AUSTRALIAN INVESTMENT COUNCIL

13 August 2024

Competition Taskforce
The Treasury
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Dear Taskforce members

Merger Reform – Consultation on exposure draft legislation

The Australian Investment Council (the Council) welcomes the opportunity to provide this submission to Treasury in response to the release of the exposure draft of Treasury Laws Amendment Bill 2024: Acquisitions (Exposure Draft) which seeks to deliver the merger reforms announced by the Treasurer in April 2024. This submission follows and should be read in conjunction with the Council's earlier submission (see Appendix).

The Council is the peak body for private capital in Australia and has over 220 members, including the leading domestic and international private capital firms operating in Australia. Private capital spans private equity, venture capital, private credit, family offices, superannuation and sovereign wealth funds. These are members of Australia's investment community that collectively invest in more than 850 businesses economy-wide, mostly small and medium-sized, are responsible for more than 600,000 full-time jobs and contribute three per cent to Australia's GDP (on a gross value-added basis).

The Council represents our members on policy issues that impact investment into Australia, including: maintaining a steady and reliable flow of domestic and foreign investment capital; harnessing and empowering innovation to support the national interest; building and retaining a world class talent pool; and addressing the challenges of climate change to realise the opportunities of a net zero world.

The Council recognises the overarching policy objective of Australia's merger control regime is to promote competition that enhances the welfare of Australians, consistent with the objectives of the *Competition and Consumer Act 2010*. We also recognise the Government's objective to foster a more dynamic and productive economy through competition.

The primary purpose of a merger is to drive efficiencies, combine assets and leverage the better resources, talent and capital available across the merging entities. Mergers have proven to be a pathway to a greater competition in a market, particularly where it leads to smaller, challenger businesses building the scale to credibly compete against larger incumbents.

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Investment (whether by way of acquisition of shares and/or assets; for convenience, merger and acquisition activity) can deliver outcomes such as:

- helping fast-growth companies access new markets, talent, products and services to support their growth and expansion strategies;
- adding value to, and reshaping, companies which otherwise, may not remain independently viable;
- assisting companies to build scale in Australia to better compete in larger, global marketplaces;
- assisting companies in achieving strategies that support growth, innovation and productivity in the Australian economy; and
- enabling entrepreneurs to realise the value in their business, thereby rewarding them for taking risk adding to economic activity.

These are desirable outcomes as they support competition, help businesses that play an important role in a community remain viable, commercialise innovation, and provide business owners with a pathway to be rewarded for their entrepreneurship.

Our response to this consultation is based on the perspectives and experience of private capital investors within our membership. Key focus areas for our members include:

- ensuring the regulatory framework governing merger activity facilitates commercially viable merger transactions and supports vigorous competition;
- recognising the unique merger needs and practices across the business spectrum ranging from early-stage to growth and buyout businesses;
- establishing a framework that is consistent with the requirements of Australia’s growing investment environment and broader M&A activity both domestically and internationally; and
- ensuring that the regulatory framework for mergers does not create stifling uncertainty, cost and delay.

Accordingly, the Council considers it critical that the regulatory settings of Australia's merger regime to be appropriately calibrated to facilitate smooth, expeditious and predictable pathways for investment flow, while enabling effective scrutiny of the small portion of merger and acquisition activity which might give rise to anti-competitive effects.

Even where the broad parameters of a regime are reasonable in principle, it is equally important the formulation of implementing legislation is not cast in terms which create unintended consequences, lead to uncertainty and/or involve excessive regulatory discretion.

The Exposure Draft, as currently formulated, raises a number of issues in this respect. This submission sets some of these issues at a high level, but does not seek to canvass all issues, particularly those arising from technical drafting issues which the Council expects will be covered in detail by other submissions.

Further, for domestic and international investors, certainty and speed to market are critical, particularly when there is a competitive process to acquire a business. Other regulatory processes in Australia have led to considerable delay and cost for investors, regardless of statutory approval timeframes. Domestic and international investors do not need to deploy capital in Australia, and the Council constructively suggests that this set of merger reforms must strike a sensible balance between policy intent and supporting the flow of much-needed capital to Australian ideas and businesses.

