GLOBAL ANTITRUST INSTITUTE COMMENT ON AUSTRALIA'S EXPOSURE DRAFT REGARDING AMENDMENTS TO THE REVIEW OF MERGERS AND ACQUISITIONS

August 11, 2024

The Global Antitrust Institute ("GAI") submits this comment to Australia's Department of the Treasury ("Treasury") regarding the Exposure Draft on reforming the process of reviewing mergers and acquisitions ("Exposure Draft").[1] Our comment is based on the GAI's extensive experience and expertise in competition law and economics.[2]

No matter how careful and well-executed the merger[3] review process, some errors are bound to occur. Errors can be false negatives (e.g., wrongly determining that a merger is competitively innocuous when in fact it is likely to substantially lessen competition) as well as false positives (e.g., wrongly determining that a merger is likely anticompetitive despite its being competitively benign). A well-designed regime of merger review incorporates procedural guardrails to try to limit errors in both directions.

Australia's current regime for merger review, in which the notification of transactions to the Australia Competition and Consumer Commission ("ACCC," or "the Commission") is on a voluntary basis, may be prone to false negatives. Some anticompetitive transactions may entirely escape the ACCC's notice and so gain approval by default, as it were. Or, if a transaction comes to the ACCC's attention only after it has been consummated, a finding by

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[1] Australia Dep't of the Treasury, *Exposure Draft—Treasury Laws Amendment Bill 2024: Acquisitions* (July 2024), https://treasury.gov.au/sites/default/files/2024-07/c2024-554547-ed.pdf.

[2] The GAI is a division of George Mason University's Antonin Scalia Law. In support of its mission, the GAI draws upon the independent expertise of the Law School faculty including Douglas H. Ginsburg, Professor of Law, Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice ("DOJ"); Abbott B. Lipsky, Jr., Adjunct Professor, Director of Competition Advocacy for the GAI, former Acting Director of the Bureau of Competition, Federal Trade Commission ("FTC"), and former Deputy Assistant Attorney General for Antitrust, DOJ; Dario Oliveira Neto, Director of GAI's Latin America Competition Advocacy Program and formerly Head of the Technical Advisory Unit to the Office of the President of the Brazilian Administrative Council for Economic Defense; Alexander Raskovich, Research Professor and the GAI's Director of Research, formerly research economist for the Antitrust Division of DOJ and Senior Economist for the U.S. President's Council of Economic Advisors; and John M. Yun, Associate Professor and former Acting Deputy Assistant Director, Bureau of Economics, FTC.

[3] For brevity, the term "merger" hereafter encompasses "acquisitions," "transactions."

the Commission of substantial lessening of competition may not have as effective a remedy at such a late stage, perhaps requiring costly and inefficient "unscrambling of the egg." Among the proposed amendments described in the Exposure Draft are ones requiring notification to the ACCC of transactions satisfying certain criteria. This shift to a mandatory notification regime holds the potential to lessen some false negatives, i.e., errors of omission.[4]

Other amendments in the Exposure Draft, however, pose increased risks of false positives, or errors of commission. There is a "loophole" in the proposed amendments that would allow the Commission to prolong the merger review process interminably, in a way not subject to judicial review. We discuss this issue in the remainder of this comment and propose a straightforward way to resolve it.[5]

The proposed regime for merger review by the ACCC has a three-step sequence: notification, Phase 1 review, and Phase 2 review. In Phase 1, the Commission has 25 business days from the merger's effective notification date within which to determine whether to proceed to Phase 2. The duration of the Phase 1 *determination period* is thus well defined: at most 25 business days. If, within this period, the Commission determines to undertake a Phase 2 review, then it must notify the parties of its reasons for doing so. The Commission's description of its competition concerns motivating Phase 2 review need not be very detailed.

The determination period for Phase 2 begins upon the Commission's notifying the parties of its Phase 2 review. Broadly speaking, there are two sub-phases to Phase 2 review. In the first sub-phase, the Commission determines preliminarily whether the transaction is likely to substantially lessen competition in some market. If the Commission makes that determination, then it notifies the parties of its competition concerns. This notification is "the Commission's preliminary assessment of whether the acquisition, if put into effect, would

[4] Of 54 jurisdictions worldwide, 46 have adopted a mandatory pre-merger notification system. *See* Organization for Economic Co-operation and Development (OECD), *Global Merger Control – OECD Competition Trends, Volume II* (2021), https://web-archive.oecd.org/2021-02-24/580592-oecd-competition-trends-2021-vol2.pdf.

[5] Accompanying the Exposure Draft is a set of Explanatory Materials. *See* Australia Dep't of the Treasury, *Exposure Draft Explanatory Materials—Treasury Laws Amendment Bill 2024: Acquisitions* (July 2024), https://treasury.gov.au/sites/default/files/2024-07/c2024-554547-exp-mem.pdf.

have the effect, or be likely to have the effect, of substantially lessening competition in any market."[6] In the second sub-phase of Phase 2, the parties may negotiate commitments with the Commission to allow their transaction to go through, or request further review to determine whether the transaction is in the public interest despite being likely anticompetitive.

