Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne VIC 3000
Wurundjeri Country
www.abl.com.au

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Competition Taskforce
The Treasury
Langton Crescent
Parkes ACT 2600

CompetitionTaskforce@treasury.gov.au

Partners
Matthew Lees
Direct 61 3 9229 9684
mlees@abl.com.au

Zaven Mardirossian
Direct 61 3 9229 9635
zmardirossian@abl.com.au

Dear Competition Taskforce

Submission to Treasury on the Merger Reform Consultation Paper

1 We refer to the Merger Reform Consultation Paper (**Consultation Paper**) published by the Treasury Competition Taskforce on 20 November 2023 regarding proposed reforms to the merger regime as part of the ongoing public review of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

2 We welcome the opportunity to draw on our experience advising clients in this area, including under the existing informal merger clearance regime, and make this submission in response to the Consultation Paper.

Summary

3 The existing regime works well for the vast majority of merger clearance applications and achieves the objective of preventing the completion of anti-competitive mergers in an efficient and low-cost manner. In particular:

(a) it is a flexible and informal process;

(b) the vast majority of merger clearance applications reviewed by the Australian Competition and Consumer Commission (**ACCC**) are for benign or pro-competitive mergers, which can be pre-assessed expeditiously under the existing regime;

(c) the high volume of merger clearance applications received by the ACCC demonstrates that businesses are already sufficiently incentivised to seek merger clearance where appropriate; and

(d) it is an efficient and low-cost way for parties to a proposed merger to obtain the ACCC's views on a proposed transaction before proceeding with it, without the additional costs associated with preparing evidence in a legally admissible form.

4 Nevertheless, for the following non-exhaustive reasons we believe that the existing regime can be improved in relation to the review of more complex or contentious merger clearance applications:

(a) *drawn out review timeframes* – where the ACCC takes a proposed merger to a phase 2 public merger investigation, a significant percentage of applications take six months or longer for the ACCC to review, after which there is the potential for a significant litigation process in which the ACCC's decision one way or the other has no particular legal significance;

(b) *lack of transparency* – as the ACCC review process is conducted wholly internally, applicants are provided with little information regarding the ACCC's reasoning and have a limited right of reply to third parties opposing the transaction; and

(c) *independence* – the consideration of complex, contentious merger applications should be undertaken by an independent judicial or quasi-judicial tryer of facts, whereas the ACCC's primary role is as the chief enforcement agency of competition law in Australia.

5 We believe merger applications should be triaged in accordance with the level of complexity of the proposed transaction and reviewed by the appropriate decision maker. We propose a dual-track system, under which merger parties can select whether to have their merger reviewed by the ACCC or the Australian Competition Tribunal (**Tribunal**). The ACCC would continue to deal with simple and uncontentious mergers with a confidential and efficient clearance process and the Tribunal, if requested, would decide applications for the limited number of more contentious or complex merger clearance applications through a more thorough, transparent and independent process.

The existing regime works well for the vast majority of cases

6 We do not agree with the ACCC's criticisms of the existing regime. In our view, the existing regime is an effective process that efficiently deals with the vast majority of proposed transactions. The issues with the existing regime emerge when considering the relatively small number of more complex or contentious merger clearance applications, as explained further below.

7 The ACCC has previously recognised the value of the current informal regime:

> "*Introducing aspects of a formal regime into our informal system will not work. It will destroy the timeliness and flexibility of the informal system that many prefer*".[1]

8 More recently, the previous Chair speaking about the current regime noted that:

> "*This is not to say that the informal regime is without benefits for both merger parties and the ACCC. The most significant is its flexibility. In addition, the pre-assessment process introduced in 2009/10 has been a game changer, by ensuring that non-contentious acquisitions are cleared expeditiously*". [2]

9 We agree. As a general observation, we also make the following points:

(a) the ACCC's position that our merger regime should be consistent with laws adopted in other jurisdictions is simplistic and not persuasive. The use of different legal tests elsewhere does not mean that those tests are best practice, immune from criticism or appropriate for Australia. The Consultation Paper notes that overseas jurisdictions including the US and EU are themselves conducting or have recently conducted competition reviews or reforms;[3]

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[1] Rod Sims, 'Enhancing competition policy address' (Speech, Law Council of Australia, Competition & Consumer Committee AGM, 12 September 2014) <Enhancing competition policy address | ACCC>.
[2] Rod Sims, 'Protecting and promoting competition in Australia keynote speech' (Speech, Competition and Consumer Workshop 2021 - Law Council of Australia, 27 August 2021) <Protecting and promoting competition in Australia keynote speech | ACCC>.
[3] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper, November 2023) 13.