The Council would welcome further direct consultation with Treasury on the issues raised in this submission as part of Treasury's consultation process on the Exposure Draft before the draft legislation package is finalised. We also note that at this point, the consultation process on thresholds has not commenced. This is a critical component of the reforms and would strongly suggest that Treasury's consultation on this aspect is thorough, to ensure that the bar is not set so low as to be dissuade what would be otherwise competition-enhancing merger activity.

If you have any questions about specific points made in this submission, please do not hesitate to contact me or our policy team via email at policy@investmentcouncil.com.au.

Yours sincerely

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1. Summary

This submission sets out a range of concerns held by our members on the form and impact of the Exposure Draft, including:

- a lack of certainty and clarity around the 'acquisitions' caught by the regime;
- the length of the review process, and potential for significant, extended delays;
- a lack of procedural fairness and transparency for transaction parties in the context of moving to an administrative regime;
- uncertainty as to how the 'cumulative' effect test applies in practice; and
- the low bar for the ACCC to block a transaction.

Below, the Council has outlined the impact of these issues on private capital investment, which is largely made into small and medium-sized businesses (SMEs) including start-ups and growth companies.

2. Importance of appropriate settings for regulating mergers and acquisitions

Merger regime settings are of vital importance to our members and the businesses in which they invest. Merger activity is not the exclusive domain of large, well-resourced businesses. Being acquired or merging with another business is a common way for SME businesses to grow, and potentially provide stronger competition for larger incumbents in a given industry.

Therefore, a merger clearance regime is a significant factor in determining how easy – or difficult – it will be for SMEs, their founders and their investor-backers to exit through a sale process.

For private capital investment, merger activity is crucial in two ways:

- as a driver of the value created when scale benefits enable businesses to grow and access new markets; and
- for investors in these businesses, as a necessary milestone in the investment cycle.

In doing this, the ultimate aim is to contribute to the Australian economy in a number of ways, including:

- contributing to a more competitive market dynamic (often supporting or reviving market players to create a viable market alternative) that is beneficial to consumers and the wider economy;
- encouraging and harnessing innovation;
- through the creation and maintenance of Australian jobs; and
- delivering lower prices, improved quality and service for consumers, businesses and the wider community.

For investors, merger activity can serve multiple purposes, including the deployment of transformation capital to distressed businesses, often within tight timeframes, and under existing regulatory approval frameworks (such as FIRB) and amidst significant structural complexity and uncertainty.

One example of the benefits of the merger and acquisition process is provided by a member who acquired a struggling food chain. It was acquired and combined with another struggling business in the same industry. Together, with reinvigorated business processes and funds to allow the business to quickly scale, the chain is now a strong competitor to the dominant market provider, delivering a competitive price environment for consumers as well as support to an important franchise network of small businesses and community employers across Australia.

Another example is in relation to smaller local Australian players that compete in a global marketplace and where consolidation locally would assist competition globally.

A merger regime which is unnecessarily restrictive and lacks specificity risks diminishing investment into and in Australia – including by creating a barrier to entry by increasing the height of the barriers to exit. By stifling investment incentives, there is a significant risk to the likelihood of entry and innovation, and ultimately, on the likelihood of disruption to the ecosystem that fuels competition.

Merger activity is also a means for entrepreneurs to facilitate generational handover, particularly where there is no successor within a family. Usually, the sale of a business to another industry participant is the pathway for the entrepreneur to realise their investment. There are more than 67,000 privately held businesses in Australia (with more than 20 employees). A merger regime that is unduly onerous on, and costly to, small and medium-sized businesses, including limiting exit options, would place a disproportionate burden on them.

3. Thresholds not yet released

Importance of further consultation

The Council notes previous advice from Treasury that it would conduct consultation on the threshold. We also note that the Exposure Draft does not include proposed thresholds which determine which acquisitions will require notification to the ACCC. This makes it difficult to assess the practical impact and reach of the Exposure Draft in its entirety, but this issue is critical for the private capital investors.

