SHOPPING CENTRE COUNCIL OF AUSTRALIA

'PUTTING THE CART BEFORE THE HORSE'

REFORMING MERGERS AND ACQUISITIONS – EXPOSURE DRAFT

EXECUTIVE SUMMARY

The SCCA reiterates our view that the 'economy-wide' nature of the *Exposure Draft* will fail to deliver a fit-for-purpose merger control system that, as per the overarching objectives of the reforms, targets sectors and markets of the economy that present market concentration and competition concerns; and, as the ACCC Chair noted recently, "*minimises the regulatory burden for acquisitions that do not have anti-competitive effects*".[1]

The Hon Dr Andrew Leigh MP has talked to market concentration issues multiple times in the context of the proposed reforms, and ten-fold any other MP, in the last 18-months;[2] yet the *Exposure Draft* package's lack of detail on this fundamental issue directly undermines the ability to properly consider (as per the *Consultation Preamble* in the *Explanatory Materials*) "*how the law is intended to operate*".[3]

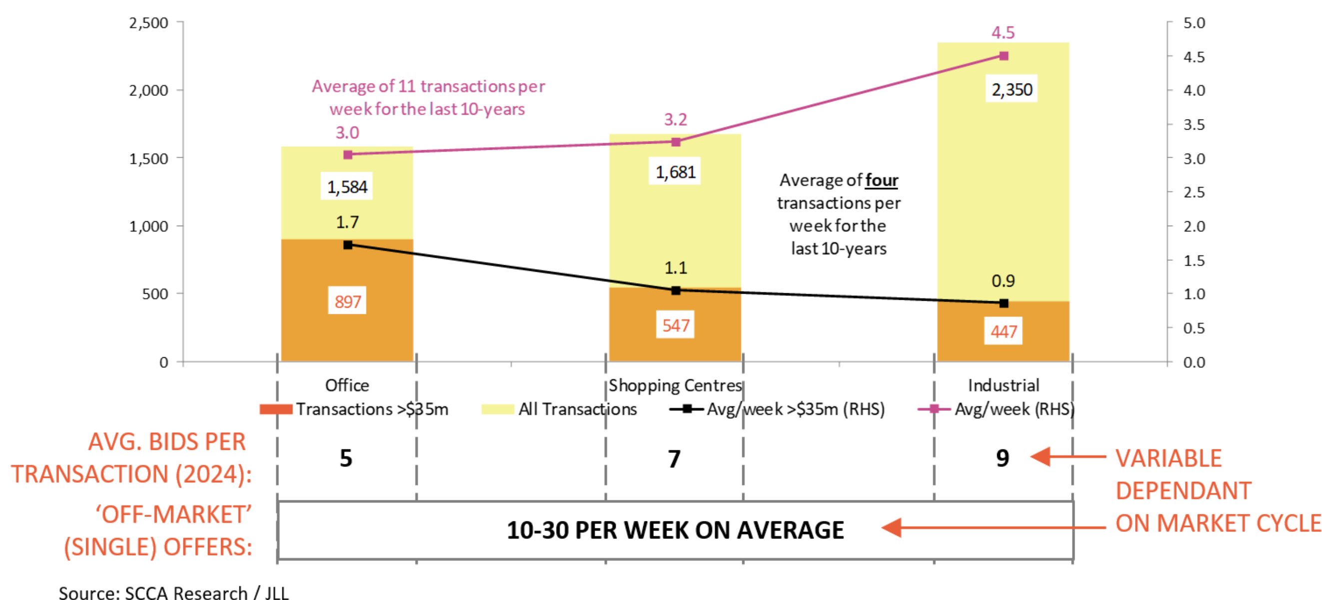
Respectfully, the "*biggest reforms to merger settings in almost 50 years*",[4] to cite the Hon. Dr Jim Chalmers MP, deserves more thorough consideration of key issues and its impacts. This is particularly the case where groups such as ours have a strong analytical basis, deep experience and willingness to engage with the Government.

In short: **(1)** the *Exposure Draft* needs to be amended (e.g. the substantial lessening of competition (SLC) test, and expanded concept of asset and reduced 'ordinary course of business' exclusion), **(2)** clarity needs to be provided on ACCC processes and safeguards, including how much will be 'outsourced' to notifying parties to enable the ACCC's 'efficient' process, and **(3)** further consultation needs to occur before legislation can be tabled in Parliament, with a view to ensure a revised Bill (including any thresholds) is fit-for-purpose and targeted at markets that present concentration and competition concerns.

As we have previously tabled with the Taskforce, the 10-year average for shopping centre transactions valued over $35 million would see a possible **1.1 notifications per week needing to be considered by the ACCC**; and for broader commercial property (shopping centre, office, industrial) 3.7 notifications per week.

Further analysis of the data we've already provided to the Taskforce highlights a **current (2024) average of 7 bidders per shopping centre transaction** (see **Figure 1** below and **Attachment 1**) who may need to be vetted by the ACCC, depending on where the legislation fits into the normal transaction process.

Figure 1 – Commercial Property Sales Transactions – Recorded Transactions by Sector – Last 10 Years



Source: SCCA Research / JLL

[1] ACCC, *Media Release: ACCC welcomes start of consultation on draft merger reform laws*, 24 July 2024.
[2] SCCA Research; GovConnex.
[3] The Treasury, *Exposure Draft Explanatory Materials – Treasury Laws Amendment Bill 2024: Acquisitions*.
[4] The Hon Dr Jim Chalmers MP, *Address to the Bannerman Competition Lecture*, 10 April 2024.

Further, as highlighted at **Figure 1** above, our further analysis highlights that **a large proportion of shopping centre transactions were 'off-market'**, directly connecting a buyer with a seller and under an arrangement that moves quickly. We are keen to discuss with the Taskforce how such transactions may be affected by the reforms.

Noting the ACCC's determination of shopping centre transactions has a historical average of **163-days/117-working days**, the ACCC will need to achieve a **350+% efficiency improvement** to deliver on the desired timeframes, along with ensuring alignment with the transaction process.

Further, our experience with Government administrative processes tells us that where efficient systems are promised – such as what is proposed under the reforms – the risk and burden is simply transferred to applicants (e.g. conducting studies; requiring legal advice) to 'enable' the efficient system to operate, and to enable the administrator to be 'satisfied' there are (or aren't) any issues. The burden grows over time through periodic reviews, and the user experience diminishes. This is a further critical issue that the Taskforce needs to consider.

KEY CONCERNS / Recommendations

We have **five core concerns** (expanded at **Attachment 2** and **Attachment 3**) that warrant the Taskforce's attention:

1. ***Thresholds/regulations*** *(Sections 45AW, 51ABG, and 51ABH)*

   Amendments are needed to provide clarity as to how regulations would be made (e.g. what tests will be applied for the purpose of setting thresholds in relation to markets / market concentration).

2. ***SLC test; Acquisition of assets (property)*** *(Section 4G of the CCA; Section 51ABN(1))*

   Amendments are needed to remove the application of the SLC test to other areas of competition law until they have been subject to consultation. As it stands, the breadth of activities that the SLC test would apply to could extend to impede shopping centre redevelopments.