(b) the fact that the ACCC has been consistently unsuccessful in its conduct of litigation to oppose certain mergers does not mean there is a need for reform to the merger regime, and should instead prompt reflection as to why the ACCC's arguments in each of those cases did not withstand judicial scrutiny;

(c) the judicial system provides a fundamental check and balance on the ACCC, underwriting the integrity of the merger regime. Without the discipline of potential judicial scrutiny, there would be a risk of deterioration in the quality of the ACCC's merger work including a greater risk of the ACCC being improperly influenced by its own policy objectives or other factors; and

(d) the informality and flexibility of the existing regime, as recognised by the former chair of the ACCC, is central to its effectiveness and efficiency. This feature would be lost through the introduction of a prescriptive clearance regime with rigid and formalised processes, diminishing the key and unique benefits of Australia's existing regime.

Voluntary notification

10 There is no credible data to suggest that merger parties are failing to notify the ACCC of contentious mergers to any significant extent. The data presented in the Consultation Paper and by the ACCC indicates that parties are in fact voluntarily seeking informal merger clearance in high volumes, with the ACCC receiving on average 333 informal merger clearance applications per year since FY2009-10.[4]

11 In our experience, it would be highly unusual for parties not to notify the ACCC of a proposed transaction where the transaction meets the threshold established in the ACCC's own merger guidelines. Failure to notify may expose a transaction to an unacceptable level of risk due to the ACCC's extensive investigative and enforcement powers, including its ability to require the production of documents, examine individuals under oath and seek an injunction to prevent completion of the transaction.

12 By the ACCC's own admission, it has been unable to estimate the number of problematic mergers failing to notify and acknowledges that it cannot determine how *"persuasive*" this argument for reform is due to the lack of information.[5] There are very limited examples of the ACCC taking enforcement action against unnotified transactions, with only three instances since the introduction of the current "substantial lessening of competition" test.[6]

13 Considering the high level of engagement by merger parties with the existing regime, the small number of notified mergers requiring public informal review and limited evidence of enforcement action against unnotified transactions, it is our view that failure to notify is not a compelling issue under the existing regime.

14 To the contrary, the data suggests that the existing regime is arguably causing too many uncontroversial mergers to be notified, although they are being assessed relatively efficiently. Under the existing regime the ACCC has cleared 93% of all notified mergers in the last five years under 'pre-assessment', with 93% of transactions in FY2022-23 pre-assessed in under four weeks (excluding time to

[4] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper – appendices, November 2023) 8.
[5] The Australian Competition and Consumer Commission, Submission to The Treasury, Competition Review Taskforce, *Merger Reform* (20 December 2023) [14].
[6] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper, November 2023) 16.

respond to requests for information).[7] The expeditious clearance of mergers through the pre-assessment process has been consistent over time.[8]

15 The effective operation of the existing regime and the high volume of voluntary notifications militates against the introduction of mandatory suspensory notification requirements. Such a prescriptive notification system is overly burdensome on the business community and is unnecessary – particularly where the ACCC is not subject to strict decision-making timeframes.

16 The high levels of notification and pre-assessment under the existing regime strongly indicate that there is little to be gained – and the risk of unnecessary burden and cost – from requiring merger parties to notify even more uncontroversial mergers. Further, the ACCC's demonstrated capacity to expeditiously clear mergers under the existing regime may not remain constant if the volume of notifications increase under a mandatory regime.