Setting thresholds at an appropriate level, which does not over-capture and does not under-capture transactions, is critical to the workability of the regime. This is particularly so given the very broad definition of ‘acquisition’ in the Exposure Draft.

An approach that may be suitable in terms of timing and notification requirements where thresholds are high, may not be suitable where the thresholds are low. This includes the

proposed fee regime and the obligations to file sensitive internal documents relating to a transaction, including the commercial rationale, strategy and competitive dynamics.

There is a particular sensitivity if thresholds are set too low, or there is uncertainty as to whether thresholds are met (a scenario in which the default decision of parties will be to notify, given the potential voiding of a transaction otherwise), as the impact of the workload on the transacting parties will be extreme for the private capital sector, in which mergers are often small, but very fast. The Council also notes the companion workload for the ACCC under this scenario.

For these reasons, the Council hopes there will be proper and adequate consultation on proposed thresholds. In this regard, aspects of the Council's previous submission on the ACCC's proposed thresholds bear repeating:

- The Council notes the ACCC's initial indication of two potential thresholds being a combined turnover threshold of A$400 million or a global transaction value threshold of A$35 million.
- The average transaction value for all mergers in FY2023 was A$92.9 million[1], well above the threshold of A$35 million that is being proposed.
- The proposed thresholds appear low compared to other jurisdictions and warrant further consideration. As a point of comparison, in the EU, the European Commission examines larger mergers with an EU dimension that reach high turnover thresholds.[2] These thresholds are significantly higher than those contemplated by the ACCC and emphasise the need to work through proposed thresholds to ensure they are set at a workable level for all transaction types and reflect the size of the companies involved in the proposed transaction.

Bases for determining thresholds

As noted previously, in general, turnover or transaction value are better determination thresholds, rather than attempting to determine market share. Applying market share thresholds requires parties to engage with the ACCC to be satisfied the same view of the market is adopted, which is often an area of considerable contention in competition law and economics. This could create additional cost upfront as each follow-on acquisition (this is called a 'bolt-on' acquisition) will require a significant level of complex analysis to determine

[1] M&A Activity Year in Review 2023, HLB Mann Judd

[2] These are assessed in two alternative ways. The first alternative requires:

1. a combined worldwide turnover of all the merging firms over €5,000 million and
2. an EU-wide turnover for each of at least two of the firms over €250 million.

The second alternative requires:

1. a worldwide turnover of all the merging firms over €2,500 million
2. a combined turnover of all the merging firms over €100 million in each of at least three Member States
3. a turnover of over €25 million for each of at least two of the firms in each of the three Member States included under ii (see Article 1 of the EU Merger Regulation)[2] and
4. EU-wide turnover of each of at least two firms of more than €100 million. In both alternatives, an EU dimension is not met if each of the firms archives more than two thirds of its EU-wide turnover within one and the same Member State.

the definition of the market - on which reasonable minds can differ. Turnover or deal value thresholds are not plagued with this need to determine an appropriate definition of 'the market'.

This is particularly relevant where the size of the bolt-on is small relative to the cost associated with the upfront analysis. A better approach would be to have an objective notification threshold such as revenue of the target (to be set at a reasonable level, like those in the EU and USA). The turnover thresholds should also require some effect of the transaction on a market in Australia for the regime to apply (e.g. by requiring both acquirer and target to have a presence or sell to customers in Australia).

If turnover and transaction value thresholds are adopted, these should be consistent with regimes in other jurisdictions, including the European Union, which provides detailed rules and guidance, and would reduce the need to perform separate calculations for Australia. In this sense, thresholds may impact global deals to the extent an entity has to file in Australia only – acting as a deterrent to investment in Australian companies.

It is important to note that a $400 million combined revenue threshold is likely to capture every bolt-on acquisition, regardless of the size of the business, particularly in businesses where the platform is of medium/large size.

