Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne VIC 3000
Wurundjeri Country
www.abl.com.au

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By Email

Competition Taskforce
The Treasury
Langton Crescent
Parkes ACT 2600

CompetitionTaskforce@treasury.gov.au

Contact
Aaron Bronitt
[redacted]
abronitt@abl.com.au

Partner
Matthew Lees
Direct 61 3 9229 9684
mlees@abl.com.au

Dear Sir/Madam

Submission on the Exposure Draft of Treasury Laws Amendment Bill 2024: Acquisitions

1 We refer to the Exposure Draft of the Treasury Laws Amendment Bill 2024: Acquisitions (**Draft Bill**) published by the Treasury Competition Taskforce on 24 July 2024.

2 We regularly advise clients on mergers and acquisitions under the *Competition and Consumer Act 2010* (**CCA**) and making applications under the existing informal merger clearance regime. We draw on that experience in making this submission.

3 The Draft Bill reinforces concerns we expressed in our January 2024 submission on the Merger Reform Consultation Paper. In short, the current regime works well for the overwhelming majority of merger matters. It is informal, flexible and pragmatic, with the Federal Court as a safeguard if required. Making the ACCC an administrative decision maker is neither necessary nor desirable – particularly given its poor track record in merger litigation. Far from the claimed benefits of a 'faster, stronger and simpler system', the proposed reforms will make it slower, bureaucratic and convoluted.

4 In making this submission, we are also constrained by the short timeframe (3 weeks) to consider and comment (with a suggested limit of 5 pages) on 180 pages of draft legislation and explanatory material. That is particularly concerning given the scope and impact of the proposed reforms, which would fundamentally change competition law beyond mergers in a way not previously foreshadowed. Further, key details of the reforms have been left to regulations (as explained further below).

5 Under cover of those objections, we make the following comments regarding the Draft Bill. In summary, the Draft Bill is deficient and concerning in several respects, including:

(a) the new test of "*substantially lessening competition*", which would apply to misuse of market power (s 46) and other prohibitions under the CCA;

(b) the failure to explain the critical notification threshold;

(c) potential constitutional and administrative law issues;

(d) the lack of provision for mergers that are confidential or urgent;

(e) the ability for third parties to obstruct mergers;

(f) the restrictions on evidence for the Australian Competition Tribunal (**Tribunal**);

(g) uncertain and unreasonable obligations to provide information; and

(h) the unrealistic presumption of "control" for minority interests.

"*Substantially lessening competition*"

6 The Draft Bill would amend the definition of "*substantially lessening competition*" (**SLC**) in s 4G of the CCA to include the concepts of "*creating, strengthening or entrenching a substantial degree of market power*". That change would apply across the CCA – not only to mergers. Regardless of its merits for mergers, it is not appropriate and has not been properly considered or consulted on for other prohibitions under the CCA.

7 In particular, when the SLC test (or "effects test") was introduced into s 46 (misuse of market power) in 2017, it was justified on the basis that the SLC test was already well known in Australian competition law and would only prohibit conduct that interferes with the *process* of competition ("on the merits").[1] Even though there have been no contested court decisions under the current s 46 to date, the Draft Bill appears to make a significant change to s 46 by prohibiting unilateral conduct that strengthens a person's market power. That is not appropriate because market power may increase as a result of legitimate competitive conduct – such as launching a new innovative product that wins market share from competitors.

8 Such a substantial change to Australian competition law should not be introduced, without proper consultation, under the guise of merger reform. If such a change is contemplated, it should be properly explained, justified and consulted on.

The notification threshold

9 The Draft Bill requires acquisitions to be notified in circumstances to be determined by the regulations (s 51ABG). The regulations are not yet available, and will be the subject of a separate, future consultation process. Without knowing the thresholds at this stage, it cannot be assessed whether the proposed reforms are appropriate for the full range of mergers to which they will apply.

10 Further, the Minister is given a broad power to determine that acquisitions that do not need to be notified under the thresholds set by the regulations must nevertheless be notified (s 51ABH). If the thresholds in the regulations are appropriate, that power seems unnecessary, and may cause considerable uncertainty for merger parties. The power reflects the inappropriateness of thresholds as a crude and ineffective tool for assessing a merger's potential impact on competition, as we argued in our previous submission.

Potential constitutional and administrative law issues

11 The Draft Bill seeks to replace the Court's decision of whether an acquisition breaches s 50 of the CCA with an administrative regime that extinguishes a fundamental property right (to sell or dispose of property) without government approval and paying a fee. It is unclear to what extent the Government has considered potential constitutional challenges, based on the separation of powers or s 51(xxxi) of the Constitution, although the s 51(xxxi) risk is acknowledged in s 189 of the Draft Bill.