17 The setting of a legally-binding threshold will inevitably lead to disputes and complexity regarding how the threshold is set and its application to each individual merger. Importantly, a simple notification threshold would be a crude tool for identifying anti-competitive mergers and would inevitably require transactions which objectively do not and cannot have competition issues to notify the ACCC, wasting both public and private resources. For example, merger thresholds based solely on the financial size of the merger transaction or the merger parties will capture uncontroversial proposed transactions such as:

(a) a merger between parties where one party is in an entirely different market; and

(b) an acquisition by a private equity firm, where that firm has not previously acquired any or any significant business in that market.

18 Thresholds that require the merger parties to be competitors in some way are also problematic in that they lead to disputes about how the relevant markets should be defined, in order to determine whether there is any actual or potential competitive overlap.

19 The imposition of a simplistic "brightline" threshold suggests that the Australian business community lacks the sophistication and expertise to exercise their commercial and legal judgement in approaching the ACCC where appropriate. Based on the high level of notification and clearance under the existing regime, the ACCC should credit the Australian business community and its advisers with more common sense, instead of adopting a high-handed 'show me your homework' approach.

The merger test

20 Section 50 of the CCA does not require reform. It properly focusses on the fundamental issue of whether a merger is anti-competitive. The current merger factors in s 50(3) are non-exclusive, allowing the Court, Tribunal and ACCC to consider any other factors it considers appropriate. It is neither necessary nor desirable to over-complicate the legislation by importing the latest trendy economic buzz words into the drafting of section 50.

21 The strengths of the merger factors were highlighted by the former Chair of the ACCC, Rod Sims, when he noted that the merger principles are open-ended and flexible,

[7] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper – appendices, November 2023) 5; ACCC & AER, *Annual Report 2022-23* (Report, October 2023) 68.
[8] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper – appendices, November 2023) 9.

allowing for an assessment of market power and dynamic characteristics of markets.[9] Nothing in the Australian business landscape has changed in recent times that would justify the wholesale reform advocated for by the ACCC.

22 Suggestions that the existing regime is overly permissive fail to acknowledge the significance of an ACCC determination of an informal clearance application. From a commercial perspective, it is very difficult for both merger parties to remain committed to a transaction once it faces the legal and practical obstacles, delay and uncertainty created by the ACCC's opposition. Many potential mergers do not progress at all because of anticipated ACCC opposition. A significant proportion of merger applications withdraw following the ACCC publishing a statement of issues.[10] Further, most transactions opposed by the ACCC are withdrawn.[11]

23 The ACCC's ability to prevent potentially anti-competitive mergers in this way, coupled with the significant penalties for breach of section 50 (the maximum was recently increased to $50 million or potentially more), create a highly effective and flexible merger control mechanism.

24 In addition to the above, the ACCC has a demonstrated ability to stop mergers where it has legitimate competition concerns. A recent example is the ACCC successfully obtaining an injunction in the Federal Court in response to Virtus Health Ltd's proposed acquisition in 2021.[12]

Productivity

25 The Consultation Paper refers to claims of slowing productivity, dynamism and increasing industry concentration as warning signs that competition policy is in need of reform. However, there have been only about 16 contested mergers cases since 1978.[13] It is far-fetched to suggest that such a small number of cases over more than four decades have had a significant impact on the Australian economy as a whole.

Problems with the ACCC's assessment of complex or contentious mergers

26 In our submission, the problems with the existing regime lie not with the 93% of mergers that are cleared expeditiously but rather with the ACCC's assessment of complex and contentious proposed mergers.

Excessive timeframes

27 Where public informal reviews are undertaken by the ACCC, the reviews are often lengthy, lack transparency and subject the merger parties to high levels of uncertainty. The average time for a Phase 2 review (excluding time to respond to requests for information) has risen from under 60 business days in 2006, to almost 140 business days in 2023.[14] In FY2022-23, 44% of Phase 2 reviews took over 24 weeks.[15] In our