While the Council understands the intention of the regime is to scrutinise deals in which a series of bolt-on acquisitions give rise to competition concerns, there may be unintended consequences from requiring every $5-10 million earned value (EV) bolt-on to seek approval from ACCC purely as a result of the size of the platform business. A better approach would be to have an objective notification threshold based on the revenue of the target alone (rather than a combined revenue target). An alternative would be to require notification where both the revenue and target EV thresholds are met.

The process for mergers falling below the (provisional) clearance regime requires further clarification. The Council would welcome the opportunity to work with Treasury through further consultation to set thresholds and to further discuss the practical implications of the Exposure Draft legislation on the private capital sector.

4. Acquisitions subject to regime

Uncertainty relating to acquisitions captured and excluded

The Exposure Draft states that the acquisition provisions do not apply to the acquisition of shares in the capital of a body corporate where the acquirer does not, following the acquisition, 'control' the target (s51ABC). The language included in the Exposure Draft encompasses a broad version of control, expressed as practical influence, or a practice or pattern of behaviour affecting the policies of a company. This differs from the well-established Corporations Act concept of control.

Under the Exposure Draft, all acquisitions for 20 per cent or more of voting rights are presumed to be a transaction which provides the purchaser with control of the target and are therefore notifiable transactions. This percentage is very low for most private capital investment

transactions – typically a party with a 20 per cent voting rights in an entity would not have control as described by the draft legislation. Applying this threshold will ensure that multiple passive investments are caught by the regime. While it may be possible that on closer analysis the presumption can be displaced, the need to disprove control at such a low threshold will create a heavy burden on private capital seeking to invest in Australian businesses.

There is also uncertainty and complexity in relation to the practical application of the definition. The definition of control may not be met in some circumstances but may be met in others, and there may be room for differing views. The requirement to rebut this presumption (s51ABC(2)(b)) means that a party will need to go to the expense of making an application to rebut a presumption, even where there is only one matter on which a party may ‘directly or indirectly determine the policy’ of a company.

For a mandatory, suspensory regime to operate effectively while supporting investment in the Australian economy, the regime must provide parties with the ability to readily determine whether the relevant acquisition needs to be notified. The proposed framework under the Exposure Draft does not enable this to occur. Given the consequences of failing to notify where required, whether or not an acquisition requires notification should be a relatively 'bright line' exercise and based on Corporations Act principles which are well-understood in Australia. Without this, the regime will create considerable uncertainty, unnecessary expense, and deter investment.

5. Substantial lessening of competition

Different tests for disallowance and approval

The Council notes that, the Exposure Draft outlines the bar for the ACCC to disallow a transaction on the grounds it will create a ‘substantial lessening of competition’ (SLC) appears ambiguous, requiring only a reasonable belief.

By contrast, the bar for the ACCC to allow a transaction to proceed on public benefit grounds is higher – requiring them to be satisfied on reasonable grounds. The Exposure Draft Explanatory Materials do not explain why the standard should be different.

Consideration should be given to adopting a consistent standard and one which is not unduly low. The Council considers that disallowing a transaction on SLC grounds should at least require the ACCC to be satisfied on reasonable grounds that the transaction will have the effect, or likely effect, of SLC – not merely because the ACCC 'reasonably believes' that an SLC is likely, which is a highly subjective standard and leaves significant discretion with the ACCC which would be difficult to challenge. In turn, this would undermine accountability and the credibility of the regime.

Changing the definition of SLC throughout CCA

Proposed changes to section 4G change the meaning of SLC to include reference to creating, strengthening or entrenching a substantial degree of power in a market. The Council notes

that the proposed changes to the meaning of SLC in s4G apply not only to the merger regime, but throughout the *Competition and Consumer Act 2010* (CCA), including to the misuse of market power prohibitions, exclusive dealing and concerted practices.

