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Dear Sir/Madam

Submission on the Merger Notification Thresholds Consultation Paper

1 We refer to the Merger Notification Thresholds Consultation Paper (**Consultation Paper**) published by the Treasury Competition Taskforce on 30 August 2024.

2 We welcome the opportunity to draw on our experience as competition lawyers in making the following submission.

3 As we explained in our submissions dated 19 January 2024 and 13 August 2024, we do not support the introduction of the proposed mandatory and suspensory merger regime – including because mandatory merger notification thresholds are a crude tool for identifying anticompetitive mergers.

4 Mandatory notification thresholds will inevitably lead to unnecessary complexity, disputes and wasted time, effort and costs (for the merger parties and the ACCC) regarding whether individual mergers fall on one side of the threshold or the other side – as opposed to the key issue of whether the mergers would substantially lessen competition. It is that key issue which should be the focus of the merger regime and efforts of the merger parties and the ACCC.

5 The difficulties with mandatory merger notification thresholds are compounded by the proposed significant legal consequences for failing to notify a merger. Under the Exposure Draft of the Treasury Laws Amendment Bill 2024: Acquisitions published on 24 July 2024 (**Draft Bill**), those consequences would include very high pecuniary penalties and the voiding of acquisitions.

6 To comply with the proposed laws, and avoid those significant legal consequences, businesses need to be able to work out whether a merger must be notified or not. Accordingly, it is essential that any mandatory merger notification thresholds are <u>clear and certain and can be reasonably applied by businesses</u>, on whom fall the burden of notification and the consequences of any failure to notify.

7 In our respectful submission, the proposed thresholds in the Consultation Paper are overly complex, with multiple alternative "limbs". Also, they rely on measuring market shares, which creates significant inherent problems and practical difficulties. In our view, market shares should not be used for mandatory notification thresholds.

8 Further, we respectfully submit that monetary thresholds should not be used alone, without an additional requirement that the merger parties are competitors or likely competitors. It also appears to us that the proposed monetary thresholds should be set

higher as otherwise they will capture a large number of mergers that are not anticompetitive.

9 Setting mandatory notification thresholds too low is neither necessary nor efficient and would result in unjustifiable cost and expense to business, create delay and waste the ACCC's resources.

10 Further, even if a merger that substantially lessens competition is not notifiable under the thresholds, the merger will still continue to be prohibited (under s 45 of the *Competition and Consumer Act 2010* (Cth) according to the Draft Bill), the ACCC can take enforcement action against it, and the merger parties can voluntarily notify the merger if they are concerned about the risk of contravention or ACCC enforcement action (as usually occurs under the current regime).

Market share thresholds

11 Market share thresholds are inherently uncertain and will unduly increase costs for businesses and the ACCC. They require businesses to define the relevant market(s) and then measure the relevant market shares. That raises a number of difficulties.

Inherent problems

12 Markets are an economic concept involving competition or rivalry between firms. Their precise boundaries are inherently uncertain. Market definition requires judgments regarding the degree to which different products are substitutable for each other, cross-elasticity of demand and supply, geographic factors and assessment of the relevant level of the supply chain.[1]

13 The Courts have recognised that market definition (emphases added):[2]

> *… involves **fact finding together with evaluative and purposive selection**. … It involves a **choice** of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve the statutory policy, the identification will be **evaluative and purposive as well as descriptive**.*

14 The ACCC's current merger guidelines[3] and misuse of market power guidelines[4] also acknowledge (emphases added):

(a) "*It is **rarely possible to draw a clear line** around fields of rivalry*" (page 13, ACCC merger guidelines);

(b) "*It is **not uncommon for more than one market to be identified** in any particular merger review*" (page 14, ACCC merger guidelines); and

(c) "*It is well recognised that market definition **is not an exact science** and that it is **not possible or necessary to identify precise boundaries***" (paragraph 2.7, ACCC misuse of market power guidelines).

15 The ACCC's current merger guidelines and misuse of market power guidelines also describe market definition as "purposive". Market definition therefore "*always depends*

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[1] See, eg, *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481; *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.
[2] *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 104 ALR 633 per French J.
[3] https://www.accc.gov.au/system/files/Merger guidelines - Final.PDF
[4] https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Misuse%20of%20Market%20Power.pdf

on the specific facts and circumstances of a merger, and current evidence from market participants will often be critical".[5]

16 It is not appropriate to impose on businesses serious notification obligations based on market shares, when ultimately it is only the Courts, the Australian Competition Tribunal or, in some circumstances, the ACCC that may legally determine how to define the relevant market(s). Even if businesses go to the expense of engaging a professional economist to give an opinion on market definition, there is no guarantee that the ACCC or the Courts will agree with that opinion.

