BCA
Business Council of Australia

Draft Treasury Laws Amendment Bill 2024: Acquisitions and explanatory materials consultation

Submission to Treasury

August 2024

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1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to provide feedback on the exposure draft and explanatory memorandum that sets out the government's proposed merger control regime.

The BCA notes the intent of merger reform to deliver a faster, stronger and simpler system to deliver a more competitive economy.

The design and execution of the Australian Government's merger reforms are critically important to all Australians. A well-functioning regime will foster confidence in investing in Australian business with appropriate guardrails to prevent the degradation of competition. A poorly functioning regime will lead to a loss of confidence in investing in Australia, increase regulatory and transactional complexity, and limit Australia's economic growth.

Inadequate and incomplete consultation

The merger control regime partially set out in Treasury's explanatory draft (recognising that notification thresholds, regulatory guidelines and notification form, amongst other components, are yet to be published) represents far-reaching changes to the types of arrangements that are required to be notified, the manner in which arrangements are assessed and the rights parties have to challenge an adverse outcome. Absent those further details to be determined through legislative instruments, the complete implications of the proposed reforms cannot be assessed.

Moreover, the BCA is greatly concerned at the combination of short time and incomplete information provided to industry to comment on what the Treasurer has described as "the biggest reforms to merger settings in almost 50 years"[1]. Our members tell us that they have had insufficient time to grapple with the draft legislation to sufficiently assess the impact on their businesses and provide meaningful feedback.

The draft legislation goes beyond matters necessary to give effect to the policy position announced by government and introduces a range of new concepts to the Australian competition framework. It includes issues not previously canvassed, such as the new *Competition and Consumer Act 2010* (Cth) wide definition of substantial lessening of competition which will impact the misuse of market power prohibition (section 46) and anticompetitive agreements prohibition (section 45), amongst others. The risk of adverse and unintended consequences is greatly enlivened by the grossly inadequate consultation period, and elevated by the unduly complex structure and drafting of the amendments.

The BCA strongly urges the government to undertake more detailed consultation on the proposed merger reforms including any revisions to the draft legislation to enable adequate input from affected businesses.

Overly complex policy execution

More broadly, the draft legislation is unnecessarily complicated in its attempts to reshape substantive legal issues rather than providing for a simpler administrative system with certainty, expediency and transparency at its heart.

Despite promising a faster regime, assessment of acquisitions is likely to take longer than under the current merger control system. While the timelines for the ACCC to provide a determination on a notified acquisition is similar to existing assessment timelines, in practice, parties will likely face a longer time to obtain an assessment once more generous 'stop the clock' provisions are included. Combined with the mandatory notification requirement and ambiguous notification criteria, it is also expected that the ACCC will face serious challenges

[1] Chalmers, J., *Merger reform for a more competitive economy*, Address to the Bannerman Competition Lecture, Sydney, 10 April 2024, https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/speeches/address-bannerman-competition-lecture-sydney accessed August 2024.

and resourcing pressures to meet the proposed timelines, and given the suspensory requirement, will impact business investment.

Further, the broad rights of third parties to seek to appeal a determination of the regulator risks dragging timelines out further.

In addition, it is troubling that the government's proposed legislation seeks to prevent acquisitions that deliver a net benefit to the public from being approved. The draft legislation provides only for acquisitions with public benefits that substantially outweigh any detriment to the public. That is, by stopping deals that have public benefits but not substantial public benefits, Australians will unnecessarily miss out on any benefits.

Finally, the ability for the ACCC to rely on evidence at the Tribunal which parties have not seen during the ACCC determination period is deeply concerning given parties are only able to adduce new evidence at the Tribunal if it did not exist at the time of the ACCC's assessment.

High degree of ACCC discretion requires a fit-for-purpose administrator

In addition to the matters raised in this submission, the BCA notes that the success of a reformed merger control system hinges on the culture, organisational structure, capacity and capability of the Australian Competition and Consumer Commission (ACCC). As it currently stands there appears to be an overreliance on the Australian Competition Tribunal (ACT) providing a check on the ACCC's decision-making and limited safeguards around the ACCC's administration and performance during the assessment of notified acquisitions.

In recognising the benefit of a mandatory notification scheme, businesses across the economy were promised a more transparent, targeted and balanced regime with greater certainty and strong procedural safeguards given the suspensory nature of the regime and the removal of other approval pathways including by declaration by the Federal Court. Key enablers of this regime have not been presented in conjunction with the exposure draft including the approach that the ACCC will bring to its revised role and associated accountability and performance framework.

The BCA is deeply concerned that without demonstrable change to the ACCC's systems, structure and engagement with applicants there remains a risk the ACCC's approach will continue to have an 'enforcement' rather than 'administrative' mindset. Failing to make this transition, and within a regime that lacks the safeguards of full merits review, would greatly increase investment and business risk in Australia and risks discouraging legitimate and productive business activity to the detriment of the overall Australian economy.

The remainder of this submission sets out key concerns that the BCA has with the proposed legislation and their significance to the efficacy of the regime, based on the limited information on the reforms currently available. Where possible the submission sets out suggested ways of resolving these concerns.