This is a significant change to concepts underpinning key components of the CCA – including provisions which are subject to heavy pecuniary penalties. These concepts are drawn from the European Commission prohibition, which is focussed on dominance, rather than a dynamic forward-looking view of the competitive landscape with and without the merger. But unlike the EC law, the new prohibition would incorporate both concepts. This would reflect a significant departure from the well-established SLC standard of Australian law. Given the far-reaching ramifications of these changes, not only to the merger control regime but more broadly across Part IV of the CCA, the proposals have involved little consultation. The Council considers it would be appropriate for this to be subject to separate, detailed consultation.

Creeping acquisition and cumulative effect of acquisitions

The Exposure Draft seeks to regulate so-called 'creeping acquisitions' through a deeming 'cumulative' effect provision. The transaction at hand is thereby taken to have the effect, or likely effect, of SLC if the 'combined effect' of that transaction and any acquisitions put into effect over the preceding three years, in the same industry, which involve any of the transaction parties or any of their related bodies corporate, would have the effect or likely effect of SLC.

These provisions make Australia an outlier. There are no other jurisdictions with a mandatory retrospective roll-up assessment of previous acquisitions. This will lead to additional time, cost and complexity in acquisitions where acquisitions have *already* been approved by the ACCC. Examples of additional burden include transaction processes, where it is likely to necessitate extensive due diligence by both parties to determine the acquisition history of the other party and any related body corporates. It may also lengthen the preparation time for notifications if parties are required to file details of past transactions in order to have a valid notification.

For private capital investors, there is a lack of clarity as to how these cumulative provisions will apply to the sector. For example, there is a degree of ambiguity as to whether an initial acquisition, made with the intention of acquiring additional, similar businesses (a ‘platform acquisition’), will be caught in the notification threshold in the context of the cumulative effect of previous acquisitions. Members have also noted the need for explicit confirmation that the three-year look-back cumulative provisions are assessed on an asset-by-asset basis rather than a whole of fund/whole of firm basis. This reflects the standard operating structure of a private equity or venture capital firm. The Exposure Draft would benefit from clarifying these aspects.

In the context of a platform acquisition, the three-year look-back provisions will require more extensive diligence to ensure that acquisitions completed by the acquirer and the target over the preceding three-year period (including acquisitions notified and approved by the ACCC) will not then trigger a breach of the merger approval regime as a result of the platform acquisition (in relation to the cumulative effect of the previous acquisitions in the last three years), potentially deterring investment.

6. Process and timing for considering acquisitions

Timelines and delays
The Council is concerned that the impact of the timelines outlined in the Exposure Draft legislation may lead to additional financing costs and may act as a deterrent to lenders and investors.

The Council generally agrees with the principle of setting timelines for the ACCC's consideration of each notified acquisition.

Nonetheless, the Council emphasises that the impacts of long timelines and delays in decision making can be significant and highly detrimental to a transaction. Accordingly, the timelines being set must not be unduly long or be irrational.

Under the Exposure Draft, Phase 1 and Phase 2 approvals could take longer than six months, significantly longer for transactions where the parties wish to put forward public benefits. This cumulatively is considerably longer than the current merger authorisation process timing of 90 days. For those more complex transactions, the new regime is likely to be slower, not 'faster', than the current regime.

Additionally, - there are numerous mechanisms by which the 'clock' can be stopped, and timing extended, at the discretion of the ACCC, for the duration of the process. This extends to the ability, even at the end of the process, to decide there is a material change in fact and return the notification to the start of the process again. Such discretion makes the regime less predictable for parties and investment generally. The parties, by contrast, have limited rights to extend timing where this might be required or useful.

While some ‘clock stoppers’ are a necessary component of the regime, as currently formulated, the Exposure Draft is likely to lead to considerable uncertainty and/or delays from a timing perspective.

This has a number of practical effects for private capital as lenders and investors may be hesitant to commit funds over an extended period (and one lacking timing certainty), potentially leading to re-negotiations or adjustments to financing terms.

In addition, financiers typically require an incremental cost on an acquisition financing facility after 90 calendar days. This is a cash cost which will accrue to the acquirer as a result of this longer merger approval regime.

