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Competition Taskforce
The Treasury
CompetitionTaskforce@treasury.gov.au

Dear Competition Taskforce,

We appreciate the opportunity to provide our views on the exposure draft and explanatory memorandum for the *Treasury Laws Amendment Bill 2024: Acquisitions* (the **Merger Reform Bill**).

Microsoft supports Treasury's goals of creating a faster, stronger, and simpler system for merger review. We strongly agree that an effective and efficient merger regime is a key pillar of maintaining a competitive and innovative economy. To this end, based on our global experience, Microsoft considers that:

1. clear and transparent notification thresholds are critical to a well-functioning merger regime, especially in a new mandatory and suspensory administrative system
2. maintaining a clear, well-understood legal standard in the merger test is vital in providing businesses with regulatory certainty and to avoid discouraging pro-competitive business activity
3. the right to seek independent merits review is an important procedural safeguard to preserving the rule of law and ensuring due process, and
4. the introduction of new third-party appeal rights is likely to significantly impede the efficiency and timeliness goals of the reformed merger clearance process.

1. Clear and transparent notification requirements

It is vitally important that notification requirements in a mandatory suspensory regime are clear and unambiguous. This is because, in contrast to an informal process, failure to notify carries significant regulatory risks and penalties for merger parties. Notification requirements and thresholds that require subjective judgments lead to uncertainty, unnecessary transaction costs, and ultimately discourage legitimate business and economic activity.

Even without information on the notification thresholds proposed, Microsoft is concerned by proposed s 51ABG to allow notification thresholds to be set in regulation and at the Minister's discretion by reference to a limitless range of possible metrics and considerations. Proposed s 51ABG(2) lists examples of metrics by which a transaction may need to be notified, which include not only established measures such as turnover and transaction value but also references to undefined classes of parties, assets, or businesses, and market concentration.

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These metrics are not used in the majority of mandatory merger notification filing regimes and risk setting Australia apart from international counterparts.

Similarly, Microsoft is concerned by the broad powers under proposed s 51ABH for Ministerial power to 'introduce additional targeted notification obligations. This additional change introduces more complexity and potential for disparate treatment under a regulation intended to apply across industries, which further compounds the uncertainty and lack of predictability in the proposed regime To the extent possible, notification requirements should be consistent with regimes of comparable overseas jurisdictions that have a mandatory and suspensory merger regime. In particular, thresholds that require determinations of law such as market share (rather than demonstrable facts like turnover) create considerable additional ambiguity, in particular in nascent or fast evolving spaces where the boundaries of relevant markets are unclear or shifting.

To achieve the Government's stated goals of clarity and efficiency, notification thresholds must be clear, unambiguous, and easy for businesses to apply as they are making commercial decisions about potential mergers and acquisitions. The initial decision about whether to notify a proposed acquisition to the ACCC should not require complex calculations, guess work, or gray areas judgment calls with respect to market definition, market share, business class, or competitive risk.

Expanding notification thresholds beyond clear-cut, objectively provable measures, such as assessments of turnover and assets in the local jurisdiction, will introduce unnecessary inefficiencies and risks stifling legitimate merger activity across Australia's economy.

Recommendation: It is critical to provide parties with clear and unambiguous thresholds in a mandatory regime and that such thresholds are not subject to continuous substantive changes. Microsoft recommends objectively demonstrable notification thresholds enshrined in legislation such as the target company's turnover or assets in Australia.

2. Maintaining clear, well-understood merger test

In addition to clarity of notification requirements, it is also important that the legal standards for finding a "substantial lessening of competition" (SLC) should be objective, clear and well-understood. While the existing interpretation of SLC invokes a well-understood legal standard that has been applied since 1977 and has not been found to be unsuitable or ineffective in numerous substantive inquiries in Australia's competition laws[1], the new framing in the exposure draft makes numerous changes without being clear as to what it proposes to add, if anything, to the existing, well-established legal standard.

For example, the new proposed definition in s 4G amends substantially lessening competition to include '*substantially lessening competition in the market by creating, strengthening or entrenching a substantial degree of power in the market*' and '*substantially lessening competition by creating, strengthening or entrenching a substantial degree of power in any market*'. This

[1] Justice M. O'Bryan, 'Should the Burden of Proof be Shifted', *Current Issues in Competition and Consumer Law*, 2021, p185.