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[9] Rod Sims, 'Gilbert and Tobin seminar: the data economy speed' (Speech, Gilbert & Tobin seminar, 15 October 2018) <Gilbert and Tobin seminar: the data economy speech | ACCC>.
[10] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper – appendices, November 2023) 7.
[11] Julie Clarke, 'Reforming Australia's merger regime' (2021) 29 *AJCCL* 285, 289 citing Michael O'Bryan, 'Section 50: Should the Burden of Proof Be Shifted?' in Michael Gvozdenovic and Stephen Puttick (eds), Current Issues in *Competition Law: Volume II Practice and Perspectives* (The Federation Press, 2021) 170, 174. "Justice O'Bryan observes that since 2002 the Commission has opposed 69 mergers (excluding those resolved through enforceable undertakings) and in 59 of those cases parties decided to abandon their proposal", amounting to 86%.
[12] *Australian Competition and Consumer Commission (ACCC) v IVF Finance Pty Ltd (No 2)* [2021] FCA 1295.
[13] Holly Cao, Stephen King and Graeme Samuel, 'Contested Mergers and the ACCC's Proposed Merger Reforms' (2022) 50 *ABLR* 34, 39-45 identify 15 contested mergers before 2022. That makes 16 including ANZ's proposed acquisition of Suncorp Bank in 2023.
[14] The Treasury, Competition Review Taskforce, *Merger Reform* (Consultation Paper – appendices, November 2023) 9.
[15] ACCC & AER, *Annual Report 2022-23* (Report, October 2023) 67.

view, where a proposed transaction is sufficiently complex to warrant such a lengthy informal public review, the merger parties would be better served by a more transparent, formal and predictable review process conducted by an impartial decision maker.

Transparency

28 The existing regime lacks transparency, unlike proceedings before a Court or the Tribunal. Members of the public are not able to see the material that is put forward by the merger parties to support a merger decision (including non-confidential information), the merger parties are not able to see information that is put forward by competitors or other parties to oppose the transaction and the ACCC is not required to publish reasons for its decision.

29 In our view, this is unsatisfactory for major commercial transactions where there may be significant consequences for the parties – and potentially other commercial parties and the public generally. This is another reason why we consider the Tribunal would be a better decision maker for complex merger cases.

Factual assessments

30 The Tribunal, whose president must be a Federal Court judge, is also better suited than the ACCC to making factual determinations, particularly on issues such as the credibility of witnesses. A good example of the benefit of the judicial determination of these issues is the recent TPG and Vodafone decision, where a key issue was whether to accept the evidence of business executives about their business plans if the merger did not proceed.[16] The Federal Court ultimately accepted that evidence, with Middleton J properly acknowledging that business decision-making must be understood in context and recognising market dynamics and changes. The sophistication and agency of merger parties in the Australian business community must be recognised and evidence from involved parties should not be unilaterally discounted.

31 In our submission, it is not appropriate for the ACCC to be making decisions that require assessment of the credibility of witnesses. That is ultimately a function for a Court or Tribunal.

Reform options

32 The Consultation Paper proposed three distinct options for reform. However, none of those options address the problems with the existing regime identified above.

33 In our submission, for the above reasons there should be a "dual-track" process involving both the ACCC and the Tribunal as primary decision makers for merger clearance. The ACCC would review the majority of non-contentious mergers quickly with a streamlined process while the Tribunal would consider more complex or contentious applications with a more thorough review process due to the size, complexity or likelihood of competition concerns arising in a proposed merger.

34 We propose that merger parties be able to select which decision maker to notify. If the ACCC is notified but does not provide clearance, the parties can proceed with the transaction at the risk of ACCC enforcement, the parties can apply to the Tribunal for a *de novo* review, or the parties or the ACCC would retain the ability to seek a declaration from the Federal Court.

[16] *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117.

35 The Federal Court would retain the role of deciding whether there is or would be a breach of section 50, given the significant legal consequences in terms of penalties. The ACCC would issue a non-binding determination after assessing a merger, as is currently the position. The Tribunal would issue a binding determination that provides legal immunity from breach of section 50 (if the Tribunal clears the merger) or prevents the merger from proceeding (if the Tribunal rejects the merger clearance application), subject to any declaration to the contrary by the Federal Court, or a further application to the Tribunal as a result of a change in circumstances since the initial application.

36 The Tribunal would have the ability to clear mergers that involve a substantial lessening of competition that is outweighed by countervailing public benefits. The Federal Court's role in upholding section 50 would not take into account any countervailing public benefits.