3. ***Acquisition of assets (land) – Ordinary course of business exclusion*** *(Section 51ABN(2))*

   Amendments are needed to focus the reduced 'ordinary course of business' exemption to specific sectors. This would otherwise impact the acquisition of adjacent land, generally used to expand existing shopping centres, or developing greenfield sites, which is not a 'strategic' acquisition in that it would not 'create a barrier to entry or expansion', i.e. land banking.

4. ***User experience for dealing with the ACCC***

   Detailed clarity is needed as to how the ACCC process will operate, and how it will engage with notifying parties, including at which point notifications would need to occur, and the impact of that timing on competitive sales processes.

5. ***ACCC safeguards / guard rails***

   Clear safeguards are needed to ensure clarity on the ACCC's process and how they will consider relevant issues, including from Phase 1 to Phase 2 (e.g. clarity as to how acquisitions are defined, how markets of concern will be identified, a limited merits review that removes any procedural fairness, and how thresholds for those markets will be set).

NEXT STEPS – GOVERNMENT NEEEDS TO ENGAGE WITH INDUSTRY

To enable the reforms to be properly considered, the Government needs to engage further with industry and affected parties, particularly ahead of any revised legislation being prepare and tabled into the Parliament.

This could also ensure that the reforms are more aligned with the overarching objectives, and that they are fit-for-purpose and targeted at markets that present market concentration and competition concerns. We also strongly believe that this will help ensure that the ACCC's proposed safeguards and processes have clarity, and are truly efficient, without an unwarranted burden being outsourced to notifying parties.

We appreciate the Government's engagement with us to date, and would welcome the opportunity to engage further. In this regard, **as flagged with the Taskforce, we are preparing a separate *Briefing Note* to complement this submission** (which we expect to submit in coming weeks) which will be pertinent to section 51ABN.

Angus Nardi
Chief Executive

James Newton
Head of Policy and Regulatory Affairs

THE CONSULTATION APPROACH IS FLAWED

On its current trajectory, consideration and development of the *Exposure Draft* in isolation will effectively design a system without consideration of who or what would be subject to it. Put simply, the consultation fails its own consultation objectives and puts the 'cart before the horse'.

This approach focusses too heavily on the ACCC proposal, disregarding policy and legislative fundamentals, and failing to consider from the outset which markets would be captured. This has resulted in widespread consternation from both industry and the legal profession, which we anticipate will, in-turn, result in a barrage of substantially similar submissions to the Taskforce. Whilst many of these submissions will be meritorious and on point, they will ultimately inform the design of a system that the authors may not be subject to and thereby create unnecessary features.

Respectfully, it is a failure of legislative reform where slogans and broad policy objectives over-ride considered analysis of the markets that should and should not be captured; where instead a 'catch-all' framework is proposed, and the burden is then on market participants to advocate for a more targeted and considered response.

We respect the ACCC and its role, however our principal argument remains that we should not be captured at all by the proposed process, no matter how "*simple, efficient and transparent*" it is in theory. To cite the ACCC Chair's recent comments noting the Government's key objective is to "*prevent mergers that pose a risk to competition, consumers and the economy*", there is a need to "*minimise the regulatory burden for acquisitions that do not have anti-competitive effects*".[5] The ACCC's comment lies at the heart of this submission.

Widespread consternation could be alleviated, and the consultation process would be more effective, if Government were to engage with industry on the sectors, values, and/or assets that would be subject to the proposed system, prior to the implementation of the new system.

As the ACCC's Chair Gina Cass-Gottlieb is reported to have said, consultation on the prospective new laws is a key step to ensure the reforms achieved their intended objectives. The approach currently being taken is failing to accord with the six 'Principles of good regulatory process' set down by the Regulation Taskforce in its report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, including the following four principles:

- Governments should not act to address 'problems' through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue.
- A range of feasible policy options — including self-regulatory and co-regulatory approaches — need to be assessed within a cost-benefit framework (including analysis of compliance costs and, where relevant, risk).
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.
- There needs to be effective consultation with regulated parties at the key stages of regulation-making and administration.[6]

Given that the objective of these reforms is to address market concentration and anti-competitive practices, the development of a new system should consider which sectors, values, or assets contribute to market concentration and anti-competitive practices, and which therefore warrant a more intense focus. This stems back to the original proposed objectives of the reforms; whereby the Treasurer cited issues such as Australia's declining competitiveness and increasing market concentration. A detailed review of relevant background material clearly highlights that only 'some' markets are concentrated, while others are not.

For the proposed system to be effective, it must be designed to achieve the objectives of the reforms, which requires an evidence-based assessment of where market concentration and anti-competitive practices occur.

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[5] ACCC, *Media Release: ACCC welcomes start of consultation on draft merger reform laws*, 24 July 2024.

[6] Productivity Commission, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006.

To support the Taskforce in this endeavour, we submit the shopping centre sector as a case study which clearly demonstrates that there are markets that do not to have issues with market concentration and anti-competitive practices. Subjecting these markets to the proposed system will hinder the effectiveness of the proposed system, add to the cost and regulatory burden of businesses, and fail to achieve to achieve the objects of the reforms.

Rather than simply responding to the *Exposure Draft* in isolation, our submission advances an enhanced approach, which would clarify and ensure that only those sectors, markets or acquisition types that are proven to have a risk of market concentration and anti-competitiveness would be subject to mandatory engagement with the ACCC.

The SCCA proposes a ***Risk-Based, Targeted Assessment Process***. Such an assessment process would afford sectors such as ours the opportunity to engage with Government to ensure fit-for-purpose regulation, with evidence-based notification thresholds, where there is a compelling case for such consideration outside of broad-based regulations. We submit that this discussion should occur in the immediate-term.

RECOMMENDATIONS

The SCCA makes the following overarching recommendations, in addition to recommendations pertaining more to the *Exposure Draft* itself (see **Attachment 2** and **Attachment 3**):

Recommendation 1 — **Government should bring forward consultation on thresholds for the proposed new laws to allow for fully informed consideration.**

Recommendation 2 — **Government should clearly and definitively acknowledge that the shopping centre sector operates in the retail leasing market, is well-defined, mature and stable, and well scrutinised in policy/at law by government.**

Recommendation 3 — **Government should clearly define 'concentrated markets' and have reference to analysis which shows that the shopping centres do not operate in a concentrated market and present no structural competition concerns.**

Recommendation 4 — **Government should collaborate in good faith with organisations such as the SCCA to understand industry analysis and develop an optimal scheme, such as the *Risk-Based, Targeted Assessment Process*, with regulations and assessments informed by an *industry expert panel*.**

Recommendation 5 — **If the thresholds proceed to be defined through regulations in the short-term, the Minister's second reading speech should provide clear guidance about markets and/or acquisition types that may be carved-out in the regulations.**

OBJECTIVES AND INTENT

In proposing a *Risk-Based, Targeted Assessment Process*, the SCCA has front of mind the clearly stated objectives and intent of the Treasurer (the Hon Dr Jim Chalmers MP), the Assistant Minister for Competition, Charities and Treasury (the Hon Dr Andrew Leigh MP), the ACCC, and the Taskforce.

The Treasurer has stated that the proposed laws "*will simplify and speed up the process for mergers that are in the national interest and give the regulator stronger powers to identify and scrutinise transactions that pose a risk to competition, consumers and the economy*".[7] The Assistant Minister described the objective of the reform process as being to support competitive markets, and delivering benefits to the economy and consumers, and providing certainty to business.[8]

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[7] The Hon Dr Jim Chalmers MP, *Media Release: Next step towards merger reform for a more competitive economy*, 24 July 2024.