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change is not necessary to the extent this 'strengthening or entrenching' is already captured under the existing definition of SLC. And to the extent this definition extends the existing definition of SLC to cover conduct that does not currently substantially lessen competition, it risks capturing a potentially overly-broad range of pro-competitive conduct such as product improvement and efficiencies. It is well accepted that mergers and acquisitions can enhance competition. The proposed merger test should not enable the Commission to block or impose conditions on mergers based on ambiguous or unpredictable standards. Rather, the test should follow established objective tests and processes, which require the Commission to identify and define the relevant market, demonstrate the existence and degree of market power, and show the causal link between the merger and the substantial lessening of competition. These factors are consistent with the economic principles and assess a transaction's propensity to cause competitive harm. For that reason, they are often central components of merger control law worldwide. In contrast, proposed s 51ABX(3) sets out a very broad list of 'Relevant matters' the ACCC may have regard to in assessing a proposed merger.

Finally, the draft laws propose to change the existing objective standard of prohibiting acquisitions that substantially lessening competition to a subjective standard of acquisitions where the ACCC ***reasonably believes*** an acquisition is likely to substantially lessen competition. The likely or intended impact of this amendment on the legal standard to be applied by the merger parties is, again, not clear.

The many proposed amendments to the legal test creates confusion and would also stifle business activity across the economy, including discouraging procompetitive deals that would otherwise result in significant public benefits including efficiencies, innovation, and economic growth.

Recommendation: A clear and well-understood legal test is essential for businesses to carry on business with confidence and regulatory certainty. To safeguard this, Microsoft recommends limiting changes to the long-standing and well-established 'substantial lessening of competition' test in the *Competition and Consumer Act*.

3. Ability to provide new evidence during Tribunal review is a key procedural safeguard

Microsoft is supportive of providing parties with the ability to admit new evidence at the Tribunal but remains concerned that the current drafting excessively restricts this key procedural safeguard.

As we have previously submitted, full merits review rights is essential for safeguarding procedural and substantive fairness. The proposed restrictions on additional evidence limits merger parties from fully testing evidence provided to the ACCC, including by third parties, and testing the credibility of third-party witnesses via further discovery and/or cross examination. A full, independent merits review that includes oral evidence ensures an accountable regulatory framework with appropriately robust checks on administrative decision-making.

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The ability to introduce new evidence would also better achieve the Government's goal of a faster merger review system. As we have previously noted, the limited merits review in Australia's current merger authorisation process leads to a significantly more burdensome upfront process where merger parties must provide all potentially relevant evidence upfront, before having any visibility on what is most likely to be relevant to the ACCC or Tribunal's analysis. Limiting review encourages parties to frontload evidence, resulting in delays and considerably greater information burden on both the merger parties and the ACCC.

Recommendation: Microsoft urges Government to consider further strengthening the important procedural safeguard provided to merger parties by the ability to introduce new evidence to the Tribunal on appeal.

4. Third-party appeal rights

Finally, Microsoft is concerned about the potential impact of broad third-party appeal rights under draft s 100C. We believe that this provision could significantly impede the efficiency and timeliness goals of the revised merger clearance process, as it would create opportunities for vexatious or strategic appeals by competitors or other parties who may oppose a transaction for reasons unrelated to competition. Such appeals could impose higher costs and delays on the Tribunals, who would have to expend additional resources to review these complaints, as well as on the merger parties, who would face greater uncertainty and risk.

Rather than a broad right to appeal, we submit that third parties should be encouraged to engage with the ACCC during the merger review process to submit their concerns. The ACCC is well placed to assess the relevant evidence and arguments from all stakeholders and to make an informed and balanced decision based on the public interest. This will help ensure that genuine and material issues are raised early in the process, avoid unnecessary burdens on the Tribunal, and that the merger clearance process remains efficient and effective.

Recommendation: Microsoft urges the Government to reconsider the proposal to introduce broad third-party appeal rights in merger proceedings.

We would welcome the opportunity to discuss our observations and comments in greater detail directly with the Taskforce at the appropriate time.

Sincerely,

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Liz Fitch
Head of Corporate Affairs
Microsoft Australia and New Zealand