[9] Consultation Paper, p 16.

[10] Consultation Paper pp 28-29.

[11] For example, the burden lies with the European Commission in the EU, the CMA in the UK, and with the FTC/DOJ initially in the US to prove a prima facie case.

transactions are competitively benign and pro-competitive and that blocking or deterring such merger transactions can result in economic costs for the general public as well as merger parties.

The proposed "satisfaction" test would also put significant unnecessary burdens on the vast majority of merger parties who are simply proposing to undertake a benign or beneficial activity. Merger parties, unlike ACCC, does not have the power or resources to obtain information required to discharge this reversed burden of proof. Such significant burdens on merger parties could deter many competitively benign mergers that would otherwise deliver benefits to the Australian economy. It would also be unlikely to produce significant resource savings for the ACCC, because the agency would still have to expend significant resources to review and consider all the information provided to it by merger parties.

In addition, the Consultation Paper proposes that the ACCC's clearance decision will be subject to merits and judicial review by the Competition Tribunal and the Federal Court.[12] The availability of merit and judicial reviews does not mitigate the issues raised in relation to the reversal of the burden of proof, as the Consultation Paper appears to contemplate that burden of proof would remain with merger parties even during merit and judicial reviews by the Competition Tribunal or Federal Court.[13]

In the Group's respectful view, a proper risk-based approach to merger control should treat merger transactions to be presumptively permissible, unless there is evidence of likely substantial competitive harm justifying remedy measures or outright prohibition. Therefore, An enforcement model, under which the ACCC or other interested parties must take legal action and prove their allegations of likely competitive harm, is the more appropriate model for merger control.

4. Any Mandatory Regime Should be Designed with Appropriate Notification Thresholds

The Consultation Paper proposes a mandatory notification regime as a potential option for merger control reform. As a common feature of merger control regimes in many major jurisdictions, the Group considers a mandatory notification regime could be an effective alternative to Australia's existing voluntary regime if it is carefully designed to focus primarily on mergers that are likely to raise competition concerns. A mandatory and suspensory notification regime with appropriately objective thresholds could provide merger parties with more certainty and efficiency in the merger review process.

If Australia is to introduce a mandatory regime, the Group appreciates that it would be aimed at addressing the concern that some anti-competitive mergers are not currently being notified to the ACCC before closing. However, the Group cautions that care must be taken in the

[12] Consultation Paper pp 27-28.

[13] Consultation Paper pp 28-29.

design of the notification thresholds so not to subject an overly broad set of merger transactions to mandatory notification.

First, the Recommended Practices caution that "merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction."[14] Further, the Recommended Practices advise that such a nexus to the reviewing jurisdiction should be based on activities "of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction."[15] In this regard, the Group observes that the proposed threshold – "an acquirer or target turnover threshold of $400 million or global transaction value threshold of $35 million"[16] – does not ensure a transaction has material nexus to Australia.

Second, notification thresholds should be based on objectively ascertainable criteria, so that there is certainty for merger parties as to whether they are subject to a notification requirement. In addition, the Group respectfully suggest that notification thresholds should be set at a level that would not significantly increase the number of notifications to the ACCC. As shown in the comparative statistics above, Australia's existing voluntary system is already resulting in notifications in numbers that are similar to mandatory regimes like the United States and Canada.

Third, a mandatory regime should provide appropriate exemptions for types of transactions that are not likely to raise competitive concerns. For example, the Canadian and US mandatory regimes exempt inter-affiliate transactions, certain minority acquisitions, and certain ordinary course acquisitions of goods and real estate. [17]

5. **Initial Information Requirements and Suspensory Periods are Appropriate if Reasonable**

The Consultation Paper raises concerns about merger parties providing insufficient or inaccurate information under Australia's current informal voluntary regime. [18] The Group appreciates that a lack of reliable information can hamper an agency's ability to effectively identify merger transactions that raise competition concerns. Under either a voluntary or a mandatory regime, it is appropriate to establish clear and specific information requirements for notification and it may be appropriate to require notifying parties to provide an attestation as to the correctness of the information provided.

Recognizing the importance of avoiding the imposition of unnecessary burdens on parties to mergers that do not present material competition concerns, the Recommended Practices also advise that "initial notification requirements should be limited to the information needed to

[14] Recommended Practices, II.B.

[15] Recommended Practices, II.C.

[16] Consultation Paper, p 24.

[17] Recommended Practices, I.A and I.B.

[18] Consultation Paper, pp 16-17.

verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation."[19] A short form or simplified procedure mechanism could also be adopted for the types of mergers that are unlikely to raise material competition concerns. Many jurisdictions, including the EU, have adopted such mechanisms.

The Consultation Paper also raises concerns about parties who notify a merger completing or threatening to complete their merger before ACCC completes its review.[20] The Group agrees that a suspensory period of a reasonable length may be appropriate for notified transactions, whether under a voluntary or mandatory regime, in order to provide the ACCC with appropriate review time. However, mergers are generally forward-looking and time-sensitive, and review processes should attempt to take this into account.

The Treasury may consider introducing a formal two-phase regime with an initial Phase I review period during which the ACCC engages an initial assessment of the merger to determine whether an in-depth Phase II review is warranted. In the Group's view, the length of suspensory periods, particularly the initial review period in a two-phase regime, should be set to be comparable to other major jurisdictions, for example an initial Phase I period of 30 days in Canada and United States and 40 days in the United Kingdom. [21]

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The Group commends the Treasury's important initiative to consider reform and modernization of the Australia's merger control regime and the decision to conduct this public consultation. Thank you for considering the Group's views. We would be pleased to respond to any questions or discuss this submission at your convenience.

Yours very truly,

William Wu

Copy to: Members of the Merger Streamlining Group

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[19] Recommended Practices, V.A. and V.B.

[20] Consultation Paper, p 15.

[21] Recommended Practices, IV.A and IV.B.