2. Key recommendations

Recommendation 1	Set clear and unambiguous thresholds by reference to a set value for turnover or assets in Australia, based on specific criteria and robust economic analysis, consistent with the stated intention to establish a risk-adjusted system. This would be consistent with the practice in comparable jurisdictions with a mandatory and suspensory regime. The specific thresholds set should be determined after adequate consultation with industry.
Recommendation 2	51ABH should be redrafted to narrow the scope of the Minister's discretion to make a determination on the basis of specific criteria supported by detailed evidence and set out prescribed consultation requirements including taking account of evidence from the ACCC, experts, and industry stakeholders when determining any additional targeted thresholds.
Recommendation 3	Establish a bright line for notification filing where acquisitions of 20 per cent or more must be notified. Where a minority interest of less than 20 per cent is acquired, a mandatory requirement to notify should fall away. Alternatively, the legislation could adopt the definition of control in the Corporations Act. The legislation could use the definition of control set out in section 50AA of the Corporations Act. This would be readily understood by the business community.
Recommendation 4	Amend section 51ABN to remove subsection (2) and by doing so, retain the current exemptions for assets acquired in the ordinary course of business.
Recommendation 5	Retain the currently legislated concept of "substantial lessening of competition". In other words, do not adopt the change to include the concepts of SLC set out in section 4G… "by creating, strengthening or entrenching". Alternatively, move the notion of "creating, strengthening or entrenching" to the relevant factors the Commission may take into consideration may take into consideration when making an acquisition determination.
Recommendation 6	Remove "reasonably believes" from section 51ABW(3)(c) and replace it with "satisfied on reasonable grounds".
Recommendation 7	The BCA recommends removing Relevant matter subsection (3)(a).
Recommendation 8	– Keep existing net public benefits test: This test only requires that public benefits outweigh public detriments, rather than any quantification of by how much they outweigh the detriments. The test is well understood by the ACCC, the Tribunal, and legal practitioners. – Establish an expedited public benefit assessment pathway for acquisitions that parties agree would or would likely SLC.
Recommendation 9	– The ability to have regard to the combined effect of the current acquisition and earlier acquisitions should be a matter that the ACCC can have regard to but is not automatically required to. – The ACCC should be able to direct a party to provide information about prior acquisitions in a particular 'market' or 'markets' rather than the current reference to 'industry'.

Recommendation 10	– Amend 51ABZT(2)(c)(i) such that "stopping the clock" can only occur following a failure to comply with a notice by a specified date. – Provide parties with the ability to seek an urgent interlocutory appeal of ACCC timing decisions. The legislation could introduce a right for affected parties to apply for an urgent interlocutory appeal (e.g., one week) of an ACCC decision that has the effect of delaying, stopping or restarting the clock. – Amend 51ABZF such that notifying parties must provide consent to the ACCC to extend a determination period if the ACCC delays providing a Notice of Competition Concern (NCC) during Phase 2 of the determination. This would mean that a delay in the provision of an NCC to parties does not affect the maximum Phase 2 determination period unless acquisition parties agree to it.
Recommendation 11	Remove the concept of stale notification – amend the exposure draft to remove 51ABK and related provisions specifying when an acquisition becomes stale.
Recommendation 12	– Establish additional procedural safeguards to provide parties the ability to respond to the ACCC's final position prior to the Commission formally rendering a determination. This could be given effect to through a concluding hearing which parties could participate in or a draft determination including grounds which parties could respond to. Any approach must require the ACCC to disclose the evidence it relied upon in arriving at its final position. – Amend 51ABZD to require the ACCC to provide written preliminary concerns or suspicions, not just its decision, when referring a particular acquisition for Phase 2 determination. – Establish a right for parties to request access to the ACCC's case file after the ACCC has issues an NCC.
Recommendation 13	Expand the grounds on which the Tribunal can receive additional evidence to include information, documents or evidence that is responsive to material not previously disclosed by the ACCC to the relevant party.
Recommendation 14	Remove third party appeal rights to provide business confidence noting that the ACCC's assessment already takes account of third party's views.
Recommendation 15	– Exclude acquisitions notified to the ACCC prior to 1 January 2026 from the operation of the new regime and grandfather the existing section 50 for a period of time for these deals to allow the ACCC to finish its process (including any challenges). – For deals that have been cleared by the ACCC prior to 31 December 2025, the legislation could that the acquisition will not be subject to the new merger clearance regime (i.e., will not be considered to be an acquisition that is "required to be notified" under section 51ABG). – Bring forward the voluntary notification period by a number of months to avoid delaying acquisitions until 2026.

3. Key issues

3.1 Notifiable acquisitions

BCA members have raised a number of practical challenges concerning the operation of notification provisions, more generally in relation to the lack of clarity in the future regime and more specifically concerning the new concept of control and its interaction with the rebuttable presumption.

