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Dear Treasury

SUBMISSION ON AUSTRALIA'S MERGER RULES AND PROCESSES

Introduction

This submission is from Quay Law Partners, a specialist Australian regulatory law firm based in Sydney. Our partners have significant experience in regulation from a private sector as well as Government perspective in Australia, as well as experience in international regulatory regimes from senior roles in International Bar Association committees and other international fora.

Thank you for the opportunity to make a submission to Treasury in a highly important area of Australian commerce. This submission focuses on the proposed areas of change to Australian merger control processes as well as the substantive merger control test in section 50 of the Competition and Consumer Act 2010 (Cth) (**CCA**), having regard to Treasury's discussion paper and the public submissions to Treasury from the Australian Competition and Consumer Commission (**ACCC**).

A. OVERVIEW

1. Key points

1.1 From a competition perspective merger control is intended to assist governments in ensuring industry structures in the relevant jurisdiction facilitate competitive outcomes for consumers. In our view, there are some fundamental issues raised in the Treasury review from a policy perspective that it is important are fully debated before making major changes to Australia's merger control regime so that there are not false expectations of what the changes proposed in the Treasury review could achieve. In particular, more targeted regulatory changes may achieve greater improvements to competition than the broad changes to merger control regulation contemplated in the review. For example, changed merger notification regimes are likely to have a more limited competition impact in the Australian airline, toll road, grocery or technology industries than other changes that the Australian Government could implement in the regulation of areas such as environmental planning, airport landing slot usage or interoperability, or via other reforms that would lower barriers to entry or expansion and provide increased certainty to invest.

Are current informal processes working?

1.2 Changing from a voluntary merger notification regime to a mandatory merger notification regime should be based on clear evidence that the ACCC is not being notified of transactions that would contravene the merger test in section 50 of the CCA. The current process involves a self-assessment with the threat of pecuniary penalties and divestment for contravention, which creates incentives to notify under the informal clearance regime if merger parties consider there are risks that the merger may contravene section 50 of the CCA. Arguments that the ACCC is not being informed of all mergers is not determinative that there is a problem with the self-assessment regime. The relevant issue is whether there are mergers that are *problematic* that are not being notified, in other words whether the ACCC is not being notified of mergers which would on their face seem likely to breach section 50 of the CCA.

1.3 The informal clearance process and the associated so-called pre-clearance process are informal processes outside the CCA where the ACCC provides “no action” letters to the merger parties, providing comfort (in the form of increased certainty) to allow them to proceed. Arguments that the ACCC is being provided with incomplete information on mergers are matters that are within the ACCC’s control to address as the informal clearance system is a creature of the ACCC. The ACCC has within its control how it accepts data or uses section 155 of the CCA to compel the provision of data under these informal processes. The ACCC is under no obligation to provide a no action letter to merger parties and should not do so if it determines that it has not received sufficient information to consider the merger.

1.4 In addition, the ACCC’s concerns on incomplete information would appear to have recently arisen in a merger authorisation matter, so the available evidence suggests that the implementation of a mandatory notification system along similar lines to the existing authorisation filing requirements may not resolve the ACCC’s concerns. Equally, arguments by the ACCC that parties are “threatening to complete” and hence a mandatory notification and suspensory regime needs to be imposed to remove the ability of parties to make such threats, need to be more fully understood as to whether such situations arise because the ACCC timeframes are uncommercial or subject the acquisition to unreasonable delay because of insufficient ACCC resources allocated to consider the matter (which issues will arise with a mandatory regime as well) or whether the merger parties are gaming the process, as the ACCC claims.

1.5 The recent Virtus Health /Adora Fertility merger decision by Justice O’Bryan lends strong weight to previous judicial consideration that the balance of convenience lies with the ACCC in protecting the status quo in mergers such that injunctions will likely be granted in situations where the ACCC has reasonable grounds to prevent a merger. The ACCC litigation in that matter sent a strong message to the business and legal communities that the ACCC was prepared to litigate – which will act as a strong disincentive to parties to seek to make threats to complete where substantive competition issues arise and the ACCC has been given insufficient time to review the proposed acquisition.

1.6 There comments suggest that closer scrutiny should be given by Treasury to ways to improve the current system, which past reviews have said has been working well, or at the very least greater scrutiny of these issues is undertaken so that any regulatory change, if Treasury is minded to recommend that to Government, is effective.

Are generally applicable low thresholds appropriate for any mandatory regime?

1.7 It is well accepted that there are only a very limited range of merger transactions that give rise to genuine merger control issues – typically between 5% and 10% in Australia (and, for that matter, most other jurisdictions). The ACCC's proposed threshold of $35 million (referred to in documents released by the ACCC under freedom of information legislation and available on the ACCC's website) for notifiable "acquisitions", without a detailed analysis of how that threshold was reached or how it might apply (e.g. we assume it does not apply to everyday acquisitions of assets or leases) creates a clear risk of capturing non problematic acquisitions and imposing significant regulatory cost and burden on business that is not justified. It is important, if the Australian Government is looking to make changes to Australian merger control regulation, that the changes actually make a material improvement and the harm sought to be addressed cannot be addressed by more targeted regulatory intervention that is less likely to have unintended consequences. In our view some of the material put forward by the ACCC on so called problematic mergers that were not notified is subject to debate by merger parties whether they would have in fact constituted contraventions of section 50. It would have been helpful for the ACCC to have addressed at this stage of the review process what would be a workable merger notification threshold and why. That is an important threshold discussion as to the workability of the ACCC's proposed merger reforms.

1.8 For example, the ACCC in seeking merger reform at the current time makes much of the need to address merger control issues in relation to anticompetitive digital platforms markets. However, a reasonable question is raised whether this is best addressed through mandatory codes for digital platforms, which the Treasury has separately consulted on, which would enable the market power in Australia of these platforms to be appropriately addressed. Broad merger regulation, typically designed for structural settings, is not best placed to deal with the problematic practices of some of the global tech giants.

1.9 Equally, reform in the Australian grocery industry to address cost of living pressures may be better achieved through targeted codes of conduct that give consumers more choice and suppliers more options. Importantly, the conditions of competition would be improved by implementing some of the changes to planning, environmental and operating hour restrictions that were recommended as part of previous competition policy reviews. While some of these changes are undoubtedly difficult to implement and require interaction with State Government on planning issues, they may well achieve more substantive changes to the level of competition by facilitating new entrants in a timely manner rather than through merger reform which would only impact future acquisitions.

