COMMENTS OF THE AMERICAN BAR ASSOCIATION
ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION
ON THE AUSTRALIAN TREASURY'S PROPOSED MERGER LAW REFORMS

September 17, 2024

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The American Bar Association ("ABA") Antitrust Law Section and International Law Section (the "Sections") appreciate the opportunity to submit these comments on the Treasury Laws Amendment Bill 2024: Acquisitions ("Draft Legislation"), which was issued for public consultation on July 24, 2024, by the Competition Review Taskforce in Treasury ("Taskforce"),[1] and will amend the Competition and Consumer Act 2010 ("CCA").

The Sections welcome the Taskforce's efforts to enhance efficiency, predictability and transparency for businesses and the community. Clarity, stability, and transparency are hallmarks of an effective merger enforcement program. These comments reflect the Sections' experience and expertise with the application of antitrust and merger review laws in a wide range of jurisdictions and with related international best practices, notably the International Competition Network's Recommended Practices for Merger Notification and Review Procedures ("ICN Recommended Practices")[2] and the Organization for Economic Cooperation and Development's Recommendation on Merger Review ("OECD Recommendation").[3] The Sections commend the Taskforce for its commitment to transparency and consultation. This commitment should help improve legislative proposals and policies for the Australian Competition and Consumer Commission ("Commission" or "ACCC") and its stakeholders.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For over thirty years, the Antitrust Law Section has provided input to enforcement

[1] Treasury Laws Amendment Bill 2024: Acquisitions. Reforming Mergers and Acquisitions – Exposure Draft, https://treasury.gov.au/consultation/c2024-554547.

[2] INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[3] OECD, Recommendation of the Council on Merger Review, OECD/LEGAL/0333 (2005), http://www.oecd.org/daf/competition/mergers/40537528.pdf.

agencies around the world conducting consultations on topics within the Section's scope of expertise.[4]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total over 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's more than 50 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as regulatory compliance, mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input on debates relating to international legal policy.[5] The International Law Section has provided input for decades to authorities around the world.[6]

EXECUTIVE SUMMARY

The Sections' comments on the Draft Legislation primarily focus on the need for efficiency, predictability, and transparency of the new single mandatory and suspensory administrative system for merger control in Australia.

The comments reflect the expertise and experience of the Sections' members with antitrust laws and enforcement practices around the world. The Sections are available to provide additional comments, or otherwise to assist the Taskforce as it may deem appropriate.

The Sections note that there is now a separate consultation on the proposed jurisdictional thresholds for notification under the Draft Legislation,[7] to which they will respond separately regarding the specific monetary and market concentration values proposed. The Sections emphasize the importance of clear, and appropriately set, thresholds to avoid unnecessary notifications and burdens on both merging parties and the ACCC, observing that low thresholds could lead to an excessive number of non-problematic deals being reviewed. In addition, while the Sections understand the ACCC's concerns with respect to serial or "creeping" acquisitions, they recommend a more discretionary approach.

While the Draft Legislation aims to improve certainty and transparency by adopting a process similar to the current merger authorization procedure under Part VII of the current CCA, the regime may create resource burdens for both merger parties and the ACCC. In addition, the conversion to an administrative system with a sequential separate public benefits application and limited merits review with a limited ability to introduce new evidence raises efficiency and due

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4 Past comments of the Antitrust Law Section are available at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

5 American Bar Association, International Law Section Policy, available at https://www.americanbar.org/groups/international_law/policy/about/.

6 Past comments of the International Law Section are available at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

7 Austl. Treas., Competition Taskforce, Reforming Mergers And Acquisitions – Notification Thresholds, https://treasury.gov.au/consultation/c2024-562395.

process concerns, particularly in the absence of clear requirements for ACCC disclosure of its evidence. The Sections are concerned that adoption of an administrative decision-making regime (i.e., where the agency fact finds and has the power to block a merger) without either full merits review or other checks and balances, such as significant transparency rights, may raise significant due process issues. The Sections suggest that the Tribunal be permitted discretion to allow new evidence to mitigate these due process issues. While the Sections understand that transparency arrangements will be consulted on in due course, the Sections recommend that clear obligations be included in the regime, to ensure better decision making by the ACCC.

