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Competition Taskforce
The Treasury
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Dear Taskforce members

Merger Reform – Consultation on notification thresholds

The Australian Investment Council (the Council) welcomes the opportunity to provide this submission to Treasury in response to the release of the consultation paper on 'Reforming mergers and acquisitions – notification thresholds'. This submission follows, and should be read in conjunction with, the Council's earlier submission to the Exposure draft consultation, and our initial submission to the Merger reform consultation.

The Council is the peak body for private capital in Australia and has over 220 members, including the leading domestic and international private capital firms operating in Australia. Private capital spans private equity, venture capital, private credit, family offices, superannuation, and sovereign wealth funds. These are members of Australia's investment community that collectively invest in more than 850 businesses economy-wide, mostly small and medium-sized, are responsible for more than 600,000 full-time jobs and contribute three per cent to Australia's GDP (on a gross value-added basis).

The Council represents our members on policy issues that impact investment into Australia, including: maintaining a steady and reliable flow of domestic and foreign investment capital; harnessing and empowering innovation to support the national interest; building and retaining a world class talent pool; and addressing the challenges of climate change to realise the opportunities of a net zero world.

The Council recognises the overarching policy objective of Australia's merger control regime is to promote competition that enhances the welfare of Australians, consistent with the objectives of the Competition and Consumer Act 2010. We also recognise the Government's objective to foster a more dynamic and productive economy through competition.

The primary purpose of a merger is to drive efficiencies, combine assets and leverage the better resources, talent, and capital available across the merging entities. Mergers have proven to be a pathway to a greater competition in a market, particularly where it leads to smaller, challenger businesses building the scale to credibly compete against larger incumbents.

Merger and acquisition (M&A) activity can deliver outcomes such as:

- helping fast-growth companies access new markets, talent, products, and services to support their growth and expansion strategies;
- adding value to, and reshaping, companies which otherwise, may not remain independently viable;
- assisting companies to build scale in Australia to better compete in larger, global marketplaces;
- assisting companies in achieving strategies that support growth, innovation, and productivity in the Australian economy; and
- enabling entrepreneurs to realise the value in their business, thereby rewarding them for taking risk adding to economic activity.

These are desirable outcomes as they support competition, help businesses that play an important role in a community remain viable, commercialise innovation, and provide business owners with a pathway to be rewarded for their entrepreneurship.

Our response to this consultation is based on the perspectives and experience of private capital investors within our membership. Key focus areas for our members include:

- ensuring the regulatory framework governing merger activity facilitates commercially viable merger transactions and supports vigorous competition;
- recognising the unique merger needs and practices across the business spectrum ranging from early-stage to growth and buyout businesses;
- establishing a framework that is consistent with the requirements of Australia's growing investment environment and broader M&A activity both domestically and internationally; and
- ensuring that the regulatory framework for mergers *does not create stifling uncertainty, cost, and delay.*

Notification thresholds are critical settings for the proposed new regime – delineating which acquisitions require notification and cannot proceed without ACCC clearance. These thresholds must be appropriately calibrated, unambiguous, and certain in their application. Given the serious consequences for failing to notify where required, there is no room for any uncertainty or ambiguity in the design and form of the thresholds – otherwise these settings will 'over capture' by default and impede the efficiency of investing in Australia.

If cast too broadly, and/or without clear operation, they will result in the notification of large volume of acquisitions which pose no risk of competition concerns, potentially inundating the ACCC and creating unnecessary burden, cost, delay, and deal risk for parties. As set out in this submission, members have concerns over the breadth and ambiguity of the proposed notification thresholds.

We welcome advice that the Centre for Evaluation will conduct a review of the functioning of the system. We would recommend that: the review period be shortened to two years at the latest; the review assess the functioning of the system against the policy intent, as well as the impact on productivity; and the findings are published.

The Council would welcome further direct consultation with Treasury on the proposed merger notification thresholds. If you have any questions about specific points made in this submission, please do not hesitate to contact me or our policy team via email at policy@investmentcouncil.com.au.

Yours sincerely

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1. Introduction

This submission sets out a range of concerns held by our members on the form and impact of the proposed monetary and share notification thresholds (thresholds), including:

- a lack of certainty and clarity about the acquisitions caught by the thresholds, and likelihood of over-capture;
- uncertainty as to how the 'cumulative effect' is to be applied in practice; and
- the practical challenges and uncertainty associated with using market concentration thresholds.

Below, the Council has outlined the impact of these issues on private capital investment, which is largely deployed or made into small and medium-sized businesses (SMEs) including start-ups and growth companies – businesses which are important to improving Australia's productivity and, with the right support for growth, can be a credible source of competition.

As noted previously, certainty and speed are critical to investing, particularly when there is a competitive process to acquire a business. Other regulatory processes in Australia have led to considerable uncertainty, delay, and cost for investors, regardless of any (notional) statutory approval timeframes.