Ambiguity in notification requirements

51ABG sets out “without limitation” a wide range of references for metrics that could require notification in the regulation. These include internationally accepted metrics such as turnover and assets, but also ‘class of parties’, ‘class of businesses’, ‘market or class of markets’, all of which are not matters of fact that merger parties can easily or clearly assess. For example, market definition issues may be the subject of contention during a competition assessment. This is likely to be exacerbated in fast moving and dynamic markets which may also be more likely to be the subject of ACCC scrutiny.

Mandatory filing thresholds must be objectively knowable facts, not unknowable value judgements that could reasonably differ and require a judgement call that, if conflicted with the ACCC’s view, could subject businesses to substantial fines for non-compliance.

The extent of this uncertainty and risk of retrospectively “changing the goal posts” with sizeable penalties in the event the ACCC takes a conflicting view to parties will stifle legitimate business activity and impose huge and unnecessary transaction costs on merger activity, as well as clogging the ACCC’s approval processes with overly cautious notifications.

Further, the thresholds should be set with respect to specific criteria, underpinned by robust economic analysis. The BCA notes that whilst the explanatory memorandum indicates an intent to set thresholds on a risk-adjusted basis and “target acquisitions most likely to result in harm to competition and consumers”[2], this is not reflected in the particulars of the draft legislation.

> **Recommendation 1**
>
> Set clear and unambiguous thresholds by reference to a set value for turnover or assets in Australia based on specific criteria and robust economic analysis, consistent with the stated intention to establish a risk-adjusted system. This would be consistent with the practice in comparable jurisdictions with a mandatory and suspensory regime. The specific thresholds set should be determined after adequate consultation with industry.

Ministerial power to set thresholds

51ABH provides a general power for the Minister to determine when acquisitions are required to be notified. Those powers are broad and are not limited by any criteria to ensure that the ministerial determination is evidence-based. Further, the BCA notes that the Treasury Reform paper stated that a Minister would be given power “to introduce additional targeted notification thresholds in response to evidence-based concerns regarding certain high-risk mergers”[3].

Section 51ABH does not contain any specific criteria for setting thresholds with respect to criteria or evidence. This is concerning as our members would expect that any notification threshold was identified due to

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[2] Treasury, 2024, *Reforming mergers and acquisitions – exposure draft*, “Explanatory materials”, p18, https://treasury.gov.au/consultation/c2024-554547, accessed August 2024.

[3] Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy* (Decision Paper, 10 April 2024), p15.

perceptions of risk to the economy that would be the subject to specified criteria and economic analysis, and this ought to confine the Minister's discretion accordingly.

Whilst the provision notes that the Minister may consider reports or advice from the ACCC, there is no requirement to obtain such advice before making a determination. Additionally, it is critical that any decision made by the Minister takes into account the views of the affected sectors or industries. However, the draft legislation only provides that the Minister "may" consider any reports or advice of the ACCC when determining additional targeted thresholds. Consultation with the ACCC, experts, and relevant industry stakeholders does not appear to be a mandatory, relevant consideration for the Minister.

This broad discretion risks the Minister setting thresholds that are not based on evidence but rather political or ideological fashions. It also risks that the Minister will make errors of law or that determinations become subject to lengthy, complex, and possibly unnecessary judicial review.

Recommendation 2

51ABH should be redrafted to narrow the scope of the Minister's discretion to make a determination on the basis of specific criteria supported by detailed evidence and set out prescribed consultation requirements including taking account of evidence from the ACCC, experts, and industry stakeholders when determining any additional targeted thresholds.

New control concept

The definition of "control" is overly complex, too prescriptive and fails to properly account for the nuances of "control" found in certain transactions, including minority acquisitions and changes in the level or type of control for joint ventures (e.g., negative and positive control).

The definition also differs from well-understood concepts of control in the *Corporations Act 2001* (Cth)[4] (Corporations Act) (which is incorporated into accounting standards) and equivalent overseas jurisdictions with mandatory and suspensory regimes (e.g., the EU, which has the "decisive influence" concept that has a considerable body of guidance and case law). This creates additional complexity and uncertainty for cross-border transactions and is likely to stifle overseas investment activity in Australia. The proposed legislation is also unclear as to how parties' assessment of control for the purposes of notification will be approached by the ACCC in relation to its assessment against the competition test.

Parties may take a conservative position to notification due to the significant penalties and risk attached to failing to notify the Commission, but this does not mean that the parties believe they possess nor actually possess control, and it is unclear how the proposed legislation accommodates this.

Given the high penalties for failing to notify an acquisition, and the likelihood that vague requirements will incentivise over-notification and slow the merger control regime down and more broadly impact the Australian economy, the government should adopt a well understood bright line approach to provide certainty to parties.

These concerns might be partly addressed by permitting merger parties to rely on a holding of less than 20% to be determinative in relation to the filing requirement - notwithstanding that there may be a rebuttable presumption only for other purposes. Such an approach would provide increased certainty as to filing, in minority interest acquisitions.

[4] Corporations Act 2001 (Cth), section 50AA

Recommendation 3

Establish a bright line for notification filing where acquisitions of 20 per cent or more must be notified. Where a minority interest of less than 20 per cent is acquired, a mandatory requirement to notify should fall away.