In contrast with Phase 1, however, the *duration* of the Phase 2 determination period is ill defined. The relevant section of the Exposure Draft[7] reads:

> If a notification of an acquisition is subject to phase 2 review, the ***phase 2 determination period*** for the notification:
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> (a) starts immediately after the end of the phase 1 determination period for the notification; and
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> (b) subject to subsections (2) and (3) of this section and section 51ABZT (extensions of determination periods), ends 90 business days after it starts.
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> (2) If the Commission does not give the notice of competition concerns in relation to the notification of the application under subsection 51ABZE(1) before the end of the 25th business day after the start of the phase 2 determination period, the phase 2 determination period is extended by the number of days:
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> (a) occurring after that 25th business day; and
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> (b) on which the Commission has not given the notice of competition concerns.
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> (3) If, under paragraph 51ABZE(4)(b), the Commission extends the period for making submissions in relation to the notice of competition concerns, the phase 2 determination period is extended by the same number of days.

Pursuant to paragraph (2)(a) and (b) above, there no fixed limit within which the Commission must issue a notification of competition concerns. The reference to a limit of 25

[6] *Supra* note 1 at 38, ¶ (1)(a).

[7] *Id.* at 40 (emphasis in the original).

business days after Phase 2 review begins is only advisory. Elsewhere, the amendment asks that if a notification of competition concerns is not issued within the 25 business days, it be done "as soon as practicable thereafter."[8] There reference to a 90-business day limit to Phase 2 review is therefore a *floor*, not a *ceiling*. The Phase 2 determination period is extended, day by day, for every day beyond the 25 business days that the Commission fails to issue a notification of competition concerns. Thus, the Phase 2 determination period could be as short as 90 business days—so long as the Commission issues a notice of competition concerns within the suggested limit of 25 business days—or else can extend indefinitely.

In principle, the Commission may tarry beyond the 25-business day limit only to the extent that it would not have been "practicable" to issue a notification of competition concerns any sooner. But there is no mechanism in the proposed amendments to assess the limits of practicability in this regard, beyond the Commission's own judgment. In particular, although the Commission's *determinations* are subject to judicial review through the Australia Competition Tribunal,[9] the Tribunal has no jurisdiction over non-actions such as failing to issue a notification of competition concerns in a timely fashion.

The Explanatory Materials accompanying the Exposure Draft emphasize the importance of judicial review:

> The ability to seek Tribunal review represents an important safeguard for parties to an acquisition and interested third parties and promotes the integrity of the system. The Tribunal, with its independent economic, business and legal expertise, will improve the quality and consistency of Commission decisions and promote good decision-making by the Commission based on sound economic and legal principles.[10]

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[8] *Id*, at 38-9.

[9] The Commission can make two determinations: a *notification determination* (whether the parties have satisfied notification requirements) and an *acquisition determination* (whether the transaction is likely to substantially lessen competition in a market, or is in the public interest despite being anticompetitive). An acquisition determination of a likely substantial lessening of competition can be reached only after the Commission has issued a notification of competition concerns.

[10] *Supra* note 4 at 51, § 6.3.

Inability to seek Tribunal review for failure to issue timely notification of competition concerns is a significant lacuna in safeguards that puts the integrity of the system at risk.

The Commission need not act in any willful disregard of timely notification of competition concerns for there to be a chilling effect on acquisitions. The procedural uncertainty arising from the open-ended nature of the Phase 2 determination period could inhibit some acquisitions from being proposed that would otherwise have been innocuous to competition or promoted consumer interests. For acquisitions that have not been so inhibited, the procedural uncertainty would put the Commission in a favorable bargaining position vis-à-vis the parties, with the potential to extract commitments from them based purely upon the exigency of their situation.

We propose that the amendments be revised to set a firmer limit on the duration of the Phase 2 determination period. The suggested limit of 25 business days for the issuance of a notification of competition concerns may be too short a time for the Commission properly to complete its economic analysis of the likely competitive effects of a notified transaction. If so, perhaps the limit should be increased somewhat, perhaps to 30 or more business days. Beyond this we suggest a revision of the amendments to allow an extension of the Phase 2 determination period by any number of days *but only so long as the parties consent* to the extension. Automatic extensions based on the Commission's failure to issue a timely notification of competition concerns should not be permitted. Requiring that any extensions to the Phase 2 determination period be consensual would introduce a proper safeguard. The parties would have the incentive to agree to an extension if they perceived the additional review would improve their chances of avoiding an adverse notification of competition concerns. Otherwise, the procedural timeline should proceed apace, allowing the parties to avail themselves of prompter review by the Tribunal.