Treasury's Merger Reform Consultation Paper Submission

A Introduction

1 Allens welcomes the opportunity to comment on the Competition Review's Merger Reform consultation paper dated November 2023 (the ***Consultation Paper***).

2 The Consultation Paper asks whether Australia's merger control processes need changing and sets out three possible options for change. In addition, the Consultation Paper considers some changes to the substantive merger control test, primarily to address a potential concern that the current test may not adequately require decision-makers to focus on the structural impact of mergers on affected markets.

3 In our view, the case for change has not been made out. The threat of contravening section 50 of the *Competition and Consumer Act 2010* (Cth) (***CCA***) and the prospect of injunctive action by the ACCC—which the ACCC has demonstrated it is willing to take—means that most parties notify the ACCC of their proposed transactions. There is not sufficient evidence that there is a significant problem of mergers taking place that the ACCC is unable to review and, if necessary, prevent from completing.

4 Accordingly, in our view, Australia's current merger control regime is fit for purpose and does not need to be changed. However, we provide some initial comments on the three options set out in the Consultation Paper, as well as on the substantive changes that have been proposed.

B The current regime remains fit for purpose

5 Currently, the parties to a transaction have the option of seeking informal clearance or applying for formal authorisation. We believe the current regime provides flexibility and choice to the parties, while also providing the ACCC with wide powers and the ability to direct its efforts and resources in a targeted way. This flexibility would be lost with the introduction of a mandatory regime. We believe there is little evidence that the ACCC is failing to 'catch' undesirable mergers. A mandatory regime would require significant additional funding and resources with arguably little increase in the number of problematic deals caught.

6 At the moment, the ACCC can investigate any deal that gives rise to competition concerns, irrespective of transaction value or the size of the parties, which gives the ACCC very wide powers. Unlike other overseas regulators which might be subject to merger control thresholds (eg the US and EU), the ACCC can arguably establish jurisdiction more easily in respect of 'killer acquisitions' or mergers which might otherwise 'fly under the radar' on the basis that one party has little or no revenue. This flexibility enables the ACCC to direct its efforts in a targeted way, by focusing on reviewing transactions that are likely to have the most impact on competition, without regard to thresholds or other 'control' principles.

7 Australia is only one of many jurisdictions that companies engage with globally as part of their merger control strategy. When considering whether reform of Australia's merger control regime is required, it is important for Treasury to give consideration to the role of Australia in the global markets to ensure that Australia maintains its reputation as a destination where global companies want to do business. In our view, part of achieving this aim is having a merger control regime that takes a pragmatic approach in assessing global transactions, is effective, efficient and timely, and does not impose unnecessary costs or administrative burden on merger parties.

C The three options for merger reform

8 The Consultation Paper outlines that the Competition Taskforce is considering a range of possible options, drawing on experience globally. It asks stakeholders to provide feedback on whether Australia's existing regime should be retained, and on three possible options for change (and for any alternative suggestions). The Consultation Paper notes that all options would replace the current informal process.

Option 1

9 The Consultation Paper describes Option 1 as a 'voluntary formal clearance regime'. Under such a regime, while it will not be mandatory for parties to notify the ACCC of a merger, if the parties choose to do so, and the ACCC clears the merger, this will provide immunity from legal action. However, if the parties choose to proceed with a merger without notifying the ACCC or without having received clearance, the ACCC would need to commence proceedings to stop the merger. While we believe there are compelling reasons to maintain a voluntary regime, if this option replaces the current informal clearance process, it will in many cases make this a de facto mandatory regime as parties will wish to seek comfort from the ACCC to proceed with the merger.

10 In addition, it is not clear how a review of an ACCC decision by the Tribunal interacts with the requirement that the ACCC must commence court action to block a merger. The Consultation Paper notes that the decision-maker under Option 1 is the ACCC subject to review by the Tribunal. However, in circumstances where the ACCC must commence proceedings to prevent a merger, it seems to us that neither the ACCC nor the Tribunal is the final decision-maker, but rather, the Federal Court. It is therefore unclear from the Consultation Paper what role the Tribunal has under Option 1. We believe it is not only appropriate, but important, that the Federal Court is the ultimate decision-maker. This provides an important check on the power of the ACCC and is crucial in circumstances where most mergers are largely efficiency enhancing and do not negatively impact competition. The test under Option 1 also suffers from the requirement that the ACCC be 'satisfied', which we discuss further in relation to Option 3 below.

Option 2

11 The Consultation Paper describes Option 2 as a 'mandatory and suspensory regime'. Option 2 will provide the ACCC with both notification in a timely manner and comfort that transactions will be suspended while the ACCC has time to conduct its review. The ACCC is not prevented from investigating matters below the threshold. It also has the potential to provide a greater level of certainty for merger parties on whether notification is required and how long the process will take. Importantly, it also retains the role of the Federal Court as the final decision-maker.