Alternatively, the legislation could adopt the definition of control in the Corporations Act. The legislation could use the definition of control set out in section 50AA of the Corporations Act. This would be readily understood by the business community.

Amendments to the carve-out of acquisition of assets in the ordinary course of business

Section 51ABN removes the exemption on "land, or an interest in land", and "patents or an interest in a patent", from the types of assets excluded from notification as a result of them being acquired in the ordinary course of business. The BCA notes that the removal of these types of assets from the ordinary course of business exemption has not been the subject of previous consultation including providing a clear articulation of the rationale for removing these classes of assets or how the provision is expected to operate in practice, including in relation to serial acquisitions and timing of ACCC determination. There is a therefore a high risk of unintended consequence which risks chilling ordinary business activities across the economy.

The BCA is concerned that the inclusion of these classes of assets, as it stands, will greatly increase the compliance risk and regulatory burden on business and have a consequential impact on the ability of a business to engage in ordinary business activities. This is particularly acute for land acquisitions (including an interest in land) which may be subject to competitive processes, including auctions (our members tell us that in a competitive property market where transactions proceed quickly (in a matter of days or minutes) this is critical)), and where its final use is dependent on further regulatory processes including planning approvals.

Whilst the government may be able to mitigate some of the risks through setting thresholds, the serial acquisition provisions (detailed in 3.5 below) appears to effectively work against the threshold by drawing in acquisitions below the line.

Recommendation 4

Amend section 51ABN to remove subsection (2) and by doing so, retain the current exemptions for assets acquired in the ordinary course of business.

3.2 Competition test

Change to Substantial Lessening of Competition (SLC) test

The exposure draft includes a new definition of "substantially lessening competition" (SLC) which would apply to the whole of the CCA (section 4G) "by creating, strengthening or entrenching a substantial degree of market power".

The BCA's previous submission to the merger review argued that the proposed changes were redundant to the extent that the existing SLC test captured these concepts (in a merger context). However, the expanded definition, also across Part IV of the CCA, creates uncertainty as to how a court or regulator may interpret the change and in doing so increases risk. This is especially the case given that it would make the changes subject to

litigation by private litigants, including class actions. Most litigation under the remodelled section 46, has been by private litigants, and not the ACCC.

The extended application of a new SLC test across Part IV the CCA was not proposed by the ACCC, the Competition Taskforce or the government's response to the recommendations and goes beyond the scope of merger law reforms. There has been no consultation concerning this change and it is not supported by thorough, evidence-based analysis and the full extent of its impact is not widely understood. This may lead to unintended consequences, for example, in how the Federal Court would interpret the new test in an enforcement context. Notably, applying the new SLC test across the CCA would impact the prohibition on misuse of market power even before the ACCC has had an opportunity to test in Court the last amendments to section 46.

If the extension to include 'creating, strengthening or entrenching' is kept, this needs to be restricted to the merger regime as a factor which the ACCC may have regard to when considering if a deal is likely to substantially lessen competition.

Recommendation 5

Retain the currently legislated concept of "substantial lessening of competition". In other words, do not adopt the change to include the concepts of SLC set out in section 4G… "by creating, strengthening or entrenching".

- Alternatively, move the notion of "creating, strengthening or entrenching" to the relevant factors the Commission may take into consideration when making an acquisition determination.

Change to legal standard

Section 51ABW (3)(c) enables the ACCC to prevent a proposed acquisition being put into effect if the Commission reasonably believes that the acquisition would have or would be likely to have the effect of substantially lessening competition. In contrast, the proposed assessment of substantial public benefits in section 51ABZL (2) requires the ACCC to be satisfied on reasonable grounds that the acquisition will deliver substantial public net benefits.

It is notable that the legal standard to prevent an acquisition is a very low standard, even for an administrative regime, and appears to be broadly equivalent to the standard for utilising the ACCC's information gathering powers under section155 which are frequently used. Given the gravity of rejecting a notified acquisition on the parties in question and the economy at large, it is expected that the ACCC would be required to meet a more substantive legal standard to do so, such as that the ACCC is satisfied on reasonable grounds that if the acquisition was put into effect, it would or would be likely to substantially lessen competition. The reference to 'reasonable grounds' would also then align with the test which has been proposed under the draft bill for the public benefit test under s.51ABXL(2). This would require that the ACCC had an appropriate evidentiary basis for concluding there is a likelihood of competitive harm from an acquisition rather than the test merely focusing on the subjective state of mind of the ACCC about whether such a likelihood exists.

Recommendation 6

Remove "reasonably believes" from section 51ABW(3)(c) and replace it with "satisfied on reasonable grounds".

3.3 Relevant matters

The BCA notes that section 51ABX provides a range of matters that the Commission may consider in making its determination. Of particular note is subsection (3)(a) – the need to maintain and effectively develop competition in markets.