1.10 If, notwithstanding the concerns raised in this submission, Treasury is minded to recommend to the Australian Government that it makes changes to merger control processes in the CCA, then mandatory merger notification thresholds should be set sufficiently high to only capture mergers that have the potential to make a meaningful difference to the economy. This is particularly so having regard to the fact that in recent years the ACCC's merger reviews on major mergers have focused on those where the merger parties have sought to rely on public benefits under the merger authorisation test (for example, Brookfield/Origin, ANZ/Suncorp, Telstra/TPG and Armaguard/Prosegur) and where the merger parties have positively sought a no action letter from the ACCC such as in more complicated mergers with substantial overlaps (and attendant divestitures) including Australian Clinical Labs proposed acquisition of Healius

Limited which the ACCC opposed in December 2023.[1] Given Australia's current self-assessment regime, it is understandable that merger parties are seeking either authorisations or no action letters from the ACCC in those types of transactions raise more substantive issues of compliance with section 50 of the CCA. Reform of appropriate filing fees, disclosures and transparency requirements should be looked at in relation to those types of merger reviews, to better reflect the extent of ACCC analysis and cost to the ACCC that is involved in the merger review.

Delays arising from administrative burden of a mandatory scheme should not be underestimated

1.11 We also believe that the ACCC may have underestimated the complexity and regulatory burden on the ACCC and the business sector of its preferred merger reform proposals. Given that the ACCC's preferred proposals include that ACCC clearance will give immunity from third party challenge to the cleared mergers (an immunity that currently only applies for merger authorisations), this will require transparent filings and thorough consultation with merger parties, customers and competitors to ensure the correct decisions are made and there is procedural fairness for those third parties. This has significant implications. First, to ensure fairness to third parties that may be impacted by a merger and who will be unable to take action to oppose the transaction if the merger is cleared, the ACCC's processes will need to be both very transparent and very thorough. This in turn will mean increased administration required by the ACCC merger processes. This does not seem to have been considered, particularly given that, as Treasury notes in the consultation paper, ACCC merger authorisations have as a practical matter far exceeded the 90 day thresholds for review prescribed in the CCA. Even with the best will and intentions, as a practical matter, the new merger timeframes the ACCC proposes will be exceeded given this need for transparency and thoroughness. The Australian Government needs to be mindful that such processes will lead to a risk that possible efficiency enhancing transactions will fail due to the time and cost involved in obtaining regulatory clearance, as well as because merger parties may be unwilling to be subject to the public scrutiny that such a clearance process will entail.

1.12 It is also useful to compare the proposed reforms with the processes under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (**FATA**). The processes under the FATA do not impact the rights of third parties, meaning that there is an option (where other factors are not relevant, such as an ACCC merger review process) for clearance to be sought on a confidential basis. Further, the thresholds for review of a merger under FATA are generally (subject to exceptions such as for transactions in critical infrastructure sectors) much higher than the thresholds contemplated by the ACCC. Those higher thresholds are intended to ensure that the administrative burden imposed on the Foreign Investment Review Board (**FIRB**) in reviewing transactions is commensurate to the risks that those transactions raise. For a short period of time from early 2020, the threshold for approval of regulated transactions under FATA was reduced to nil. This imposed an unreasonable burden on FIRB, which was not sustainable, and the previously applicable higher thresholds were quickly reinstated.

Variation of Option 2 in relation to merger notification is preferred if reform is to be pursued and the current merger test should be retained with clarification to section 50(3) criteria if required

[1] ACCC Media Release.

1.13 In these circumstances we believe that Treasury's proposed Option 2 is preferable in terms of merger process if Treasury is minded to make recommendations for change to the Australian Government. That is, a mandatory merger notification regime for appropriate acquisitions based on an appropriate turnover and size of transaction test that is focused on transactions that have a meaningful competition impact. Care should be taken not to set such low thresholds to capture mergers with the lowest common denominator that the ACCC has suggested of $35 million or set so low so as to capture so called creeping acquisitions that we discuss later in this submission. As the OECD, in its recent discussion paper[2] on creeping acquisitions has noted (including in relation to the ACCC's latest proposals), there are conflicting views on whether it is better to set notification requirements for serial acquisitions based on the number or amount of each acquisition, or to adopt an additional limb to the merger test. The changes to the merger test as suggested by the ACCC are problematic for the reasons raised in this submission and it is suggested that a more limited notification regime (but not requiring a suspensory filing), should be considered to address ACCC concerns as to the competition impact of "roll ups" whether by large companies, private equity or fund managers. This is discussed later in our submission at paragraph 1.22. In our view such an approach would be preferable if Treasury is minded to address creeping acquisitions.

1.14 While we believe it is appropriate to retain the requirement, as applies in the United States, for the competition regulator to go to court to prevent mergers proceeding (rather than a system where merger parties need to litigate the ACCC's administrative decision), consideration should also be given whether it is appropriate to look to have more efficient court processes for merger litigation more consistent with the processes of the Australian Competition Tribunal (**Tribunal**) to deal with competition cases than the current general Federal Court processes to look for efficiencies in time, cost and expertise. In this respect we would defer to Judges of the Federal Court and Tribunal as to the most appropriate manner in which to address merger cases in an efficient, fair and just manner.

1.15 Unless merger parties are seeking to rely on public benefits to argue compliance with the merger test, the merger test should not require the ACCC to be satisfied that the merger does not lessen competition substantially. This is consistent with the current merger authorisation test provided for in the CCA, with both the ACCC (and then the Tribunal on appeal) having to be satisfied that public benefits outweigh any detriments to the competitive process arising from the acquisition. As a general proposition merger parties should not be required to prove that their merger complies with the law. Accordingly, we submit that Treasury's Option 2 is preferable, being to add clarifications to the section 50(3) criteria in the CCA.

1.16 We note the ACCC's proposition that best practice should involve the adoption of overseas merger regimes. However, Australian merger control should be fit for Australia's circumstances; namely, in an economy with low trade barriers to imports (which act to constrain any market power), a vast geographic market and comparatively small population, Australian companies should be subject to a merger threshold that allows them to achieve scale efficiencies in order to compete with larger overseas companies that have scale based on global operations or their larger population base).

1.17 In recent times other jurisdictions have moved to adopt foreign investment rules as Australia has had in place for considerable time. This is an example of where, in terms of broader

[2] Available here: OECD Discussion Paper.

merger regulation, Australia has led the way with appropriate laws and regulations and there is no reason to slavishly follow other jurisdictions where evidence exists that Australia is able to implement best practice regulation to suit its own circumstances.

1.18 There is also much to be said for retaining the concept of public benefits for Australian consumers to allow mergers in appropriate circumstances, particularly where global supply chain and geopolitical issues mean that ensuring Australian production and self-sufficiency is prudent (for example acquisitions and joint ventures to promote Australian manufacturing under the recently announced $15 billion National Reconstruction Fund).

Addressing creeping acquisitions and acquisitions in adjacent markets by changing the merger test

1.19 We have concerns with the ACCC suggestion of importing the European additional competition test limb, that is, to include in the substantial lessening of competition test mergers that "entrench, materially increase or materially extend a position of substantial market power" as being a panacea for reviewing mergers in adjacent markets or creeping acquisitions. The additional competition test from Europe is not easy to reconcile with the architecture of the CCA being based on the United States "substantial lessening of competition test". In addition, the European test is predicated on a higher threshold of entrenching a dominant position in the European market which is both a higher threshold and also of course a much bigger market. Equally problematic is the uncertain and imprecise nature of "entrench, materially increase or materially extend", having regard to the more settled concept of substantially lessening of competition.

