Law Council
OF AUSTRALIA

Business Law Section

16 August 2024

Competition Taskforce
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By email: CompetitionTaskforce@treasury.gov.au

Dear Taskforce

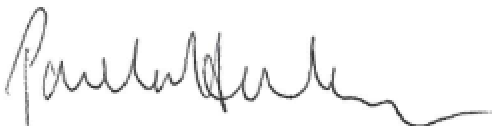
Treasury Laws Amendment Bill 2024

This submission concerning *Treasury Laws Amendment Bill 2024: Acquisitions* exposure draft (**Exposure Draft**) to amend the Competition and Consumer Act 2010 (Cth) (**CCA**) is made jointly by the Competition and Consumer Committee and Corporations Committee (the **Committees**) of the Business Law Section of the Law Council of Australia.

The Committees would be pleased to discuss any aspect of this submission.

Please contact the Chair of the Competition and Consumer Committee, Lisa Huett, at lisa.huett@au.kwm.com if you would like to do so.

Yours faithfully



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Treasury Laws Amendment Bill 2024

Competition Review

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Executive Summary

The Competition and Consumer Committee and Corporations Committee (the **Committees**) of the Business Law Section of the Law Council of Australia welcome the opportunity to jointly participate in the consultation being undertaken by the Competition Review (**Taskforce**) on the *Treasury Laws Amendment Bill 2024: Acquisitions* exposure draft (**Exposure Draft**) to amend the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The Committees support the policy objectives of improved certainty, predictability, and—in some circumstances—speed and efficiency of Australia's merger control process to promote the CCA's objective of enhancing the welfare of Australians. We also recognise the strong policy direction given by Government that Australia's informal merger process should be replaced with a mandatory and suspensory regime centred around the ACCC as an administrative decision maker (cf. enforcement through the Federal Court).

The proposed reforms will constitute a fundamental realignment of our merger regime.

In making this shift, however, the Committees are mindful that the current Australian model has benefits which do not have to be lost to deliver the policy outcomes. These include:

- a reasonable degree of clarity regarding the nature of the transactions that are subject to the regime;
- over 30 years jurisprudence governing the merger test of "substantial lessening of competition" (including relatively orthodox merger factors in section 50(3));
- in relation to the merger authorisation process, a high degree of transparency around the submissions lodged with the ACCC about the merger being reviewed; and
- a reasonable degree of flexibility around the process, timing and engagement with the ACCC, including when exploring and negotiating remedies.

We also note the robust accountability and oversight offered by the Federal Court, which are not currently replicated in the proposed limited merits review process before the Australian Competition Tribunal.

While not perfect, these are features that make our regime workable and well-understood. In this submission, we consider the draft merger reform legislation through the "lens" of seeking to achieve a smooth and effective transition to the new administrative model that delivers these policy objectives while keeping the best of our current regime, including its relative flexibility, certainty, accountability and developed legal and economic principles.

As a general observation, we respectfully note that the draft legislation suffers at times from a high level of complexity and prescription. There is a significant risk that this will create a more rigid, time-consuming and difficult process to navigate for the ACCC, merger parties and other stakeholders.

We consider that many of these concerns can be addressed through a waiver and allowing greater discretion to the ACCC in relation to some aspects of the regime.

Finally, we consider that the current transitional provisions raise specific issues that are likely to give rise to confusion and complexity for Australian businesses (including inbound capital) in their current form. This is an issue we address specifically in section 4 of our submission.

1. Summary of Submission

To assist the Government, set out below in summary form are the key recommendations made by the Committees in this submission, along with a cross reference for further detail on each of these matters.

Issue	Summary of recommendation	Section reference
Control	• Delete the rebuttable presumptions in section 51ABC(2) • Replace the definition of 'control' in section 51ABC(3) with the definition taken from section 50AA of the *Corporations Act 2001* (Cth)	Section 2
Acquisitions test	• Delete references to 'direct and indirect acquisitions' in section 51ABB • Amend section 51ABC to include a provision to clarify that entry by a party into an agreement to acquire shares or assets, or an option to acquire shares or assets, is not of itself an acquisition of shares or assets • Amend section 51ABC to clarify that the acquisition provisions do not apply to an acquisition by a person of units in a unit trust if immediately before the acquisition the person controlled the unit trust, or if immediately after the acquisition the person does not control the unit trust • Amend section 51ABD to exclude from 'acquisitions of assets' any acquisition of units in a unit trust • Include an additional carve-out in section 51ABC for acquisitions of shares in a listed entity under professional underwriting arrangements, or as a result of participation in a rights issue • Amend the definition of 'Financial Institution' in section 4(1) to include private credit funds, non-bank underwriters and entities whose ordinary course of business includes moneylending activities • Extend the period of 12 months within which to dispose of the shares or assets under section 51ABC(7) where the holder is making genuine attempts to effect a disposal	Section 3

Issue	Summary of recommendation	Section reference
	• Amend section 51ABF to expressly exclude security interests in shares and assets • Amend section 51ABJ(e)(i) to limit the application of that section to when the ACCC has made an acquisition determination under section 51ABW(1)(c) • Amend section 51ABR(1) to refer to a ‘proposed acquisition’, rather than an ‘acquisition’, so as to align with the reference in section 51ABQ(1) to a proposal to put into effect an acquisition • Protect the ability of parties to manage on-market bids by enabling the ACCC under section 51ABZB(1) to provide the ACCC with flexibility to make a determination *within* 15 business days if it does not have any competition concerns and where the ACCC is satisfied that market inquiries are not required. This issue could also be the subject of the waiver power which is the subject of a separate recommendation.	
Transitional arrangements	• Introduce an exemption to the new laws for acquisitions which have been voluntarily notified to the ACCC under the old informal regime, and for which the ACCC has issued a clearance or non-intervention letter prior to 31 December 2025, but which have not yet come into effect • Introduce a provision that grandfathers the current informal regime acquisitions which have entered into prior to 1 December 2025 and which have not yet come into effect on 1 January 2026. • Amend the Exposure Draft to allow merger parties to notify acquisitions under section 88 of the CCA up until, at least, 30 November 2025 • Introduce an exemption to the new laws for acquisitions which have been notified to the ACCC under the formal authorisation process, and for which the ACCC has granted authorisation prior to 31 December 2025, but which have not yet come into effect	Section 4

Issue	Summary of recommendation	Section reference
	• Introduce a provision which grandfathers the current formal authorisation process for merger authorisations sought to 1 December 2025 but the acquisition has not come into effect as at 1 January 2026	
Process and timeframes—Notice of Competition Concerns	• Bring forward the deadline for the ACCC to provide the Notice of Competition Concerns to merger parties by 1–2 weeks. If the deadline for the Notice is not accelerated, the EM (or a Ministerial Direction) should explicitly permit or require the ACCC to provide market feedback to merger parties as early as reasonably practicable within Phase 2 • Where the ACCC is delayed in providing the Notice of Competition Concerns (beyond 25 business days), this should automatically extend the period for the offering of remedies • Given that the Notice of Competition Concerns is not public, consideration should be given to the ACCC putting non-confidential material on the public register to facilitate engagement by other stakeholders • Provide merger parties with considerably more time to respond to the Notice, having regard to the timeframes that apply to third parties and in relation to remedies • Include a firm statutory deadline for the Notice of Competition Concerns, which can be extended only with the consent of the merger parties (consistent with the current merger authorisation process) • Remove section 51ABV(3) given it is unnecessary and creates difficulties for some types of transactions, such as hostile deals	Section 5.1 and 5.4
Process and timeframes—Remedies	• Retain the flexibility in the existing merger laws around negotiation of remedies and remove any time limits on the offering of remedies. • However, if time limits are retained: (a) Clarify the concept of "offering" a commitment or undertaking to make clear that this does not need to be in a form capable of immediate acceptance by the	Section 5.3

Issue	Summary of recommendation	Section reference
	ACCC to recognise that draft undertakings are typically consulted upon throughout the clearance process and are not finally 'offered' until the terms have been settled (b) Provide the ACCC with the ability to extend the timeframe for offering an undertaking without being forced to extend the entire determination period (i.e. a right to extend should be included in section 51ABY which does not link to section 51ABZT) (c) Where there has been a delay in the ACCC providing the Notice of Competition Concerns under section 51ABZE (beyond 25 business days), this should automatically extend any remedy timeframe—without requiring merger parties to separately request an extension of the entire determination period under section 51ABZT (which is at the discretion of the ACCC) (d) Extend the timeframe for offering remedies to better reflect the time available to other stakeholders to respond to the process	
Process and timeframes—Clock restarters and clock stoppers	• Include a power for the Commission to waive obligations under the regime, including (without limitation) the obligation to notify an acquisition. This may be exercised as a specific or general waiver (i.e. applicable to a class of applicants or acquisitions). For example, it may be relevant to waive certain categories of land transactions (such as lease variations etc) which may otherwise be inadvertently brought within the regime by the removal of the 'ordinary course of business' exemption for land transactions—under section 51ABN. • Amend the proposed new laws to remove the reference to 'reckless' in the offence relating to the provision of misleading or false material in section 45AZB • Amend the proposed new laws so that a notification is only 'void' in circumstances where a party knowingly provides information that is false or misleading, as to a material particular	Section 5.4

Issue	Summary of recommendation	Section reference
	• The ACCC should publish clear and comprehensive guidance regarding the notification form and information requirements • Amend section 45AX(1)(d) so an offence only arises if a party "is aware or ought reasonably to have been aware that" … a change of fact is material to the Commission and fails to notify the ACCC of that change • Amend section 51ABU so that the ACCC has the power to 'stop the clock' if it becomes aware of a material change of fact, in order to permit parties to provide further information or evidence responding to the change. The ACCC should not be forced to restart the clock as its only option for addressing a change in circumstances • Apply the same approach for voluntary information requests and section 155 notices, so that the clock is only stopped if parties are late with responding to either form of request (and for the period by which they are late in responding). To the extent that the ACCC determines that section 155 notices are required and would be likely to warrant an extension of the determination period, this should be a matter that is discussed and agreed between the ACCC and the merger parties, as occurs today (under section 51ABZT(2)(d)) • Provide a mechanism for parties to appeal any abuse of process by the ACCC (in the form of unduly burdensome voluntary information requests or section 155 notices) that would delay the statutory timeframes. The appeal could be heard and decided by the Australian Competition Tribunal within 7 days (with the timeframe for the acquisition paused during this process)	

Issue	Summary of recommendation	Section reference
Notification of restraints, the good will exception and anti-overlap with the cartel provisions	• Retain the approach to cartel defences under the existing laws by removing sections 28, 29, 38, 74, 75 and 82 from the Exposure Draft. However, introduce a general requirement for merger parties to provide a copy of any agreements containing relevant restrictions to the ACCC at the same time as an acquisition is notified. This requirement should not be a prerequisite to the goodwill exception applying • Remove the 30-day time limit to notify the ACCC in order to be able to rely on the anti-overlap provision in section 45 of the CCA from sections 33 and 79 of the Exposure Draft • Rather than the ACCC having the ability to invalidate exemptions, the ACCC could consider the impact of any restrictions or restraints as a condition in the conferring of a merger clearance thereby providing greater certainty by avoiding any retrospectivity • Amend section 80 of the CCA to provide that only the Commission can seek an injunction in respect of a breach of section 45 relating to the acquisition of shares or assets	Section 6
'Substantial lessening of competition' (SLC) analysis	• Remove section 15 of the Exposure Draft (which amends section 4G of the CCA to provide that a reference to an SLC includes a reference to *"substantially lessening competition in the market by creating, strengthening or entrenching a substantial degree of power in the market*") • Include the 'creating, strengthening or entrenching' concept into the "relevant matters" to be considered in the context of any merger assessment under section 51ABX (see below) • Remove the set of 'relevant factors' in section 51ABX. An alternative set of factors based on established Australian economic and competition law concepts, but which are directed at the same policy objectives, should be applied instead. The Committees endorse the position outlined in the paper prepared by Greg Houston, Partner of HoustonKemp Economists, and George Siolis, Partner of RBB Economics, which is contained in Annexure 2 to this submission	Section 7

Issue	Summary of recommendation	Section reference
New tests and thresholds that are uncertain or create undue complexity	• Replace both the "real and not remote possibility" and "comprehensively address" test for acceptance of condition under section 51ABW(2) with a test based on reasonable belief that the acquisition would have the effect or likely effect of SLC *if put into effect without the conditions.* • Replace "reasonable belief" in section 51ABW(3) with "is satisfied on reasonable grounds" to align the tests at the public benefits and SLC stages • Replace the current "reasonably suspect" test for moving from Phase 1 to Phase 2 under section 51ABZD(1)(a) with a conventional test that applies the same standard as for a final Phase 2, but requires only that the ACCC considers it *may* be likely to SLC (consistent with the current 'amber' light approach in statements of issues). • Remove the current section 51ABZ and instead include the cumulative effect of prior acquisitions as a matter that the ACCC may have regard to in considering an acquisition. This could be similar to the current drafting of section 51ABX that allows the ACCC to have regard to any restrictions in deal contracts when considering the effect of a transaction on competition. The reference to "industry" could also then be replaced with any "*market or markets identified by the ACCC*". The ACCC should provide guidance on its approach to this issue • Retain the current net public benefit standard as expressed in section 90 • Allow public benefits to be raised by the parties with the ACCC at an earlier stage, including at Phase 2 of the new process • Amend section 100(5) to permit the Tribunal to consider evidence that is responsive to information, documents or evidence that was not available to the applicant at the time the determination was made	Section 8

Issue	Summary of recommendation	Section reference
Transparency, workability and balance	• Amend section 100(5) to permit the Tribunal to consider evidence that is responsive to information, documents or evidence that was not available to the applicants at the time the determination was made • Amend section 51ABZX to ensure that the register provides a minimum level of transparency equivalent to the merger authorisation register maintained under the current process	Section 9

Additional drafting comments not otherwise captured in our comments below are contained in **Annexure 1** to this submission.