[8] The Hon Dr Andrew Leigh MP, *Media Release: Consultation on merger reform*, 20 November 2023.

The ACCC's *Proposal Paper* to the Treasury, which gave rise to this reform process, stipulated that the ACCC recognises that most mergers are not anti-competitive,[9] whilst the Taskforce's initial Consultation Paper noted that an "*effective merger control regime should seek to achieve its policy at the lowest cost possible and a timely manner*".[10]

Further, the Taskforce has highlighted the need for the merger control regime to be informed by robust empirical evidence and designed in a risk-based manner.[11] Paragraph 3.5 of the *Explanatory Materials* also goes on to state that the proposed section 51ABG(2) aims to ensure a risk-based system that targets acquisitions "*most likely to result in harm to competition and consumers*".[12]

An evidence and risk-based approach to the proposed reforms requires consideration of which markets are concentrated and which are not. Without such consideration, the proposed reforms will deliver an unsophisticated 'one-size-fits-all' system that adds to the regulatory burden on businesses in markets that present no or limited risk.

RISK-BASED, TARGETED ASSESSMENT PROCESS

The *Exposure Draft* (at section 51ABG) provides for thresholds to be set through regulations or determined by the Minister, ensuring that prospective new laws are "*risk-based, and targets acquisitions most likely to result in harm to competition and consumers (including, for example, serial acquisitions and acquisitions of nascent competitors), while reducing the overall compliance burden on businesses*".[13] This should be the focus of any public policy response, rather than casting a wide net over a significant number of business transactions.

An unsophisticated application of broad-based, economy-wide thresholds will inevitably capture acquisitions and sectors that have evidence of 'low risk' or none at all; in which case higher thresholds ought to apply. The possibility of a fast-tracked determination would still require additional cost and administrative burdens to be borne by business.

Government's objectives cannot be achieved by setting 'one-size-fits-all' thresholds, that would apply economy-wide. Accordingly, the SCCA proposes a *Risk-Based, Targeted Assessment Process*. This would see Treasury collaborate in good faith with organisations such as ours to set evidence-based, sector-specific thresholds. It is critical that sector-specific market composition, buyer/vendor characteristics, the nature of transactions etc. are considered, so as to focus the ACCC's efforts.

Figure 2 outlines an assessment process that would afford sectors such as ours the opportunity to proactively engage with Government and present a case for sector-specific regulation, with a view to agreeing on appropriate and considered notification thresholds, where there is a compelling case for such consideration.

Much of the reason for this is believed to be that the ACCC and its representatives lack any relevant experience or expertise in our industry and are unable to make a reasoned decision without amassing a mass of educative material (even in respect of acquisitions which persons with relevant leasing experience and expertise would readily dismiss as being unlikely to raise any competition concerns).

Such an assessment process would be aided by the development of a 'test' or clear definition of 'market concentration' that is absent in the *Exposure Draft* (rather than a potentially opaque determination by the ACCC at the end of a costly, resource-intensive notification process).

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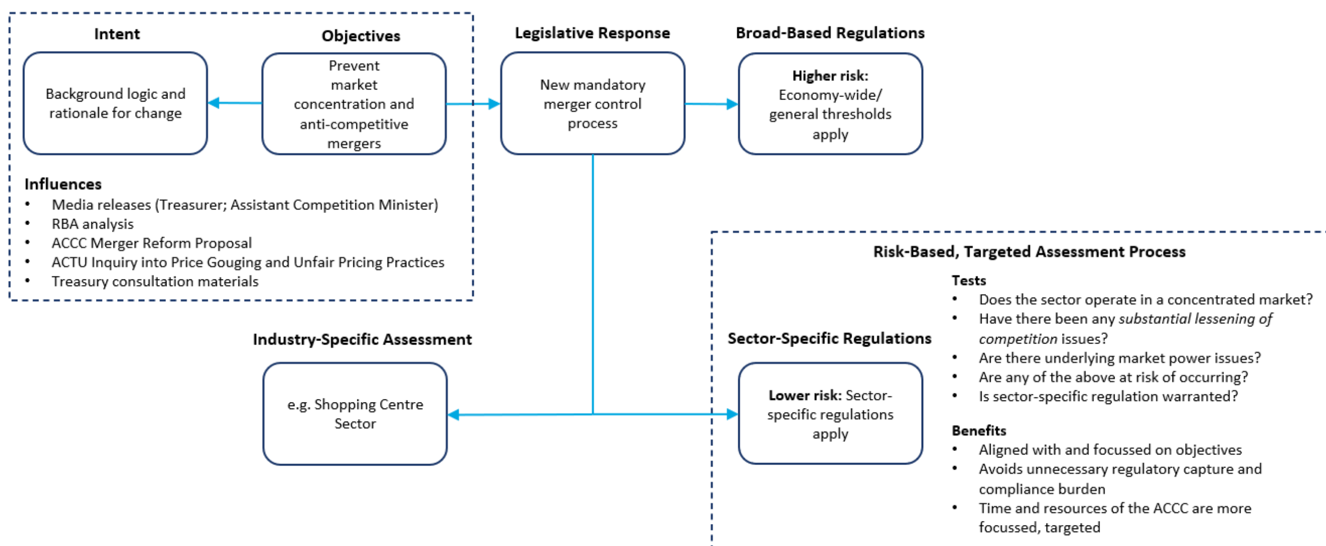
[9] Australian Competition and Consumer Commission, *Outline to Treasury: ACCC's proposals for merger reform*, March 2023.
[10] The Treasury, *Merger Reform: Consultation Paper*, November 2023.
[11] The Treasury, *Merger Reform: Consultation Paper*, November 2023.
[12] The Treasury, *Exposure Draft Explanatory Materials – Treasury Laws Amendment Bill 2024: Acquisitions*, 2024.
[13] The Treasury, *Exposure Draft Explanatory Materials – Treasury Laws Amendment Bill 2024: Acquisitions*, 2024.

Figure 2 – Risk-Based, Targeted Assessment Process



Broadly, this should provide for an industry-level submission and assessment process that would satisfy government that the underlying market conditions (concentration; power issues/dynamics), key features/attributes of a sector etc. contribute to a lower risk and that sector-specific regulation is warranted on account of the inapplicability of broad-based thresholds.

To be able design a streamlined regulatory process that actually works for the shopping centre industry (as opposed to a process that might work for another industry) there needs to be extensive consultation with the participants and experts in our industry which gives them the opportunity of making submissions and to provide analytical data which might assist in arriving at a streamlined and effective regulatory process.

For instance, an asset value threshold of ≥$35 million may be set at an economy-wide level, but is demonstrably far too low with respect to shopping centres and so would warrant separate – more targeted and focussed – regulations. Further, this assessment process would remove conjecture around appropriate market definitions.

The aim of this consultative process should be to come up with a process which is objective and which carefully balances the costs of the process, the delay and inefficiencies experienced as part of that process against the competition concerns (if any) applicable to the shopping centre industry (and wider market for the supply of retail space to retailers).

Our view is this this approach is aligned with the intent and focussed on the objectives of the new laws, would avoid unnecessary regulatory capture and compliance burden, and would save the ACCC time and resources to dedicate to more focussed/targeted acquisitions.