Finally, the Sections consider that the Draft Legislation may significantly increase the resources required by companies involved in non-problematic mergers and acquisitions, as well as for the ACCC. The Sections recommend that the Draft Legislation introduce a short form filing for transactions that do not raise competition concerns as other international merger regimes use, to mitigate the burden on merging parties.

COMMENTS

I. Jurisdiction

A. Notifiable Transactions: International Best Practice for Mandatory Thresholds

The Draft Legislation sets forth at Schedule 1, item 39, subsection 51ABH(1) of the CCA that the following acquisitions will be notifiable under the new mandatory and suspensory merger control regime in Australia: (a) acquisitions that meet a threshold to be prescribed by regulations, or (b) acquisitions determined as such by the Minister, by a legislative instrument, in response to evidence-based concerns regarding certain high-risk acquisitions (e.g., in industries or sectors with high market concentration or high barriers to entry or expansion).

Clear thresholds help parties to assess whether a transaction satisfies the criterion for a mandatory notification. The threshold setting is critical and cannot be resolved by establishing a 'waiver' or 'fast track process' if that process means transaction timetables are extended and there is uncertainty associated with the legal standing of that process (e.g., if it does not attract immunity from third party action or subsequent ACCC investigation).

The Sections note that the suggested approaches, identified below, would move the Draft Legislation to more uniform approaches used internationally, which would help facilitate merging parties' ability to gather multi-jurisdictional transaction data on a consistent basis, as recommended by the International Competition Network.[8] Based on the Australian Treasury Competition Taskforce's recent consultation paper,[9] and the explanatory materials of the Draft

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[8] *See* INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES (2002), RP II.E, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf at Cmt. 3 [hereinafter ICN RECOMMENDED PRACTICES].

[9] Austl. Treas. Competition Taskforce, Merger Notification Thresholds Consultation Paper (Aug. 30, 2024), https://treasury.gov.au/sites/default/files/2024-08/c2024-562395-consult.pdf [hereinafter Australian Notification Thresholds Paper].

Legislation,[10] and noting that a separate response is forthcoming with respect to the most recent consultation on exact monetary and market concentration notification thresholds, the Sections make the following general observations at this juncture in relation to: (a) the level of the thresholds, (b) which thresholds are suitable to the Australian jurisdiction, and (c) how such thresholds will be set.

First, the Sections respectfully submit that thresholds should aim to *"screen out transactions that are unlikely to result in appreciable competitive effects in a given jurisdiction."*[11] *"If thresholds are set too low . . . there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and authorities."*[12] Therefore, it is *"crucial to set them [thresholds] at a high level, so as not to impose unnecessary burdens on business or the reviewing agency and its limited resources."*[13]

In terms of international experience of conversion of a "voluntary" regime to a mandatory regime, the example of Brazil may be instructive. Prior to the enactment of the current Brazilian competition law in 2012 (Law No. 12,529/2011), which implemented the current mandatory and suspensory regime for transactions that meet the legal criteria, Brazil had a non-suspensory regime. One of the main challenges of the transition to the new regime was the increased workload and resource demand for both the Brazilian antitrust authority, CADE, and merging parties. As a result of these changes, since the new law was enacted, the number of cases reviewed by CADE has greatly increased (over five thousand merger cases in that time period).

The high number of cases can be explained, among other reasons, by the relatively low filing thresholds adopted in Brazil (based on turnover). Over 90% of cases analysed by CADE under the suspensory regime have been unconditionally cleared, which demonstrates that a high number of cases that do not pose any competition concerns are still being submitted for CADE's review. An even greater proportion exists in the US, albeit through the more streamlined HSR process.