Annexure 2 to this submission is a paper prepared by Greg Houston, Partner of HoustonKemp Economists, and George Siolis, Partner of RBB Economics, to expand upon the economic aspects of two elements of the Exposure Draft legislation, namely the proposals to amend the definition of a lessening of competition in section 4G of the CCA and to establish a new set of 'relevant matters' to which the Commission may have regard in applying the substantial lessening of competition (**SLC**) test for the purposes of merger clearance.

2. Acquisitions that do not provide control—section 51ABC

2.1. Overview

For the reasons set out below, the Committees consider that the approach taken to the definition of 'acquisition' in section 51ABC are complex, do not align with established Australian statutory equivalents and risk confusion and uncertainty for a range of transactions.

In particular, the use of the "control" test in the manner proposed (with certain rebuttable presumptions) to qualify the meaning of "acquisition" creates unnecessary complexity. Any control test should also be defined in a way that aligns with an existing Australian statutory standard.

In summary, the Committees submit that:

- The 'control' provisions in section 51ABC should be replaced with the definition in the Corporations Act;
- The rebuttable presumption should be removed;
- All references to direct and indirect acquisitions should be deleted;
- An acquisition should not include the grant of an option to acquire shares or assets;

- An acquisition should not include acquisitions subject to a condition that the acquisition is not to be put into effect unless it is notified etc.

More detail is set out below.

2.2. Rebuttal presumptions in relation to control—section 51ABC(2)

Under section 51ABC, the acquisitions provisions do not apply to an acquisition by a person of shares in the capital of a body corporate (the 'target') if, immediately prior to the acquisition the person already *controlled* the target, or if after the acquisition the person does not control the target. For this purpose, section 51ABC(2) creates a rebuttable presumption that a body corporate will:

- ***not control*** the target if the person's voting power (as defined by the Corporations Act) in the target is less than 20% at a particular time;

- ***control*** the target if the person's voting power in the target is 20% or more at a particular time.

The rebuttable presumption of 'control' where a person would acquire 'voting power' of 20% or more under section 51ABC(2) should be deleted for a number of reasons:

a) Rebuttable presumptions are inappropriate in the context of a mandatory notification regime.

Firstly, in the context of a compulsory notification regime, where failure to notify results in a contravention of the CCA and results in the acquisition, which may have already been completed for some time, being declared void, it is inappropriate for an acquirer to have the burden of proving that their acquisition did not confer control. Put another way, an acquirer of, say, a 20% interest who makes a good faith determination at the time that such acquisition does not confer control, should not be faced with the burden of having to prove the contrary at some later date, when the transaction has already been completed and the commercial positions of the parties to the transaction will have changed fundamentally. The practical result of the provisions may be that all or substantially all acquisitions above 20%, even if they don't confer control, will be notified in order to avoid having to subsequently prove that fact to the Commission or a Court, and in order to avoid the consequent unacceptable uncertainty around whether an acquisition which has already closed is void or not.

b) The rebuttable presumptions effectively create two tests rather than one.

Secondly, the rebuttable presumptions having regard to whether 'voting power' is above or below 20% effectively means that there are two tests - a 20% 'voting power' test and a control test. This is cumbersome, and rather than assisting in the interpretation of the 'control' test, creates further administrative burden for acquirers who need to apply both the 'voting power' test and the 'control' test to determine whether they need to notify or not.

c) 20% is far too low.

Thirdly, if there is to be a rebuttable presumption, then 20% is far too low (as it does not ordinarily equate to control in any normal sense). The takeover provisions in s 606 of the Corporations Act regulate acquisitions above 20% in a listed entity,

however that is in the context of a broadly held publicly listed company, where typically a portion of the shares will be held by passive or disinterested holders who will not vote on all resolutions at a general meeting. Even then, 20% is a very conservative threshold, and will not typically give control of a listed entity (that would normally occur closer to the 30% to 40% shareholding level).

In the context of a privately held company, a shareholding above 20% but less than 50% will typically not confer any control, and should not be presumed to do so.[1] If voting thresholds are to be used as a measure for control, control should only arise in relation to a private company at a higher threshold. [2]

d) The 'voting power' test from the Corporations Act is not an appropriate test.

'Voting power' has a very broad meaning under section 610 of the Corporations Act, and includes a broad range of situations where the party has no power whatsoever in relation to voting. For example, a minority shareholding in a private joint venture company which does not give any power to control the financial and operating policies of the joint venture, will invariably confer 100% 'voting power' (within the meaning in section 610 of the Corporations Act) on the holder of that minority shareholding. This arises because all shareholders may be "associates" for the purposes of section 12(2) of the Corporations Act, and because the joint venture agreement will commonly include pre-emptive rights on transfer of shareholdings in the company, which then give each shareholder in the company, no matter how small their holding, a "relevant interest" in all of the shares in the company, and therefore "voting power" in 100% of the company. If voting power is to be used as a measure for 'control', then the test needs to be tied to actual power to control the right to vote attached to shares in the entity only, not to rights to control disposal.

Recommended change:

Delete the rebuttable presumptions in relation to control at 20% voting power from section 51ABC (i.e. do not treat these as part of any test of an 'acquisition') in determining those acquisitions which must be notified.

51ABC Acquisitions of shares to which acquisitions provisions do not apply

Acquisitions that do not give control

(1) The acquisitions provisions under section 51ABB of the Act do not apply to an acquisition by a person of shares in the capital of a body corporate (the ***target***) if:

(a) immediately before the acquisition, the person (whether alone or, if the person is a body corporate, together with any related bodies corporate) controlled the target; or

(b) immediately after the acquisition, the person (whether alone or, if the person is a body corporate, together with any related bodies corporate) does not control the target.

~~(2) For the purposes of subsection (1):~~

~~(a) if the person's voting power (within the meaning of the Corporations Act 2001) in the target is less than 20% at a particular time, the person is taken not to control the target at that time, unless the contrary is proved; and~~

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[2]If voting power is to be used as a measure for control, appropriate notification thresholds should be specified in the regulations.

~~(b) if the person's voting power in the target is 20% or more at a particular time, the person is taken to control the target at that time, unless the contrary is proved.~~

2.3. 'Control' test in section 51ABC(3)-(5)

In the Exposure Draft (proposed section 51ABC(3)), 'control' is defined for the purposes of the exception in section 51ABC(1) as the capacity to directly or indirectly determine the policy of the body corporate in relation to one or more matters. This is in contrast to the widely accepted definition of 'control' in section 50AA of the Corporations Act, which defines 'control' as the "*capacity to determine the outcome of decisions about the financial and operating policies of the body corporate*".

In the Committees' view, the Exposure Draft definition is far too broad, and will result in an unintended high number of notifications, risking delays as well as placing a strain on ACCC resources and the effective operation of the new regime. It is broader than the definition in section 50AA of the Corporations Act in material respects, including the following:

a) Unlike section 50AA of the Corporations Act which depends on the capacity to determine the financial and operating policies of the body corporate, section 51ABC(3) provides that control can exist if the capacity is to directly or indirectly determine the policy of the body corporate in relation to one or more matters, with the nature of the matters unspecified. Given that companies can have policies on any range of matters, section 51ABC(3) is unacceptably broad. In the Committees' view, a person should not be deemed to control the body corporate unless they can determine the outcome of decision making on financial and operating policies of the corporation, not on some other unrelated matter. For example, a person who can determine a body corporate's policy on an isolated social or environmental issue, but who does not otherwise have power to determine the body corporate's operating or financial policies, should not be regarded as controlling the body corporate.

b) Section 51ABC(3) refers to the capacity to 'directly or indirectly' determine the policy of the body corporate. Those words 'directly or indirectly' do not appear in section 50AA of the Corporations Act. Those words are unclear and presumably unnecessary given that section 51ABC(4) requires that practical influence and practices or patterns of behaviour are taken into account in any event.

c) The reference in section 50AA to 'determining the outcome of decisions' has been deleted in section 51ABC(3). The Corporations Act wording means that control is tested by reference to the power to determine the outcome of decisions by the governing body of the corporation, rather than some other general capacity to determine policy, which is harder to evaluate.

In addition to being too broad, the section 51ABC(3) control definition introduces uncertainty, as it is a test that the market is not familiar with, unlike the test in section 50AA of the Corporations Act. Points to note here include:

a) The test in section 51ABC(3) appears to have been borrowed from the definition of 'significant action' which was included in section 54 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) in 2015, however that test is rarely applied

because of the substantial overlap between 'significant' and 'notifiable' actions under the FATA.

b) By way of contrast, the control test in section 50AA is already widely used. It has been used in the Accounting Standards for decades, and was introduced into the Corporations Act from AASB 1024 approximately 25 years ago. It is also the widely used definition of 'control' in commercial agreements in Australia. In the Committees' view, there is little utility in adopting a new (and overly broad) definition that the market will not be familiar with.

c) Further, section 50AA of the Corporations Act has been the subject of judicial consideration (see e.g. *Amcor Ltd v Barnes* [2016] VSC 707) where the Court observed at [1282] that the Corporations Act test focuses on "whether the entity has the capacity, in a real and practical sense, to determine the important decisions of the company that set the framework for the operation of the business, in meeting its legal and regulatory obligations and in achieving its financial and other corporate objectives, as distinct from the day to day decisions made within that framework"). In contrast, to our knowledge, section 54 of the FATA has not been the subject of any judicial consideration or determination.

d) Divergence in the meaning and assessment of 'control' in the CCA will cause significant difficulty for market participants in determining whether notification is required. In particular, section 51ABC(3) will give rise to particular uncertainty for acquisitions involving:

    i. minority acquisitions and changes in the level or type of control for joint ventures;

    ii. funds and general partnerships;

    iii. state owned entities.

e) The Committees understand that the Government's position is to ensure the new framework focuses on 'material influence' over the acquired business, not only decisive influence.[3] As explained in April, the new regime looks to capture 'de facto control or the ability to materially influence the acquired business'.[4]

f) Notably, the UK regime is a voluntary one and includes a material influence test in section 26 of the Enterprise Act 2002 as the lowest level of control that may give rise to a notifiable merger. De facto control and a controlling interest are the higher thresholds (discussed below). The CMA guidance provides that:

> *When making its assessment, the CMA focuses on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, and thus includes* ***the strategic direction of a company and its ability to define and achieve its commercial objectives****.*[5]

[3] Explanatory Materials at [2.5].
[4] 'Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy' at p5.
[5] Mergers: Guidance on the CMA's jurisdiction and procedure (25 April 2024) [4.17].

g) Relevant factors the CMA may consider in determining 'material influence' include:

i. the acquirer's ability to influence the target's policy through exercising votes at shareholders' meetings, together with, in some cases, any additional supporting factors such as:

   a. whether the acquirer is the largest shareholder;
   b. patterns of attendance and voting at recent shareholders' meetings such that the acquirer's shareholding could in practice block a special resolution;
   c. whether the shareholders afford the acquirer special voting or veto rights over relevant policy or strategic matters sufficient to confer material influence.

ii. the acquirer's ability to influence the board of the target or its representation without the acquirer necessarily being able to block votes at shareholders' meetings;

iii. shareholdings (with shareholdings below 25% less likely to confer material influence);

iv. financial arrangements that confer material influence where the conditions are such that one party becomes so dependent on the other that the latter gains material influence over the company's commercial policy.[6]

h) One hurdle identified in the CMA guidance is that 'the variety of commercial arrangements entered into by firms makes it difficult to state categorically what will (or will not) constitute material influence.' In a mandatory notification regime, this lack of clarity is not sufficient and established principles of control in Australia and should be embraced without a need for importing concepts from other jurisdictions that already fail to provide parties with sufficient clarity about when notification is required.

i) Adopting the section 50AA Corporations Act test in section 51ABC will capture acquisitions that confer material influence and will do so in a way that provides clarity and certainty for businesses seeking to comply with a new mandatory regime (noting that section 51ABC(3), (4), (5) and (6) reflect the structure and language in section 50AA(1), (2), (3) and (4) of the Corporations Act).[7]

Recommended change:

Replace the definition of control with the definition of control in section 50AA of the Corporations Act.

51ABC Acquisitions of shares to which acquisitions provisions do not apply

Acquisitions that do not give control

(3) For the purposes of subsection (1), ***control*** of a body corporate is the capacity to ~~directly or indirectly~~ determine the outcome of decisions about the financial and

[6] Mergers: Guidance on the CMA's jurisdiction and procedure (25 April 2024) [4.16]-[4.32].
[7] As discussed below, we have modified the language carried across from section 50AA(3) of the Corporations Act in the manner contemplated in section 608(6) of the Corporations Act.

operating policies of the body corporate. ~~the policy of the body corporate in relation to one or more matters.~~

(4) In determining whether a person has the capacity mentioned in subsection (3) in relation to a body corporate:

(a) the practical influence the person can exert (rather than the rights it can enforce) is the issue to be considered; and

(b) any practice or pattern of behaviour affecting the financial or operating policies of the body corporate is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

(5) A person does not control the body corporate merely because the person and an entity that are not acting in concert[8] jointly have the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.

(6) For the purposes of subsection (1), if a person:

(a) has the capacity to determine the financial or operating policy of a body corporate; and

(b) is under a legal obligation to exercise that capacity for the benefit of someone other than the person's members;

the person is taken not to ***control*** the body corporate.

3. The 'acquisition' test should be amended to take into account a number of practical considerations

3.1. Direct and indirect acquisitions—section 51ABB

Under section 51ABB, the acquisitions provisions apply to 'direct and indirect' acquisitions of shares and assets. It is unclear what is meant by an 'indirect' acquisition in this context and therefore what needs to be notified as an indirect acquisition.