12 In circumstances where the ACCC has acknowledged that 'most parties do not challenge the ACCC when it opposes tie-ups'[1] and that its concerns with the current regime relate largely to a 'small proportion' of mergers that are occurring, it is appropriate and important to retain the requirement for the ACCC to seek an order from the Federal Court to prevent an anti-competitive merger. While we acknowledge that pursuing litigation is resource intensive, it is required very rarely and is also likely to become easier for the ACCC if a mandatory suspensory regime with information requirements and filing fees is in place. Further, the overall costs of Option 2 (including litigation) are likely to be less than the overall costs of Option 3 given the likely

[1] Global Competition Review, 'ACCC concerned about US style merger regime', see https://globalcompetitionreview.com/article/accc-concerned-about-us-style-merger-regime?utm_source=Bamford%2Bset%2Bfor%2BCMA%2Breturn%2Bas%2Bnew%2Bexecutive%2Bmergers%2Bdirector&utm_medium=email&utm_campaign=GCR%2BAlerts

significant expense of preparing (for parties) and reviewing (for the ACCC) ACCC applications with a limited merits review to the Tribunal, as has been seen in the merger authorisation context.

13 The efficacy of Option 2, however, would depend on a range of factors:

- **Thresholds**: the thresholds for notification would need to be appropriately calibrated to avoid over capture, to ensure the regime is correctly targeted and does not unnecessarily raise ACCC (and taxpayer) costs. We consider that any thresholds would also need to outline a threshold level of domestic turnover that triggers notification. Without a domestic turnover threshold, we believe the thresholds proposed by the ACCC would result in significant over capture. Establishing thresholds is not straightforward, and jurisdictions with such thresholds have detailed guidance on how turnover is calculated and allocated to which jurisdiction, as well as what constitutes a corporate group. Such guidance would need to be developed, ideally with a level of consistency and convergence with other jurisdictions. Given the complex factors which will need to be considered in threshold design, it will be important for Treasury to publicly consult on any thresholds and applicable rules or guidelines. Industry needs are diverse and direct consultation with the affected industries on appropriate threshold design will help avoid the real risk of over-capture.
- It is also unclear from the existing proposals whether the informal review process will continue to exist. We believe that parties should be able to continue to seek comfort from the ACCC, especially if they are in a 'borderline' transaction that just falls below the threshold.
- **Process**: while Option 2 contemplates the introduction of upfront information requirements, overseas experiences show that it is not uncommon for merger regimes to also provide for a simplified or short-form process for mergers that are unlikely to raise any competition concerns. The ACCC has also publicly advocated for a process that involves the granting of 'waivers' within a short time frame for mergers that meet thresholds but do not give rise to issues. We consider that this will be an important element of any mandatory regime.
- **Upfront information requirements**: any such requirements should be publicly consulted on and should be appropriately framed having regard to the ACCC's existing broad information gathering powers. In our view, under a mandatory regime, the ACCC's information requests should be targeted and specific, rather than broadly framed, particularly for non-merger parties. This will be important to minimise the burden on non-merger parties and the potential disclosure of confidential information.
- **Timing**: Option 2 would need to incorporate statutory timeframes during which the regulator must make a decision, or the transaction will be deemed unconditionally approved (as in the EU). This would provide the merger parties with certainty as to timing and minimise information-gathering burdens.

14 The ACCC is of the view that Option 2 creates incentives for strategic behaviour.[2] For example, it considers that merger parties will have an incentive to provide insufficient or inaccurate information to the ACCC during the suspensory period to 'run down the clock' in circumstances where the ACCC ultimately bears the burden of proof in court should it choose to block a merger.[3] We think this concern is overstated. It suggests that parties are willing to undermine the ACCC's process and run the risk of needing to defend their position in Court, incurring significant time and costs. In our view, merger parties are in fact incentivised to engage with the ACCC throughout its

[2] ACCC preliminary submission at [36]-[43]
[3] ACCC preliminary submission at [38]

review and comply fully with any information obligations in order to avoid the very real threat of litigation.

Option 3: the ACCC's proposal and the problem with the 'satisfied' test in a mandatory regime

15 The ACCC is advocating for a mandatory formal clearance regime that would require mandatory notification of mergers above certain thresholds, while retaining a 'call-in' power. The ACCC would only grant clearance if it is 'satisfied' the merger is not likely to substantially lessen competition or will not result in a net public benefit if a merger cannot be cleared on competition grounds. This is largely an 'administrative model', with transactions requiring ACCC approval before they can proceed.