This appears to be derived from the European Union (EU) formulation which is in the context of developing the common market across all nation states in the EU. It is not appropriate to import that concept in Australia. There is already case law and guidance in relation to the need to take into account the impact on potential competition (i.e. whether the proposed merger would lessen that potential competition). It does not make sense to import new concepts which would only serve to create ostensible dissonance between the test and the factors and to complicate matters where existing law and guidance suffices.

One interpretation of subsection (3)(a) leaves open the possibility of the Commission rejecting a proposal to put an acquisition into effect for the express purpose of developing competition (framed positively, or curatively) which sits at odds with the competition test which is focused on whether or not an acquisition has the effect of substantially lessening competition (framed in the negative, or preventatively).

The BCA is supportive of a merger regime which protects the economy from anticompetitive conduct but is concerned that the framing of this relevant factor stands at odds with the competition test. The role of the merger regime should not be to create competition beyond what is present in the market (and therefore purports to be corrective of past decisions).

Recommendation 7

The BCA recommends removing Relevant matter subsection (3)(a).

3.4 Substantial public benefit test

The BCA is concerned that a new "substantial" public benefit test whereby public benefits must "substantially" outweigh any public detriments will practically prevent certain deals which provide a net benefit to the community. It will also act as handbrake on the critical transitions Australian businesses are undertaking to become more globally competitive including in delivering Australia's net zero transition, to all Australians detriment.

There is an inherent difficulty trying to quantify and compare public benefits. The approach under the CCA to the net public benefits test has therefore been to apply a single evaluative judgment of "instinctive synthesis" rather than a mathematical equation to quantify and weigh the benefits and detriments. Raising the public benefits test to require public benefits to "substantially" outweigh any public detriments increases the risk that these objectives will not be met.

Treasury's merger reform proposal identified that "*the Australian economy is undergoing significant structural shifts including the rise of the care economy, rapid transformation to net zero, and the growth of the digital economy. Allowing the ACCC to consider whether an otherwise anti-competitive merger raises substantial and meaningful net public benefits is important as our economy responds to these challenges.*"

The inclusion of a requirement for the public benefits to "*substantially*" outweigh any public detriments complicates the weighing of benefits and detriments by requiring a greater degree of quantification and comparison between disparate matters. This detailed quantification may be particularly difficult in emerging areas of great public importance, e.g. sustainability sector where the science is continuing to develop rapidly and urgent action is also required concurrently. Members advise that doing so will make it prohibitively difficult for merger parties to run a public benefits application, particularly when public benefits cannot be considered until Phase 3.

Nonetheless, if a proposed merger is assessed to deliver net benefits, then it should proceed. It is unclear why merger approvals would be restricted only to those where benefits are "substantial". That is, by not proceeding, Australians will unnecessarily miss out on any net benefits, however modest.

Finally, there must be a mechanism to enable faster consideration of public benefits associated with acquisitions where applicants recognise that the arrangement would or would be likely to lead to substantial lessening of competition. That is, the regime should have sufficient flexibility to avoid protracted combined Phase 1 and 2 assessments if parties agree that the acquisition would ordinarily lead to SLC.

Recommendation 8

- Keep existing net public benefits test: This test only requires that public benefits outweigh public detriments, rather than any quantification of by how much they outweigh the detriments. The test is well understood by the ACCC, the Australian Competition Tribunal, and legal practitioners.
- Establish an expedited public benefit assessment pathway for acquisitions that parties agree would or would likely SLC. This might perhaps occur during the Phase 2 process.

3.5 Serial acquisitions

The BCA recognises the policy intent of government to monitor smaller acquisitions that fall below notification thresholds, but that over time may accumulate into an acquirer exercising market power and may SLC. However, it is unclear how section 51ABZ is intended to work in practice and there is a risk of significantly higher, onerous and excessive regulatory burden on parties. For example, for those acquiring property or minor interests and/or derivative rights in property, or participation in any kind of auction (if the, as yet unknown, mandatory and suspensory notification thresholds for acquiring assets are triggered).

Rather than leaving the need for examining 'roll ups' to the ACCC as part of its administrative discretion, section 51ABZ appears to work automatically, essentially requiring all prior transactions in the same industry to be assessed in every case. This raises obvious complexity and uncertainty with how the analysis would work.

The additional assessment also involves a new concept of an "industry" related to the acquisition rather than a "market". "Market" is a well-defined concept in competition law whereas "industry" is not an established legal concept at all. While there are conventions around "industry" for statistical purposes, these are statistical not legal concepts and cannot be applied in a legal context with any certainty or consistency in the absence of a clear legal definition. In addition, there are different levels into which industry classifications may be disaggregated and limits to the usefulness of these distinctions. Such a concept creates uncertainty (including for merger parties as to what information should be put forward to enable the ACCC to consider this in the context of a given merger) and provides discretion to the ACCC as to how it may consider multiple acquisitions of a business.

Moreso, by focusing on "industry" rather than "market" there is a significantly higher regulatory burden without an equivalent offsetting benefit to the competition assessment, particularly for the acquisition of assets with wide geographic distribution like land. For example, it is unclear how the acquisition of land on the outskirts of Brisbane is pertinent to a similar acquisition in a different geographic market such as the Adelaide Hills, and how cumulatively they would affect the markets each are acquired in.