CASE STUDY – SHOPPING CENTRE SECTOR

Shopping centres present as a case study and clear example of a sector to which a *Risk-Based, Targeted Assessment Process* should be applied. As articulated in our *Supplementary Submission* (12 March 2024) and *Briefing Note* (17 June 2024), our sector is a case study as to why sector-specific regulation is warranted.

In summary, the key features/attributes of our sector are:

- The shopping centre sector does not operate in a concentrated market – being the retail leasing market – and presents no structural competition concerns or risks outside the current process.
- Our market is highly competitive and diverse.
- The retail leasing market extends beyond shopping centres of varying size to shopping strips (or high street), retail outlets that handle bulky goods or act as direct factory outlets, as well as retail shops in other commercial buildings.
- The retail leasing market also competes with online platforms.

- Shopping centres are a well-defined, mature/stabilised sector that is well-scrutinised in policy/at law.
- Our sector comprises >1,300 shopping centres and >800 separate owners. As such, there are no significant barriers to entry to being a landlord (supplier) in the retail tenancy market in Australia.
- The largest owns 9.4% of shopping centre floor space, which is around 45% of total retail floor space (i.e. approximately 4.3% market share of the retail leasing market.
- Even when considering the shopping centre sector in isolation, market concentration equates to a HHI score of 276, which is nowhere near 2,000, which is the ACCC's "*preliminary indicator of the likelihood that the merger will raise competition concerns requiring more extensive analysis*."[14]
- The sheer diversity of buyers and vendors – including many with only limited retail exposure, and with this varying motivations and reasons for investing in retail assets – highlights and emphasises the lack of market concentration in our sector.
- Prolonged delays/notification processes would disrupt and distort the sale process.
  - Shopping centre transactions occur frequently. Per previous data and analysis provided to the Taskforce, on average there are 55 shopping centre transactions per year (one a week) ≥$35 million, with multiple prospective buyers. This increases to 190 transactions per year (four a week) for the wider commercial property sector.
  - This cannot feasibly be resourced by the ACCC, particularly when considering the much higher number of expressions of interest and offers, whose proponents may be required to engage with the ACCC. Updated analysis at **Attachment 1** refers.

In short, considering the characteristics of our market, the acquisition of a shopping centre does not meaningfully effect what is a highly diversified and competitive retail tenancy market.

Further to the market analysis provided previously and summarised above, we note also that shopping centres are captured under ANZSIC 6712 for non-residential property operators, a sub-category of ANZSIC 671 for property operators. Research published by the Department of Industry, Innovation and Science and the Office of the Chief Economist in 2019 analysed the market concentration evolution across Australian industries from 2002-2016.[15]

This research did not highlight either ANZSIC 671 or 6712 as having concentration issues, and found that increases in concentration were more likely to occur in industries that are already more concentrated; for instance, those identified in the *Inquiry into Price Gouging and Unfair Pricing Practices*.[16]

SECTOR-SPECIFIC REGULATIONS

The shopping centre sector is demonstrably not a sector that warrants the close eye of the ACCC in the vast majority of instances. We expect that an assessment of the shopping centre sector would determine that we do not operate in a concentrated market and present no structural competition concerns.

Our view is that sector-specific regulations – informed by a *Risk-Based, Targeted Assessment Process* (or similar) – is the only appropriate course of action, given the inherent difficulty of setting economy-wide thresholds. Such thresholds should be negotiated between Government and industry/experts and not left to chance/ill-informed determinations at ACCC officer/executive level that have no bearing on the complexity or commercial realities of our market.

Industry expert panel

The draft bill appears to have been drafted largely at the behest of the ACCC, but as Arnold Bock Lieber partner Zaven Mardirossian has said the changes proposed to be made will make the ACCC "*judge, jury and executioner*" on deals and parties will have limited review rights. Put another way the draft legislation "*proposes a very significant cultural shift from a judicial enforcement model, where parties could have their day in court…to an administrative model with no practical ability to access the courts*."[17]

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[14] ACCC, *Merger Guidelines 2008*, Updated 2017.
[15] Department of Industry, Innovation and Science, *Trends in Market Concentration of Australian Industries*, 2019.
[16] Australian Council of Trade Unions, *Final Report: Inquiry into Price Gouging and Unfair Pricing Practices*, February 2024.
[17] Australian Financial Review, *Merger crackdown to make ACCC 'judge and jury' on deals*, 28 July 2024.

To address both the above efficiency issue and this unhealthy balance of power issue (where there are not enough check and balances built into the system), a panel of independent industry experts with relevant industry expertise might be required to be retained by ACCC. With respect to shopping centre acquisitions and redevelopments this expert should have practical real world experience and expertise in the actual leasing of retail space in applicable markets (ideally from both the perspective of landlords and retailers).

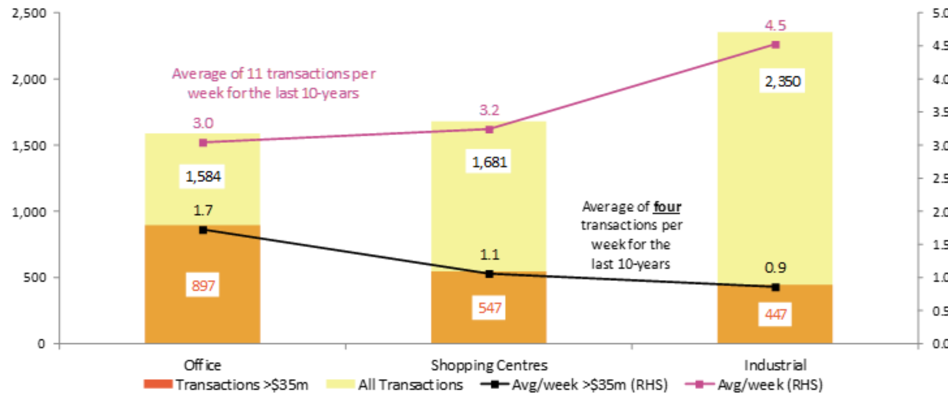
It is unsatisfactory both to the quality of the decision likely ultimately be made and to the speed and efficiency with which such a decision might be made for the decision-maker to simply have a penchant for and experience with economic theories, economic modelling and data analysis and a propensity for extrapolating, without real world experience, the same to the markets in which our members in fact operate.

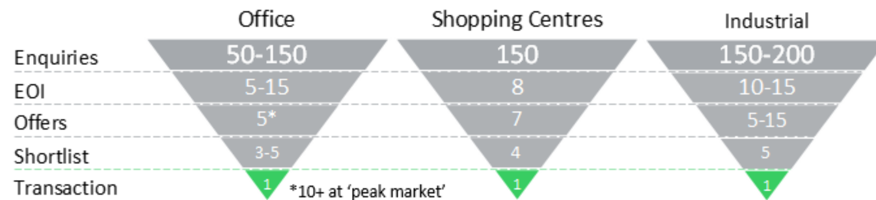
Having such a panel of industry on experts on tap, whom the ACCC is required to consult and take notice of, should speed the process up and address the information asymmetry which the ACCC often complains about (without the need for a prospective acquirer having to provide substantial amounts of educative material to the ACCC each and every time it wants to acquire a shopping centre or adjoining piece of land or undertake a substantial redevelopment of one of its existing centres).