Second, criteria that are solely based on transaction size, without considering local nexus and domestic turnover of the target, create challenges both in ensuring transactions have sufficient

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[10] Treasury Laws Amendment Bill 2024: Acquisitions. Reforming Mergers and Acquisitions – Explanatory Materials, https://treasury.gov.au/sites/default/files/2024-07/c2024-554547-exp-mem.pdf.

[11] INT'L COMPETITION NETWORK, SETTING NOTIFICATION THRESHOLDS FOR MERGER REVIEW 4 (April 2008), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf.

[12] OECD, Jurisdictional Nexus in Merger Control Regimes – Background Paper by the Secretariat, DAF/COMP/WP3(2016)4/REV1, 16 (July 27, 2016): https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf; OECD, Jurisdictional Nexus in Merger Control Regimes – Note by BIAC, DAF/COMP/WP3/WD(2016)26, 23 (June 6, 2016), https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)26/En/pdf.

[13] Maureen K. Ohlhausen, An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification, Address Before the Eleventh Annual Competition Day, Fiscalia Nacional Economica (Nov. 5, 2013), https://www.ftc.gov/news-events/news/speeches/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-competition-advocacy-premerger-0.

local nexus to that specific jurisdiction,[14] and in determining the value of a transaction at the time of filing.[15] By advising merging companies to make precautionary filings due to uncertainty, the Sections believe that the Draft Legislation may unnecessarily increase the number of filings and the burdens in both preparing and reviewing all filings.

In addition, the value of consideration can fluctuate between the time of signing an agreement (or letter of intent) and closing the transaction, especially in transactions in which the consideration provided to the seller involves securities or cash held in foreign currencies and so naturally subject to market fluctuations, which could even require the parties to submit precautionary filings to avoid the possibility of violating a notification requirement. Where a transaction size threshold is considered, the Sections recommend that the ACCC adopt a standard for the relevant date at which turnover should be determined that provides the merging parties with greater certainty and predictability sufficiently in advance of the planned closing date (e.g., the date the definitive agreements are executed).[16]

The characteristics of Australian markets (e.g., smaller markets, higher concentration, the importance of import competition in some sectors, as well as the significant number of "pre-assessed" mergers under the current system leading to a lack of published decisions and as a result, limited data/precedents on defined markets and market shares) may also mean that a market concentration threshold may be an inappropriate test for a mandatory and suspensory regime, where there is a lack of clarity/precedent on defined markets and various ways a market could be construed. Finally, the Sections note that the 'share of supply test' is even less straightforward for merger parties to apply than a market share test given this does not correspond to relevant economic markets (as it is based only of share of supply of goods/services rather than a more holistic market share test that considers substitutability and complementarity). Such a test may, therefore, not be consistent with ICN Recommended Practices for Merger Notification Document: namely that notification thresholds should be "*clear and understandable*" and "*based on objectively quantifiable criteria*."[17]

In addition, the Sections respectfully recommend that the Draft Legislation also include a list of exemptions for categories of assets or transactions that are unlikely to be subject to merger control. The United States, for example, exempts from premerger notification certain real estate acquisitions that are unlikely to raise competition concerns.[18] The use of exemptions may assist in

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14 OECD, Start-ups, Killer Acquisitions and Merger Control – Background Note, DAF/COMP (2020) 5, 173 (May 7, 2020), https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf.

15 *Id.* at 172.

16 *See* ABA, Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Draft Guidance on Transaction Value Thresholds For Mandatory Pre-Merger Notification (Section 35 (1a) Gwb And Section 9 (4) Kartg" (June 15, 2018), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments-2018/001salsil-comments-on-austrian-german-guidance-on-transaction-thresholds_final_6152018.pdf.