We think the reference to 'direct and indirect' acquisitions is unnecessary and unhelpful. Section 4(4) of the CCA already provides that an acquisition of shares or assets includes an acquisition of any equitable interest in the shares or assets, so the words 'indirect' are not needed to catch acquisitions of equitable interests. Similarly, if there is an acquisition of shares at the top level in a corporate group, that acquisition will already be caught at that top level, even if it involves an indirect acquisition of companies further down the corporate chain. As Lockhart J observed in *Trade Practices Commission v Australian Iron & Steel Pty Ltd* [1990] FCA 23, since an acquisition within the meaning of section 50 involves a party acquiring some legal or benefit interest the words "directly or indirectly" in section 50 are superfluous.

The subsequent judicial interpretation has not been determinative so the Committees would propose that Treasury could use this opportunity to clarify the existing legislation and ensure there is a clear test for what types of acquisitions must be notified, particularly under a mandatory regime where failure to notify involves a contravention of the CCA

[8] We have modified the language carried across from section 50AA(3) of the Corporations Act in the manner contemplated in section 608(6) of the Corporations Act, so that entities which are acting in concert in relation to the target's financial and operating policies can be regarded as jointly controlling the target (i.e. both could be regarded as controlling the target).

(section 45AW) and results in the subsequent acquisition being voided (section 45AZA). The reference to 'direct or indirect' acquisitions should therefore be deleted from section 51ABB since this is covered by the existing section 4(4) of the CCA.

Further, if Treasury is seeking to aggregate revenue across a corporate group to trigger an obligation to notify, this should be included in the notification threshold in the regulations rather than create uncertainty in the legislation.

Recommended changes:

Delete references to 'direct and indirect acquisitions'.

51ABB Acquisitions to which acquisitions provisions apply

Subject to this Subdivision and any prescribed regulation, the acquisitions provisions apply to the following acquisitions:

(a) ~~a direct or indirect~~ an acquisition by a corporation of shares in the capital of a body corporate;

(b) ~~a direct or indirect~~ an acquisition by a corporation of any assets of a person;

(c) ~~a direct or indirect~~ an acquisition of shares in the capital of a corporation;

(d) ~~a direct or indirect~~ an acquisition of any assets of a corporation.

3.2. Agreements and options to acquire shares or assets—section 51ABB and section 4(4)

Under section 4(4), an acquisition of shares or assets is defined to include an acquisition of an equitable interest in those shares or assets.

A party may acquire an equitable interest in shares or assets merely as a result of entering into an agreement to acquire those shares or assets (even though the acquisition of the legal and beneficial interest in the shares or assets has not at that point been completed), or by taking an option over those shares or assets. While *Arnotts Ltd v Trade Practices Commission* [1990] FCA 473 established that such circumstance are not acquisitions, a plain reading of the Exposure Draft seems to have the effect that a party could not enter into an agreement or option which was conditional on the ACCC determining to approve the underlying acquisition, with the effect that ACCC approval would be required *prior to entry into any agreement*. This would be impractical for both the ACCC and merger parties, as public consultation on a potential transaction prior to agreement would often not be possible, given public disclosure issues, and is inconsistent with global practice, rendering processes in multijurisdictional transactions unworkable. Moreover, given the mandatory and suspensory nature of the regime, extending the prohibition so broadly is unnecessary.

Therefore, like existing section 15 of the FATA, the Committees suggest including a provision making it clear that the entry into an agreement to acquire or option to acquire is not of itself an acquisition to which the provisions apply.

Recommended change:

Include a provision to clarify that entry by a party into an agreement to acquire shares or assets, or an option to acquire shares or assets, is not of itself an acquisition of shares or assets.

51ABC Acquisitions of shares to which acquisitions provisions do not apply

…

Agreements and options to acquire shares or assets

(8) The acquisitions provisions do not apply to an acquisition of an equitable interest in property that may occur upon entering into an agreement to acquire, or upon being granted an option to acquire, such property, provided that completion of the acquisition of that property under that agreement, or following exercise of that option, does not occur until such time as the acquisition of that property becomes a notified acquisition.

3.3. Exemption for non-controlling acquisitions of shares in the capital of a body corporate should extend to non-controlling acquisitions of units in a unit trust—section 51ABC(1)

The proposed drafting of section 51ABZZ(2)(c) does not adequately exclude non-controlling acquisitions of units in a unit trust (such as acquisitions in listed management schemes or real estate investment trusts), as it does for shares. While that section states that a reference in the acquisitions provisions to a corporation is taken to include a reference to a unit trust, section 51ABC(1) refers to a ‘body corporate’ rather than a ‘corporation’, and also is limited to shares not units. The drafting therefore needs to be expanded to exempt unit trusts.

One consequence if this amendment is not made, is that it would be practically impossible to acquire a pre-bid stake in a listed trust through on-market acquisitions. We do not think this is an intended objective of the Exposure Draft.

Recommended changes:

1. Amend section 51ABC(1) to clarify that the acquisition provisions do not apply to an acquisition by a person of units in a unit trust if immediately before the acquisition the person controlled the unit trust, or if immediately after the acquisition the person does not control the unit trust.

   51ABC Acquisitions of shares and units to which acquisitions provisions do not apply

   Acquisitions that do not give control

   (1) The acquisitions provisions do not apply to an acquisition by a person of shares in the capital of a body corporate or the units in a unit trust (the ***target***) if:

   (a) immediately before the acquisition, the person (whether alone or, if the person is a body corporate, together with any related bodies corporate) controlled the target; or

   (b) immediately after the acquisition, the person (whether alone or, if the person is a body corporate, together with any related bodies corporate) does not control the target.

2. Section 51ABD should be amended to exclude from ‘acquisitions of assets’ any acquisition of units in a unit trust.

   51ABD Acquisitions of assets to which acquisitions provisions do not apply

   (1) A reference in the acquisitions provisions to an acquisition of any assets of a person does not include a reference to an acquisition of a share in the capital of a body corporate or an acquisition of a unit in a unit trust.

3.4. Exceptions for acquisitions in relation to shares in listed entities for underwritings, rights issues etc

Similar to the exceptions in the takeover provisions in the Corporations Act (section 611 of the Corporations Act), there are a number of ordinary course activities in relation to listed entities which should be excluded from the notification provisions. These include where an underwriter to a capital raising by a listed entity is called upon to acquire shares under the underwriting arrangements, and where a shareholder has acquired shares under a rights issue and has increased their percentage holding as a result of a shortfall in other shareholders participating in the rights issue.

Recommended change:

Include additional carve-outs for acquisitions of shares in a listed entity under professional underwriting arrangements, or as a result of participation in a rights issue.

51ABC Acquisitions of shares and units to which acquisitions provisions do not apply

Acquisitions that do not give control

(1) The acquisitions provisions do not apply to an acquisition by a person of shares in the capital of a body corporate or the units in a unit trust (the ***target***) if:

…

Underwriting arrangements

(8) The acquisitions provisions do not apply to an acquisition by a person of shares or units in a listed corporation or listed managed investment scheme (the target) under an underwriting or sub-underwriting agreement if the underwriting or sub-underwriting agreement was entered into in the ordinary course of undertaking an underwriting or sub-underwriting business.

Rights issues

(9) The acquisitions provisions do not apply to an acquisition which results from an issue of securities by a listed corporation or listed management investment scheme under a rights issue.

3.5. Temporary holdings by financial institutions - section 51ABC(6)

The definition of 'Financial Institution' in section 4(1) is limited to an ADI, a bank, a building society or a credit union. It would not, for example, extend the benefit of the exemption to private credit funds or non-bank underwriters for capital raisings. It is unclear why this definition is so limited in circumstances where the conditions in section 51ABC(6)(a)-(c) would still need to be satisfied for the acquisition to be carved out from the acquisition provisions.

The Commission should be able to extend the period of 12 months to dispose of the shares or assets under section 51ABC(7) where the holder is making genuine attempts to effect a disposal.

Recommended change:

Amend the definition of 'Financial Institution' in section 4(1) to include private credit funds, non-bank underwriters and entities whose ordinary course of business includes moneylending activities.

Subsection 4(1)

financial institution means:

(a) an ADI; or

(b) a bank; or

(c) a building society; ~~or~~

(d) a credit union;

(e) private credit funds;

(f) non-bank underwriters; or

(g) entities whose ordinary course of business includes money lending activities.

Recommended change:

The period of 12 months to dispose of the shares or assets under section 51ABC(7) should be extended where the holder is making genuine attempts to effect a disposal.

51ABC Acquisitions of shares to which acquisitions provisions do not apply

…

Temporary holdings by financial institutions and authorised insurance companies

…

(7) This subsection applies if:

(a) the holder does not exercise voting rights in respect of the shares; or

(b) the holder exercises such voting rights only with a view to maintaining the value of the shares; or

(c) the holder exercises such voting rights only with a view to:

(i) preparing the disposal of all or part of the body corporate or its assets; or

(ii) disposing of the shares;

and any such disposal takes place within 12 months of the acquisition, or such longer period as the Commission may allow where the holder made genuine attempts to dispose of those shares within 12 months of the acquisition.

3.6. Circumstances in which the acquisitions provisions do not apply - section 51ABF

While it seems clear that the notification requirements are not intended to apply to lenders taking security over shares and assets for ordinary course lending transactions, to avoid unnecessary market conjecture this could be added to the express exclusions in this section.

Recommended change:

Section 51ABF should expressly exclude security interests in shares and assets.

51ABF Other circumstances in which the acquisitions provisions do not apply

The acquisitions provisions do not apply to an acquisition:

(a) by a person in the person's capacity as an administrator, receiver, receiver and manager or liquidator (all within the meaning of section 9 of the Corporations Act 2001); or

(b) that takes place pursuant solely to a testamentary disposition, intestacy or a right of survivorship under a joint tenancy;

(c) that results from a person creating or giving rise to a security interest if:

(i) both of the following apply:

(A) the person's ordinary business includes the provision of financial accommodation by any means;

(B) the person took or acquired the security interest in the ordinary course of their business of the provision of financial accommodation by any means and on ordinary commercial terms; or

(ii) all of the following apply:

(A) the person took or acquired the security interest for the benefit of another person;

(B) the person's ordinary business, or the other person's ordinary business, includes the provision of financial accommodation by any means;

(C) the person took or acquired the security interest in relation to financial accommodation provided by the other person in the ordinary course of their business of the provision of financial accommodation by any means and on ordinary commercial terms.

[Drafting Note: based on section 611(6) of the Corps Act]

3.7. When notifications have not been finally considered—section 51ABJ

An acquisition has not been "finally considered" under section 51ABJ(e)(i) if the ACCC has made an acquisition determination in respect of the notification which has not been subject to review and the period to apply for a review has not expired. Presumably section 51ABJ(e)(i) should be limited to where the ACCC has made an acquisition determination under section 51ABW(1)(c) that the acquisition must not be put into effect (not where the determination is that the acquisition may be put into effect). Otherwise, if the application is approved, then the acquisition is still stayed until the review period in section 100 expires, even where there won't be a review because the application has been approved. We do not think this is the intention of the legislation.

***Recommended change*:**

Amend section 51ABJ(e)(i) to refer to when the ACCC has made an acquisition determination under section 51ABW(1)(c).

51ABJ When notifications have not been finally considered

A notification of an acquisition has not been ***finally considered*** if:

…

(e) all of the following subparagraphs apply:

(i) the Commission has made an acquisition determination in respect of the notification under subsection 51ABW(1)(c);

(ii) an application has not been made under subsection 100C(1) for review of the determination in circumstances to which subsection 100C(2) applies;

(iii) the period during which such an application could be made under subsection 100C(1) has not ended; or

…

3.8. Requirements for notifications—section 51ABR

Section 51ABR(1) should refer to a 'proposed acquisition', rather than an 'acquisition', so as to align with the reference in section 51ABQ(1) to a proposal to put into effect an acquisition.

Recommended change:

Amend section 51ABR(1) to refer to a proposed acquisition.

51ABR Requirements for notifications

(1) A notification of ~~an~~ a proposed acquisition is made in accordance with this subsection if it:

(a) is made in writing; and

(b) is accompanied by the fee (if any) prescribed by the regulations for the purposes of this paragraph in relation to the notification; and

(c) is made by:

(i) if there is only one principal party to the acquisition—the principal party; or

(ii) otherwise—all of the principal parties jointly.

3.9. Takeover bids

Section 51ABZB(1) prohibits the ACCC from making a determination earlier than 15 business days after the effective notification date, so that even if a notifying party had 'pre-cleared' a takeover with the ACCC on the basis that it has no competition concerns whatsoever (and the ACCC was confident that market inquiries were not required), the party would not be able to launch an unconditional takeover bid (including an on-market takeover bid) for 15 business days after the bid became public with the notification.

Recommended change

Amend section 51ABZB(1) to provide the ACCC with flexibility to make a determination within 15 business days if it does not have any competition concerns and where the ACCC is satisfied that market inquiries are not required. This issue could also be the subject of the waiver power which is the subject of a separate recommendation.

4. Transitional arrangements are unclear

4.1. Transition from the informal regime to the mandatory regime

The transitional arrangements in the Exposure Draft do not clearly address how merging parties and the ACCC are intended to transition away from the informal merger regime to the new mandatory merger regime.

The mandatory regime effectively provides that from 1 January 2026, an acquisition that is required to be notified cannot be ***put into effect*** until the ACCC has approved the acquisition.

However, it is unclear how:

- acquisitions which have been entered into prior to 31 December 2025 and which have received informal clearance from the ACCC under the voluntary informal merger regime prior to 31 December, but which have not been *put into effect* by 1 January 2026, will be dealt with; or
- acquisitions which have been entered into prior to 31 December 2025 and have sought informal clearance from the ACCC but have not yet received a decision from the ACCC as at 1 January 2026 and have not yet been *put into effect*, will be dealt with.