1.20 In reference to proposals as to the use of the word "entrench", if it strengthens a position of a company having a substantial degree of power in a market by impacting dynamics and change, then it should be acknowledged it is a lower threshold than in Europe where that threshold is in relation to a business that has a dominant position, whereas in Australia the threshold is lower, that is, having substantial market power which was adopted to be able to argue that many companies may have a substantial degree of market power.

1.21 It is unclear whether "materially" would in fact create a higher threshold than substantially lessen competition and if so, it serves no assistance in addressing the harm that the ACCC have raised. If it is to be a lower threshold, then it affects the architecture and consistency of the Part IV prohibitions in the CCA and the merger test in section 50. If it is considered that this change to the concept of what constitutes substantially lessening competition is to apply to the other prohibitions in Part IV of the CCA (e.g. misuse of market power in section 46 of the CCA or sections 45 and 47), then the ACCC should be upfront as to the impact of this change.

1.22 In summary, we believe that this additional change to the merger test is highly problematic. It is unclear whether it would capture both roll up acquisitions by private equity or funds managers or creeping acquisitions by major companies or only the latter type of acquisition. A merger notification requirement involving aggregating acquisitions at a lower threshold as mentioned earlier (but without the need to seek merger clearances) would ensure these acquisitions are drawn to the attention of the ACCC. That approach would avoid the uncertainty created by amending the legal test. The new proposed test by the ACCC would need extensive explanation and it is likely that costly (and inefficient) litigation will be required to resolve the interpretation to be applied to the test, as well as to determine the broader impact of the test on other prohibitions in Part IV of the CCA. All of these issues with this proposal create uncertainty for business in upfront assessing their proposed mergers

compliance with Australian merger regulation. In circumstances where the number of problematic mergers is universally acknowledged as low, the need for this additional prohibition proposed by the ACCC has not been made out.

Big is not necessarily bad

1.23 As the Productivity Commission recognised in its 2023 submission to the Australian Parliament House of Representatives Inquiry in relation to Promoting Economic Dynamism, Competition and Business Formation, there is not a consistent correlation between concentration and competitiveness and productivity. It will depend on the circumstances.

1.24 It is also important to recognise, as part of the consideration of merger law reform, that sectors of the Australian economy may be trade exposed, so that the size of Australian competitors and domestic industry concentration is not determinative of the level of competition in terms of price or service to Australian consumers because of both imports and exports competing on a global or regional basis.

1.25 For example, Australia is a large continent with a comparatively small population largely limited to the coastline and has an economy that relies heavily on the export of minerals and agricultural commodities. This means that our supply chains need to be efficient to ensure that Australia's exports are globally competitive as Australian export prices are constrained by global players with whom Australian exporters compete.

1.26 Further, Australian businesses may need to have sufficient scale so that they can provide products and services to Australian consumers in a cost-effective manner that allows them to compete with global competitors that enjoy global scale economies or economies based on the larger populations of their home country.

B. **ADDITIONAL DETAILED COMMENTS**

2. **Merger reforms should not be looked at in isolation from other competition reforms: the proposed merger process and merger test changes are unlikely to be the panacea that is suggested, with more direct regulatory intervention under mandatory codes in different sectors, such as the digital platform or grocery sectors likely to provide better outcomes.**

2.1 We note at the outset that, unlike in past reviews, the Government has not sought through the current review process a holistic independent review of competition policy. While this is the case, the Treasury review, and the ACCC submissions to Government, should not overlook the broader context of what competition policy changes could provide the greatest increase in productivity to the Australian economy as a whole and attendant benefits to Australian households that are the subject of cost of living pressures.

2.2 A review of ACCC merger assessments that have been publicised on the ACCC website in recent times would suggest that most of the more significant merger reviews that the ACCC has undertaken have been the subject of merger authorisation applications (e.g. Brookfield/Origin and Linfox and Prosegur) and appeals to the Tribunal (e.g. Telstra/TPG and ANZ/Suncorp) with a comparatively smaller number being reviewed under the public informal clearance process. Those mergers assessed under the informal process have had more limited economic impact. We have had limited regard to so called merger pre-assessments given that by their nature they are of such low competition impact they are cleared by the ACCC on the

papers with no, or limited, targeted non-public reviews. Merger pre-assessments are the vast majority of the ACCC's merger reviews, and many arise through referrals from FIRB.

2.3 There may be very sound reasons to improve merger notification processes; increase filing fees; and/or ensure that there are fulsome filing obligations in merger authorisations processes (given applicants for authorisation are seeking to rely on public benefits outweighing merger detriments to obtain approval to proceed) and also in the case of takeover proposals with very large overlaps and competition issues where the acquiror seeks a positive clearance (through the issue of a no action letter from the ACCC), such as in the Australian Clinical Labs/ Helius takeover.

2.4 However, questions of regulatory benefit/burden arise when having merger notifications extend to *all* acquisitions (or acquisitions above a very low threshold) with attendant filing fees and preparation costs when it would appear that the number of problematic mergers (in the sense of the number needing more detailed review) is actually quite limited.

2.5 There may be greater benefits to Australian households by increased focus and use of Government resources on implementing mandatory codes applying to digital platforms or focusing on other areas which are of key importance to Australians such as the grocery industry, rather than extensive changes to the merger process that all past independent reviews have suggested have worked reasonably well. This is particularly the case when it is not clear that the merger changes mooted by the ACCC would as a practical matter result in a changed commercial environment. It is likely, given Australia's small size and number of consumers, that the large tech companies would still bypass compliance with Australian merger laws such as occurred with Google/Fitbit where the acquisition was opposed in Australia with attendant enforcement public statements by the ACCC, but no eventual action. The ACCC's "no decision" dated 16 October 2023 in relation to the Microsoft/Activision Blizzard transaction is another practical example where remedies were imposed by larger jurisdictions in relation to a very significant technology merger but not action was taken in Australia. It is unclear what the outcome for Australian consumers will be as a result. By means of comparison, given that Australia has not progressed in implementing mandatory codes in the digital platforms sector, it would appear that Australian consumers will not receive the benefits of positive changes that have been implemented in Europe under the Digital Markets Act. An Australian Government focus on taking regulatory action to implement such codes, in sectors such as digital platforms and technology which give rise to problematic competition outcomes which harm consumers, is likely to provide a superior overall outcome than changes to the merger regime. We have elaborated on this further in a later section.

2.6 In summary, our submission is that changing the merger process and merger tests is not the panacea that may be being suggested and more focused regulatory intervention is preferable or should be given priority of Treasury resources.