17 ICN RECOMMENDED PRACTICES, *supra* note 8, Practices II(D) and (E).

18 *See, e.g.*, 16 C.F.R. §§ 802.1 (certain goods acquired in the ordinary course of Business), 802.2 (certain real property), 802.5 (investment rental property).

alleviating the issues that stem from thresholds that trigger notification of many transactions, and reduce the burden on merging parties and the agency.[19]

Third, the Draft Legislation sets forth at Schedule 1, item 39, subsection 51ABH(1) of the CCA (a) that "thresholds will be regularly reviewed and set with respect to evidence of the risk of potential harms to the community over time," and (b) an additional ministerial power to determine, by a legislative instrument, acquisitions to be notifiable, in response to evidence-based concerns regarding certain high-risk acquisitions (e.g., in industries or sectors with high market concentration or high barriers to entry or expansion). The Sections respectfully encourage further elaboration on how regularly the thresholds will be reviewed.

The Sections submit that a regular review of turnover or size of transaction thresholds could be useful in order to correct for any over-capture of transactions that do not raise concerns. Nevertheless, the frequency of review should also be transparent for the merging parties to adequately predict and prepare in advance. In this regard, under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, as amended ("HSR Act"), 'size-of-transaction' thresholds are adjusted annually by the Federal Trade Commission ("FTC") based on changes to the gross national product to determine whether merging parties are required to notify a transaction.[20] This may support including provisions in legislative instruments which allow for thresholds to be more easily updated to calibrate for the volume of filings the ACCC might receive.

The Sections look forward to engaging with the most recent consultation on proposed monetary and market concentration jurisdictional thresholds.

II. Substance

A. Creating, Strengthening or Entrenching a Substantial Degree of Market Power

It is the Sections' understanding that the proposed amendments to the SLC definition are not intended to define potential theories of harm referred to as "conglomerate" or "portfolio" effects. Accordingly, the Sections do not address those issues here.

B. Concept of "Reasonably Believes"

The Sections observe that the concept of "reasonably believes" may engage a subjective element to the standard that the ACCC would be required to apply, and respectfully encourages the Australian Government to make legislative amendments that adopt a more objective standard. The Sections note that the Australian Law Council submission dated August 16, 2024, makes

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[19] *See* ABA, Joint Comments of the American Bar Association Antitrust Law and International Law Sections on the Peruvian Merger Control Guidelines on the Definition and Analysis of Merger Transactions (July 15, 2022), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2022/comments-peruvian-merger-control-guidelines.pdf.

[20] Press Release, Fed. Trade Comm'n, FTC Announces 2024 Update of Size of Transaction Thresholds for Premerger Notification Filings (Jan. 22, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-announces-2024-update-size-transaction-thresholds-premerger-notification-filings.

corresponding recommendations at Sections 8.2 and 8.4 to address this issue and the Sections support those recommendations in this regard.

C. Serial Acquisitions

The Sections observe that amendments intended to enable the ACCC to take account of the impact of serial acquisitions have the potential to substantially increase the burden on notifying parties as well as the ACCC in review by requiring consideration of a larger number of transactions than otherwise would normally be considered. The Sections respectfully suggest that providing the ACCC with discretion to consider this potential issue on a case-by-case basis is likely to reduce the otherwise unnecessary volume of reviewable transactions. This is because such discretion would provide the ACCC with the flexibility to only consider earlier transactions where it considers the issue may be relevant. The Sections suggest this may be achievable by including the issue of cumulative acquisitions as one of the broader matters that the ACCC may take into account when considering an acquisition. This approach would be consistent with Guideline 8 of the US agencies' 2023 Merger Guidelines, which states that the agencies may consider a series of multiple acquisitions collectively under any or all of the core Guidelines 1-6.

D. Overlap with Conduct Prohibitions

Finally, the Sections further observe that the proposed amendments as drafted appear to apply the extended SLC definition to conduct prohibitions elsewhere in the law. For example, this extended definition of an SLC could, if applied under Section 46, mean that conduct could be newly prohibited if a claimant showed that it creates, strengthens, or entrenches a firm's market power. This may create unintended consequences by limiting otherwise procompetitive conduct that also improves a firm's market position, but which does not harm competition.