The Exposure Draft implies that the current informal merger process will not be available at all from 31 December 2025 (with the repeal of section 50 and section 50A), but does not clearly address what this means for acquisitions which are being investigated by the ACCC under the informal regime as at 31 December 2025 (or which have already been assessed by the ACCC under the informal regime but which have not closed as at 31 December 2025). This is a clear gap.

In this regard, the Explanatory Memorandum and Exposure Draft Fact Sheet note that:

- Businesses can continue to voluntarily engage with the ACCC via its informal merger review process until 31 December 2025.[9] Existing prohibitions will continue to apply to acquisitions that were *entered into* before 1 January 2026, even if they have not yet been completed as at that date'.[10] The Explanatory Memorandum states that this is addressed in section 188(1) of the Exposure Draft.
- From 1 January 2026, businesses will no longer be able to voluntarily engage with the ACCC via its informal clearance process. The prohibitions in sections 50 and 50A of the CCA will be repealed from 1 January 2026. After this date, acquisitions will be subject to the new system set out in Part IVA.[11] To cover acquisitions that occur during December 2025, before section 50 is repealed, an adjustment will be made to section 50 to clarify that the section does not apply to a notified acquisition.[12]

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[9] Exposure Draft Fact Sheet, p 3. <https://treasury.gov.au/sites/default/files/2024-07/c2024-554547-factsheet.pdf>
[10] Explanatory materials, at [8.20].
[11] Explanatory materials, at [8.17].
[12] Explanatory materials, at [8.18].

Section 188 of the Exposure Draft states that:

188 Application of amendments

Contracts, arrangements or understandings that restrict dealings or affect competition

(1) Subsections 45(4A) to (4C) apply to an acquisition that is put into effect on or after 1 January 2026.

Acquisitions not required to be notified before 1 January 2026

(2) Section 51ABG applies in relation to an acquisition that is put into effect on or after 1 January 2026.

Notifications may be made on or after 1 December 2025

(3) Division 2 of Part IVA applies in relation to a notification made on or after 1 December 2025.

Applications for authorisations

(4) Subsection 88(8) applies in relation to an acquisition that is put into effect on or after 1 January 2026.

It is unclear how the Explanatory Memorandum and Fact Sheet should be read with section 188 of the Exposure Draft. In this regard:

a) Section 8.20 of the Explanatory Memorandum suggests that section 188(1) of the Exposure Draft provides that acquisitions that were entered into before 1 January 2026 but which have not yet completed at that date will continue to fall under section 50.[13] However, subsection 188(1) rather seeks to ensure that the purpose prohibition in section 45 can apply to acquisitions which have the purpose of substantially lessening competition and are put into effect after 1 January 2026. Section 45(7) states that section 45(1) will not apply to an acquisition of shares or assets on or before 31 December 2025. This appears to mean that the ACCC could take action in relation to an acquisition under section 45(1) that is completed after 1 January 2026. However, it does not appear to allow those acquisitions to be considered under section 50 post that date.

b) Section 188(2) then refers to section 51ABG which simply states that only acquisitions put into effect after 1 January 2026 are required to be notified under the new regime.

c) The transitional provisions therefore do not address a scenario where an acquisition has been entered into prior to 1 January 2026, but has not yet been put into effect (other than the fact that they can be considered under section 45).

d) Based on the current drafting, it appears that any acquisition that completes after 1 January 2026 will be subject to the new merger clearance regime (including the prohibitions on completing without ACCC merger clearance), even if the acquisition was entered into prior to 1 January 2026, and/or notified or cleared under the ACCC's informal merger review process prior to 1 January 2026.

e) A one-month transitional period (1 December 2025 to 31 December 2025) during which merging parties can either voluntarily notify an acquisition under the new regime or voluntarily notify the ACCC under the old informal regime does not adequately

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[13] Explanatory Materials, at [8.8].

address this issue. As Treasury is likely aware, the ACCC currently undertakes (in terms of the informal merger regime) to conduct a pre-assessment in 2–6 weeks; a public review process in a further 6–12 weeks; and a post-SOI assessment in a further 6–12 weeks, with the ACCC often exceeding these suggested timeframes. This means that, at a minimum, it is quite likely that a number of acquisitions voluntarily notified to the ACCC after June 2025 are not adequately addressed under the Exposure Draft.

The uncertainty that the Exposure Draft introduces, in terms of both cost and delay, is likely to result in some unintended consequences for both merger parties and the ACCC:

- Merging parties may be less incentivised to voluntarily notify the ACCC of proposed acquisitions in the months leading up to the launch of the new mandatory regime. This may lead to a rush of applications to the ACCC in December 2025 and early 2026 (putting a real strain on ACCC resources).
- Merging parties may be more incentivised to close deals prior to 31 December 2025 and either not voluntarily notify the ACCC of the proposed acquisition at all or 'close over' the ACCC's investigation to ensure that the acquisition has been *put into effect* prior to 31 December 2025. While the ACCC may be able to continue to take action in court in relation to those provisions under the old section 50 this could also put a strain on ACCC resources.
- The ACCC may be required to use resources to re-commence an assessment of an application that it has already substantially reviewed, even if there is a formal and procedural element to this.

To address these gaps, the Committees make the following recommendations which it believes can be addressed in a new 'Transitional Arrangements' provision in the Exposure Draft set out below.

We consider that the proposed recommendations are unlikely to result in a 'flood' of voluntary merger filings to the ACCC under the informal regime in the lead up to 30 November 2025. It is likely to involve only a handful of mergers given the small number of mergers that the ACCC takes to public review. The remaining pre-assessed mergers are generally dealt with fairly quickly. It is also unlikely that merging parties will be able to materially speed up their commercial arrangements simply to *put acquisitions into effect* and file a notification under the informal merger regime in advance of 30 November 2025. However, if this is a concern the grandfathering could be limited to proposed acquisitions which have been notified to the ACCC and the ACCC has commenced its assessment of the proposed acquisition, or the acquisition has been listed on the ACCC's public review register. The proposed recommendations will also allow for a smoother and easier transition for the ACCC, which is preferable to the unintended consequences of the current transitional arrangements (as outlined above).

Recommended changes

1. In respect of acquisitions which have been voluntarily notified to the ACCC under the old informal regime, and for which the ACCC has issued a clearance or non-intervention letter prior to 31 December 2025, but which have not yet come into effect, the Committees suggest that the Exposure Draft be amended to introduce an exemption along the following lines:

   (a) *Section 51ABG does not apply to an acquisition in relation to which the ACCC has issued a Decision Letter, so long as the date on which the acquisition is put into effect is no more than 12 months after the date on which the Decision Letter was provided.*

   (b) *'Decision Letter' is a letter issued by the ACCC in which it indicates that it:*

      (i) does not intend to intervene in the transaction under section 50; or

      (ii) does not intend to conduct a public review of the transaction under section 50.

2. In respect of acquisitions which have been voluntarily notified to the ACCC under the old regime, but which the ACCC is still investigating at 31 December 2025 and which have not yet come into effect, the Committees suggest that the Exposure Draft should be amended to introduce grandfathering provisions in respect of section 50 of the CCA (and its relevant accompanying provisions). In this manner, acquisitions entered into and notified to the ACCC prior to 1 December 2025 could continue to be assessed by the ACCC under the informal clearance regime after 1 January 2026. All the remedy and enforcement declaration provisions would also survive so the ACCC could seek enforcement under section 50 of the CCA or the parties could seek a declaration under section 50 of the CCA:

   Section 50, section 50A, section 76, section 81, section 87B, section 88 and section 90 of the CCA will continue to apply to acquisitions which have been entered into on or prior to 30 November 2025 and section 51ABG does not apply to those acquisitions.

4.2. Transition from the authorisation regime to the mandatory regime

The Explanatory Memorandum notes that, from 1 July 2025, the current merger authorisation process will be closed off to new applications.[14] The Explanatory Memorandum also notes that the new regime will establish a process for the ACCC to determine whether an acquisition may be put into effect even if it would otherwise be anti-competitive. The ACCC may only make such a determination if it considers that the acquisition is of public benefit, and that benefit would substantially outweigh the anti-competitive detriment of the acquisition.[15]

There is currently no process in place for acquisitions which are of public benefit to be notified to the ACCC during the period 1 July 2025 to 1 December 2025. This is a clear gap. Merging parties cannot be expected to put proposed acquisitions that are of public benefit on hold for 5 months while they wait for the ability to voluntarily notify under the

[14] Explanatory materials, at [8.23]; Exposure Draft, Schedule 1, item 1, subsection 88(1A).
[15] Explanatory materials at [5.0].

new regime on 1 December 2025. This is especially so in circumstances where the new regime will retain the ability for the ACCC to assess, and approve, a proposed acquisition on public benefit grounds.

To address these gaps, the Committees make the following **recommendations**.

Recommended changes:

1. Merging parties should be permitted to notify acquisitions under section 88 of the CCA up until, at least, 30 November 2025.

   The application must be made on or before ~~30 June 2025~~ 30 November 2025 if any of the specified provisions is section 50.

2. As above, in respect of acquisitions which have been notified to the ACCC under the formal authorisation process, and for which the ACCC has granted authorisation prior to 31 December 2025, but which acquisition has not yet come into effect, the Committees suggest that the Exposure Draft be amended to introduce an exemption along the following lines:

   Section 51ABG will not apply to acquisitions in relation to which the ACCC has granted an authorisation under sections 88 and 90.

3. In respect of acquisitions which have been notified to the ACCC under the formal authorisation process, but where authorisation has not been granted as at 30 November 2025, the Committees suggest that the Exposure Draft be amended to introduce grandfathering provisions in respect of sections 88 and 90 of the CCA (and its relevant accompanying provisions) insofar as they apply to merger authorisations which we have included in the drafting above in relation to the informal clearance regime.

5. Process and timeframes

The Committees embrace the Treasury objectives of greater transparency and certainty around timeframes. However, we are concerned that the approach which has been adopted in the Exposure Draft is complex and rigid and is likely to create considerable confusion and uncertainty.

Complex mergers take considerable time to assess. There is little to be gained from trying to hasten this process or by restraining the ability of the ACCC and merger parties to flexibly engage around the issues. Indeed, one of the benefits of the current informal clearance process is that it offers a considerable degree of flexibility around engagement with the ACCC. The need for longer review timelines in complex mergers is reflected in the review timelines for complex transactions experienced in other jurisdictions, including the United States and Europe.

However, in an apparent attempt to ensure information and remedies are provided early, the process in the Exposure Draft introduces several short and rigid time limits that will create frustration for the ACCC and merger parties. It also restricts the ACCC to stopping and ‘restarting the clock’ in circumstances which, today, would be managed by allowing the ACCC and parties more time to address changes in circumstances or any lack of information.

Our primary concerns are as follows:

5.1. Phase 2 test

Section 51ABZD(1)(a) states the ACCC may determine a notification be subject to phase 2 review if the ACCC "reasonably suspects" the acquisition would have the effect or likely effect of SLC. This introduces a further and unnecessary test.

By contrast, the CMA simply refers transactions to a phase 2 investigation if it believes that "it is or may be the case that" the transaction does not satisfy the relevant UK test.[16]

Recommended changes:

Amend paragraph (a) to say:

- *"the Commission reasonably believes that the acquisition, if put into effect, may have the effect, or may be likely to have the effect, of substantially lessening competition in any market"*

or, if the recommendation with respect to section 51ABW(3) above is adopted:

- *"the Commission is satisfied on reasonable grounds that the acquisition, if put into effect, may have the effect, or may be likely to have the effect, of substantially lessening competition in any market"*

5.2. Notice of competition concerns

The Committees welcome the introduction of a "Notice of competition concerns" (the **Notice**) in section 51ABZE. In particular, this notice requires the ACCC to provide merger parties with "*the relevant material facts and the material information and material evidence the Commission relies upon in making the assessment*". While this does not go as far as providing parties with the full ACCC file, it appears to offer a meaningful improvement on the level of transparency that currently exists during the informal process, with respect to ACCC concerns and their economic and evidential basis.

We do note that the Notice is provided only to merger parties. While this is understandable, it reinforces our view that it is important for the transparency and credibility of the process that, subject to any confidentiality claims, submissions and material provided to the ACCC should be published on the register—in the same way as occurs under the current merger authorisation process.

The Committees are also concerned that:

a) <u>The Notice is only provided to the parties by the ACCC 5 weeks (or longer) into Phase 2. During this period, merger parties lose access to market feedback.</u>

   Under the current informal clearance process, the ACCC generally provides merger parties with market feedback prior to the conclusion of Phase 1, allowing for the parties to respond to concerns or questions that have been raised, with the potential to resolve or at least narrow any concerns that may require further review in Phase 2. The Committees are concerned that the administrative nature of the new process may lead to the ACCC delaying providing any feedback until the full Notice has been finalised. This is likely to introduce significant delays. We would welcome

[16] Mergers: Guidance on the CMA's jurisdiction and procedure (25 April 2024) [3.1].

assurance from the ACCC (or through the draft legislation or EM) that earlier informal market feedback will continue to be provided prior to the full Notice.

b) It is possible for this period to be delayed beyond this period (i.e. 'as soon as reasonably practical' after the end of the five-week period).

For the reasons set out below, this raises particular concerns in relation to the negotiation of remedies, as any delay in the delivery of the Notice does not (automatically) extend the deadline for offering remedies. In most cases, it appears unlikely that remedies will be able to be meaningfully advanced with the ACCC until the extent of any concerns are better understood through the Notice.

c) Merger parties have only 3 weeks to respond to the Notice.[17] This is 10 weeks less than other stakeholders are given to provide information to the ACCC.