Finally, the proposed amendments provide that an acquisition must not be put in to effect in a number of circumstances, including where it has been notified to the Commission, but the Commission has not determined that it can be put into effect. This suspensory regime means acquisitions are rendered void if put into effect without determination, even in circumstances where the Commission may have failed to meet its own timeframes as put forward in the legislative framework. In practice, this puts an unreasonable level of uncertainty around the framework.

Uncertainty and delays are significant in terms of their impact on both the transaction at hand, and future investment decisions by the investment community at large.

Preparatory requirements prior to Phase One commencement

There is the potential for a significant volume of work, and therefore time, in agreeing the form and content of the initial submission to the ACCC prior to commencement of the ACCC's review timeframe.

Pre-filing engagement with regulators under mandatory processes can be lengthy. For example, in the EU, this process can take up many months and often over a year for complex matters prior to the review process starting. This can be exacerbated if the merger authority is non-responsive or has no obligation to engage in good faith with the applicant. A preferable position would be to have an obligation on the ACCC to engage in good faith in relation to agreeing the form and content of the initial submission, as well as having the ability to start the consideration where a submission is materially complete.

The Exposure Draft contemplates that notification of a merger be made in prescribed form. The Council suggests that form requirements are provided for consultation to ensure that they are not unintentionally unwieldy or burdensome, particularly in terms of the provision of internal documents company to the ACCC. If not balanced, these upfront filing requirements will create additional burden, time, and cost and may not deliver key information to the ACCC.

The Council suggests there would be significant utility in ensuring there is appropriate bilateral engagement between the ACCC and the applicant prior to review commencement to ensure the most relevant materials are provided and time is not spent on producing non-essential documentation.

Necessity for quick turnaround in certain types of private capital transactions

The potential impacts on the speed at which a transaction may be undertaken are particularly relevant where a transaction may be taking place to avoid an entity from exiting the market (a distress/turnaround situation) and the transaction must take place within limited timeframes. Some transactions must be fast to preserve the ability of the relevant businesses involved to keep trading. An example of a members' acquisition of an advisory firm in a three-week period is a demonstration of this situation: the acquisition maintained nearly 2,000 Australian employees in full time employment and continued the provision of services to government health, infrastructure and defence agencies.

If transactions cannot take place at speed, including because of a long regulatory process, the business model of some funds is at risk, particularly those whose business model is premised on moving quickly in order to save, rebuild, and ultimately sell, flailing businesses. Slow regulatory approvals will have a profoundly adverse effect on the business model of Council members that adopt this strategy (and which is pro-competitive in that it ensures that some entities remain in, and do not exit, the market) as well as of other market participants, such as high net worth individuals who often step in to provide urgent capital to support businesses under stress.

Slow regulatory approvals could also lead to the risk that sellers of assets will choose not to engage with participants that have existing assets in the market (who would therefore require ACCC approval under the new regime), which could lead to inefficient markets in the sense that many mergers produce savings by allowing merged firms to reduce costs, eliminate duplicate functions, and achieve scale economies.

Finally, market conditions can change during a lengthy regulatory process, impacting the valuation of the target company. Fluctuations in economic conditions, industry trends, or interest rates could affect the perceived value of the investment.

Timeframe determined by business days

The current proposal for up to 120 business days in a Phase 1 and Phase 2 review equates to 24 weeks (or 5.5 months), plus a further 50 business days for public benefit application. This timing applies from when the ACCC accepts the notification as valid. When combined with pre-filing engagement with the ACCC prior to commencement of the formal timeline, this could lead to significant delays. This may necessitate that long-stop or sunset dates for acquisitions (regardless of size) be set at longer than six months, which would not be in line with current market expectations today, or standard acquisition timeframes in other jurisdictions.

Process interruptions

Members expressed concern in relation to the ability of the ACCC to interrupt the review process or 'stop the clock' on a discretionary basis, or to defer commencement of the notification process if it believes that the notification is materially incomplete.

Members also expressed concern in relation to the undefined concept of "reasonable consideration" where the ACCC may make a determination that it reasonably considers a notification to be incomplete and a requirement that a determination is also made within a reasonable period (i.e. without a set timeframe) is also likely to impact timing of the transaction.