ATTACHMENTS

1. Shopping Centre Transactions
2. Recommendations
3. Comments on *Exposure Draft*

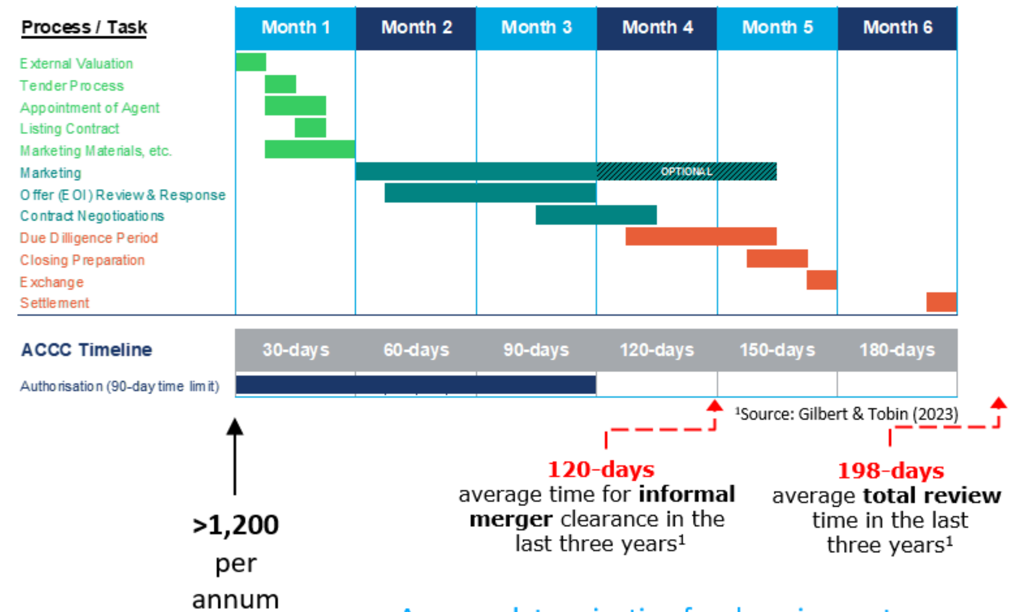
ATTACHMENT 1 – SHOPPING CENTRE TRANSACTIONS





In addition, there are on average **10-30** 'off-market' offers per week nationally.

Will ALL bidders need to be vetted by the ACCC ahead of making an offer?



Average determination for shopping centre transactions According to the ACCC Public informal merger reviews register:
163-days (117-working days)

Source: SCCA Research / JLL

ATTACHMENT 2 – RECOMMENDATIONS

Overarching recommendations about the consultation	
1	Government should bring forward consultation on thresholds for the proposed new laws to allow for fully informed consideration.
2	Government should clearly and definitively acknowledge that the shopping centre sector operates in the retail leasing market, is well-defined, mature and stable, and well scrutinised in policy/at law by government.
3	Government should clearly define 'concentrated markets' and have reference to analysis which shows that the shopping centres do not operate in a concentrated market and present no structural competition concerns.
4	Government should collaborate in good faith with organisations such as the SCCA to understand industry analysis and develop an optimal scheme, such as the *Risk-Based, Targeted Assessment Process*, with regulations and assessments informed by an *industry expert panel*.
5	If the thresholds proceed to be defined through regulations in the short-term, the Minister's second reading speech should provide clear guidance about markets and/or acquisition types that may be carved-out in the regulations.
Specific recommendations about the *Exposure Draft*	
i	**Notification of acquisitions (thresholds)** See Recommendation 1.
ii	**Regulated and excluded acquisitions** The acquisition threshold included in the Bill should be lifted to 50% to focus on actual control, rather than influence. A 20% share threshold to determine control of a body corporate is far too low and imprecise.
iii	**Expanded concept of asset** The Bill should exclude acquisitions of real property from the expanded concept of 'assets', given these transactions can be unwound relatively simply.
iv	**Expanded concept of asset** The Bill should explicitly clarify that improvements to existing asset are not notifiable and subject to the proposed system.
v	**Material changes of fact** The Bill should provide explicit timeframes for the ACCC to determine if the effective notification date is to be changed.
v	**Material changes of fact** The Bill should specify what constitutes a material change of fact.
vii	**Process for considering application – timings** The timeframes outlined in the *Exposure Draft* for the consideration of applications should be revised down significantly, and/or the ACCC resourced to support this.
viii	**Process for considering application – timings** The timeframes outlined in the *Exposure Draft* for notifying parties to respond to the ACCC should be more equitable relative to the timeframes provided for the ACCC.
ix	**Process for considering application – timings** The Bill should require the ACCC to disclose the specific reason for delays in processing a determination to ensure transparency.
x	**Process for considering application – timings** The Bill should provide clarity as to the timings required for notifiable acquisitions in competitive sales processes.
xi	**Stronger, expert administrative decision-maker** The Bill should maintain the ability for notifying parties to seek a merits review via the Federal Court, to ensure an impartial final decision-maker.
xii	**Commission's consideration of acquisitions** The ACCC should provide clear guidance as to how and if it will determine the markets it considers for the purpose of the SLC test.
xiii	**Commission's consideration of acquisitions** The ACCC should engage with the SCCA to ensure that its position as to the market shopping centres operate in is accurate and aligns with the real-world experience of the sector. See also Recommendation 4.
xiv	**Commission's consideration of acquisitions** The Bill should provide clarity as to the metrics and impact assessment process that will be used to consider the "relevant matters" as part of the SLC test, to ensure consistency.
xv	**Broader application of the SLC test** The proposed changes to 'substantial lessening of competition' should not be applied to other areas of competition law until they have been subject to consultation within those contexts.

Specific recommendations about the *Exposure Draft* (continued)	
xvi	**Notice of competition concerns** The ACCC should provide clear and consistent guidance as to the factors it will consider when developing a 'notice of competition concerns'.
xvii	**Notice of competition concerns** The timeframes outlined in the *Exposure Draft* for notifying parties to respond to the ACCC should be more equitable relative to the timeframes provided for the ACCC.
xviii	**Limited merits review** The Bill should maintain the ability for notifying parties to seek a merits review via the Federal Court, to ensure an impartial final decision-maker.
xix	**Limited merits review – considerations** The Bill should enable the Tribunal to consider all evidence it deems relevant, including new information provided by notifying parties.
xx	**Limited merits review – considerations** The Bill should empower the Tribunal to conduct its review with independence from the ACCC, including the ability to make its own findings of fact.
xxi	**Limited merits review – considerations** The Bill should provide for industry groups to be considered as parties with 'sufficient interest', as is the case with consumer associations and consumer interest groups.
xxii	**Ordinary course of business exemption** The Bill should provide exemptions for commonplace expansions of shopping centre sites.

ATTACHMENT 3 – COMMENTS ON EXPOSURE DRAFT

TARGETED MANDATORY NOTIFICATION THRESHOLDS

Notification of acquisitions (thresholds)

Issues

Because the dimensions, concentrations and other characteristics of markets in Australia differ so greatly depending upon the industry involved and functional level likely affected by a proposed acquisition or merger, the process for setting thresholds needs to allow for the tailoring of those thresholds to each distinctive industry or class of industries.

There is no point, for instance, in setting a general value threshold which captures regular transactions in one industry, (and which do not raise competition issues in that industry) just because a merger in another industry for that value might justify ACCC scrutiny and review.