At a practical level it is also unclear how the cumulative assessment would be implemented. As section 51ABZ does not require parties to notify past acquisitions "put into effect" in the past 3 years at the time of notification, it is unclear whether the government's expectation is for parties to do so (in addition to issues identified in 3.1). Conversely, if parties are making acquisitions below the threshold, it is not clear at what, if any, point the acquisitions become notifiable.

Recommendation 9

- The ability to have regard to the combined effect of the current acquisition and earlier acquisitions should be a matter that the ACCC can have regard to but is not automatically required to.
- The ACCC should be able to direct a party to provide information about prior acquisitions in a particular 'market' or 'markets' rather than the current reference to 'industry'.

3.6 Timeframes

Faster timeframes and increased certainty were essential elements of the government's revised merger regime to promote investment confidence and ensure that the Australian economy wasn't left hamstrung by overly bureaucratic processes. Yet, the cumulative impact of the proposal, including the staged approach to consideration of public benefits and the broad discretion of the ACCC throughout the notification and phases of assessment, fails to deliver certainty and timeliness to parties, and disincentivises investment and acquisitions in Australia.

As currently set out, the proposed timelines are comparable to the ACCC's targets for assessing mergers under today's merger regime so do not provide any additional benefit, except perhaps formalising those targets. However, once accounting for the effect of providing a notice to parties under section 155 of the CCA which immediately stops the clock in contrast to current practice, the timeliness of the regime is likely to be further eroded.

ACCC discretion to delay, stop and restart the clock

Significantly, the ACCC has broad discretions to delay, stop and restart the clock for a review of a notified acquisition, including where:

- the ACCC fails to publish a 'Notice of Competition Concerns' when it is required to do so, in which case the clock is delayed until the ACCC publishes the notice (and there is no ultimate deadline on the ACCC);
- the ACCC 'reasonably considers' an application is materially incomplete (in which case, the clock does not start until the ACCC considers the application complete) and if the ACCC determines that an application is 'misleading' after the process has started it can 'restart' the clock;
- the ACCC becomes aware of a change of fact (in which case, the clock can be reset if the change of fact is material to the ACCC's assessment),
- the parties are late to respond to a Request For Information (RFI) issued by the ACCC in the timeframe set by the ACCC (in which case, the clock is stopped until the parties respond); or
- the ACCC exercises its compulsory information gathering powers (i.e., issues a section 155 notice) (in which case, the clock is stopped from the time that the notice is issued).This ability to 'stop the clock' on the determination period when a section 155 notice is issued is inconsistent with its use presently whereby the 'clock is stopped' only in so far as parties subject to the notice fail to satisfy its requirements by the specified date. In contrast, 51ABZT(2)(c) enables the 'clock to be stopped' from the date that the notice is issued.

In its decision paper introducing the proposed reforms, Treasury said that there would be "procedural safeguards" to ensure this discretion is not abused.[5] However, the only procedural safeguard in the draft legislation is internal review (and only in relation to decisions to delay or restart the clock). Given the timeframe for internal review is 90 days, this safeguard is useless as the review process will likely be as long as or longer than the period that the ACCC has stopped the clock.

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

Additionally, section 155 notices are currently the ACCC's primary information gathering tool in complex merger cases for both informal clearance and merger authorisation applications. If the ACCC were to continue issuing the same volume of section 155 notices under the proposed regime and "stop the clock" each time, it would render the review timelines meaningless. Further, this would be out of step with other key jurisdictions (e.g., while the European Commission and Competition and Markets Authority have powers to extend the timeline in various circumstances, such extensions are always capped).

The absence of merits review, strong procedural safeguards and an ability to obtain access to the file (discussed below) will practically require notifying parties to frontload pre-notification consultations to ensure a notification will be complete and accepted, and contains all the relevant evidence that may be needed if merits review arises. Further, it remains unclear how parties could practically participate in a contestable process, such as an auction, under the proposed approach.

Recommendation 10

- Amend 51ABZT(2)(c)(i) such that "stopping the clock" can only occur following a failure to comply with a notice by a specified date.
- Provide parties with the ability to seek an urgent interlocutory appeal of ACCC timing decisions. The legislation could introduce a right for affected parties to apply for an urgent interlocutory appeal (e.g., one week) of an ACCC decision that has the effect of delaying, stopping or restarting the clock.
- Amend 51ABZF such that notifying parties must provide consent to the ACCC to extend a determination period if the ACCC delays providing a NCC during Phase 2 of the determination. This would mean that a delay in the provision of an NCC to parties does not affect the maximum Phase 2 determination period unless acquisition parties agree to it.