The lack of clarity of these proposed features create a sense of uncertainty that undermines the proposed Fast-Track and Phase One process timelines, the integrity of which is critical for private capital investors. Such uncertainty has potential to stifle the acquisition processes of SMEs.

There are significant contractual consequences of process interruptions and delays:

- The parties involved may need to revisit, and potentially amend, the terms of the acquisition agreement to account for the extended timeline. This may involve negotiating extensions, revising conditions, or addressing other contractual considerations.
- Transaction documentation can often include provisions allowing either party to terminate the deal if certain conditions, including regulatory approval, are not met within a specified timeframe. Delays may trigger termination rights and require re-negotiation or extension of these provisions.

One member provided the example of an acquisition of a business that was in financial distress. Delays in regulatory approvals (at the time the primary one being FIRB) presented a delay in the deployment of capital, ultimately putting the business and the approximately 8,000 Australian jobs within that business, at greater risk as time went by. Importantly, transaction mechanics took into account the financial needs of the business and the significant amount of work that needed to be undertaken by the investor; as a result while the acquisition was going through the FIRB review process, the acquisition was effectively changing as time progressed.

The Council strongly supports the Treasury commitment "…to provide certainty to parties that the form and accompanying requirements will not be subject to disallowance" however, the unclear, layered obligations relating to information provision, combined with the discretionary ability for the ACCC to interrupt and pause process timelines, are a source of concern for the Council's members.

Procedural fairness and transparency

The Exposure Draft introduces a mandatory, suspensory regime in which the ACCC acts an administrative authority with power to decide whether or not a transaction can proceed.
In introducing an administrative regime, and affording such powers to the ACCC, corresponding rights need to be afforded to transaction parties or the regime will lack the requisite procedural fairness and rights that administrative regimes require.

The Exposure Draft does not do so. While the Council understands that the Exposure Draft seeks to draw from overseas regimes, in particular the EU, there appears to be asymmetry in the relative rights and obligations afforded to the ACCC relative to transaction parties.

Consideration could be given to the introduction of procedural rights for merger parties such as those that currently exist in the EU. For example, the right to be heard and respond to the evidence and arguments against the merger (including the right to an oral hearing before the decision-makers) and full access to the file.

In the interests of transparency, there should also be requirements for the ACCC to present all of its evidence to the parties by a particular deadline in the review timetable to allow the parties sufficient time to review and respond. Further, where an assessment process has been undertaken it is important to provide a 'market feedback' assessment to companies so that decision making is transparent.

Providing more detail on the ACCC's decisions would help to improve the precedential value of those decisions and their outcomes.

At the very least, the new regime should provide the same level of transparency as the current regime offers. For example, the requirement for third party submissions to be published on the ACCC website in the current merger authorisation regime (with an ability to redact trade secrets, etc) should continue to be a feature of any mandatory regime. This offers an important way for parties to correct misunderstandings and leads to more robust and better decision-making by the ACCC.

Limited merits review

The Council notes that ACCC determinations will be subject to limited merits review by the Australian Competition Tribunal, based on material before the ACCC, subject to limited exceptions. There will be an option of fast-track or standard procedure for Tribunal review.

Members advised the Council that, as only information before the ACCC in the ACCC's process will be admissible for in a Tribunal review, this will require parties to 'front load' the ACCC process in terms of information. This will create significant administrative cost, time and disruption to provide the necessary information to ensure sufficient information is available in the Tribunal process.

As noted above, a regime that provides transparency and procedural fairness for all steps in the transaction clearance process is essential to the practical implementation of the Government's objectives. In this respect, in terms of merits review, the Council consider that fairness requires that new evidence ought to be allowed in the Tribunal in circumstances where third party concerns or internal ACCC analysis (e.g. economic modelling) raise issues that were not disclosed to the merging parties by the ACCC in a way that enabled them to meaningfully engage and provide evidence to the ACCC.