2.7 Accordingly, our submission reflects a perspective that if the Australian Government is minded to change the merger process to require a mandatory merger notification regime, that it be carefully calibrated to an appropriately high monetary threshold. This does not stop the ACCC investigating mergers that could raise competition issues where transactions fall below the notification thresholds, as the United States agencies do. This is in our view a better approach than trying to have merger notification thresholds calibrated to catch a very large number of smaller acquisitions as this avoids the danger of setting an economy wide merger notification

threshold based on the lowest possible denominator. While the ACCC may wish to review, rollup acquisitions which would fall below a high threshold, for example, pub acquisitions or individual pet store and vet clinic acquisitions, as in the United States, this is more an enforcement question on a factual basis as to whether those acquisitions lead to increased prices and worse service or whether they lead to better quality and improved service.

2.8 These issues are further complicated by the ACCC's request for so called "call in" powers without strict limitations on those powers, particularly where they create filing fee obligations. Our experience highlights that care needs to be taken that global transactions or domestic transactions are not "called in" because the regulator would like to know what is occurring, even if the dollar value or market impact in Australia is actually small. The nature of the ACCC "call in" powers should be the subject of careful consideration to ensure that the grant of this power does not undermine the certainty provided by any new merger notification powers. It may be that the appropriate regulatory setting is the ability to require answers on global mergers affecting Australia is confirmed under the ACCC's powers under section 155 of the CCA, but not the ability for the ACCC to require merger filings if turnover is below the relevant notification threshold (as appropriately calibrated).

3. **Nature of regulatory settings should not be to require merger parties to show that a merger complies with the law in the absence of the merger parties seeking to rely on claimed public benefits.**

3.1 One of the fundamental issues that underlies this review is the important philosophical debate as to the extent of intervention that is appropriate in markets. That is, the extent of everyday acquisitions being subject to review by government such that commerce is not adversely impacted by having to obtain approval for such everyday transactions from a regulatory agency.

3.2 An important aspect of regulatory intervention is setting the threshold correctly to ensure that any new mandatory regime will address only those transactions likely to genuinely impact competition in a meaningful manner. Merger review thresholds need to be set at appropriate levels so that, for example, multi-year leases, purchases of machinery and other goods are not subject to merger control where they pose no likelihood of competition impact.

3.3 It is also necessary to ensure that regulatory decisions are the best possible not only for businesses but the Australian community, and do not deter investment in Australia. Best practice regulation in the area of merger control should have regard to the touchstones of:

- ***Providing certainty of application of merger laws (i.e. that the process and law is clear).*** There are aspects of what the ACCC has proposed that raise questions of certainty of application such as the "call in" power and the vague concepts of "entrenching a dominant market position". While these concepts are used under European law, it is an open question whether they are not problematic because of uncertainty and that uncertainty in turn leads to unnecessary litigation.

- ***Predictability of outcomes based on similar facts and scenarios.*** Important ACCC merger decisions should be published so that they provide guidance to business and their advisers prompting compliance with the law and an understanding of the ACCC's approach in particular factual positions.

- ***Transparency of process so that merger parties and the public have confidence in the process.*** If merger parties will obtain a clearance and immunity from challenge to their merger, the proposed new law will require public filings and a process to review and challenge decisions. The merger authorisation process is highly public because it immunises a transaction from third party challenge but creates lengthy time periods far exceeding the 90 day statutory period.
- ***Accountability in terms of robust, public decisions that can be challenged in the courts if considered to be incorrect by merger parties and people affected by the merger in a genuine manner.*** This will mean that the ACCC will need to publish fulsome decisions as it does in merger authorisations.
- ***Commercial timeliness.*** Processes, review periods and appeal processes should be conducted in a commercially timely manner so that a merger subject to review is not as a practical matter stymied through the effluxion of time and bureaucratic processes. As a practical matter the Government needs to understand the considerable cost for merger parties in making merger filings and the time involved in getting the forms right. From our own past experience, merger filings in Europe cost well over €100,000 to prepare and, typically, over a month is taken in consultation with the European Commission in “pre-filing” discussions.

4. **Merger control needs to be fit for the Australian context and economy.**

4.1 As with past independent reviews, there is the need for consideration of the policy objective of ensuring that the overall needs of the Australian economy are achieved in terms of competitiveness, productivity and facilitation of the development of Australian industries to provide Australia with an economy that is able to operate in a sustainable manner if supply chains are disrupted (e.g. the Adblue issue[3]). This means that, amongst other matters, competition policy in the form of merger control needs to be looked at together with other mechanisms, such as current and future mandatory codes. With this in mind, the following points should be considered:

(a) Australia is a democracy and, as with the United States, has generally adopted a political position which is mindful of government and bureaucratic intervention in the operation of free markets and the rights of its citizens.

(b) The US merger control regime is a mandatory merger notification regime based on turnover or deal size with a filing fee and merger suspensory waiting periods that requires US antitrust agencies to allow the waiting period to expire or litigate by going to court to oppose a merger based on a merger test and concepts that are broadly consistent with those in the CCA rather than merger control regimes in Europe. This means that care needs to be taken in moving from well understood concepts under Australian law to the adoption of European rules, which do not form the basis of the existing merger test in the CCA, as discussed in further detail below.

4.2 Establishing a mandatory merger notification regime requires a timely and transparent assessment of mergers both from the perspective of the merger parties and the public. If the

[3] The shortage of Adblue (an essential additive to diesel fuel) in Australia during the recent COVID pandemic is an example that highlights Australia’s supply-chain issues.

ACCC is to "clear" a merger it will impact the rights of third parties. At the moment the ACCC's informal clearance process does not restrict in any way the rights of third parties and that public informal clearance process (including the pre- assessment process) is to be contrasted with the existing very transparent authorisation process which requires the publication of merger forms, submissions, correspondence with third parties and also the submissions of those third parties.

4.3 It is not clear whether the size and scope of the regulatory task the ACCC will face if its preferred form of reform is introduced is fully appreciated, as it will change the nature of the assessment of the vast number of mergers that are currently considered under the ACCC's informal processes, including for those mergers that are pre-assessed by the ACCC. The pre-assessment process is the subject of some disquiet as to timeframes and procedural steps undertaken, as there is no publication by the ACCC of what mergers have been pre-assessed (as compared to mergers which are subject to a public informal merger review), nor how the ACCC's processes are intertwined with the otherwise largely confidential FIRB approval process.

4.4 From a practical perspective there is a question of whether it is appropriate for the ACCC as an enforcement agency to be making decisions on whether a merger satisfies the substantive test based on the experience and knowledge of its staff from the junior to senior levels having regard to the already very expansive breadth of its regulatory coverage. Comparisons may be made between the size and cost of the ACCC at the current time with competition agencies in Europe and more recently the United Kingdom. Such comparisons are eye opening, with those other regulators being significantly larger, and more costly for taxpayers in those jurisdictions.

4.5 There are also concerns that have been raised in the context of the public informal merger review process as to the sensitivities of publication of submissions of third parties and the nature and type of consultation by the ACCC on merger remedies including undertakings. Those are likely to escalate if a mandatory regime is introduced.