"Stale" transactions

The BCA does not consider that rendering an acquisition stale if it has not been put into effect following determination by the ACCC or the Tribunal within 12 months of determination is fit-for-purpose. For example, such a limitation is unlikely to be practical for deals requiring FIRB assessment or as part of a global transaction that may be subject to running concurrent reviews in multiple jurisdictions. In the latter case, it is not always possible to predict or align timelines across jurisdictions. In fact, this could result in an absurd outcome whereby an acquisition has gone stale in Australia whilst it is subject to consideration elsewhere. This is especially the case given that one of the policy objectives for the reforms was because the ACCC was concerned it was not being notified of global deals until after other regulators. Merger parties should not be penalised for notifying the ACCC early in a complex, multi-jurisdictional transaction.

Various issues could compound the risk of this occurring, including a protracted Second Request in the United States or where the acquisition has no or limited effect in Australia but may have greater effect in other jurisdictions because of where the target's operations are.

Recommendation 11

Remove the concept of stale notification – amend the exposure draft to remove 51ABK and related provisions specifying when an acquisition becomes stale.

3.7 Transparency during assessment period

To fulfil the government's policy commitment for the process to be transparent and for the ACCC to be accountable as the administrative decision maker, there needs to be very clear obligations on the ACCC for transparency through all phases of its review (particularly concerning phase 2 determination) and the opportunity to be able to respond to materials forming the basis of the ACCC's views. The exposure draft fails to specify sufficient safeguards to accomplish this end.

Phase 1 determination

It is unclear what detail the ACCC is required to communicate to parties at the conclusion of Phase 1 determination should an acquisition be determined to require Phase 2 consideration. Given the detailed NCC will not be provided until part way through Phase 2 consideration, some 25 business days or 5 weeks following the conclusion of Phase 1 determination, it is reasonable for parties to be informed, based on the ACCC's position at that time, as to the reasons the ACCC has referred the acquisition to Phase 2. Currently, the ACCC provides market feedback to merger parties at an earlier point. It would be a step backward for parties to receive no meaningful feedback for 5 weeks until they receive the full notice in Phase 2 – and at which point the timeframe for responding is very short.

Whilst the ACCC may further refine its views during the early weeks of Phase 2, it is still appropriate for parties to be properly informed as to the key concerns or suspicions that the ACCC holds at the conclusion of the Phase 1 period. Though 51ABZD requires written notification of the ACCC's decision to refer an acquisition to Phase 2 it does not set out an obligation to provide reasons for the decision even if they are preliminary.

Phase 2 determination

The requirement for the ACCC to provide a NCC is welcomed. This additional transparency will assist parties to understand the Commission's view and the grounds for those views and afford parties an opportunity to respond to identified concerns.

However, three weeks (15 business days) appears wholly inadequate for parties to respond. It is also not clear why the merger parties should be constrained in this way given that there is a considerable gap between the period in which parties respond to an NCC (day 40) and the point at which a Phase 2 determination is made (up to day 90). The NCC is a preliminary view and therefore does not raise a risk of judicial review for the ACCC. BCA members advise that other jurisdictions, such as Europe, allow parties a hearing at the conclusion of the competition assessment to understand the final case in favour or against an acquisition and provide the ability for parties to respond and present additional material as warranted. Another approach may be to provide parties a draft determination at the conclusion of the Commission's assessment setting out views and grounds and providing a final window for parties to respond.

Given the current constraints on providing evidence at the Tribunal it is essential that parties are afforded an opportunity to provide any additional or clarifying material to the Commission once the Commission's final position is known. Further, given third parties are able to provide additional information to the Commission up until 10 days prior to the conclusion of the determination period, it is important that parties are afforded an opportunity to respond (noting that this will require transparency and disclosure of materials provided to the Commission by third parties). It is crucial that parties understand the factual basis underlying the Commission's final position in order to properly respond to it and that is common in international regimes. e.g. in the EU, parties have the right to request access to the EC's case file after it issues its statement of objections in phase 2.

Recommendation 12

- Establish additional procedural safeguards to provide parties the ability to respond to the ACCC's final position prior to the Commission formally rendering a determination. This could be given effect to through a concluding hearing which parties could participate in or a draft determination including grounds which parties could respond to. Any approach must require the ACCC to disclose the evidence it relied upon in arriving at its final position.
- Amend 51ABZD to require the ACCC to provide written preliminary concerns or suspicions, not just its decision, when referring a particular acquisition for Phase 2 determination.
- Establish a right for parties to request access to the ACCC's case file after the ACCC has issued an NCC.

3.8 Ability to provide evidence during Tribunal review

We note that the government's policy position is to not allow parties to seek full merits review at the Tribunal and instead only allow new evidence to be admitted during a standard review (not rapid) if it did not exist at the time that the ACCC made its determination.

The BCA is concerned that the limits on additional evidence may not afford parties natural justice in being able to respond to material that parties did not have access to during the Commission's determination period, and which has influenced the Commission's determination.

As noted in item 3.7, parties will not have access to the final determination and associated grounds by the Commission nor access to the arguments and evidence put forward by third parties.