17 Page 21 of the Consultation Paper concedes that market share thresholds "*may create some uncertainty in a mandatory control system*" and notes that the OECD and the ICN "*recommend that market share thresholds should not be used as the only indicator in a mandatory system because they are not clear and objective notification criteria*". However, the criticism of market share thresholds by the OECD paper cited by the Consultation Paper[6] is not limited to situations where they are the "*only indicator in a mandatory system*". Rather, the paper discusses that "*international recommendations recommend the adoption of objective notification criteria as jurisdictional thresholds for merger control*", given non-objective criteria such as market shares can "*undermine the goal of greater transparency and predictability for businesses*".

Practical problems

18 Even if a market can be defined, there are many industries where businesses do not have access to the data required to calculate market shares. If it is available, businesses may be forced to rely on and incur costs to purchase market share information from third party information providers or analysts – which may or may not be accurate. In some industries there is no reliable information, or the available information may relate to a field that is broader or narrower than the relevant market.

19 Unlike the ACCC, businesses do not have compulsory information gathering powers to help them determine market shares. Further, competition law generally discourages competing businesses from sharing with each other the types of data required to determine market shares.

Use by the ACCC

20 While a combined market share threshold is employed by the ACCC in its current merger notification regime, that regime is voluntary and, whether a proposed merger is notified or not, the key legal issue remains whether the proposed merger will likely substantially lessen competition. Thresholds play a fundamentally different role in a mandatory notification regime in which falling under or over the threshold may have significant legal consequences for businesses, including penalties and the merger being legally void.

21 If the ACCC wishes to do so, it could still use market shares as part of its recommendations or guidelines about when merger parties should notify a merger on a voluntary basis, even if the merger is not legally required to be notified under the thresholds.

Adopting a "conservative" approach

22 The Consultation Paper (page 21) acknowledges that difficulties with market definition and calculation of market shares "*could create uncertainty over whether a merger should be notified*". It suggests, however, that this uncertainty might be mitigated if the merger parties are required to "*calculate market share based on the market definition*

[5] ACCC merger guidelines, p 14.
[6] See one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN3/FINAL/en/pdf

most likely to raise competition concerns". That approach would make it even more onerous for businesses to comply with the notification requirement and is fundamentally inconsistent with having clear and certain notification thresholds.

23 Businesses cannot be reasonably expected to anticipate what the ACCC may consider to be a "*conservative*" approach to market definition. In fact, it is likely that many businesses would already adopt a cautious approach to the notification thresholds because of the significant legal consequences of a failure to notify. The proposed approach is therefore likely to lead to the notification of a large number of mergers that are not anticompetitive and should not, in the interests of costs and efficiency, be notified.

Share of supply

24 The problems with mandatory market share notification thresholds are not sidestepped by replacing them with mandatory notification thresholds based on "share of supply". First, although "share of supply" is considered by the Competition and Markets Authority (**CMA**) in the UK, the UK merger notification regime is <u>voluntary</u>, and does not support the use of "share of supply" as a mandatory notification threshold.

25 Second, although "share of supply" avoids the need to define a market, it would still require the merger parties to define the boundaries of the relevant good(s) or service(s). This is acknowledged in the CMA's guidance paper,[7] which explains that the CMA has a "*broad discretion*" to identify the relevant category of goods or services, there may be more than one reasonable description for a set of goods or services, and the CMA may apply an unlimited range of criteria to decide whether goods or services should be treated as being of separate description.

26 Third, using "share of supply" does not overcome the practical difficulties for businesses in obtaining the data necessary to calculate the relevant shares.

Monetary thresholds

27 The Consultation Paper proposes a two-limbed monetary threshold, in which the first limb is intended to capture economically significant transactions by medium-sized businesses and the second limb is intended to capture mergers involving larger businesses (corresponding to approximately the largest 1000 businesses in Australia).

28 As discussed in our submission dated 19 January 2024, merger thresholds based solely on monetary limits will necessarily capture uncontroversial and potentially pro-competitive proposed mergers such as:

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

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

29 Accordingly, we respectfully submit that monetary thresholds should not be used by themselves and a merger should only be required to be notified if the parties are competitors or likely competitors (a test that businesses are already required to apply under the cartel laws).

30 In our view, a merger that is not between competitors or likely competitors (such as a "vertical" merger between a customer and supplier), but still substantially lessens competition, is rare and ought not be the basis for setting proposed notification thresholds. Rather than requiring a large volume of mergers that do not involve

[7] Competition and Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure* (25 April 2024) 31-2. The paper is cited in footnote 53 of the Consultation Paper.

competitors to be notified, if a merger that does not involve competitors does raise competition concerns it could be investigated and subject to enforcement action by the ACCC under s 45 (as explained above) – if it is not notified on a voluntary basis.

31 It also appears to us that the monetary thresholds are set quite low and likely to capture a high proportion of mergers that do not raise any competition concerns. This is particularly so without any requirement that the parties are competitors or likely competitors, and given that the thresholds may be applied to a series of mergers in the previous three years.

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

Yours sincerely
Arnold Bloch Leibler

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