4.6 Care should be taken in importing concepts from Europe into a reformed merger control test, as these do not sit easily with US merger control concepts, on which the CCA is based. For example, the language used in Europe as to entrenching a dominant position needs to be considered as against the larger European market size and the lack of clarity in what such "entrenching" means. The use of this concept to capture so called "creeping acquisitions" as the ACCC has suggested is not straightforward or the panacea that the ACCC appears to be suggesting. The ACCC Chair has recently commented that the changed merger processes and tests would assist the ACCC in stopping acquisitions such as those that occurred in the recent Petstock/ Woolworths matter[4] where the vendor had undertaken numerous acquisitions that the ACCC considered may have contravened section 50 of the CCA. However, while the ACCC may have taken a pragmatic approach in clearing that transaction in securing the divestiture of those acquired sites that the ACCC considered problematic, if the ACCC wanted to send a clear message that merger parties should seek clearances in those types of roll up situations, it could have brought penalty proceedings that would have tested both whether its view on the acquisitions it considered problematic was correct and the level of penalties the Federal Court will set for contraventions of section 50 of the CCA. As further context, presumably the vendor in that transaction will receive the purchase price for the divested sites as well as the purchase

[4] ACCC Media Release Petstock/Woolworths

price from Woolworths meaning, in truth, it will suffer little loss and so the "remedy" obtained by the ACCC will not act as a disincentive.

4.7 Given it is unlikely that the individual store acquisitions in the Petstock/Woolworths acquisition would have been above even the ACCC's proposed low threshold of $35 million, it may be that enforcement proceedings would have sent a clearer message to the market. An example of where the ACCC has sent a very clear message to the market was the ACCC proceedings in the Adora/ Virtus injunction proceedings where the ACCC followed through on seeking to block a merger where they were given insufficient time to review it, with the Federal Court accepting that the regulator was protecting the public interest.[5]

4.8 Finally, the ACCC has suggested that the proposed changed merger processes and test would assist in dealing with merger control in relation to digital platforms and supply chain integrity. It is not clear how that is the case. Merger control issues in relation to global mergers involving digital platforms arise as it has been, and will continue to be, difficult to obtain remedies in such cases given the comparatively small size of the population and associated revenue in Australia. This will be the case irrespective of the nature of any merger control laws in Australia. The ACCC's experience in Google/Fitbit, as previously referred to, is a good example where the ACCC despite a merger filing did not take action.[6] The ACCC announced in December 2020 that it would continue to investigate the transaction but quietly issued a "no decision" notice on 15 January 2021 stating that, as the acquisition had been completed, the matter had become an enforcement investigation. No further public statement has ever been made by the ACCC.

4.9 It is submitted that issues in relation to digital platforms and processes should be more specifically addressed in the proposed mandatory codes that the Australian Government is currently considering. Those codes will provide concrete benefits to Australian consumers by requiring changes to anticompetitive behaviour that is already directly impacting them. This will provide a better outcome than reform of merger laws, where the ACCC may be unable to take meaningful action against a global behemoth.

4.10 In relation to the commentary that Australia needs a merger control regime that assists in addressing supply chain issues and seeking to make Australia more resilient in dealing with global shocks, this should be examined in greater detail. This is most likely to be a relevant factor in allowing mergers, particularly between Australian or Australian based companies, in situations where that merger may otherwise have the possibility of lessening competition. In other words, an argument that it is in the "public interest" for Australia by facilitating supply chain resiliency to overcome concerns about the anticompetitive impacts of the merger. The CCA already has the ability to address this under the CCA through the merger authorisation process, which allows the balancing item of public benefits to Australians from the merger outweighing the anti-competitive detriment.

4.11 This argument highlights another reason to be reticent to make the ACCC a regulatory agency which "approves" mergers, as if the proposed changes are made, there is scope for the ACCC to make qualitative decisions, that is, as to what is in the public interest, with limited oversight. For example, the Brookfield/Origin proposed merger is a recent example of a matter

[5] ACCC statement on informal merger review register.
[6] Media article outlining ACCC opposition to Fitbit acquisition.

considered under the existing authorisation process where the ACCC acknowledged the merger would have substantially lessened competition but authorised it on the basis that the public benefits flowing from the proposed merger as a result of overseas companies investing in the energy transition resulting in environmental benefits flowing faster than would otherwise have occurred. Whether that weighing decision was correct was subsequently thrown into doubt by the fact that an Australian superannuation fund, which was already the biggest shareholder in Origin, publicly saying it had the financial resources to fund that investment. In that specific case, questions should also be asked whether it was correct for the ACCC to have accepted those benefits when they were not quantified in the authorisation application and were not subject to an enforceable undertaking in favour of the ACCC meaning no action could have been taken by the ACCC if the investment by the new shareholder had not eventuated. In addition, while the list of public benefits under the authorisation test is not closed, typically the Tribunal would look at where the profits of the merger entity would flow. The Qantas/Air New Zealand merger decision of the Tribunal[7] is authority for the proposition that profits flowing to foreign shareholders of the merged entity would not be a public benefit. In making a decision in the Brookfield/Origin proposed merger, the ACCC did not appear to consider benefits flowing back to shareholders at all.

5. **Recent changes to the US merger notification regime demonstrate how once implemented the filing requirements and administration requirements imposed at an agency level can become very onerous.**

5.1 Looking to the US, very recent changes proposed by the US Federal Trade Commission (**FTC**) and the US Department of Justice (**DOJ**) to the Hart-Scott-Rodino (HSR) Antitrust Improvements Act mandatory pre-merger notification forms would require increased disclosures by merger parties with associated increases in the extent of filing requirements.

5.2 Under United States antitrust legislation, from early 2024, mergers valued at more than US$119.5 million must be notified to the FTC and the Antitrust Division of the DOJ.[8] Notified mergers must be suspended for 30 days from notification and cannot be closed in that period. As in Australia, most mergers are not opposed by the FTC or DOJ - media reports indicate only 2% were opposed in 2021. Nonetheless, under the reforms referred to in the previous paragraph, the DOJ and FTC are requesting that merger parties should provide all drafts of transaction documents, identify potential business overlaps and acquisitions in the past 10 years, list their creditors, minority shareholders and non-controlling entities, as well as officers, directors and board observers. US law firms predict that the changes will add 100 hours to each merger filing. While not stated as being targeted at private equity or investment funds, the filing requirements suggest a desire for increased disclosures from this investment sector, that is, only one sector to which the changes will apply.

5.3 The US position demonstrates that, even if initially lawmakers consider that the regulatory burden imposed on businesses by a mandatory notification regime are reasonable, over time this may change as more onerous requirements are imposed over time by the regulator.

6. **A very detailed legal analysis of the proposals supported by the ACCC, and outlined in the consultation paper, is required.**

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[7] Qantas Airways Limited [2004] ACompT 9 at paragraph 199 onwards.

[8] FTC Media Release. The previous threshold was US$111.4 million.