Relevantly, domestic and international investors do not need to deploy capital in Australia. To incentivise Australian capital to stay onshore, and to attract foreign capital into the Australian economy, the Council constructively suggests that this set of merger reforms – including the proposed notification thresholds - must strike a sensible balance between policy intent and growing productivity through investment.

2. Greater clarity and certainty required for thresholds

It is essential for all businesses that undertake M&A activity in connection with Australia (including foreign investors) for there to be a clear, unambiguous and objective threshold test (or tests) that facilitates absolute certainty with respect to whether parties must (by law) notify the relevant acquisition, including by using parameters which avoid unnecessarily capturing large volumes of transactions which pose no potential competition concerns. The thresholds must be simple, readily understood, and based on objectively quantifiable criteria.

The proposed thresholds - comprising four tests (or 'limbs'), each with their own subset of multiple tests, and overlapping with each other, plus further thresholds of 'control' and 'material connection' to Australia – do not achieve this. They are complex and do not provide certainty. They have seemingly been set to address concerns that a small number of smaller acquisitions raising potential competition issues do not fall through a 'gap'. Such concerns could be addressed through other mechanisms (e.g. specific settings for specific industries or parties) without unnecessarily complicating the operation of the thresholds for all other acquisitions in the Australian economy.

To this end, the Council supports the use of monetary thresholds – and not additional, alternative market concentration thresholds – because monetary thresholds have greater potential (subject to their form and scope) to provide the required certainty. This is subject to the specific settings adopted for such monetary thresholds, including clear, unambiguous boundaries with respect to 'turnover', 'transaction value' or other metrics used, so that these can be readily ascertained and calculated.

Monetary thresholds have the added benefit of being the model that is most consistent with the standard used by the majority of other OECD jurisdictions – reflecting the certainty that such thresholds can generally provide. Setting monetary thresholds will reduce the inconsistency global businesses are subject to, and frustration arising from the unique burdens imposed by the Australian regime.

Currently, Australian legal practitioners advising on competition aspects of transactions must request information – including share information - which is different (and often less readily available) to the information which is typically provided upfront when undertaking a multi-jurisdictional analysis that is based on monetary thresholds.

Responses to the questions in the consultation paper are set out below.

1. **What indicators should be used for the monetary thresholds? Are turnover and transaction value metrics appropriate for the Australian economy?**

   In principle, our members consider that turnover and transaction value are the most objective measures on which to set monetary thresholds.

   Nonetheless, it is important to highlight some issues with the proposed form of thresholds:

   - The effectiveness – and certainty - associated with using monetary thresholds relies on the definition and parameters of 'turnover' and 'combined turnover', and 'transaction value', being clear cut and able to be assessed.

   - There is currently a lack of clarity as to how these concepts apply across all types of corporate structures, funds, and other investments. The consultation paper lacks important detail as to how turnover will be assessed across such varying forms of structures and investments – in particular, in the context of PE and VC structures. Such structures often involve multiple funds each with multiple investments in portfolio companies or other businesses, and it is unclear from the consultation paper (which refers to 'acquirer group') how such structures would fall to be assessed in terms of turnover – i.e. whole of fund, or the portfolio company group. As to the Australian 'combined turnover' values proposed, these are likely to be met in many cases merely by the existing size of either the acquirer or target, i.e. *before* they are combined, meaning they are too low to be practicable.

- The monetary thresholds (as currently formulated) also, fundamentally, fail to consider the potential for the relevant acquisition to give rise to any competition concerns, and so operate as a 'blunt' screening device.

For many businesses, particularly those with turnover over $200 million, each and every acquisition they undertake will be caught, irrespective of whether they could give rise to competition issues. For this reason, members consider that increasing the values of these thresholds, to avoid over-capture and only capture the most economically significant transactions, is appropriate.

2. **What structure and numerical values should be set for the monetary thresholds to ensure the merger system strikes an appropriate risk-based approach between compliance costs and competition concerns?**

As highlighted above, the proposed multi-test structure of the proposed notification thresholds (as a whole), each with its own multi-factored components, is inherently complex and uncertain. For each acquisition, each buyer and seller will need to undertake an assessment of up to four different multi-limbed tests to understand if it is necessary to seek notification.

Even in terms of the monetary thresholds, parties would be required to navigate two tests ('Limb 1' and 'Limb 2') and the multiple components of each such test. This is not without burden or cost. To do so, they would need to collate and analyse financial turnover data (including historical data), for all parties to the relevant acquisition.

In terms of values, the numerical values proposed in the monetary thresholds appear to be set *below* a level which appropriately balances administrative burden (on both the ACCC and acquirers) against the risk of not capturing acquisitions which substantially lessen competition.

The stated focus of the legislation is “acquisitions of businesses or assets by medium to very large businesses”. However, the values are likely to capture a wider range of businesses. For example, assuming a target group's turnover is $40 million, notification would be required whenever the acquirer group has at least $160 million in revenue. The Council does not consider these to be indicative of a medium sized business relative to the size of the Australian economy. For the reasons stated below, increasing the combined turnover limb to circa $400 million and the individual turnover limb would be appropriate.