The SCCA notes that the Taskforce will separately consult on the thresholds that will determine the application of the new law later this year. These thresholds are a critical component of these reforms, as they are necessary to understand if the Government's intended approach will be fit-for-purpose and efficient.

The SCCA welcomes the indication that the Government will "*regularly review*" thresholds in order to target 'high-risk' acquisitions. However, we submit the criteria on which the thresholds will be set and reviewed need to be clearly defined from the outset and include market-specific criteria.

We have provided the Taskforce with detailed analysis of turnover, transaction value and market identification, all of which may be used as important factors to determine the concentration of a particular market. In this submission, we have also put forward shopping centres as a case study that demonstrates how an evidence and risk-based assessment process is needed, to ensure that the proposed new laws are focussed on high-risk acquisitions, in accordance with the objectives of the reforms.

In targeting 'high-risk' acquisitions, the *Risk-Based, Targeted Assessment Process* that we have detailed in this submission would enable the Government to achieve its objectives for these reforms and deliver a robust and effective system.

Impact of proposed reforms

As the proposed new laws stand, a 'one-size-fits-all' system would be implemented that will result in a deluge of notifications requiring processing and assessment, the majority of which, by the ACCC's own admission, will present no actual risk to market concentration or anti-competitiveness.

This will inevitably prolong the processing time for lower-risk acquisitions and place a significant and costly administrative burden on both the ACCC and businesses party to an acquisition.

Recommendation i **Government should bring forward consultation on the thresholds for the proposed new laws to allow for fully informed consideration.**

Regulated and excluded acquisitions

Issues

The proposed presumption that control of a 20% voting share indicates control over a corporation is a low threshold that would not necessarily give rise to control. Although the *Exposure Draft* provides for the presumption of control being rebutted, there is no clarity as to the factors or considerations that would enable the presumption to be rebutted.

Impact of proposed reforms

With such a low threshold of 20%, the volume of acquisitions subject to mandatory notification will be substantial and include many acquisitions that do not give rise actual control. This will unnecessarily clog the system, causing delays in processing and approvals. The lack of clarity as to the how the presumption of control can be rebutted will result in uncertainty and inconsistency.

Recommendation ii	**The acquisition threshold included in the Bill should be lifted to 50% to focus on actual control, rather than influence. A 20% share threshold to determine control of a body corporate is far too low and imprecise.**

Expanded concept of asset

Issues

The SCCA notes that the *Exposure Draft* expands the concept of an asset for the purpose of acquisitions to explicitly capture 'any kind of property'. As we have highlighted in previous submissions, we do not consider this expansion to be warranted.

Acquisitions of real property, such as shopping centres, can be unwound much more readily than the complete merger of two companies, which involves the exchange, integration and possible dismissal of intellectual property, staff etc. It is also unclear – and fundamentally important to understand in considering the *Exposure Draft* – if the SLC test would extend to apply to the redevelopment of existing shopping centres.

Impact of proposed reforms

If the expanded concept is progressed, acquisitions of real property will be subject to the mandatory notification system, adding a significant administrative and cost burden on the transaction parties. This is despite the ability for these transactions to be unwound relatively simply and retrospectively, where issues arise.

The Bill must be amended to clarify the activities that are considered to be acquisitions. For example, expanding the Gross Lettable Area Retail (GLAR) of a Regional shopping centre (e.g. by 40%) may "*create, strengthen and entrench a substantial degree market share and power*". It is unclear whether this would be subject to limitations or a lengthy review process? Clearly this would disincentivise investment and the capacity of businesses to organically increase their market share and position.

We will provide further data and analysis on this issue.

Recommendation iii	**The Bill should exclude acquisitions of real property from the expanded concept of 'assets', given these transactions can be unwound relatively simply.**
Recommendation iv	**The Bill should explicitly clarify that improvements to existing assets are not notifiable and subject to the proposed system.**

Material changes of fact

Issues

The SCCA notes the requirements for a notifying party to inform the ACCC in respect of material changes of fact in relation to notified acquisitions and that the ACCC may then change the effective notification date of the acquisition, thereby delaying the date of a review decision.

Whilst the *Explanatory Materials* provide one example of a material change of fact, the *Exposure Draft* provides no further guidance or criteria for what would constitute a material change of fact.

Impact of proposed reforms

The ability for the ACCC to effectively delay the review process will cause the review timeframes for the proposed laws to be exceeded, and therefore fail to meet the objective of an efficient merger control system. Given there is no timeframe, other than a 'reasonable period', placed on the ACCC to make a determination as to whether the effective notification date will be changed after receiving a material change of fact, these delays have the potential to be lengthy.

Additionally, the lack of clarity as to what constitutes a material change of fact will cause uncertainty for business and a potentially inconsistent application of the ACCC's power to delay the assessment process.

Recommendation v	**The Bill should provide explicit timeframes for the ACCC to determine if the effective notification date is to be changed.**

Recommendation vi	**The Bill should specify what constitutes a material change of fact.**

SUSPENSORY TIMELINES SUPPORTING PROMPT REVIEW

Process for considering application – timings

Issues

The SCCA notes that the proposed timings are largely unchanged from those outlined in the report *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy.* With the exception of the 15-day fast track determination during Phase 1, we consider the timeframes to be inordinate and unacceptable, particularly the possibility of a ≥6-month delay.

The disparity between the timeframes afforded to the ACCC and the timeframes notifying parties are expected to adhere to is particularly egregious and highlights a level of disrespect for business that will be inherent in the proposed system. For example, the ACCC will be afforded 11 weeks from the commencement of Phase 1 to develop its 'notice of competition concerns', with the unspecified delays available at the ACCC's discretion. In contrast, a notifying party is afforded only 15 business days to respond to the notice, with extensions available only at the discretion of the ACCC.

We have provided fresh analysis in this submission that details the high volume of notifications the ACCC can expect to receive for shopping centre transactions. Combined with the average processing time for applications under the current system, our fresh analysis shows that the ACCC will be required to significantly uplift its efficiency to meet the proposed timeframes.

We note that the proposed timeframes have been seemingly settled. However, the Government's appointment of Ms Andrea Gomes da Silva to advise on the ACCC's capabilities, practice, systems and resourcing calls into question the capability of the ACCC to meet even the generous timeframes proposed.

Impact of proposed reforms

As we described in our *Supplementary Submission*, shopping centre transactions occur in relatively quick time and in a competitive environment. It remains unclear as to whether a typical shopping centre sale process has been considered, particularly:

- The point at which a party would be required to notify the ACCC of an acquisition (i.e. before or after the conclusion of an EOI process).
- The cost implications of unsuccessful bidders, in the event notification is required prior to the conclusion of EOI process.
- Less competitive bids as a result of the cost burden for notifiable acquisitions.
- The detrimental impact of to a vendor if a transaction falls through.
- The impact to capitalisation rates and access to finance as a result of prolonged determination timeframes.

We are also concerned about the ACCC's capability to meet the (albeit generous) timeframes proposed. This concern is exacerbated by the appointment of Ms Gomes da Silva.

The proposed timeframes, and provisions permitting the ACCC to delay them, would significantly prolong the sale process of a shopping centre and introduce additional costs for potential purchasers. This may, in contrast to the objectives of the reforms, reduce the competitiveness of bids and in-turn, the market.