For most complex mergers in a Phase 2 process, 3 weeks is manifestly inadequate. This is especially the case given the policy objective of increasing the economic and data-driven analysis of mergers. Expert economic and data analysis is complex and time-consuming. It appears unlikely that, for most sizeable transactions, the statutory process will be able to be met without an extension of time—which is subject to the discretion of the ACCC (section ABZE(4)).

The Committees also note that other stakeholders have 10 weeks (50 business days) more than the merger parties, until 10 business days before the end of the period, to submit material to the ACCC. It is therefore not clear why merger parties are constrained in this way?

The overall structure of the process creates a significant imbalance in the process. This issue raises additional procedural fairness concerns given the very restricted rights of merger parties to bring forward new evidence in the limited merits review process.

Recommended changes:

The Committees recommend the following changes which look to deliver the objectives identified by Treasury, while balancing the interests of the various stakeholders including merger parties:

1. The deadline for the ACCC to provide the Notice to merger parties should be brought forward by 1–2 weeks. If the deadline for the Notice is not accelerated, the EM (or a Ministerial Direction) should explicitly permit or require the ACCC to provide market feedback to merger parties *as early as reasonably practicable* within Phase 2.
2. Where the ACCC is delayed in providing the Notice (beyond 25 business days), this should automatically extend the period for the offering of remedies. Although we note our comments below regarding whether the negotiation of remedies should be constrained in this way at all.
3. Given that the Notice is not public, the Committee submits non-confidential material should be placed on the public register to facilitate engagement by other stakeholders.

[17] Section 51ABZE(3).

4. The merger parties should be given considerably more time to respond to the Notice, having regard to the timeframes that apply to third parties and in relation to remedies.

5.3. Timeframe for negotiation of remedies

Under the current merger regime, the ACCC is open to remedies being offered at any time. The Exposure Draft removes this flexibility and specifies that remedies can only be "offered" within the following windows (unless extended):

- *Phase 1*: within four weeks (20 business days) of notification; and
- *Phase 2:* within 10 weeks (50 business days) of the start of phase 2.

These stringent timing requirements as to when remedies must be offered is a significant departure from the existing regime under which parties can (and do) offer remedies later in the process once they have a clear understanding of the ACCC's concerns and can frame remedies to address them. This avoids the merger parties proposing remedies that do not address the ACCC's concerns. Draft undertakings are always the subject of public consultation before they are agreed with the ACCC, finalised and 'offered' by the parties. This consultation generally requires at least 10 days, and sometimes longer.

The Committees therefore consider that the time limits applicable to remedies in the Exposure Draft, while able to be extended at the discretion of the ACCC,[18] are nonetheless unnecessary and build uncertainty and inflexibility into the process.

There is also uncertainty regarding what constitutes a commitment or undertaking that is "offered" by the merger parties. Typically, remedies are negotiated over a considerable period but are not formally "offered", in the sense of provided to the ACCC as an executed section 87B undertaking capable of acceptance by the ACCC, until late in the process—once the terms have been subject to public consultation and are settled.

The Committees question why there needs to be <u>*any*</u> time limit placed around the negotiation of remedies? Ultimately, merger parties have a strong incentive to seek to make commitments or to offer undertakings at an early stage in order to improve the prospects of clearance as quickly as possible.

However, if any restrictions are placed on the offering of remedies, the Committees submit that Treasury retains as much of the current flexibility around engagement as possible.

Recommended changes:

1. The new regime should retain the current flexibility around negotiation of remedies. The Committees propose that any time limits on the offering of remedies are removed.

If time limits are to be retained:

2. The concept of "offering" a commitment or undertaking should be clarified to make clear that this does not need to be in a form capable of immediate acceptance by the ACCC to recognise that draft undertakings are typically negotiated and

[18] An extension to the deadline for undertakings can only be permitted by the ACCC through extending the overall timeframe for the final determination under ss.51ABZT(3) and (4).

consulted upon throughout the clearance process and are not finally 'offered' until the terms have been settled.

3. The ACCC should have an ability to extend the timeframe for offering an undertaking without being forced to extend the entire determination period (i.e. a right to extend should be included in section 51ABY which does not link to section 51ABZT).
4. Any delay by the ACCC in providing the Notice under section 51ABZE (beyond 25 business days) should automatically extend any remedy timeframe—without requiring merger parties to separately request an extension of the entire determination period under section 51ABZT (which is at the discretion of the ACCC).
5. The timeframe for offering remedies should be extended to better reflect the time available to other stakeholders to respond to the process.

5.4. Uncertain and rigid "clock restarters" and "clock stoppers"

The draft legislation includes a range of clock 'restarters' and 'stoppers', which create uncertainty around the process.

a) The process around incomplete or 'misleading' notifications is not fairly balanced and allows the ACCC to 'restart' the clock in cases of inadvertence or genuinely held differences in view.

The ACCC may determine at any time prior to a final determination that the process did not validly commence (i.e. does not have an effective notification date[19]), if the ACCC reasonably considers that the notification is materially incomplete, materially misleading, or contains information that is false in a material particular.[20]

Such a determination would create significant transaction risk and should only be brought into play where a party has acted in a manner that is intentionally misleading.

However, under section 51ABS as currently framed:

- The notification may be invalidated (including at a late stage in the process) for being found to be 'materially incomplete' or where it contains information that is false, even if the parties at the time the information was provided were not aware of its falsity.[21]
- Once the ACCC makes a decision of this kind, the notification date is set aside, the clock is stopped and only restarts if the parties give the ACCC additional information (and pay a further fee).[22]

Separately, a party commits an offence under section 45AZB if a person is 'negligent' (which is taken to include 'reckless') in providing information to the ACCC that is found by it to be misleading or false in a material respect. The concepts of 'negligence' and 'recklessness' are broad and unhelpful where there are genuinely

[19] Section 51ABS(7).
[20] Section 51ABS (page 28).
[21] While under section 45AZB, knowledge of falsity appears to be required in order for a party to be found to have contravened the obligation not to mislead the ACCC, this does not appear to qualify the ability for the ACCC to invalidate a notification under section 51ABS.
[22] Section 51ABT.

contested and complex economic concepts such as market definition being debated between merger parties and the ACCC.

Merger parties should be able to hold and express genuine and reasonable views about market definition or other dynamics, that are different to those of the ACCC, without parties being subject to the risk that their notification may be invalidated (at any time) or that they may be found to have committed an offence.

Recommended changes:

1. The 'negligence' test in section 45AZB should be replaced with a 'knowledge' test, ie, the person knew the information was false or misleading in a material particular.
2. The voiding of a notification should only occur where a party knowingly provides information that is false or misleading, as to a material particular. In other cases, the process of rectifying any incomplete or inadvertently wrong information should operate as a matter that allows the ACCC to "stop the clock" for a reasonable period while information is provided to rectify the issue. This is consistent with the way in which the informal clearance operates today.
3. The serious consequences currently associated with an incomplete notification underscore the importance of clear and comprehensive guidance from the ACCC, at an early stage, regarding the notification form and information requirements.

b) The ACCC can restart the clock based on any 'material change of fact'.

Complex merger processes often take 6–12 months and can take longer (particularly if they involve judicial or merits review). Markets do not stand still waiting for ACCC consideration of a deal—and often uncertainty around a transaction can, itself, lead to other changes in market dynamics. It is therefore not uncommon for the ACCC and merger parties to have to deal with and incorporate changing circumstances into their analysis during a merger review. This kind of flexibility is essential to a workable and timely merger regime.

However, the ACCC has the power under section 51ABU at any time prior to a final determination to effectively "restart the clock" if it becomes aware of a change of fact that it considers would be material to its determination.

Moreover, it is a contravention for a merger party to fail to notify the ACCC of a material change of fact.[23]

There are at least two significant issues with this approach:

- First, the test of materiality is a subjective one based on what the ACCC considers to be material to its assessment. This will not usually be known to merger parties, particularly where the ACCC is engaged in market inquiries with third parties.
- Second, as noted above, it would be common for market dynamics to change over an extended, 6–12 month merger process. It cannot be appropriate for merger parties to face the risk that their process will be 'restarted' based on

[23] Section 45AX.

market changes outside of their control and which the ACCC determines might be material.

Rather, there should be consultation between the ACCC and merger parties on how the material change in fact is likely to impact the ACCC's assessment and the merger parties would be incentivised to agree to a time extension (where required) to ensure the ACCC has sufficient time to consider the material fact and/or the merger parties can sufficiently address any concerns, so that the ACCC can be satisfied in its determination that acquisition could still be put into effect.

For information issues, a similar level of increased discretion and flexibility should be allowed to the ACCC to manage the process where changes occur.

Recommended changes:

1. Amend section 45AX(1)(d) so an offence only arises if a party "is aware or ought reasonably to have been aware that" … a change of fact is material to the Commission and fails to notify the ACCC.
2. Section 51ABU should operate to give the ACCC the power to 'stop the clock' if it becomes aware of a material change of fact, in order to permit parties to provide further information or evidence responding to the change. The ACCC should not be forced to restart the clock as its only option for addressing a change in circumstances.

c) Clock stoppers—section 155 notices and requests for information (RFIs), Notice of competition concerns.

Generally, the Committees welcome the attempt made in section 51ABZT to place greater certainty and transparency around the 'clock stoppers' that apply where remedies are offered or information is requested by the ACCC. We also endorse the Government policy announced by Treasury that any extensions of timeframes should be subject to "procedural safeguards".[24]

The Committees do note, however, the difference in approach adopted for section 155 notices and RFI responses, notably:

- If the ACCC issues an RFI—the clock stopper only applies if the merger parties are late with responding to the request (and extends the determination period by the period they are late).
- If the ACCC issues a section 155 notice—the clock stopper operates from the time that the notice is *issued*.

This is likely to provide an incentive for the ACCC to engage with merger parties through compulsory notices rather than more flexible RFIs, so that the ACCC has more control over the timing of its process. This would be unfortunate given the greater flexibility associated with RFIs and which has been a reason they tend to be used more by the ACCC at Phase 1 of the informal clearance process. Providing a longer pause on the determination period for section 155 notices also removes any

[24] Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy* (Decision Paper, 10 April 2024), 7.

timing incentive for the ACCC that might otherwise exist to ensure notices are appropriately targeted (and perversely could have the opposite effect).

The Exposure Draft also does not include any procedural safeguards for unreasonable or unduly burdensome RFIs or section 155 notices (e.g. multiple RFIs and section 155 notices issued during one phase or with unreasonably short timeframes). If parties consider that an RFI or section 155 issued by the ACCC is an abuse of process (i.e. for the purposes of delaying the timeframe or unduly burdensome), there should be a procedural safeguard for parties to have the issuing of the RFI or section 155 urgently reviewed by the Tribunal.

Recommended changes:

1. The Committees suggest that the same approach should be adopted for RFIs and section 155 notices, so that the clock is only stopped if parties are late with responding to either form of request (and for the period they are late in responding).
2. To the extent that the ACCC determines that section 155 notices are required and would be likely to warrant an extension of the determination period, this should be a matter that is discussed and agreed between the ACCC and merger parties, as occurs today (under section 51ABZT(2)(d)).
3. Provide a mechanism for parties to appeal any abuse of process by the ACCC (in the form of unduly burdensome RFIs or section 155 notices) that would delay the statutory timeframes. The appeal could be heard and decided by the Australian Competition Tribunal within 7 days (with the timeframe for the acquisition paused during this process).

d) Clock stopper for delay in issuing a Notice of competition concerns.

As noted above, any delay in the issuing of a Notice (beyond 25 business days after phase 2 commences)[25] automatically results in a 'clock stopper' for the period it takes the ACCC to issue the Notice.

As a result, it is likely that most complicated merger clearance reviews will have the timeframes for review extended, leaving very little timing certainty for merger parties. Some form of final statutory deadline for the Notice should be considered, subject to agreement with the merger parties (as occurs under the current merger authorisation process, where the statutory deadline for ACCC determination can only be extended by consent).

e) Termination of a notification process if the ACCC 'reasonably believes the parties … no longer intend to put the acquisition into effect".

The ACCC will have the ability to terminate its review of a notification if it "reasonably believes" the parties to the acquisition no longer intend to give effect to the acquisition.[26]

The Committees are not clear why the ACCC should be given a unilateral ability to cease considering a transaction, based on its own view of the likelihood of the

[25] Section 51ABZF(2).
[26] Section 51ABV(3).

parties proceeding. This is especially the case under a mandatory framework where parties are unable to continue with a deal unless it has been notified and a determination has been made.

It is unclear how this power will operate in the context of hostile takeovers, where at least one party to the acquisition does not wish to give effect to the acquisition.

Recommended changes:

1. Any delay by the ACCC beyond the 25-day period for production of the Notice should automatically extend any timeframes associated with offering remedies—without requiring parties to have to seek a full extension of the determination period from the ACCC.
2. A firm statutory deadline for the Notice should be included, that can be extended only with the consent of the merger parties (consistent with the current merger authorisation process).
3. Remove section 51ABV(3) given it is unnecessary and creates difficulties for some types of transactions, such as hostile deals.

f) Ability for ACCC to grant waivers

Given the prescription of a number of parts of the process, the Committees consider that some form of general ACCC waiver would be valuable and avoid unintended adverse consequences.

This should operate generally (and could be applied on a specific or class basis) but would include, for example, use during any transition in relation to waiving the notification requirement for acquisitions which have already been the subject of informal clearance as at 31 December 2025.

Recommended changes:

Include a power for the Commission to waive obligations under the regime, including (without limitation) the obligation to notify an acquisition. This may be exercised as a specific or general waiver (i.e. applicable to a class of applicants or acquisitions).