6.1 **The ACCC's proposed changes to Australia's mergers process regime.** The ACCC Chair advocated for several important changes to Australia's merger laws, both in terms of process and in terms of legal substance. These proposals arise from the ACCC's concerns that Australia's current merger regime "is not well placed" to deal with current issues in the Australian economy. These issues are said to be increased industry concentration, uncertainty and vulnerability from supply chain problems, geopolitical issues and climate change transitions. The ACCC Chair nonetheless acknowledged that:

> *The vast majority of merger transactions do not harm competition and can provide benefits, including by allowing firms to achieve efficiencies, diversify risk or enter new markets.*

However, the ACCC Chair also raised concerns that mergers can impact the competitive conditions of an industry and may entail material adverse changes in the structure of a market. The ACCC Chair sounded a particular note of concern with:

> *…markets that already have large incumbents with positions of market power and markets where it is difficult for new rivals to enter.*

With these issues in mind, the ACCC Chair proposed the significant changes to the merger process regime as well as the substantive merger test which are discussed in this part of our submission.

Putting in place a mandatory merger notification requirement is understandable from an ACCC perspective, but it creates significant cost burdens on both merger parties and the ACCC

6.2 This is proposed to address the ACCC's concerns as to the informal merger process where merger parties provide incomplete or last-minute data or threaten to, or actually do, complete before the ACCC has finalised investigating the merger.

6.3 Merger parties may respond to the ACCC that various independent Australian Government reviews, including the most recent Competition Policy Review of 2015 (**Harper Review**), reported that the informal clearance merger system is working well and that the flexibility that it enables means it should be retained. Further, given that the informal clearance system is based on what are effectively "no action" letters from the ACCC (i.e. that based on what was presented to it and any merger investigations carried out by the ACCC, the ACCC will not oppose the merger), whether a clearance is given is dependent on the ACCC being satisfied that no substantial lessening of competition is likely to arise.

6.4 In other words, the ACCC "makes the rules" and is not beholden to merger parties to clear a transaction unless it is satisfied that it should provide a clearance. Indeed, the ACCC's practical power is particularly evident in mergers which are notified to the FIRB, as FIRB will not be likely to make a recommendation to the Treasurer to approve a merger without the ACCC confirming it has no objections. While under the informal clearance process the ACCC is required to take merger parties to court in order to oppose a merger, merger parties are as a practical matter often need to obtain an ACCC clearance/no action letter or a merger authorisation not only because of FIRB requirements but also because, in the case of public company takeovers, court approvals in schemes of arrangement, or just regulatory uncertainty of concern to shareholders, means this is required.

6.5 In addition, case law, as recently confirmed by the Federal Court in the Virtus Health/Adora Fertility proposed merger, affirms that courts will grant interim injunctions to prevent mergers until the merger litigation is heard, based on a lower threshold to protect the public interest while the status quo is maintained and before the "eggs are scrambled" when a merger is implemented.

6.6 As such, it is not clear that the alleged difficult cases previously cited by the ACCC, which we discuss in the next section of this submission, provide solid foundations for changing the merger regime, and support the ACCC's position, particularly given the considerable cost and expense for both merger parties and the ACCC in that:

(a) As already mentioned, a mandatory threshold level will be required and setting the right threshold to deal with national mergers, but also potentially those that affect regional and rural Australia, will not be easy. Equally, mandatory merger notification thresholds in other jurisdictions are often based on deal value or turnover of one or more merger parties. Moving away from focusing on overlapping market positions/market shares to a turnover test as an initial filter will likely broaden the number of mergers the subject of review by the ACCC, without any corresponding evidence that high turnover of itself creates a competition issue. The ACCC has also indicated it wishes to have a call-in power for mergers that it views as contentious that fall below the mandatory threshold. While these call in powers exist in the United States and Europe, the growing use of these powers by the European Commission (and the UK's Competition & Markets Authority) is creating unease because it undermines the certainty sought to be provided by merger turnover thresholds as a basis for merger notifications, which should act to provide certainty to parties in knowing whether a transaction is subject to regulatory review and the resulting impact that this will have on merger timelines.

(b) With a mandatory merger notification threshold there will inevitably be requirements for mergers to be assessed within set timeframes. Mandatory merger regimes are also suspensory, meaning a notified merger cannot be implemented during the statutory assessment period. This usually creates issues for regulators who then build in considerable pre-merger notification assessment thresholds and consultations to give themselves more time to analyse a transaction. In Europe for example, the merger notification process typically involves numerous drafts being provided to the regulator before the required "Form CO" is accepted, and antitrust lawyers in the United States have suggested the recently proposed changes to the HSR Form discussed above will add months to the pre-filing process, not the 100 hours that have been suggested by regulators. It is already that case that complex merger authorisations under the current merger regime process in Australia quite often take considerably longer than one month and, even with a short assessment time frame in new legislation, it would be expected that assessment time frames in a practical sense, will increase.

(c) It is inevitable that mandatory merger notification requirements will also see the imposition of a merger filing fee, with other jurisdictions imposing such fees based on transaction size in monetary terms, not necessarily the level of competition complexity.

(d) If the ACCC does oppose a merger, appeals appear likely to be to the Tribunal. Under the current process for authorisations, merger parties appealing to the Tribunal are largely restricted to the evidence that was originally before the ACCC. If this is also to apply

under the proposed new regime, it will mean that the costs of merger filings and evidence as well as supporting submissions for the more complex mergers will need to be very substantial, adding cost and review time for both merger parties and the ACCC. To address this issue and the cost and time issues in general that arise from the proposals, the ACCC has proposed a waiver mechanism for non-contentious mergers, where the merger parties can seek confirmation in advance that the merger does not require an extended review. However, such waivers will likely need to be non-binding so as not to affect third party rights when a matter has not been publicly tested and reviewed.

Accordingly, while at the moment, the ACCC's statements on changes to the merger process are thin on details, they already raise significant questions and practical issues for all stakeholders.

Substantive changes to the legal test underpinning Australian merger laws proposed by the ACCC

6.7 **Reversal of the onus of proof.** The ACCC has suggested that there should be an onus on the acquirer to show to the ACCC (and, on appeal, the Tribunal), that an acquisition does not substantially lessen competition. This is because the ACCC argues that courts have made it very difficult for the ACCC to show how in the future, the position after the merger, would substantially lessen competition. For merger parties to positively prove that an acquisition will *not* substantially lessen competition is likely to be very difficult and will place, as a practical matter, substantial regulatory control in the hands of the ACCC as to which mergers will be permitted.

6.8 It is not surprising that enforcement agencies such as the ACCC may wish to see laws changed in the face of losses in the courts. The ACCC, under both the current and former Chairs, has expressed concerns as to the difficulty in proving counterfactuals or the likely commercial outcome of a merger (where the ACCC say the outcome will be anti-competitive), when its merger decisions are challenged in the courts. However, it is important to be respectful of the decisions of the courts in interpreting factual situations, before making changes to Australia's merger tests in the CCA, such as revising the onus of proof.