For these reasons, the Sections respectfully suggest that the Government refrain from extending the SLC concept and, instead, allow the ACCC and private parties to rely on *ex post* enforcement.

III. Process and Procedural Issues with the Proposed Merger Law Reforms

The Draft Legislation aims to improve the certainty, predictability, and transparency of Australia's merger control process. Many of the reforms proposed (e.g., mandatory and suspensory merger control) would bring Australian merger control process into line with what have become international norms. However, in the Sections' view, when overlaid on various jurisdiction-specific elements (e.g., the public benefits process), the regime outlined in the Draft Legislation is likely to create undue burdens for both merger parties and the ACCC. In addition, the conversion of the Australian review process to an administrative system (in which the regulator has the power to fact find, decide on competitive effects, and ultimately block a merger), and restriction of the Tribunal's role to limited merits review raises significant due process issues. While the statutory timelines introduced in the Draft Legislation propose more rigid deadlines and accountability for the ACCC (although these deadlines are still subject to extensions and stop clock periods), in practice more time will be required for parties to prepare an Australian merger filing given that parties will need to assume they might wish to seek Tribunal review; and the nature of the evidence

needed under the Australian regime (including limitations around the adducement of new evidence).

The Sections consider that if not more appropriately balanced, these issues have the potential to stifle and dis-incentivize global investment and M&A activity in Australia, in circumstances where the Australian regime has scope to represent one of the most lengthy and resource-intensive pre-merger filing processes on the global stage.

A. Merits Review

The Draft Legislation makes the ACCC the decision-maker on mergers, rather than the Federal Court, and adopts an administrative regime similar to those in Europe, with a similar lack of timely full merits appeal or transparency obligations that those systems entail. The limited merits review process proposed by the Draft Legislation is similar to the existing merits review of merger authorization decisions (which are infrequent due to the high cost and extensive preparation process), with further judicial review of Tribunal decisions available in the Federal Court. Under the Australian system, the Tribunal may only consider new evidence concerning facts and matters not in existence at the time of the ACCC's determination, meaning parties may not have the opportunity to respond to all evidence before the ACCC, particularly in the absence of an obligation on the ACCC to disclose all exculpatory and inculpatory material relied upon by the ACCC.

The Sections are concerned that this restriction may limit the ability of merger parties to present responsive, new, or updated evidence that may be relevant to the merger review, or responsive to concerns identified by the ACCC or third parties, especially in dynamic and fast-changing markets. In addition, this limitation means that merger applications will be more resource intensive to prepare. Experience with the current authorization procedure that has a similar review process has demonstrated the requirement for extensive filing preparation with all evidence potentially relevant to a subsequent Tribunal hearing front-loaded at the application stage. For example, the authorization application in Telstra / TPG comprised 100+ pages and 30+ annexures, in ANZ / Suncorp, 250+ pages, 100+ annexures and 20+ witness statements/expert reports, and in Linfox / Armaguard, almost 200 pages and 40+ annexures, with all of these cases including expert economist reports at the application filing stage. Such voluminous filing preparation not only causes delays to transactions but also significantly inflates the legal costs for merging parties.

The Sections acknowledge the legal reasoning underlying the inability to adduce new evidence; namely, observations made in the Harper Review that a full rehearing with unfettered ability to put new material before the Tribunal would likely dampen the incentive to put all relevant material to the ACCC in the first instance and leads to delays where large amounts of new evidence are introduced at the Tribunal stage. However, this risk should also be balanced against the significant time and cost that is imposed in a system which is mandatory in nature and, subject to consultation on jurisdictional thresholds, with scope to capture many more transactions than at present. The Sections note that courts evaluating contested mergers in the United States may consider <u>any</u> evidence that is relevant to the merger review, and that the agencies have the opportunity to respond to new or updated evidence presented by the merger parties.