6. Notification of restraints, the good will exception and anti-overlap with the cartel provisions

6.1. Exceptions and defences to cartel laws

Australian competition law has long drawn a distinction between cartel conduct and anticompetitive mergers/certain merger-related restrictions, via clear exceptions to cartel laws for cartel provisions which provide for the acquisition of shares or assets (section 45AT), or which are included in certain transaction documents but are reasonably necessary to protect goodwill that is being acquired (section 51(2)(e)). These exceptions and defences apply automatically under the existing laws.

The Exposure Draft blurs this important distinction by introducing a complex and confusing set of requirements which ostensibly limit[27] the applicability of those defences and exceptions based on whether a transaction has been notified to the ACCC within 30 days of signing. This limitation is inappropriate in circumstances where cartel laws are the most serious breaches in our competition laws. For such laws, it is appropriate that defences apply without the need to satisfy process or procedural requirements. While under the current laws there are timing requirements for voluntarily seeking authorisation for potential breaches of Part IV, there is an inherent distinction between those timing obligations and the ability to rely on a defence to cartel conduct in respect of mergers that are required to by notified to the ACCC. Further, given prohibitions on pre-completion integration and information sharing, there is no reason to super impose a 30-day procedural rule.

In addition, the 30-day timeframe between finalising agreements and notifying the ACCC of the transaction is far too short. Indeed, it is also not clear why any such timeframe is required. Practically, the 30-day notification requirement will discourage pre-consultation with the ACCC, as parties will feel compelled to submit an application within that timeframe to obtain protection from those laws, including in circumstances where further consultation with the ACCC on the content of the application could have led to a more efficient review process.

Moreover, for complex mergers, lodging a detailed submission within 30 days of signing is often not feasible:

- Until a transaction is publicly announced at signing, it is often not possible to consult with, and obtain relevant data from, relevant business units, critical to identifying potential issues and preparing a submission to the ACCC that is based on detailed evidence.
- In multijurisdictional transactions, where filings must often be made in upwards of 30 jurisdictions, ensuring that a substantive submission is lodged with the ACCC within 30 days is particularly impractical.
- Particularly in the context of the limited merits review contemplated, it will be increasingly important to ensure that a detailed submission and all supporting evidence is filed upfront. 30 days is simply not realistic to be able to achieve this.

[27] Note however that this is unclear as subsection 45AT(3) provides the notified acquisitions are not subject to the cartel conduct prohibitions. It is unclear what this adds when subsection 45AT(1) already provides that acquisitions are not subject to the cartel conduct prohibitions. Similarly, it is unclear what section 45AMA adds to section 45AT, or how the two sections are intended to interact.

6.2. Goodwill exception

Currently, the exception under section 51(2)(e) for non-competes or restraints included in a share or business sale agreement that is solely for the purpose of protecting the purchaser in respect of the goodwill is straightforward, well-understood and commonly used.

The Exposure Draft replaces this with a process for notification of restrictions associated with a notified transaction.[28] The Exposure Draft also and separately introduces significant qualifications to the current exemption under section 82 (which introduces a new section 51(2AAA)).

Taken together, the intention appears to be the following:

- To be protected, any restraint needs to be "directly related" to an acquisition, which means under section 51ABO that the restraint is *necessary for putting the acquisition into effect.*
- A restraint is only protected if an acquisition is notified to the ACCC within 30 days of the contract containing the restraint being executed in order for the parties to avoid potentially contravening the CCA for 'making' the relevant constraint.[29]
- A restraint can only form part of transactions that are implemented as share sale transactions (rather than also under asset or business sales).[30]

The policy intent for these changes is not clear and is not addressed in the explanatory materials. In addition to the timing difficulties outlined above, the changes raise a range of difficulties:

a) First, it is not clear whether a restraint that is solely for the purpose of protecting the purchaser in respect of the goodwill will ordinarily be "*necessary for putting the acquisition into effect*". More often, such restrictions are intended to protect the commercial bargain associated with a transaction. A deal may often proceed without the protection of a non-compete post completion, but at a significant discount.

b) Second, the amendments are not necessary given that the reasonableness of any restraint of trade remains subject to common law principles.

c) Third, section 51(2)(e) currently applies to goodwill in any *business sale* whether implemented as a share or an asset transaction.

d) Fourth, the ability of the ACCC to invalidate the cartel and goodwill exemptions will add significant complexity to M&A deals by requiring parties to factor in the risk (and impact on M&A pricing) of the potential invalidation of restraints. It is an unusual approach from a policy perspective for the ACCC to have the ability to remove an exemption, and thereby cause a party to contravene the law, on a retrospective basis.

e) Fifth, the highly complex 'exception to an exception to an exemption' language in section 51(2AAA) and section 51(2AAB) does not appear to work.
Section 52(2AAA) states, in effect, that the goodwill exemption does not apply to

[28] Section 51ABR (4).
[29] Section 82 (amendment to introduce s51(2AAB)).
[30] Section 51ABR(4) applies only to an acquisition of shares.

pre-completion business protection restrictions if the transaction is required to be notified, but has not been, as long as the transaction is notified within 30 days after the contract is executed and the restrictions are qualified so that they have no effect unless and until the notification occurs. However, section 52(2AA)(d) states that the restrictions do not apply while the acquisition is stayed in any event, which would include times before and after notification to the ACCC, hence rendering section 51(2AAB) superfluous and creating a direct drafting inconsistency. Critically, it is important that the goodwill exemption applies through both of these periods, hence before notification and during ACCC consideration so that the acquirer has the benefit of business protection requirements through the full ACCC timeline.

Given the very significant consequences for a restraint falling outside the exemption (i.e. potential cartel conduct), the Committees consider it is vital that the current workable approach is maintained.

6.3. General anti-competitive agreements

The Exposure Draft also blurs the long-standing distinction between anti-competitive mergers and other types of anti-competitive agreements, by repealing the anti-overlap provision in section 45 of the CCA (which provided that section 45 did not apply to certain merger agreements) and replacing it with a narrower anti-overlap that only protects transactions notified within 30 days of signing. This 30-day timeframe is far too short and will also discourage pre-consultation, for the same reasons outlined above.

Unlike the current section 50, for which only the ACCC is able to seek an injunction in respect of, ‘any person’ could seek an injunction for an anti-competitive merger which falls within the scope of section 45 (even if it does not require notification under the mandatory and suspensory regime). There is no clear rationale behind this change, which has the potential to be disruptive, time consuming and costly.

Further, the Exposure Draft proposes a new provision in section 45 which deems certain mergers with a purpose of substantially lessening competition to have a purpose of substantially lessening competition for the purposes of section 45. The rationale or need for such a deeming provision is not apparent, and adds further complexity to the laws.

Recommended changes:

1. Retain the approach to cartel defences under the existing laws by removing sections 28, 29, 38, 74, 75 and 82 from the Exposure Draft. However, introduce a general requirement for merger parties to provide a copy of any agreements containing relevant restrictions to the ACCC at the same time as an acquisition is notified. This requirement should not be a prerequisite to the goodwill exception applying.
2. Remove the 30-day time limit to notify the ACCC in order to be able to rely on the anti-overlap provision in section 45 of the CCA from sections 33 and 79 of the Exposure Draft.
3. Rather than the ACCC having the ability to invalidate exemptions, the ACCC could consider the impact of any restrictions or restraints as a condition in the conferring of a merger clearance thereby providing greater certainty by avoiding any retrospectivity.

4. Amend section 80 of the CCA to provide that only the Commission can seek an injunction in respect of a breach of section 45 relating to the acquisition of shares or assets.

7. Proposed changes to the 'substantial lessening of competition' (SLC) analysis

7.1. Extension of the new test to all of Part IV

The amendment to section 4G(2) provides that a reference to an SLC includes a reference to "substantially lessening competition in the market by creating, strengthening or entrenching (**CSE**) a substantial degree of power in the market".

The Committees acknowledge the policy objective of ensuring that whether a merger is likely to result in the CSE of market power is taken into account as part of the application of the SLC test in a mergers context, and to reflect that a SLC *can* result from creating, strengthening or entrenching substantial market power.

a) Lack of consultation with respect to impacts on other parts of the CCA.

However, the proposed change has the effect of amending the SLC test to incorporate the CSE concept across all of Part IV of the CCA. The Committees are concerned that there has been no consultation in relation to the broader application of this concept to other sections of the CCA that have an SLC test, including sections 45, 46, and 47. These provisions involve different types of conduct to which the new amendment could apply differently in practice. They are also penal provisions with serious consequences for contravention.

Moreover, since the Harper Review, most litigation under the modified section 46 has been brought by private litigants and not by the ACCC. Any change to the wider approach to SLC must take into account the implications for private and class action enforcement.

There are any number of practical examples of pro-competitive conduct that could be challenged by private litigants in the Federal Court under section 46 if section 4G is amended in the manner proposed to incorporate the CSE concept. For example:

- a decision by a firm with significant market share to seek a patent or design rights over an innovation that may give it a market advantage; and
- the largest supplier in the market matching prices offered by rivals or otherwise responding to short term pricing pressure to help retain its business, might be said to protect or "strengthen" the supplier's market position by making it more difficult for rivals to get a foothold in a market.

These go well beyond the orthodox understanding of a misuse of market power, based around exclusionary conduct; the proposed amendment is incapable of distinguishing between, on the one hand, conduct that has a harmful effect on rival suppliers, strengthens a firm's dominance and harms consumers and, on the other hand, conduct that is designed to protect the firms legitimate commercial interests. The Committees therefore submit that the CSE concept is better dealt with as one of the

‘relevant matters’ to which the ACCC can have regard in the context of the clearance process, rather than embedding it into the definition of SLC within section 4G (that will then apply across all of Part IV).

If there is a desire to consider any wider potential application of the CSE concept across the CCA, this should be the subject of separate and distinct consultation.

b) Insufficient regard given to the origins and evolution of the CSE concept in the EU.

The incorporation of the CSE concept is also based on some elements of the ‘Significant Impediment to Effective Competition’ or “SIEC test” in Article 2(2) and (3) of the EC Merger Regulation and applied in EU merger cases since 2004.

Ironically, the SIEC test was introduced to seek to amend EU merger law by moving it *away* from a structural assumption focused on dominance as a presumptive requirement. Over the last twenty years, the test has evolved to largely resemble the same kind of forward looking, dynamic exercise applied in Australia under the SLC test.

Prior to 2004 in the EU, a merger was prohibited if it would:

> “*create or strengthen a dominant position as a result of which effective competition would be significantly impeded*”

In response to concerns that ‘dominance’ had become a prerequisite consideration (and thereby overlooking other potential harms), the test was amended under the 2004 EC Merger Regulation so that a merger was prohibited it if would:

> *‘significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a **dominant** position’*

The effect of this change was not to deem any concentration that created a dominant position, or strengthened a dominant position to be prohibited but to (a) put the SIEC consideration before any dominance consideration and (b) ensure that if a concentration that did create or strengthen a dominant position, that this would remain a particular factor (but not alone a necessary or determinative factor) to be considered in determining whether the SIEC test was contravened.

The Committees are concerned that the drafting approach adopted in relation to the amendment to section 4G produces precisely the kind of structural presumption around dominance that led the EU to revise the test in order to avoid a focus on structural presumptions and rather focus on forward looking market dynamics consistent with a modern competition policy focused on economic evidence.

Recommended changes:

1. Remove section 15 of the Exposure Draft (which amends section 4G of the CCA).
2. Include the CSE concept into the “relevant matters” to be considered in the context of any merger assessment under section 51ABX (see below).

7.2. “Relevant factors” in the context of merger control

The Committees understand that in broad terms, the policy objective sought to be achieved through the inclusion in section 51ABX of the Exposure Draft of “relevant matters” to which the Commission may or must have regard is to:

- ensure that an explicit emphasis is placed on economic methodology and analysis of competitive effects.[31] The EM state that ‘these principles are intended to ensure explicit emphasis is placed on economic methodology and analysis of competitive effects’[32]; and

- provide a framework within which the Commission is to make its decisions by outlining those matters to which it may have regard when making a determination and applying the SLC test. As the EM states ‘the intent is for the principles to guide the Commission’s decision making towards outcomes based on economic and legal analysis of evidence, information and data on the competitive impact of an acquisition’.[33]

In principle, the Committees support those policy objectives.

However, the way that the drafting of section 51ABX has been approached is not consistent with this policy intent. The approach adopted has been to draw on concepts from EU competition law merger control introduced in the early 2000s, specifically Article 2 of the EU Merger Regulation.

The new merger factors in section 51ABX(3) involve a reordered and restructured set of factors lifted from Article 2(1) of the EC Merger Regulation which provides that:

> *“In making this appraisal, the Commission shall take into account:*
>
> - *the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;*
>
> - *the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.*”

Transplanting and ‘mixing and matching’ elements of EU law with the existing drafting in the CCA, as interpreted over 40+ years of Australian case law, is problematic. It should certainly not be assumed that the EUMR offers a more developed, economically focused, or coherent set of statutory language.

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31 Treasury Fact Sheet, p.2; Explanatory Memorandum, paragraph 4.8.

32 Explanatory Memorandum, paragraph 4.4.

33 Explanatory Memorandum, paragraph 4.4.

That said, the Committees acknowledge the twin policy objectives of:

- emphasising as part of the Commission's assessment of mergers that a 'substantial lessening of competition' *can* result from a transaction that creates, strengthens or entrenches substantial market power; and
- ensuring that merger factors (in the form of 'relevant matters') applied by the ACCC in its administrative decision making are fit for purpose and encourage explicit emphasis on economic methodology and the associated economic analysis of competitive effects. We also acknowledge and agree that it is appropriate to include an explicit factor that includes consideration of efficiency arguments as part of the SLC analysis.

To assist in delivering on the policy objective, two leading economists (who are also members of the Competition Committee), Greg Houston, Partner of HoustonKemp Economists, and George Siolis, Partner of RBB Economics, have prepared a separate paper (the **Houston/Siolis Paper** contained in the Annexure to this submission) outlining their views on the SLC test and an appropriate articulation of the 'relevant matters' to which the Commission may have regard.