16 Both Options 1 and 3 contemplate a shifting of the burden of proving that a transaction does not substantially lessen competition to the parties. In both options, the ACCC will only grant clearance if it is 'satisfied' the merger is not likely to substantially lessen competition (although it appears from the Consultation Paper that, under Option 1, the ultimate decision would be made by the court). The 'satisfied' test is different from Option 2 and the current regime where the court can only prevent a merger if, on the balance of probabilities, it is likely to substantially lessen competition. This is an important difference and we have concerns with the use of the 'satisfied' test.

17 Under the current informal regime, a merger is unlawful if it will have the effect or likely effect of substantially lessening competition. The courts have interpreted 'likely' to mean a 'real chance', which must be proved on the balance of probabilities. This is a low threshold, but it has generally been fit for purpose in the context of the current voluntary regime where only those mergers that are likely to pose competition issues are opposed by the ACCC. Whether a merger is likely to have the effect of substantially lessening competition is ultimately a question for the Federal Court to decide.

18 While the 'satisfied' test has been used in the non-merger authorisation process for some time, it is generally in respect of conduct that would otherwise be contraventions of the CCA (such as cartels or arrangements that substantially lessen competition) where the effect of the conduct is outweighed by a public benefit. This reflects the presumption that the conduct is anti-competitive and, arguably, it is appropriate that the ACCC or Tribunal are satisfied that the public benefit outweighs the detriment in these circumstances. In the merger authorisation context, the 'satisfied' test is part of a voluntary process which is generally utilised by those mergers likely to raise competition concerns and where there may be a public benefit. In contrast, in circumstances where most mergers do not raise competition concerns, it is not appropriate to require the ACCC to be 'satisfied' that they are not anti-competitive. This is an inappropriate burden on the parties and does not reflect the approach in overseas jurisdictions.

19 The ACCC's proposal also involves its decision being reviewable by the Tribunal on the evidence before the ACCC, rather than by the Federal Court. As already noted above, we believe that it is both appropriate and important that the evidence can properly be tested in a court or tribunal, including through adducing new evidence and cross-examination. The current authorisation process, where parties are limited to the evidence before the ACCC, not only makes the ACCC process extremely onerous but does not allow for a proper testing of the evidence on appeal.

20 Under any administrative model, we believe there would also be a greater need for transparency. In particular, there would need to be appropriate transparency in respect of the ACCC's concerns, reasoning and decisions, including the evidence it has relied on, in a timely manner. Limited transparency can materially hinder parties' ability to understand precisely the reasoning and evidence on which the regulator relies when identifying concerns about transactions. Increased

transparency should be coupled with 'rights to be heard', as exist in other jurisdictions (eg in the EU there is the oral hearing, and in the UK the hearing process is a core feature of the merger regime). These are very important in an administrative model.

D Other changes to the substantial lessening of competition test

21 The Consultation Paper also discusses the ACCC's proposal to change the test for whether a merger is likely to substantially lessen competition. This includes three options:

- **Option A:** to amend section 50(3) of the CCA, which sets out 'merger factors' to which the ACCC may, and Federal Court must, have regard by:
  - amending the merger factors that a decision-maker must take into account when assessing the impact of mergers to include creeping acquisitions, loss of potential competition, access to or control of data and other significant assets, market power, interlocking directorships and to expressly refer to the changes in market features resulting from a merger; or
  - removing the factors from the legislation to simplify the 'substantial lessening of competition' test.
- **Option B:** to expand the 'substantial lessening of competition' test to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'.
- **Option C:** to allow the consideration of related agreements (eg non-competes).

22 Currently, section 50(3) sets out a list of 'factors' the Federal Court *must* take into account in considering whether a transaction will substantially lessen competition. It does not limit the matters that the Federal Court, and of course the ACCC, *may* take into account. In practice, the ACCC can and does take into account a broad range of matters when assessing a transaction against the 'substantially lessening competition' test. It does already take into account matters such as the loss of potential competition, access to data and interlocking directorships. The possible changes set out in Options A, B and C can and should be considered as part of the 'substantial lessening of competition' test. The ACCC is a very experienced authority capable of conducting effects-based analyses. Introducing any prescriptive requirements risks unnecessarily over-complicating the 'substantial lessening of competition' test and undermining the inherent flexibility and effectiveness of the current test.

23 Specifically, we do not agree with the proposed expansion of the 'substantial lessening of competition' test as outlined in Option B to include mergers that 'entrench, materially increase or materially extend a position of substantial market power'. An effects-based assessment should already capture deals that lead to an entrenchment of market power. Expanding the test to account for this could also create an undue focus as to whether the merger parties have substantial market power. This will lead to detailed and expensive analyses as to market definition which are inherently difficult. While there are jurisdictions, such as the EU and a number of European Member States, that have regard to whether a merger would create or strengthen a dominant position, this is done in the context of an overall assessment of the effects of the merger on competition.