The Sections respectfully recommend that the Draft Legislation permit the Tribunal to consider any evidence that is responsive to the merger review if the Tribunal grants leave to do so, and that the ACCC should have the opportunity to respond to such evidence. This should be coupled with full transparency rights and requirement on the ACCC to disclose inculpatory and exculpatory material relevant to its decision-making.

B. Timing

The Draft Legislation proposes to replace the current informal merger process with a mandatory and suspensory regime with the ACCC as decision-maker applying processes and procedure similar to the existing formal authorization merger process. Under the proposed regime, the ACCC must complete its Phase 1 review in 30 business days (and no less than 15 business days for 'fast-track' determinations when no issues are identified). For mergers that proceed to a Phase 2 review on the basis that they are likely to raise competition concerns, the ACCC must make a decision within a further 90 business days. However, the ACCC can extend the review periods in a number of circumstances, for example if the ACCC issues a notice to a third party, or when the ACCC considers that the merger parties have not provided sufficient information. Further review periods apply if the transaction proceeds to a public benefits test review or a Tribunal review.

While the ACCC timelines are not far afield of global norms, the Sections wish to emphasize the importance that reviews not go on too long. The Sections urge the ACCC to balance the need for relevant information and proportionate review against the burdens and uncertainties for merger parties and develop clear criteria for identifying mergers that pose no threat to competition or Australian consumers which are able to benefit from the fast-track process.

C. Separate Public Benefits Test

The Draft Legislation also introduces a separate "substantial public benefit application" where the ACCC has determined that the acquisition is anti-competitive. Where a substantial public benefit application is made, the ACCC will balance (adverse) competitive effects against benefits of a proposed acquisition. This test will be sequential to the finding of adverse competitive effects and have its own timeline, and so will add a further timeline to the review process. This risks the potential for duplication in considering competitive effects previously considered, which the ACCC will need to consider relative to any public benefits. In addition, the sequential nature of the public benefits test will mean that merging parties will need to pay potentially three separate filing fees for each stage of review.

The Sections are concerned that the sequential public benefits test may create a disincentive for merger parties to pursue transactions that may have net public benefits but also raise competition concerns, as they will face a prolonged and uncertain review process. The Brookfield/Origin case, approved on public benefits grounds, demonstrates how central public benefits can be to the case for clearance. There is potential for reviews of such transactions to be unnecessarily lengthy, for which there does not appear to be any good reasons. The Sections suggest that if the ACCC provides the appropriate expertise to assess public benefits and a holistic balancing of such impacts is appropriate, then the competition and public benefits analyses could be conducted concurrently.

D. Publication Requirements

The Draft Legislation also requires the publication of information and documents on a public register, subject to confidentiality claims by merger parties and third parties. Whilst the detail on the information and documents required to be published remains to be seen, the Draft Legislation appears similar to the current publication requirements applicable to the current merger authorization process.

The Sections are unclear on how the confidentiality regime will work and what safeguards will be in place to protect the merger and third parties' sensitive commercial information from disclosure. In particular, the current merger authorization process has involved onerous and time-consuming confidentiality claim processes, with protracted debates between parties to the transaction, interested third parties/opposing parties, and the ACCC. Clearly there is a balance to be struck between protecting commercially sensitive business information whilst allowing merger parties the ability to respond to material before the decision-maker. A similar tension has arisen in other international merger regimes.

The Sections note that the HSR Act provides for strict confidentiality of the information and documents submitted by merger parties and third parties, and that any disclosure by the Agencies is subject to judicial review. The Sections recommend that the ACCC provide clear and consistent guidance on the confidentiality regime and the process for making and challenging confidentiality claims, and that any disclosure by the ACCC be subject to judicial oversight.

E. Transactions Before 1 January 2026

The Draft Legislation also provides that the regime will be mandatory from 1 January 2026, but it is unclear which regime will apply to transactions signed before that date. The Sections are concerned that the transitional provisions may cause confusion and uncertainty for merger parties and the ACCC, especially for transactions that are notified under the old regime but not yet in effect by the commencement date of the new regime.