These 'relevant matters' seek to capture and express the essential economic objectives of the Government using language and concepts which are tested and familiar in Australian competition law. The Committees endorse the position outlined in the Houston/Siolis Paper.

Recommended changes:

1. Delete section 15 of the Exposure Draft (which amends the current section 4G).
2. Replace section 51ABX with the 'relevant matters' outlined in the Houston/Siolis Paper, reflecting an alternative set of factors based on established Australian economic and competition law concepts.

8. New tests and thresholds that are uncertain or create undue complexity

8.1. The threshold for the ACCC to accept conditions as part of any approval is too high and unworkable

Section 51ABW enables the ACCC to clear a notified transaction subject to specified conditions.

However, this right to clear a deal subject to conditions is heavily qualified under section 51ABW(2), under which the ACCC must **not** do so unless:

- there is a real, and not merely a remote, possibility that the acquisition, if put into effect, would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and
- the conditions would comprehensively address that possibility, including by addressing the adverse effects of such a substantial lessening of competition.

No policy reason is provided in the explanatory materials for introducing this new and high threshold for the ACCC to be able to clear a transaction with conditions.

The issues raised by this drafting include the following:

- The reference to a possibility that is not remote is taken from the current s45AB and longstanding authority that the test of any "likely" lessening of competition means a possibility that is a "real chance".[34] By using this phrase together with 'likely' (i.e. a real but not remote possibility that the acquisition would be likely to …), the compound test is considerably lower than one that simply requires the ACCC to form a view that an acquisition is likely to substantially lessen competition before being able to clear based on conditions.

- The second element of the test requires the ACCC to reasonably believe that the conditions would "comprehensively address" the possibility of a lessening of competition—including any effects of that lessening of competition.

Taken together, the test appears to suggest that if the ACCC has any suspicion that a transaction may raise even a mere possibility of lessening competition, it cannot clear the deal with conditions unless it is also confident that those conditions *comprehensively address* such a remote possibility. This is not a workable standard and is likely to significantly reduce the cases in which the ACCC considers it is able to clear deals with conditions. That is not in the interests of the ACCC or merger parties.

The Committee's view is that section 51ABW(2) should be removed.

However, if it is intended that the ACCC be empowered to unilaterally impose conditions other than a condition that a person give and comply with a s87B undertaking that is offered by that person (which appears to be open on the face of section 51ABW(1) given that the reference to a section 87B undertaking is provided as just one example of a condition), we agree that this power should not be unfettered, and should be limited to conditions necessary to address a likely substantial lessening of competition. For example, the ACCC should not be able to unilaterally impose a condition on clearance that any remedies offered to overseas regulators must also be implemented in Australia (regardless of whether those remedies are necessary to protect competition in Australia).

Recommended changes:

1 Remove section 51ABW(2), or

2 If it is intended that the ACCC be empowered to unilaterally impose conditions *other* than a condition that a person give and comply with a section 87B undertaking that is offered by that person, amend section 51ABW(2) as follows:

"The Commission must not determine under paragraph (1)(b) that the acquisition may be put into effect subject to conditions unless the Commission reasonably believes that~~:~~ the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market if put into effect without the conditions.

[34] Per French J in *Australian Gas Light Company v ACCC* (No. 3) [2003] FCA 1525 at [343].

~~*(i) the acquisition, if put into effect, would have the effect, or would be likely to have the effect, of substantially lessening competition in a market; and*~~

~~*(ii) the conditions would comprehensively address that likelihood, including by addressing the adverse effects of such a substantial lessening of competition; or*~~

~~(b) *where the condition is for the parties to give and comply with an undertaking the parties have voluntarily provided the Commission with an undertaking in accordance with section 87B and the Commission reasonably believes that the undertaking would address possible competitive effects."*~~

Corresponding changes would also be needed to section 51ABZL(2) for determinations in relation to public benefits.

8.2. Different tests at the public benefit and SLC stages should be aligned

The Committees support the policy position that the onus rests with the ACCC as to whether a transaction is likely to substantially lessen competition.

However, the Committees note that there is benefit in aligning the legal standard of belief that applies across both the SLC and the public benefit limbs. The test applied in relation to the public benefit test under section 51ABZL is one that requires the ACCC to be satisfied "on reasonable grounds". This is an appropriate standard which is substantively similar to the legal standard used in the exercise of administrative decision making in relation to authorisations in Part VII of the CCA.

For example, section 90 authorisation cannot be granted unless the ACCC is 'satisfied in all the circumstances'. In the Committee's view, this differs from the arguably lower and less objective standard which has been included in the SLC stage under section 51ABW, which applies a "reasonably believes" standard. The 'reasonably believes' standard is the same standard that is used in section 155(1) of the CCA, which empowers the ACCC to issue notices ('section 155 notices') requiring the compulsory production of information, documents or attendances before the ACCC.

In practice, the High Court has held this standard to be a relatively low standard.[35] While it does import an element of reasonableness, the test focuses on the subjective state of mind of the decision maker and is only an objective standard to the extent that it requires there to be in existence facts that are sufficient to induce that belief in a reasonable person.[36] While this test is appropriate in the context of the exercise of an important investigatory power of the Commission, which is often required to be exercised at an early stage when only limited facts may be known to the Commission, a higher and more explicitly objective standard is appropriate for substantive administrative decisions of the kind required under section 51ABW that can have important long term impacts on the welfare of Australians.

The Committees consider that the "satisfaction on reasonable grounds" standard is the most appropriate standard to apply at both phases and places more explicit emphasis on

[35] *Daniels Corp International Pty Ltd v ACCC* (2002) 192 ALR 561, [130].
[36] *Seven Network Ltd v ACCC* (2004) 212 ALR 31, [49]. See also *George v Rockett* (1990) 93 ALR 483, 490-491.

ensuring that any determination has an appropriate evidentiary basis (rather than a test ultimately focused on subjective belief). The Courts have held that while the 'satisfaction' test in section 90 does not impose an evidentiary standard of proof such as the balance of probabilities, it does require there to be an 'affirmative belief' that the conduct for which authorisation is sought meets the conditions set out in section 90.[37] In the context of section 51ABW, it is appropriate that the Commission should be required to have reached an affirmative belief on reasonable grounds that a substantial lessening of competition has or is likely to occur.

Recommended changes:

The test in section 51ABW(3) should replace "reasonable belief" with "is satisfied on reasonable grounds".

8.3. The cumulative effect of acquisitions over the past three years

The draft legislation seeks to address the ACCC's stated concerns regarding "creeping acquisitions" by requiring it to take into account when considering whether an acquisition lessens competition, any other acquisitions that were put into effect by a merger party (or any of their related bodies corporate) during the prior three years within the same "industry".[38]

The Committees have the following concerns with the approach which has been adopted:

- Instead of empowering the ACCC to consider the cumulative effect of transactions over the prior three years, the draft legislation makes it mandatory for the ACCC to do so in every case—by making the effect of the current transaction the effect if combined with all others over that period. It is difficult to predict what this will mean in terms of analysis, but it looks likely to make any counterfactual assessment significantly more complex.

- The drafting refers to other transactions that "involve the same industry as the current acquisition". The concept of an "industry" appears intended to be wider than "market", but it is a vague term that is new to Australian competition law. This will create further uncertainty for the ACCC, merger parties and advisers around what is intended.

Once again, the Committees query whether this level of prescription is needed. The issue can be more flexibly and workably managed by giving the ACCC discretion to deal with the issue, where it considers this is relevant.

[37] *Re Telstra Corporation Ltd and TPG Telecom Ltd (No 2)* [2023] ACompT 2, applying *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282.
[38] Section 51ABZ.

Recommended changes:

1. Remove the current section 51ABZ and instead include the cumulative effect of prior acquisitions as a matter that the ACCC may have regard to in considering an acquisition. This could be similar to the current drafting of section 51ABX that allows the ACCC to have regard to any restrictions in deal contracts when considering the effect of a transaction on competition.
2. This approach would permit the ACCC flexibility to determine, on a case by case basis, what prior acquisitions are relevant to its assessment. The reference to "industry" could also then be replaced with any "*market or markets identified by the ACCC*". The ACCC should provide guidance on its approach to this issue.

8.4. The 'substantial' public benefits test

The Committees support the policy position that the onus rests with the ACCC as to whether a transaction is likely to substantially lessen competition.

However, the Committees note that there is benefit in aligning the legal standard of belief that applies across both the SLC and public benefit limbs. The test applied in relation to the public benefit test under section 51ABZL is one that requires the ACCC to be satisfied "on reasonable grounds". This is an appropriate standard which is substantively similar to the legal standard used in the exercise of administrative decision making in relation to authorisations in Part VII of the CCA.[39]

In the Committees' view, this differs from the arguably lower and less objective standard which has been included in the SLC stage under section 51ABW, which applies a "reasonably believes" standard. The 'reasonably believes' standard is the same standard that is used in section 155(1) of the CCA, which empowers the ACCC to issue notices ('section 155 notices') requiring the compulsory production of information, documents or attendances before the ACCC.

In practice, the High Court has held this standard to be a relatively low standard.[40] While it does import an element of reasonableness, the test focuses on the subjective state of mind of the decision maker and is only an objective standard to the extent that it requires there to be in existence facts that are sufficient to induce that belief in a reasonable person.[41] While this test is appropriate in the context of the exercise of an important investigatory power of the Commission, which is often required to be exercised at an early stage when only limited facts may be known to the Commission, a higher and more explicitly objective standard is appropriate for substantive administrative decisions of the kind required under section 51ABW that can have important long term impacts on the welfare of Australians.

The Committees consider that the "satisfaction on reasonable grounds" standard is the most appropriate standard to apply at both phases and places more explicit emphasis on ensuring that any determination has an appropriate evidentiary basis (rather than a test ultimately focused on subjective belief). The Courts have held that while the 'satisfaction' test in section 90 does not impose an evidentiary standard of proof such as the balance of probabilities, it does require there be an 'affirmative belief' that the conduct for which

[39] Which is a "reasonably satisfied in all the circumstances" standard.
[40] *Daniels Corp International Pty Ltd v ACCC* (2002) 192 ALR 561, [130].
[41] *Seven Network Ltd v ACCC* (2004) 212 ALR 31, [49]. See also *George v Rockett* (1990) 93 ALR 483, 490-491.

authorisation is sought meets the conditions set out in section 90.[42] In the context of section 51ABW, it is appropriate that the Commission should be required to have reached a similarly affirmative belief on reasonable grounds that a substantial lessening of competition has or is likely to occur.

Recommended changes:

The Committees submit that the policy objectives will be better achieved by a process that:

1. retains the current net public benefit standard as expressed in section 90; and
2. allows public benefits to be brought to the ACCC at an earlier stage, including at Phase 2 of the new process.

9. Transparency, workability and balance

9.1. Approach to "new evidence" in limited merits review

The Law Council's starting point is to support access to full merits review of administrative decision making generally. However, if this is not the preferred Government approach, the Committees recognise and support the proposed "fast track review" process where merger parties are prepared to accept that the Tribunal is restricted to (a) findings of fact made by the ACCC in its determination; and (b) information referred to in the reasons given by the ACCC.[43]

However, for other (non-fast track) limited merits review processes, to ensure fairness and credibility of the process, the Committees strongly submit that the Tribunal should have the power to grant leave to receive information and evidence from merger parties or other stakeholders in limited circumstances—namely to respond to material that had been before the ACCC but which was not available to those parties at the time.

This is currently not permitted given the approach to "new evidence" adopted in the decision of O'Bryan J in *Telstra/TPG*. His Honour found that "new information, documents or evidence" is to be understood narrowly to mean *"new material concerning facts and matters that did not exist at the time the ACCC made its determination"* (and not new material that did not exist at the time, but which concerned facts or matters that did exist at the time).[44]

The Committees acknowledge that this may require the Tribunal to also have discretion to extend their statutory timeframe for any decision.

Allowing a broader approach to "new evidence" before the Tribunal has a number of important benefits:

- It offers an incentive for the ACCC to provide transparency during the process.
- It offers important procedural fairness. While the Notice offers a level of transparency, it is only provided mid-way through Phase 2. Third parties can submit

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[42] *Re Telstra Corporation Ltd and TPG Telecom Ltd (No 2)* [2023] ACompT 2, applying *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282.
[43] Section 100P.
[44] *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1, [82] (O'Bryan J, Walker J and Eilert J).

information to the ACCC up to 10-days before the end of Phase 2 and so the ACCC will often have significant amounts of internal and market feedback that has not been provided to, or subject to any response from, merger parties at the time of its final determination.

- It reflects that the new merger process does not provide the same level of transparency as the merger authorisation process. Unlike the current merger authorisation process, there is no requirement for the ACCC to publish submissions and other non-confidential information received by the ACCC during the process.

- Allowing additional evidence at the review stage does not need to create incentives to game the process or to introduce unnecessary delay. In this regard, the Committees accept that:

  - any additional information or evidence should only be allowed if the Tribunal grants leave to do so (meaning that the Tribunal will have control over the type and amount of additional information or evidence that is allowed to be provided); and

  - if the Tribunal grants leave to accept new information or evidence, the timeframes associated with a merits review decision should be extended accordingly.

The Committees see this as a modest change which would deliver a substantive improvement in the overall balance and workability of the regime.

Recommended changes:

Amend section 100N(5) as follows:

> *For the purposes of a standard review, the Tribunal may allow a person to provide new information, documents or evidence that the Tribunal is satisfied is responsive to information, documents or evidence that was not available to that person at the time the Commission made the determination to which the review relates.*

9.2. The register

The Committees are strongly of the view that improved transparency for all stakeholders must form an important component of the move to an administrative regime—where the regulator holds substantially greater discretion.