6.9 Care should be taken to evaluate the reasoning behind judgments and the ACCC's losses, so that we do not end up with a very heavy-handed regulation of mergers, where the regulator has an oversize say in market structures based on its view on likely outcomes. High Court Justice Jagot, in her Honour's 2021 paper, "Some thoughts about proof in competition cases", noted that *"(l)likelihoods are required to be evaluated in a common sense commercial context"*. Before tilting the regulatory landscape in favour of the ACCC's perspectives, we should be confident that the ACCC's views on likely outcomes have been consistent with that real world commercial context.

6.10 In situations where most mergers are not problematic and, in a typical year, it is only some 5% to 10% of mergers that require close scrutiny, it may be better to refocus policy reform on areas of the economy that will deliver better outcomes for Australia and Australians as a whole.

6.11 **Adding a new concept of entrenching market power.** Secondly, the ACCC suggests that the new merger test should include an additional limb to the substantially lessening competition test of "entrenching, materially increasing or materially extending a position of substantial

market power" as exists under EU competition law. However, the European test has a threshold which is higher, which is a dominance test.

6.12 Section 46 of the CCA, which regulates misuse of market power, has a different test to section 50 of the CCA, which is "substantial degree of market power". The amendments to the CCA that gave effect to that changed test were predicated on the basis that in Australia, with our concentrated industries, several firms may have a substantial degree of power in a market and would therefore fall within the regime (as was intended). By analogy, the proposed new section 50 test may well mean that many more mergers in Australia, with our smaller and more concentrated markets, will potentially breach section 50.

6.13 The ACCC has not referred to the legal challenges arising from the language used in EU merger law regarding entrenching or creating impediments to competition. Challenges have been made because the concepts are uncertain. In our view we should be cautious in adopting European merger law language and transferring unsettled concepts into Australian merger law.

6.14 **Conclusion on changes to the legal test**

The proposals to change the merger test highlighted in this section, that is, to reverse the onus of proof for merger parties to satisfy the merger test and adoption of a new entrenching a substantial degree of market power test, need to be considered in the context of the potential mandatory merger process administered by the ACCC. It could be quite difficult for many Australian businesses to satisfy the ACCC that a merger will not substantially lessen competition, particularly where the ACCC argues those businesses already have a substantial degree of market power. How such a test would be applied to new acquisitions by large companies operating in Australia may be problematic and for the reasons outlined earlier in this submission, may hamstring them from competing with larger global rivals who enjoy economies of scale. Accordingly, a new test that is not very clear and straightforward, raises many potential issues that should be further analysed.

7. A look at some of the cases cited by the ACCC as warranting the push for merger reform

7.1 The ACCC has, in its public commentary, pointed to two relatively recent mergers as demonstrating the need for merger reform. Naturally if you did not act for a merger party, making comments from an external perspective necessarily means that you may not be able to appreciate the full picture and circumstances, so our comments are qualified with that caveat.

Qube acquisition of the Newcastle Agri grain export terminal

7.2 The first case the ACCC points to is the Qube acquisition of the Newcastle Agri grain export terminal. This transaction was apparently notified to the ACCC on 8 September 2021 and, despite the ACCC raising some issues and wanting to review the merger in more detail, Qube completed the transaction on 30 September 2021. The ACCC may seek penalties and divestiture where a party breaches the merger laws, so proceeding without ACCC approval would not have been taken lightly by the purchaser.

7.3 After the transaction completed, the ACCC removed it from its merger assessment team and commenced a merger enforcement investigation on 7 October 2021, but ultimately decided in March 2022 not to litigate. This acquisition was reported in the press to be for approximately $90 million.

7.4 If the ACCC's public commentary on the timelines is correct, then the timeframe given to the ACCC was tight, particularly if the factual material provided by Qube was limited. Accordingly, the contentious issue seems to be a process issue, that is, giving the ACCC sufficient time to review the merger, rather than the merger test. This is reflected in the fact that the ACCC ultimately did not commence proceedings to seek divestiture.

7.5 Interestingly, in 2023 Qube made a request to the ACCC for an informal clearance for acquiring Newcastle Stevedores, but ended up withdrawing the request. Hence Qube does not appear to be spurning the ACCC merger processes, but instead appears to be having difficulties using that process.

Virtus Health acquisition of Adora Fertility

7.6 The second merger cited by the ACCC as a justification for their proposed changes is also from 2021, being the Virtus Health proposed acquisition of Adora Fertility and three-day hospitals from Healius. Both parties provided assisted reproductive technology treatments including in vitro fertilisation (IVF). This merger appears to have been notified to the ACCC based on the parties seeking a pre-clearance, as the ACCC public commentary suggests it was notified on 30 August 2021. The ACCC advised Virtus Health on 21 September that the ACCC could not grant an early pre-clearance. On 8 October 2021, Virtus Health advised the ACCC that it would complete the transaction on 15 October 2021, which the ACCC noted would be during the period the ACCC was conducting market inquiries. In response to that advice, the ACCC sought and obtained a preliminary injunction to allow the matter to be heard in court before the merger completed. On 17 December 2021 Virtus Health advised the ACCC that it would not be proceeding with the merger.

7.7 The ACCC had a reasonably low threshold to satisfy before the court when it obtained the interim injunction, because it was protecting the public interest. The transaction was announced by Virtus Health to be for $45 million. It was therefore, comparatively, not a substantial acquisition and litigation costs would have quickly made the acquisition uneconomic even if Virtus Health was ultimately successful against the ACCC. Therefore, it is unsurprising that Virtus Health did not seek to push ahead with the merger.

7.8 As mentioned above, the transaction was put forward to the ACCC by the acquirer as a pre-clearance matter, that is, one where the merger should not raise substantive competition concerns and where the ACCC is expected to be able to clear the merger expeditiously on the papers. If the matter was to be taken forward as part of an informal clearance public merger, which seems to have been what the ACCC required, then it is understandable that the ACCC may have wanted more time and more information on the merger.

7.9 Nonetheless, something appears to have gone awry in this matter for the merger parties and ACCC to have such divergent views on substantive competition issues and also because the parties could not agree a workable solution on a revised timetable (given the alternative was costly and stretched out timeframes involving litigation). But it is not clear that this matter demonstrates that there was anything wrong with the merger process or law in this situation from an ACCC perspective. The ACCC succeeded in opposing a transaction it was concerned about and credibly showed to the market that the ACCC would litigate if pressed.

8. Reflections on these merger issues and the informal merger clearance process as put in place in 2003 by former ACCC Chair Graeme Samuel

8.1 The current format of the ACCC informal clearance process (including the pre-clearance process) stems from the regime put into place by then ACCC Chair Graeme Samuel in 2003, which was revised in 2006. Mr Samuel was a lawyer and investment banker and he publicly stated that he sought to strike a balance in the merger process to maintain the benefits of the informal merger review system that had been the subject of prior criticism of the ACCC in the so-called Dawson Review, completed before his appointment. Those criticisms included lack of commercial timeliness and lack of transparency. The 2015 Harper Review acknowledged that the ACCC merger review process was considered to be working reasonably well. The balance Mr Samuel tried to strike in the revised merger process had some important elements that remain relevant even now, some 20 years later, as discussed in this section.