37 This proposal would preserve the effective features of the existing regime, namely, the expeditious approval of non-contentious mergers, while creating an effective triage system with an independent and transparent review process for complex or contentious mergers. Parties would be incentivised to engage with the appropriate process in the first instance, reducing the administrative costs borne by the ACCC, the Court and businesses alike.

38 We consider this would have a number of benefits, including that:

(a) it retains and formalises the ACCC's expeditious review of non-contentious mergers. As discussed above, 93% of applications under the existing regime are approved at pre-assessment, and the "vast majority" of these applications are dealt with in four weeks.

(b) it incentivises merger parties to self-select the appropriate review process to minimise the delay and costs incurred. This promotes the efficient allocation of public resources by allowing the parties, who are best placed to assess the complexity of, and likelihood of competition issues associated with, the proposed merger, to determine the appropriate review process. If the merger parties anticipate their proposed transaction is likely to be considered complex or controversial by the ACCC, they would have the option of having their transaction reviewed by an independent statutory review body rather than the competition regulator. The Tribunal is comprised of legal and economic experts with the relevant and necessary knowledge and independence to make these complex decisions. This effectively utilises the Tribunal's "*expertise in making competition assessments*".[17]

(c) the "dual track" triage process promotes the efficient expenditure of public resources, as the Tribunal will review the more contentious and time-consuming merger review applications, meaning the ACCC would be able to focus its resources on expeditiously reviewing non-contentious mergers.

(d) the risk of the ACCC commencing proceedings, together with the substantial penalties for breach of section 50, would incentivise parties to seek merger clearance where there may be competition issues associated with a proposed merger and deter parties from completing mergers without clearance by the ACCC or the Tribunal.

(e) the final decision on a merger clearance application should be made by a judicial or quasi-judicial body. The ACCC is not designed to exercise final decision-making powers over the status of conduct under section 50 of the

[17] The Australian Competition and Consumer Commission, Submission to The Treasury, Competition Review Taskforce, *Merger Reform* (20 December 2023) [23].

CCA – such a determination should be reserved for the Court and the Tribunal which have greater expertise and are not influenced by policy objectives. The role of the Federal Court is an essential feature and safety net of the existing regime that should be preserved.

39 Finally, we comment briefly on the three options proposed in the Consultation Paper:

(a) **Option 1** proposes a voluntary formal merger clearance regime where the ACCC is the primary decision maker. For the reasons set out above, we consider complex mergers could be dealt with more appropriately by the Tribunal in the first instance.

(b) **Option 2** proposes a mandatory suspensory merger control regime. Under this option the ACCC would be required to commence legal proceedings in the Federal Court to prevent a merger. In our view, the retention of the Federal Court's role as an independent supervisor and guardian of the integrity of the merger regime is essential. However, there are a number of issues with proposed option 2, as detailed above, including the loss of the ACCC's flexible and expeditious assessment process for the vast majority of notified mergers under the existing regime.

(c) **Option 3** is the ACCC's proposal, which involves a mandatory formal merger clearance regime. Under this option, there would be compulsory notification of proposed mergers over a certain threshold, the ACCC would act as the primary decision maker, and it would have call in powers and the ability to consider the net public benefit. In our view, the inclusion of the net public benefit test is appropriate to allow for the broader assessment of merger benefits in suitable cases. However, we do not support mandatory notification or suspension for the reasons set out above. Also, under this option ACCC 'call in powers' would reduce the certainty provided by the proposed mandatory threshold and undermine the rationale for having the threshold in the first place.

40 Further, none of the Consultation Paper options include an effective mechanism to separate or triage the limited number of complex or competitively contentious mergers from the vast majority of benign or pro-competitive mergers. In our respectful submission, the Consultation Paper options do not address the issues explained above – that contentious or complex mergers are subject to extensive review delays, are part of an opaque process and are not determined by an independent judicial or quasi-judicial body. Our proposal would address this by giving merger parties the option to seek clearance directly from the Tribunal.

Conclusion

41 We are available to discuss any aspect of this submission.

42 Please do not hesitate to contact us if you have any queries.

Yours sincerely

Zaven Mardirossian Partner	**Matthew Lees** Partner	**Daniel Kelly** Lawyer