In this regard, we note that the Notice of Competition Concerns is limited in a number of respects:

- First, the Notice is provided mid-way through the process and so does not reflect a substantial amount of material that can continue to be provided.

- Second, it is provided only to the merger parties and so is not available to third parties.

- Third, it is subject to some discretion by the ACCC over the amount of detail provided.

Although the draft legislation requires the ACCC to keep a register of notified acquisitions,[45] it is also limited in that it currently only obliges the ACCC to include a copy of:[46]

- each acquisition determination (if any) made in respect of the notification and its reasons;
- a copy of its decision (if any) that the notification is to be subject to a phase 2 review; and
- any other information or documents prescribed by the regulations.

Subject to seeing the intended form of regulations, it is unclear whether the ACCC will be required to publish other key materials on its register, including interested party submissions. At this stage, the level of transparency guaranteed by the Exposure Draft is therefore significantly less than other jurisdictions (such as the EU or New Zealand) or the current merger authorisation process.

Under current merger authorisation process, the CCA requires the ACCC to publish on its register a copy of its draft determination, as well as any document furnished to it and particulars of any oral submissions made in relation to an application for authorisation, subject to confidentiality claims.[47] The Committees accept that some of these obligations has resulted in complexities under the current merger authorisation (e.g., confidentiality claims in a large complex matter can be quite onerous and can slow down the timeline) and the ACCC may need to undertake further consideration and consultation to strike the right balance in order for this not to materially impact clearance timeframes.

Consistent with Government's policy to provide improved transparency and accountability alongside the reorientation of the merger regime as an administrative process, we consider it is nonetheless important for there to be clear obligations on the ACCC to publish information on the register either under section 51ABZX or through regulations which, as a starting point, should aim to provide stakeholders with broadly equivalent transparency to the merger authorisation register today.

Recommended changes:

The Commission should be required to publish the following materials through amendments to section 51ABZX(2) or by prescribing through regulations:

- a copy of each acquisition determination (if any) made in respect of the notification and a statement of the Commission's reasons for making the determination;
- a copy of the decision to move to Phase 2 and a statement of the Commission's reasons for making the determination (i.e., similar to the current SOI under the informal merger clearance process);

a copy of any interested party submissions made to the Commission (or at minimum, a summary of such submissions).Relevant confidentiality machinery provisions could be adopted from the current merger authorisation regime in relation to any materials that the Commission is required to disclose to the merger parties and/or publish on the register.

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45 Section 51ABZX(1).
46 Section 51ABZX(2).
47 Section 89(3)-(5C).

Annexure 1: Miscellaneous drafting comments

#	Section	Drafting issue or potential error / inconsistency	Proposed alternative drafting / solution
1	**No definition of "put into effect"**	A penalty applies for "putting into effect" an acquisition, but the Exposure Draft and explanatory materials do not explain what is intended by "put into effect" in the context of an acquisition.	We suggest including a definition of "putting into effect" that specifies what is intended by this phrase in the context of an acquisition, for example, whether this means signing an agreement, giving effect to an agreement, completing an acquisition, taking steps to meet conditions precedent under a signed agreement and/or integration planning.
2	**Meaning of "acquisitions subject to notification" in section 45AMA**	There is ambiguity as to whether the meaning of "acquisitions" subject to notification extends to employee contracts.	We recommend clarifying whether the meaning of "acquisitions" subject to notification extends to employee contracts.
3	**Definition of "purport to put into effect" in section 45AV(2)**	A person "purportedly puts into effect" an acquisition if the person engages in conduct that, apart from new Division 1A of Part IV, would constitute putting the acquisition into effect (section 45AV(2)).	This should perhaps be clarified to mean completing an acquisition but for the voiding provision.
4	**Acquisitions of units in a listed trust (section 51ABZZ)**	It is unclear, on the current drafting of section 51ABZZ, whether the exemption for an acquisition of shares in a body corporate (where the acquisition does not give control) should also apply to an acquisition of units in a listed trust.	We recommend clarifying whether the exemption for an acquisition of shares in a body corporate (where the acquisition does not give control) should also apply to an acquisition of units in a listed trust.
5	**Third party review rights**	While the explanatory materials provide some guidance as to which third parties might have "sufficient interest" to appeal an ACCC decision (i.e., consumer associations and consumer interest groups), it is unclear whether spoiling parties would have standing to appeal a	The right to appeal a decision of the ACCC should be limited to the notifying parties and persons who are directly impacted by the acquisition, for example, by defining criteria for

#	Section	Drafting issue or potential error / inconsistency	Proposed alternative drafting / solution
		decision of the ACCC to clear a merger.	“sufficient interest” as such.
6	**Redundancy of subsections 45(4A) to (4C)**	Subsections 45(4A) to (4C) are unnecessary and unduly complicated. The situations envisioned in those subsections are clearly already captured by subsection (1).	Remove subsections 45(4A) to (4C).
7	**Time for application for Tribunal review**	Under sections 100C, 100D, applications for review to the Tribunal need to be made within 14 days or 7 days (for fast track review) of the ACCC’s determination. This has the potential to be unreasonably short if the ACCC’s determination is made just prior to a public holiday period, such as the Easter, Christmas or New Year periods.	Amend the timeframes to 10 and 5 business days respectively.

Annexure 2: Commentary on economic elements of Exposure Draft

This brief paper has been prepared jointly by Greg Houston, Partner of HoustonKemp Economists, and George Siolis, Partner of RBB Economics, to expand upon the Law Council of Australia Business Law Section's Competition and Consumer, and Corporations Committees' response to the exposure draft of the Treasury Laws Amendment Bill 2024: Acquisitions. Mr Houston and Mr Siolis are both members of the Competition and Consumer Committee.

Our paper addresses economic aspects of two elements of the exposure draft legislation, i.e., the proposal:

- to amend the generic, *Competition and Consumer Act (2004)* (CCA)-wide definition of the lessening of competition in section 4G of the CCA; and
- to establish a new set of 'relevant matters' to which the Commission may have regard in applying the substantial lessening of competition (**SLC**) test for the purposes of merger clearance.

We have prepared our comments by reference to the stated intention of the proposals:[48]

> *'to ensure explicit emphasis is placed on economic methodology and analysis of competitive effects.'* (ED, para 4.4)

and further that, in contrast to the 'merger factors' that currently exist in subsection 50(3) of the CCA:

> *'rather than acting as a checklist, the intent is for the principles to guide the Commission's decision-making towards outcomes that promote competition and protect consumers, based on economic and legal analysis of evidence, information and data of the competitive impact of the acquisition.'*

In our opinion, neither the proposed amendment to the CCA-wide section 4G definition of the SLC test nor the proposed set of relevant matters will achieve these economic objectives in relation to merger control.

Rather, the amendment to the CCA-wide section 4G definition of the lessening of competition should be withdrawn, with the 'creating, strengthening or entrenching' of substantial market power instead being incorporated as a relevant matter to be considered for mergers alone. For the reasons we set out below, to retain such a provision in a manner that infects the same SLC test applied under sections 45, 46 and 47 and elsewhere in the CCA carries the strong risk of stifling pro-competitive innovation, to the detriment of the welfare of Australians.

In relation to the exposure draft list of relevant matters, we propose a more economically coherent, streamlined set of relevant factors that reflect not only the importance of considering the competitive structure of markets affected by an acquisition, but also other modern, widely accepted economic considerations applying in competition analysis.

[48] ED, para 4.4

Creating, strengthening or entrenching amendment to section 4G

Section 4G of the CCA clarifies that, wherever it appears in the CCA, references to a 'lessening of competition' 'shall be read as including references to preventing or hindering of competition'. By extending this reference as proposed, the lessening of competition benchmark underpinning not only section 50 but also the reference to the agreements, unilateral conduct and exclusive dealing provisions at sections 45, 46 and 47 of the CCA, is similarly extended.

Such an amendment risks the very significant, economy-wide consequence of inhibiting pro-competitive conduct that is far removed from mergers. This is because:

- the existing section 4G reference to preventing or hindering competition refers to (but does not extend beyond) acts that are of an exclusionary form, i.e., actions in a market that have no explicable economic motivation beyond the deterrence or frustration of competitors, and so are presumptively anti-competitive;

- whereas many forms of agreement, unilateral conduct and/or exclusive dealing may be said to create, strengthen or entrench a substantial degree of power in a market but for which the apparent economic motivation is the better serving of customer demand, and so are not presumptively anti-competitive, such as where a firm:

  - through innovation or some other form of 'competition on the merits', is a market leader and so may well be found to have substantial market power; and

  - introduces a further form of innovation (either unilaterally, or by some form of agreement or exclusive dealing) that enhances its product or service, but has the effect of creating, strengthening or entrenching a substantial degree of power in a market.

Pertinent examples of presumptively pro-competitive conduct for which such a broadening of the definition of a lessening of competition may well cause firms to apprehend a tangible degree of unnecessary risk include (assuming, for illustration, that the relevant, hypothetical firm has substantial power in one or more markets):

- a major airline undertaking a substantial fleet upgrade or other service-related features not offered by any of its competitors, such as introducing direct flights from Sydney/Melbourne to New York and London; and/or

- a major smart phone manufacturer introducing a form of 'artificial intelligence' feature into its next version of smart phone, which it may achieve by agreement with a leading AI service provider; and

- a major mobile telephony provider engaging in a market leading 'network upgrade' (say, by introducing nation-wide mobile telephony coverage by means of low orbit satellite technology available to many modern mobile handsets), which it achieves by agreement with a third party satellite provider that involves an initial period of exclusivity.

By consequence, the proposed amendment to section 4G:

- goes far beyond the exclusionary theme of the existing section 4G reference to the prevention or hindering of competition;

- thereby involves a substantial alteration to the broad, existing settings for competition law; and
- has the potential to stifle many forms of pro-competitive innovation.

Of course, we recognise that the Australian Competition and Consumer Commission (ACCC), as the enforcement agency responsible for sections 45, 46, and 47, may never intend to take such a broad view of how such amended provisions of the CCA may be applied. However, it is vitally important to bear in mind that:

- the ACCC is but one player in the antitrust enforcement landscape and, for many years, has participated in a comparatively modest share of cases before the courts involving allegations as to a substantial lessening of competition; and
- the recent, inexorable rise in third party funded, plaintiff-focused commercial litigation reinforces the risks of unintended consequences of an amendment of this form.

Accordingly, we urge that the proposed amendment to the CCA-wide definition of the lessening of competition be withdrawn, with the reference to the 'creating, strengthening or entrenching' of substantial market power instead being incorporated as a relevant matter for consideration in mergers alone.

Proposed list of relevant matters (or merger factors)

We understand the role of the exposure draft set of relevant matters, which replace the 'merger factors' presently listed at section 50(3) of the CCA, as being a proposed means for:

- securing the desired increase in emphasis on 'economic methodology and analysis of competitive effects' underpinning the reformed merger clearance regime;
- shaping the ACCC's development of updated guidelines as to the detailed considerations it expects to apply in its new administrative decision-making role;
- establishing an economically sound reference point for guiding each of:
  - the ACCC as administrative decision maker;
  - the Australian Competition Tribunal in its limited merits review of ACCC merger decisions; and
  - the courts in the event of any applications for judicial review of ACCC/ACT merger decisions.

In our opinion, the exposure draft 'relevant matters' are capable of substantial improvement in terms of their ready ability to further these goals. In particular, we observe that:

- there is a substantial gap between the modern, practical application of merger control in Europe (and other major jurisdictions) and the twenty year old 'appraisal considerations' set out in Article 2 of the European Commission's Merger Regulation, from which many of the exposure draft relevant matters appear to be drawn;

- few if any of the exposure draft relevant matters engage recognisable competition economic terminology, although there are several instances of terms that may be synonymous with—but are conspicuously different from - recognised competition economics terms, e.g., the references to:

  – ‘economic power’, as distinct from the more usual ‘market power’;

  – ‘obstacles to competition’, as distinct from ‘barriers to entry’; and

  – ‘alternatives’, as distinct from ‘substitutes’.

- some relevant matters appear not to fit with the existing structure of Australia’s CCA and ‘which issues belong where’, such as the reference to ‘access’, which invokes terminology that more likely to belongs in Part IIIA of the CCA, a similar scheme for which is not present to the same extent in the European Union framework of competition laws.

On these considerations, we urge a rethink of the relevant matters so that the desired attributes of the new regime are more likely to be realised. By way of an initial set of practical considerations, these factors should:

- adopt terminology that is consistent with and/or meaningful in the context of modern antitrust economics, as well as Australian jurisprudence;

- avoid duplication or double-ups of relevant concepts; and

- avoid a ‘shopping list’ that is so extensive and/or contains matters that are not clearly distinct from each other so that its guidance (to each of the process steps above) is limited and/or unnecessarily burdensome.

With these considerations in mind, we propose the following ten relevant matters as conforming with these criteria:

a) the nature of competition, including potential competition, in the market;

b) the structural and/or other conditions affecting competition, including the level of concentration in the market;

c) the height of barriers to entry to the market and any increase in those barriers;

d) the nature and strength of competitive constraints, whether within and/or outside the market, including the potential for the acquisition to give rise to increases in prices and/or profit margins;

e) the degree of product and/or service differentiation in the market;

f) the degree of dynamism—whether through innovation or otherwise—in the market;

g) the degree of countervailing power in the market;

h) the conditions for entry and expansion in the market;

i) the potential for the acquisition to create, strengthen or entrench a substantial degree of power in a market; and

j) the extent to which the acquisition may give rise to efficiencies that could not otherwise be obtained.

We would be pleased to discuss any aspect of these suggestions and our associated reasoning with the Taskforce.

Greg Houston
George Siolis

14 August 2024

Annexure 3: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Dr Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

The Section's website is www.lawcouncil.asn.au/business-law.