The Sections suggest that the Draft Legislation should introduce exemptions and grandfathering provisions for such transactions, or at least clarify the applicable regime and the process for transitioning from one regime to the other.

IV. Resource Impacts

A. Impact on Companies

The Draft Legislation contemplates that companies pay a filing fee when formally reporting their proposed transactions. The fee structure or amount are not specified in the Draft Legislation, and of course the greater the fee, the more burdensome the reportability regime on companies. Certain fee structures could mitigate that burden, for example by creating a small fee of $50-$100K for all reportable deals. Alternatively, a fee schedule that depends on the total size of the transaction would mitigate the filing burden on smaller deals and on companies.

Further, a mandatory notification process would require companies seeking to do any transactions (irrespective of the antitrust merits of any individual transaction) to incur certain costs

associated with preparing their filing. Depending on the details required in the initial filing and the availability of a "short form" filing (akin to the Short Form CO in the EU process), those costs may be more or less significant. If the CCA were amended to include a mandatory notification process, the Sections suggest that the Draft Legislation introduce a short form filing for transactions to mitigate the burden and process related to transaction that would not raise any competition concerns.

The process for the filing submission would also greatly impact merging parties. A "notice" filing similar to the HSR Form in the United States, where the substance of the form does not leave much room for interpretation by antitrust agencies, enables parties to control much of the process' timeline, which helps prepare for resource management decisions, in particular, business engagement that can help mitigate disruption to ordinary course activities. By contrast, a lengthy merger pre-notification process similar to the one that exists in the European Union or the United Kingdom, where parties do not control the timeline or the level of information required, would impose greater burden for merging parties, both because of timing uncertainty, but also because of the difficulty of predicting how much legal resources and business resources need to be dedicated to the process.

Finally, as the Draft Legislation contemplates a broader standard for the investigation and finding of deals likely to lessen competition, a mandatory review process is more likely to result in in-depth reviews of transactions that previously would not have warranted scrutiny. This would subject a much greater number of deals and merging parties to a burdensome review process that can stretch over more than a year and result in the production of millions of documents, all of which would be incurred at the parties' expense.

B. Impact on ACCC

Under a mandatory notification regime, the ACCC could face a significant increase in the volume of deals and information that would be subject to its review and approval. The administrative nature of the ACCC's decision-making role and publication requirements will require more detailed applications and consideration of confidentiality, further adding to the administrative burden. To avoid delays and backlogs, the ACCC will need to dedicate resources to triaging notifications to identify transactions that do not need further scrutiny from those that would require a closer look or even an in-depth investigation.

In addition, under a mandatory notification process, the ACCC should expect to investigate a greater number of transactions than under the current regime, which will also require greater budgetary and staffing commitments to ensure a thorough investigation of the merits of those transactions that ACCC deems of interest. Even with the calibration of notification thresholds to the existing number of transactions as planned by the Taskforce, this will have an inevitable transition period where a large volume of transactions fall within the thresholds. There may also be an initial increased tendency for over-notification as parties voluntarily notify in order to safeguard against regulatory uncertainty/potential retrospective application. The Sections note that the ACCC has until now not matched the private sector in its salary structures. This is in stark contrast to international jurisdictions such as the US and Canada, where there is a higher turnover of staff going from agencies to private sector and vice-versa.

Finally, and as discussed above, the limitation on parties' ability to introduce new evidence upon appeal will mean that the ACCC will face voluminous material at the application stage, potentially creating inefficiencies and a "bottleneck" effect. That is, the ACCC will need to dedicate resources to reviewing lengthy applications in order to triage those likely to pose competition concerns, rather than the current inverse process (where the ACCC reviews a short submission and requests further information/discussion in relation to specific competition concerns it identifies).

CONCLUSION

The Sections appreciate the opportunity provided to comment on the Draft Legislation and remain available for any clarification that the Taskforce and the ACCC may need.