Provision of data

8.2 The ACCC should be entitled to receive all relevant material necessary to properly make a merger assessment under this process. Indeed, any decision by the ACCC to take no action in any particular case will be based on the information provided by the merger parties (and – where undertaken – market inquiries), so there is an incentive for the parties to ensure that information that it provided is fulsome and accurate. Further, the process is “informal” as there is no statutory basis for it (as opposed to the merger authorisation process established in the CCA).

8.3 Both types of review are within the ACCC’s discretion, so if the ACCC is not satisfied with the extent of data it receives, it is not obligated to start an informal review process and the merger parties take the risk of proceeding without any form of clearance from the ACCC. To give the ACCC greater traction in this area, to assist in ensuring that its reasonable information requirements are met, the ACCC should perhaps revisit its expectations and – for full transparency – publish those expectations on its website.

Transparency

8.4 The informal merger review process should be transparent (to the public and merger participants) and commercially timely. There is a general lack of transparency as to when a matter can be pre-assessed (reviewed on the papers based on the ACCC’s experience) or when it creates substantive competition issues that need to be the subject of public market inquiries. It may be that the ACCC should implement a more transparent “triage” of merger reviews initially so that merger parties have a better understanding of the timeline they are facing and whether something can be pre-assessed or whether it should be the subject of a public informal clearance review.

8.5 While this has not been made clear by the ACCC, moving to a mandatory merger notification regime requiring ACCC approval will mean that a very transparent process is required as the ACCC’s decision to clear a transaction (or provide a waiver of going through a full merger review process as it indicated it was proposing), will have an impact on the rights of third parties affected by the merger, who will be unable to challenge that merger if the ACCC gives its approval. The authorisation process under the CCA has to be very transparent for this very reason, as an authorisation immunises the acquisition from third party challenge. In these circumstances, moving to a mandatory merger review process where a clearance will remove third party rights to challenge, may mean that all filings will need to be public so that parties can see mergers that may affect them are under consideration.

Resourcing

8.6 Reviewing mergers in commercial timeframes means that the ACCC needs to be sufficiently well staffed and funded accordingly. This may mean it is appropriate for the Australian Government to consider providing a power to the ACCC to impose filing fees for its informal clearance processes, notwithstanding that these occur outside the CCA.

C. **CONCLUDING COMMENTS**

9. **Changes to the merger control process**

9.1 The existing merger authorisation process should be retained, with refinements and increased filing fees, given their complexity and the workload authorisation processes impose on the ACCC. We suggest that, to deal with some of the ACCC's concerns, there be an increased requirement for disclosure by applicants and other parties to the transaction (signed by officers of those companies for completeness to avoid arguments as to instructions to lawyers being incomplete). There should also be greater requirements on the ACCC to market test undertakings that are given as to their effectiveness, given that authorisations immunise transactions from third party challenge.

9.2 If a mandatory merger notification regime is considered it apply based on the current test with a sufficiently high threshold such as in Option 2, with the current informal clearance test continuing to be available if parties seek such clearance for transactions below the threshold. The Government would need to ensure that the ACCC does not as a practical matter cease that informal process.

9.3 To address the ACCC's concerns, as well as those of merger parties, regarding litigation, rather than appeals moving directly to the Federal Court it may be appropriate that the Tribunal or other specialist body hear such cases to hone expertise and timeframes and costs. It would be important to ensure that the ACCC has appropriate powers under section 155 of the CCA to obtain pertinent information, but also that merger parties can transparently see the nature of objections being raised against their merger, as is currently the case in the authorisation process. It is recommended that, before a matter goes to the Federal Court or the Tribunal, there is a decision by the ACCC on which the litigation is based for the purposes of transparency and accountability.

9.4 Issues of transparency and timeliness highlight that the notification threshold needs to be reasonably high or the ACCC will be overwhelmed.

10. **Changes to the merger control test**

10.1 The ACCC's proposals to change the merger test, particularly in relation to a suggestion that mergers are not approved unless the ACCC is satisfied that a merger will not substantially lessen competition, is largely based on the relatively new test for authorising mergers.

10.2 There is, it is submitted, no basis for the Government to make the ACCC the determinant whether mergers between private parties should be permitted by creating a mergers regime where merger parties have to prove that conduct is not anti-competitive. The regulatory setting should not be initially set to the negative where merger parties whether big or small have to convince the ACCC and then Court (or Tribunal) they have satisfied the legal test. In a

democracy, private citizens and corporates should not be required to demonstrate they have complied with the law.

10.3 There is scope, as Treasury has perhaps suggested in Options 1 and 3, to clarify the section 50(3) criteria that in concentrated markets there is more of an onus on merger parties with significant shares to show that the acquisition does not lessen competition substantially. As a practical matter, it is arguable that this already is a requirement. In relation to Option 3, it is not clear that associated agreements should not already be subject to the substantial lessening of competition test as any such arrangements would be factors addressing the existing degree of market power held by the acquirer.

10.4 As we have noted above, in relation to Option 2 there are problems both as to consistency with the architecture of the CCA (which is based on US antitrust law) and as to questions of legal clarity and certainty in the ACCC's suggestion of importing from Europe the concept of an entrenching market power provision which seems to be part of Option 2. First, such a concept comes from a much higher starting point of entrenching a *dominant* position in the European market (noting European markets are much broader in geographic size). In any event, the language of such a test is unclear, and is not easily reconciled with the substantial lessening of competition test currently used in section 50 of the CCA. Finally, if adopting this additional test intended to capture creeping acquisitions, which appear to be of particular concern to the ACCC, it is not clear that it would do so, as small acquisitions of themselves may not "entrench" a dominant position.

11. Benefits to Australians

11.1 Before embarking on a process of implementing such significant changes to the merger process and the merger test as set out in some proposals in the consultation paper, it is worth considering whether these outcomes will materially improve Australian merger control and the Australian economy in general.

11.2 In situations where the ACCC Chair recognises that most mergers are not problematic and, in a typical year, only some 5% to 10% of mergers require close scrutiny, it may be better to refocus policy reform on areas of the economy that will deliver larger outcomes for Australia and Australians as a whole. The merger test and processes may well be able to be refined, however greater Treasury and Australian Government resources should be focused on areas which will most impact cost of living issues and Australia's future competitiveness and jobs growth, for example, in relation to implementation of the proposed digital platform mandatory codes. The Australian Government could adopt the approach of ensuring that very significant mergers are subject to mandatory notification and closer scrutiny, rather than adopting wholesale changes to both merger processes and the merger test in the CCA, which would create higher regulatory costs and importantly a changed philosophy of greater intervention in commerce that will not have clear benefits to Australian businesses, whether large and small, or importantly Australian households.

We would be happy to discuss any of the matters raised in this submission further with the Treasury.

Yours sincerely

D Poddar

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