12 Further, as an administrative decision maker, the ACCC must comply with the requirements of natural justice. With transactions worth millions or billions of dollars at stake, the ACCC could find itself subject to claims of apprehended bias (potentially by third parties seeking to obstruct the merger) based on, for example, a position the ACCC previously took in an enforcement matter, market study or public commentary. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) is excluded for some ACCC decisions (whether to proceed to a phase 2 review) but that does not prevent a claim for a remedy under s 75(v) of the Constitution.

[1] Explanatory Memorandum, Competition and Consumer Amendment (Misuse of Market Power) Bill 2017 (Cth) 10 [1.27]; Competition Policy Review Panel, *Competition Policy Review* (Final Report, March 2015) 341 ("Harper Review").

Confidential mergers

13 The Draft Bill would establish an "acquisitions register" of all notified acquisitions, available for public inspection on the internet. An acquisition determination by the ACCC or a decision by the ACCC to proceed to a phase 2 review must be included on the register on the same day as the determination/decision (s 51ABZX(3)). The regulations may also prescribe any other information or documents that must be included on the register, and when they must be included (s 51ABZX(2)(c) and (4)), and will also be the subject of a future consultation process.

14 Currently, many mergers are cleared by the ACCC on a confidential basis. That occurs when it is clear the merger will not substantially lessen competition, and market inquiries are unnecessary. It enables merger parties to announce the merger – including to their customers, employees and suppliers – without the uncertainty of the merger being conditional on ACCC approval. Being forced to announce the merger while it remains uncertain may cause unnecessary concerns for some stakeholders, and cause the merger parties to lose customers, employees or commercial opportunities. In some cases, that risk may cause the parties not to pursue the merger at all – even if the merger would be pro-competitive or have other public benefits.

15 While the proposed reforms seek to increase transparency, that need not be at the expense of the parties to a confidential merger, or jeopardise the merger itself, in circumstances where there is no real competition concern. The Draft Bill (or regulations) should ensure that such mergers (and potentially all mergers that are approved by the ACCC without a phase 2 review) need not be made public on the register until after they have been approved by the ACCC. As under the current informal process, the merger parties should also be able to decide not to proceed with the proposed merger, rather than have the ACCC announce the proposed merger when it has not been approved.

Long and uncertain timeframes

16 Mergers are often time-critical and may become commercially unviable due to delay and uncertainty. The maximum period of a phase 1 review is at least 30 business days (6 weeks or approximately 1½ months). That may be followed by a phase 2 review, the maximum period of which is at least 90 business days (18 weeks or approximately 4 months). Substantial public benefits are not considered until after the end of phase 2, with a maximum period of at least 50 business days (10 weeks or more than 2 months). Those timeframes may be extended by an additional 15 business days (3 weeks) if a merger party offers a remedy (such as a s 87B undertaking) to address any concerns.

17 It is unclear why such a long period is required for phase 2 when the ACCC has already begun its assessment in phase 1, or why the ACCC cannot consider substantial public benefits during phase 2 (particularly in cases where the merger parties accept that competition may be lessened and the real issue is whether the merger should be permitted due to public benefits).

18 Further, the commencement of the relevant time periods is pushed back if the ACCC exercises its considerable discretion to determine that it "*reasonably considers*" that a notification or application is "*materially incomplete*" (ss 51ABS and 51AZBH) or that there has been a "*material*" change of fact (ss 51ABU and 51ABZJ). What is "*material*" is open to argument, is to be determined by the ACCC and may not be reasonably foreseeable by the notifying party. The ACCC also has considerable discretion to extend determination periods by seeking further information or conducting investigations, including through s 155 notices (s 51ABZT).

19 Moreover, as explained below, even if the ACCC approves the merger, third parties may apply to the Tribunal for a review. While a fast track review must be completed within 60 days, the time limit of 90 days for a standard review is extended to 180 days

if there is new evidence, and can be extended for a further 60 or 90 days if there is a large volume of material, complexity or other unspecified "special circumstances".

Urgent mergers

20 The Draft Bill imposes a minimum period of 15 business days before the ACCC may make a determination regarding substantially lessening competition (s 51ABZB(1)), followed by a further minimum period of 15 business days before the ACCC can make a determination regarding substantial public benefits (s 51ABZP(1)). The legislation should allow a merger to be assessed urgently, without any minimum time period, if that is necessary on public benefit grounds and the merger would otherwise be prevented by delay. The situation could arise, for example, where the merger is needed to ensure the continuation of an essential service provided by a supplier that is on the brink of insolvency and ceasing to trade. Without a mechanism for such urgent situations, the responsibility will fall to government to ensure continuity of service.