Fees

The subject of the appropriateness of a $50,000 - $100,000 filing is inherently linked to the notification thresholds, which are yet to be defined. Should the threshold be set a low level, thereby casting a wide net for notification, the fee component for filing could become prohibitive for some transactions, regardless of the competition or other public interest benefits. It may also, when added to other barriers to investment in Australia, add to the deterrents to much-needed in-bound investment.

For example, where the filing fee equates to 5 - 10 per cent of the transaction value, the commercial viability of the proposed merger would be questionable. This is before adding the costs of preparing a notification (including gathering information) and engaging with the ACCC during the process.

To the best of our knowledge, the rationale for setting a fee between $50,000 - 100,000 seems unclear, in particular whether the fee will be determined having regard to the complexity of the application / proposed acquisition. The complexity of an acquisition may be highly subjective and/or difficult to determine. A preferable position would be for the fees to be scaled based on the size of the acquisition.

The Council strongly supports the need for a genuine, reliable and predictable Fast Track and Phase One review process, with a lower fee threshold, and without undue costs associated with preparing notifications and engaging with the ACCC during the Fast Track/Phase One processes.

7. Public disclosure requirements

With respect to the 'register' of notified acquisitions, the Exposure Draft includes few requirements on the nature and extent of material to be included on the register. However, it contemplates that all notified acquisitions will be published on the public register. This removes the existing ability to seek and obtain ACCC clearance confidentially, upon which many transaction parties rely. For at least some transactions, this will act as a sufficient deterrent that parties do not proceed. In competitive bid scenarios, the thresholds may mean that some potential acquirers must notify (and have their proposed acquisition published on the register) while others do not – thereby favouring some bidders over others, and also publicising the bidder pool which may otherwise not be known by other bidders. It may also render the ability to carry out on-market takeovers and offers of listed companies, completely impossible, thereby significantly impacting and fundamentally changing M&A activity in Australia.

In addition, members advised that the proposed public register of applications could lead to the disclosure of significant confidential commercial information which would previously have been limited to disclosure between the ACCC and the applicant (as per the informal merger approval regime).

An extensive public disclosure regime could lead to unintended consequences around internal corporate disclosures (for fear these may one day be made public) and lead to the unintended disclosure of confidential information.

Similarly, the public nature of the approval regime could lead to vendors being unwilling to enter into a transaction given the publication of certain confidential information (including the fact that a transaction is being contemplated). This is particularly relevant for private families or founders that value privacy.

A preferred approach would be to maintain the confidentiality of any commercial in confidence information provided to the ACCC by not disclosing the application to the public, and instead only providing a summary, after a period of time or when no longer commercially sensitive. Alternatively, the applicant should have the ability to redact any information which is deemed to be commercial in confidence.

8. Goodwill exception

The Council notes that the Exposure Draft seeks to change the operation of the existing 'goodwill' exception to the cartel conduct provisions of the CCA (goodwill exception). This currently protects non-compete restraints in share or asset sale agreements provided they are solely for the protection of the purchaser in respect of the goodwill of the business being acquired. Such restraints are widely used and well established to be linked to consideration being paid for the acquisition.

The Exposure Draft appears to amend the operation of the goodwill exception and its protection of these restraints. The effect of this appears to be the exception will not apply unless (in basic terms) (i) the restraint is subject to a CP as to when they come into effect (ii)

the transaction is notified within 30 days of being signed and the restraint specified in the notification and (iii) the ACCC does not 'declare' the exception not to apply to the restraint. The Explanatory Materials do not provide substantive policy reasons for the proposed change in approach, so the underlying objective is unclear.

At a practical level, if these provisions require transactions to be notified within 30 days of signing, this will be unworkable and a deterrent for investment. For multi-jurisdictional transactions, there is significant preparation involved in preparing filings globally and this often takes many months – it will not be practicable to file in Australia within 30 days.
At a drafting level, the changes relate to restraints in a share sale agreement, despite such restraints being common and necessary components of asset sale transactions. Assuming this is not the intention of the Exposure Draft, this should be addressed in the drafting.