Recommendation vii	**The timeframes outlined in the *Exposure Draft* for the consideration of applications should be revised down significantly, and/or the ACCC resourced to support this.**
Recommendation viii	**The timeframes outlined in the *Exposure Draft* for notifying parties to respond to the ACCC should be more equitable relative to the timeframes provided for the ACCC.**
Recommendation ix	**The Bill should require the ACCC to disclose the specific reason for delays in processing a determination to ensure transparency.**

Recommendation x	**The Bill should provide clarity as to the timings required for notifiable acquisitions in competitive sales processes.**

STRONGER, EXPERT ADMINISTRATIVE DECISION-MAKER

Issues

The broad expansion of the ACCC's powers is concerning, particularly given the emphasis on the ACCC as an 'expert decision-maker'. Without reflecting on the capabilities of any individual staff members of the ACCC, the nature of the ACCC as a whole leads to a vastly more theoretical understanding of business and market conditions than the on-the-ground reality. Cynically, claims that business will benefit from the enhanced role of the ACCC seem merely self-serving.

Impact of proposed reforms

The increased role of the ACCC as a formal decision-maker removes the safeguard of judicial oversight of the merits of ACCC determinations.

Although we note the avenue for a review of an ACCC determination via the Australian Competition Tribunal (the Tribunal), discussed below, the removal of a fully impartial arbiter will erode business confidence in the credibility of the proposed system.

Recommendation xi	**The Bill should maintain the ability for notifying parties to seek a merits review via the Federal Court, to ensure an impartial final decision-maker.**

SUBSTANTIAL LESSENING OF COMPETITION

Commission's consideration of acquisitions

Issues

To reiterate, the SCCA supports the existing 'merger control test' and consider that section 50(3) of the CCA remains appropriate.

The proposed SLC test permits the ACCC to consider a broad range of 'relevant matters' and apply a subjective interpretation of the future impact of the acquisition in respect of those factors. The SLC test has reference to markets, yet the proposed system provides to indication of how or if the ACCC will identify particular markets.

One of the perceived 'benefits' of the proposed reforms are changes to the 'substantial lessening of competition' test, which are said to grant the ACCC the ability to "*give more weight to whether a merger would create, strengthen or entrench market power*".[18]

This change is the result of the insertion of section 4G(2) into the CCA which is proposed to provide that:

> *a reference in this Act to substantially lessening competition in a market includes a reference to substantially lessening competition in the market by creating, strengthening or entrenching a substantial degree of power in the market*

The *Explanatory Materials*, state the amendment to section 4G is "*intended to increase the focus on the market power of the parties to the acquisition and clarify that even an incremental change in market power, may still amount to a substantial lessening of competition if the acquisition…strengthens the acquirer's market power…or protects their market power in an enduring way."*

The capacity of the ACCC to "*give more weight to whether a merger would create, strengthen or entrench market power*" will also be affected through the introduction of section 51ABX(3)(e) into the CCA which is to set out, as one of the matters to which the ACCC must or may have regard in making a determination under section 51ABW(1) in respect of a notification of an acquisition:

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[18] Australian Financial Review, *Merger reforms 'will stymie big tech buying up start-ups',* 10 April 2024.

(e) *technical innovations,* ***economic developments*** *and productivity gains that could result from the acquisition, including:*

(i) *the extent to which they would be to the advantage of consumers; and*

(ii) *the extent to which they would result in, or increase, obstacles to competition.*

These changes reflect a significant shift in focus from the existing section 50(3), which considers acquisitions in the context of broader market factors and conditions, to the new SLC test, which appears to consider acquisitions primarily in the specific context of an acquirer.

Impact of the proposed reforms

Our fundamental concern, as outlined in our *Briefing Note*, remains that, as written, the proposed reforms provide no guidance or clarity as to how or if the ACCC will define markets. The proposed reforms therefore leave significant scope for the ACCC to assess acquisitions with reference to ill-defined and/or incorrect markets.

As detailed in previous submissions and discussions, the market that shopping centres operate in is often mischaracterised. Shopping centres operate within the retail leasing market, which includes competition with other retail locations, such as strip malls and high streets. Reference to other, more narrow 'markets' would fail to consider the reality of our sector.

The more siloed focus on a particular acquirer's position in a market, rather than the overall conditions of a market, will impede the accurate assessment of the impact of acquisitions. Combined with the lack of objective bounds for the ACCC's consideration of 'relevant matters' when carrying out the SLC test would leave little confidence that the proposed system is impartial and fit-for-purpose.

Recommendation xii	**The ACCC should provide clear guidance as to how and if it will determine the markets it considers for the purpose of the SLC test.**
Recommendation xiii	**The ACCC should engage with the SCCA to ensure that its position as to the market shopping centres operate in is accurate and aligns with the real-world experience of the sector. See also Recommendation 4.**
Recommendation xiv	**The Bill should provide clarity as to the metrics and impact assessment process that will be used to consider the "relevant matters" as part of the SLC test, to ensure consistency.**

Broader application of the SLC test

Issues

We are concerned that a new focus for the SLC test will potentially bring into question the 'acquisitions' of 'assets' not previously considered anticompetitive or likely to be caught by current the test.

For example, in our industry, expansions of and improvements made to shopping centres sites enhance consumer experience and retailer performance, in-turn increase market capacity and have to date almost invariably been considered pro-competitive.

It is unclear, however, the extent to which the proposed new SLC test would apply to expansions and improvements given they may be viewed as 'acquisitions' that 'entrench' or 'strengthen' an owner's market position, despite those expansions and improvements being driven by competition in the market and adding to the quality and quantity of retail space available in that market.

Similar comments may be made in respect of shopping centre developments of greenfield sites where no shopping centre at all has previously existed.

The SCCA is also concerned about the prospective application of an SLC test to activities beyond acquisitions given that proposed changes to the definition of 'substantially lessening competition' in the CCA will impact the operation of numerous sections in the CCA including section 45, section 46 and section 47.

Section 46(1), for instance, currently prohibits firms with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that market or any other market in which the corporation (or related corporation) supplies or acquires goods or services. In relation to the application of this section 46 the ACCC currently says on its website that:

> *A business with substantial market power is also allowed to out-compete other businesses. For example, it can:*
>
> - *attract customers through promotional campaigns*
> - *use its skills and resources to develop a better product or service*
> - *drive down its prices with efficiency improvements.*
>
> *Competitive practices that improve efficiency, innovation, product quality or price competitiveness are unlikely to be a misuse of market power.*

The ACCC further currently says in its section 46 guidelines that:

> *Section 46 does not prohibit a firm from obtaining a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. This conduct is part of the competitive process, which drives firms to improve their performance and develop and offer products that are more attractive to customers, and should not be deterred. As stated by the High Court in* Queensland Wire Industries v Broken Hill Pty Ltd (1989):
>
> *Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way…these injuries are the inevitable consequence of the competition section 46 is designed to foster.*[1]

The SCCA again is particularly concerned about the prospective application of the new SLC test under sections 45 and 46 to shopping centre expansions and shopping centres redevelopments. This is all in circumstances where, to the SCCA's knowledge, no competition issues have been raised by the ACCC, or anyone else, in respect of such redevelopments and expansions. Such shopping centre developments benefit consumers, retailers and the construction industry.

Impact of the proposed reforms

Extending provisions contemplated as part of the merger reform process to other areas of competition law is concerning, given the Taskforce has not discussed or consulted on the changes in those contexts.