Obstruction by third parties

21 Merger laws must strike a careful balance between taking into account third parties' interests where appropriate and not enabling them to obstruct a merger in their own self-interest. This is reflected in the current laws, where, unlike other prohibitions in the CCA, only the ACCC can seek an injunction to prevent a merger. The required balance must be carefully considered in the Draft Bill given that the Minister may fund consumer associations and consumer interest groups to participate in Tribunal reviews (s 100R), and given that third parties also include competitors of the merger parties, rival bidders in a takeover, short-sellers and speculative investors.

22 If the ACCC has considered a third party's submissions and decided to allow a merger, the third party should not be able to delay the merger by applying for a Tribunal review of the ACCC's decision. Under the Draft Bill, however, any person who is dissatisfied with the ACCC's determination may apply for a Tribunal review (s 100C(1)) and the Tribunal must conduct the review if the applicant has "*sufficient interest*" (s 100C(2)). What is "*sufficient interest*" is not defined and is left to the Tribunal to decide. It has been the subject of uncertainty under the current law regarding Tribunal reviews of ACCC determinations (s 101(1AA)). It creates the potential for third parties to game the system and force merger parties to enter into side deals to avoid delay.

23 It is not sufficient that the Tribunal may dismiss frivolous or vexatious applications (s 100J). There may be a reasonable argument that the ACCC should not have permitted the merger, but that does not justify giving a third party the ability to obstruct the merger when their interest can already be considered in the ACCC's decision making process.

Restrictions on material for the Tribunal

24 The Draft Bill limits the information, documents and evidence the Tribunal may consider in a standard review (s 100N(6)). In particular, merger parties may introduce new material only if the Tribunal is satisfied the material was not in existence when the ACCC made its determination (s 100N(5) and (6)(g)). That is too restrictive. Even if material was "in existence", it might not have been known to the merger parties, it might not have been reasonably obtainable by them and it might only have become relevant because of a change in the commercial circumstances since the initial application, or because of something the ACCC relied on in its determination.

25 Further, the Tribunal may consult and obtain material from consumer associations or consumer interest groups (s 100N(1)(b) and (6)(c)) as the Tribunal sees fit, and obtain any further information the Tribunal specifies from the ACCC (s 100N(2) and (6)(d)). It would be manifestly unfair if the merger parties do not have an opportunity to give the

Tribunal information, documents or evidence in response (apart from material not in existence at the time of the ACCC's determination or clarifications of that material).

26 The restriction cannot be justified by efficiency when it does not even relate to the fast track review, in which the Tribunal is limited to material that was referred to in the ACCC's determination or required to be provided under the regulations (s 100P(1)).

Obligations to provide information

27 A notifying party must notify the ACCC of a change of fact if, among other matters, "*the change of fact is material to the Commission making a determination under subsection 51ABW(1) in respect of the notification*" (s 45AX(1)(d)). That is unfair and unreasonable as the notifying party may not know whether a change of fact is material to the ACCC's determination – particularly when, at the relevant time, the ACCC has not made its determination, let alone explained the basis of it (s 45AX(1)(c)(iii)).

28 The new prohibition (s 45AZB) on being "*negligent*" (which includes but is not limited to being "*reckless*") in providing information to the ACCC regarding a merger also sets the bar for liability too low. It could capture information that was provided honestly and in good faith, particularly when merger assessments necessarily involve uncertainty and opinions about hypothetical future situations and economic analysis.

29 It is also unjustified, and without proper consultation, to introduce civil penalties (in addition to the existing criminal penalties) for failure to comply with a s 155 notice. Like the change to the definition of "substantially lessening competition", this amendment is not limited to merger assessment and would apply to s 155 notices in all ACCC investigations, such as for cartels or breaches of the *Australian Consumer Law*.

"Control" presumptions

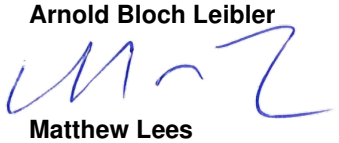
30 The Draft Bill includes rebuttable presumptions that a person "controls" a company if they have at least 20% voting power, but do not control below that level (s 51ABC(2)). Simply having that level of voting power does not provide control because it can be outvoted by the other 80%. If, for some reason, a party does obtain control, despite only having a minority interest, that should be considered, but the presumptions are divorced from reality and may lead to absurd results. It is also highly inefficient and onerous for all minority interests of at least 20% to be presumed to be controlling, and for the parties to be forced to go to the time and effort of proving the opposite.

ACCC discretion

31 Subsections 51ABW(2) and (3) only restrict the ACCC when it determines to specify conditions on an acquisition or that an acquisition must not be put into effect. The ACCC apparently has discretion to allow an acquisition, no matter how anticompetitive it is. That is plainly inappropriate.

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

Yours faithfully
Arnold Bloch Leibler



Matthew Lees
Partner