An obvious consequence of this gap in procedural fairness is that parties will not be able to respond to any case against the acquisition by third parties, and therefore may be caught short during the Tribunal's consideration. This is especially the case given that the deadline for responding to the ACCC is only 10-business days before the end of Phase 2, and so there may be significant amounts of information that are not shared with merger parties. The regime also does not currently require the publication of submissions received by the ACCC, so offers less transparency in this regard than the current merger authorisation process.

In addition to Recommendation 11, a further way of mitigating this gap would be to provide the Tribunal with an ability to grant leave to allow parties to put on additional evidence in response to any argument or information that was before the ACCC but which was not available to that party prior to the ACCC decision. This would assist with procedural fairness and would incentivise the Commission to provide increased transparency with parties during the various determination periods.

This will also help the Tribunal to make better and more accurate decisions, based on more and better evidence.

Failing to address this deficiency will result in parties needing to include otherwise extraneous information and witness statements in their initial application to the ACCC, further increasing the administrative burden of the proposed regime.

Further, the policy argument against the ability to adduce new evidence at the Tribunal is not supported by facts. It is not common practice for parties to 'play their cards close to their chest' until they reach the Tribunal. Properly motivated commercial decision makers will disclose all relevant information to the ACCC during the merger review process as it is in their interests to obtain an efficient regulatory outcome. In any event, as

recommended, the decision about whether to allow additional information (and the amount allowed) would remain one for the Tribunal, if requested by a party.

Recommendation 13

Expand the grounds on which the Tribunal can receive additional evidence to include information, documents or evidence that is responsive to material not previously disclosed by the ACCC to the relevant party.

3.9 Third party appeal rights

The BCA is concerned that providing for third party rights to appeal will undermine the expediency of the proposed merger control system by enabling a wide range of third parties to appeal a determination and delay the ability of notifying parties to put an acquisition into effect.

The use of "sufficient interest"[6] is very broad and creates a real risk that any acquisition will be subject to Tribunal re-hearings further blowing out the time to put into effect a transaction.

The assessment of a notified acquisition already enables third party participation and considers the impact on third parties, including consumers, to be accounted for in the ACCC's determination. To this extent, an ACCC determination already represents the weight of third party evidence and in relation to consumers, the relevant matters provisions enable an explicit assessment of the interests of consumers.

The government has not adequately articulated how allowing third party rights to appeal a determination will improve investment confidence or enable a simpler and faster merger control regime.

Recommendation 14

Remove third party appeal rights to provide business confidence noting that the ACCC's assessment already takes account of third party's views.

3.10 Transitional provisions

The BCA and its members are greatly concerned about the workability of the proposed transitional provisions, the impact on transaction planning for businesses, and the resulting effect on the Australian economy.

Notably, there are no grandfathering provisions for acquisitions notified to the Commission prior to 1 December 2025. This includes both transactions which have been cleared under the informal regime but not yet put into effect as well as those that have been notified (and may be well advanced in the ACCC process). As noted during the consultation, the vast majority of arrangements notified to the Commission are through the informal clearance process and there can be time between clearance and completion for a range of reasons, whether commercial reasons, or other regulatory considerations.

The draft legislation provides that any acquisition that completes after 1 January 2026 will be subject to the new merger clearance regime (including the prohibition on completing without ACCC merger clearance), even if the

[6] "Sufficient interest" is not defined in the legislation. However, the explanatory materials state that it is "intended to capture consumer associations and consumer interest groups that can demonstrate some particular interest in the subject matter in the Commission's determination to bring an application for review to the Tribunal": Explanatory Memorandum, Treasury Laws Amendment Bill 2024: Acquisitions, 6.16

acquisition was signed prior to 1 January 2026, and/or notified or cleared under the ACCC's informal merger review process prior to 1 January 2026.

This 'guillotine' approach to the start date will drive a range of unwelcome incentives that will create difficulties:

- First, large or complex transactions during the second half of 2025 will need to hold off on engagement with the ACCC until December. This is likely to lead to an influx of complex deals at the point in time when the ACCC is already trying to implement the new regime.
- Second, for some merger parties, the threat of having to re-notify and re-open an ACCC process may lead them to have an incentive to complete deals before the end of 2025, even if they are subject to ongoing ACCC consideration.
- Third, it creates additional work and duplication for the ACCC in having to restructure and address deals in the mandatory process, that have already been considered and cleared or are well-advanced through the informal clearance process.

It seems most sensible to grandfather section 50 for a period, post 1 January, to allow the ACCC to continue to resolve the ~12-18 deals that are typically subject to informal clearance at any time through that process. This will also reduce resource pressure on the ACCC, the perverse incentives set out above, and provides for a much smoother transition.

Recommendation 15

- Exclude acquisitions notified to the ACCC prior to 1 January 2026 from the operation of the new regime and grandfather the existing section 50 for a period of time, for these deals, to allow the ACCC to finish its process (including any challenges).
- For deals that have been cleared by the ACCC prior to 31 December 2025, the legislation could provide that the acquisition will not be subject to the new merger clearance regime (i.e., will not be considered to be an acquisition that is "required to be notified" under section 51ABG).
- Bring forward the voluntary notification period by a number of months to avoid delaying acquisitions until 2026.

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