Applying a wider definition of 'substantial lessening of competition' to other business conduct will capture a broader range of competitive conduct, particularly from larger businesses. This will stifle innovation and improvement, disincentivise engagement in competitive environments, and restrict Australian businesses international competitiveness.

With the proposed amendments to the SLC test and with it to apply to section 46, in effect prohibiting firms with a substantial degree of market power from engaging in conduct having the purpose, effect or likely effect of "*creating, strengthening or entrenching*" {their} "*substantial degree of power in the market*", the accepted practice which encourages competition between firms would no longer stand.

Recommendation xv	**The proposed changes to 'substantial lessening of competition' should not be applied to other areas of competition law until they have been subject to consultation within those contexts.**

TRANSPARENCY AND PREDICTABILITY

Notice of competition concerns

Issue

The SCCA notes and supports the inclusion of a 'notice of competition concerns', which is "*intended to ensure that the Commission sets out and explains its objections or concerns, substantiated by material facts, material evidence and other material*".

Impact of the proposed reforms

Whilst the introduction of a notice of competition concerns is positive, it will only be effective if the facts, information, and evidence provided in the notice are objective and evidence-based. Should the notices contain subjective assertions based on limited evidence, they will effectively result in a reverse onus of proof whereby notifying parties are required to disprove subjective and baseless opinions.

As noted in our feedback regarding overall timeframes, we are concerned that the disparity between the timeframes afforded to the ACCC and the timeframes afforded to notifying parties will lead to an inequitable system. The disparity is most stark for notices of competition concerns, with the ACCC afforded 11 weeks to develop a notice, whilst notifying parties receive only 15 business days to respond a notice.

Recommendation xvi **The ACCC should provide clear and consistent guidance as to the factors it will consider when developing a 'notice of competition concerns'.**

Recommendation xvii **The timeframes outlined in the *Exposure Draft* for notifying parties to respond to the ACCC should be more equitable relative to the timeframes provided for the ACCC.**

REVIEW OF ACCC DETERMINATIONS AND PROCEDURAL SAFEGUARDS

Limited merits review

Issues

The proposed laws remove the right of notifying parties to seek a merits review of an ACCC through the Federal Court. Instead, a limited merits review will only be available through the Tribunal, with the Federal Court only able to consider a judicial review.

Impact of the proposed reforms

The removal a right for notifying parties to seek an impartial merits review through the Federal Court removes a key safeguard that currently exists to ensure that final decisions have been subject to robust and independent consideration.

As discussed below, the proposed system significantly skews the review process in favour of the ACCC, with the independence and impartiality of final reviews severely compromised. The proposed reforms abandon both the procedural fairness currently available for all parties, and will undermine confidence that the merger control system is impartial and evidence-based.

Recommendation xviii **The Bill should maintain the ability for notifying parties to seek a merits review via the Federal Court, to ensure an impartial final decision-maker.**

Limited merits review – considerations

Issues

The proposed laws provide for a limited merits review of ACCC determinations to be conducted by the Tribunal. There a number of restrictions placed on the scope of the Tribunal's review, including that the Tribunal must 'stand in the shoes of the original decision-maker'.

However, whilst notifying parties are not permitted to introduce additional evidence for the Tribunal's consideration, the ACCC and other consumer associations and consumer interest groups are able to provide additional evidence.

Further, the Tribunal is explicitly prohibited from making a finding of fact that is inconsistent with a finding of fact made by the ACCC.

We also note that parties with a 'sufficient interest' are permitted to seek a review by the Tribunal. Although 'sufficient interest' is not defined in the *Exposure Draft*, the *Explanatory Materials* clarify that it is intended to capture consumer associations and consumer interest groups, which are also eligible under the proposed laws for financial assistance to support their participation in a review.

Impact of proposed laws

Without change, the limited merits review of the proposed system is severely skewed in favour of the views of the ACCC. This undermines entirely the credibility of the proposed reforms.

That the Tribunal can receive additional reports from the ACCC and consult with consumer associations and consumer interest groups, but not receive additional information from notifying parties will inherently undermine the impartiality of the Tribunal's review.

Similarly, the explicit prohibition on the Tribunal making its own finding of fact that may be contrary to those determined by the ACCC is, frankly, farcical.

The SCCA has no issue with permitting consumer associations and consumers interest groups to participate in a review as parties with 'sufficient interest', however we are concerned that the proposed laws do not seem to contemplate the participation of industry groups on the same basis. Should this remain the case, it is yet further evidence of a skewed review process that has many barriers to the ability of notifying parties and industry to obtain procedural fairness.

Recommendation xix **The Bill should enable the Tribunal to consider all evidence it deems relevant, including new information provided by notifying parties.**

Recommendation xx **The Bill should empower the Tribunal to conduct its review with independence from the ACCC, including the ability to make its own findings of fact.**

Recommendation xxi **The Bill should provide for industry groups to be considered as parties with 'sufficient interest', as is the case with consumer associations and consumer interest groups.**

Ordinary course of business exemption

Issues

The *Exposure Draft* seeks to "*effectively expand the concept of asset for the purposes of the acquisition provisions*" to capture the following:

- any kind of property; and
- a legal or equitable right that is not property.

These amendments in particular exclude 'land' from the section 4(4) exemption for acquisitions that are 'in the ordinary course of business'. According to the *Explanatory Materials*, this is on the basis that "*land is an essential input for many industries and the acquisition of land holdings could for example, create barriers to entry or expansion*".[19]

Historically it had been considered possible that the exemption in section 4(4) for acquisitions made in the ordinary course of business might exclude the acquisition of adjoining land (including expenditure on the redevelopment of that land) for shopping centre developments.

It is commonplace for shopping centres to grow over time by adding to the footprint of existing sites, unlike other commercial buildings, such as offices.

Even if the capital expenditures made on the redevelopment and refurbishment of an existing shopping centre might be regarded as having been made in the ordinary course of business, the exemption in section 4(4) does not diminish the SCCA's concerns given that the proposed amendment to the definition of 'substantially lessening of competition' are to apply equally to sections 45, 46, and 47 (to which the section 4(4) exemption does not apply).

Impact of proposed reforms

The existing application of the 'ordinary course of business' exemption is already restrictive. Yet the proposed reforms further narrow the scope of the exemption. The proposed new section 51ABN(2)

[19] The Treasury, *Exposure Draft Explanatory Materials – Treasury Laws Amendment Bill 2024: Acquisitions*.

explicitly provides that the section 4(4)(b) exemption does not apply if the asset is land or an interest in land. The restrictions on the exemption seem to be heavily influenced by the prospect of 'land banking', which is more pertinent to other sectors.

With the removal of section 50 being proposed by the *Exposure Draft* and the changes proposed to section 45(7) of the CCA there is a real possibility of the new SLC test being applied to shopping centre expansions and redevelopments.

Again this is all in circumstances where, to the SCCA's knowledge no competition issues have been raised by the ACCC, or anyone else, in respect of such expansions and redevelopments.

Given that the expansion of shopping centres over time is commonplace and part of the 'ordinary course of business' for shopping centres, the further narrowing of the exemption's applicability is yet more evidence of the proposed laws intent to cast a wide, unsophisticated net over all transactions.

We will provide further data and analysis on this issue.

Recommendation xxii **The Bill should provide exemptions for commonplace expansions of shopping centre sites.**