Proposed thresholds in limb (1) do not reflect commercial realities

Many of our members advise that most portfolio company revenue exceeds $200 million individually or is likely to when aggregated with the target, so test Limb 1(a) is likely to be satisfied almost all of the time. This means that Limb 1 is likely to be triggered, and notification required, for *all* exits via sale process.

For private capital investors, the implications of this test mean that the vast majority of buyout deals would be required to notify under the new regime, even where many of these would not have been required under the current regime.

Importantly, in relation to Limb 1(a) and Limb 2(b), $40 million is low as a turnover value; for example, one member advised that all but one portfolio company would have revenue exceeding $40 million and that transaction values are generally more than $200 million. The turnover values in Limb 2(b) are even lower (at $10 million). These are set at such a level that they would likely catch all acquisitions made by businesses meeting Limb 1(a) and Limb 2(a) (of which there are likely to be many), regardless of the size or competitive impact of the acquisition, or transaction value. It is likely that this would cause unnecessary burden on acquiring parties as well as the ACCC.

With respect to Limb 1(b) and Limb 2(b) referring to the turnover of each of at least two of the merger parties, it is unclear how this operates or applies to co-investment scenarios. If this does not look to the turnover of the target, but could be triggered only by co-investor turnover, this is likely to capture a large number of acquisitions as it effectively has no regard to the size of the target or transaction.

The consequence of the above is that a large number of acquisitions are likely to caught by the thresholds as currently formulated. To avoid over-capture, increasing the combined turnover limb (e.g. to $400 million) and the individual turnover limb would be appropriate.

Proposed thresholds in limb (2) are set too low and appear to be unnecessarily complex

With respect to the second test (Limb 2), the stated intent is to capture transactions by large businesses, with Treasury estimating some 900 businesses falling into the category of large business. The Council submits that the low transaction value for this test (of only $50 million) would capture a large number of transactions.

As to both structure and numerical values, the 'aggregation' of turnover for acquisitions over the preceding three years raises further, unnecessary complexity and is a feature that exists in no comparable notification thresholds. The consultation paper lacks requisite detail about how this would operate in practice and to which parts of the monetary threshold it applies; members expect this involves adding the cumulative 'past' turnover to the turnover of the target, although this would involve double counting if also attributed to the acquirer group's turnover. Further explanation and worked examples would have been appropriate to include in the consultation paper to demonstrate the proposed operation and impact of this uncommon feature, absent which the Council is unable to provide feedback. The proposals relating to the three-year aggregate turnover are discussed further below.

3. Are the proposed monetary thresholds set at a level that enables acquisitions by large businesses and/or businesses with substantial market power to be scrutinised?

The Limb 2(a) turnover threshold at $500 million captures, on Treasury's estimates, some 900 businesses. As explained above, it is the Council’s view that this is likely to lead to

significant over-capture of acquisitions, and undue burden on both parties and the ACCC. The Council suggests this be set at a higher level, for example, $750 million, again with reference to the large size of the Australian economy.

4. Are the proposed cumulative turnover thresholds appropriate to address competition risks associated with serial acquisitions?

As noted above, there is currently a real lack of clarity in terms of which limb the cumulative turnover thresholds apply to and how they apply in practice.

For example, it is unclear if the intention is that all prior acquisitions aggregated for the Australian turnover test in Limb 1(a) and Limb 2(a), or Limb 1(b) and Limb 2(b) are captured. Limb 1(a) and Limb 2(a) would implicitly already include prior acquisitions given previously acquired revenue would be already included in the acquirer's total turnover. There should be no requirement to aggregate turnover in addition to what is already in the acquirer's total turnover (including the turnover of those acquired businesses). As noted above, if this is meant to be added to the target's turnover, this is not clear.

Another option, although not mentioned in the consultation paper, would be to aggregate the global transaction values. In this respect, valuations can vary widely by sector and adding together multiple transaction values over a three-year period would be unlikely to not provide insight into the competitive impact of the transaction at hand, or the cumulative competitive impact with past transactions.

It is also unclear if it is only an accumulation of the Australian portion of the past transactions that applies and is to be aggregated. The current proposal is not clear on this element, or how this would apply in practice. More generally, the proposed threshold framework does not appear to consider the practical impact of the thresholds for international (foreign to foreign) transactions, noting that the current methodology and data used by Treasury to estimate the number of acquisitions that will be captured by the proposed thresholds omits reference to potential offshore foreign transactions which would be caught.

As currently drafted, the cumulative requirements do not require that the past acquisitions are in the same geographic markets as the acquisition at hand – only the same product or service. This is unduly broad, particularly if intended to capture 'creeping acquisitions' in the same market, including as to geographic dimension. This should be addressed in the revised form of thresholds, if the cumulative requirement concept is retained (despite the range of practical issues and complexity it generates).

5. What other sources of data are available to inform the value of the monetary and market concentration thresholds, including the expected number of mandatory notifications?

FIRB applications may provide some data points as to turnover and transaction value that could indicate the minimum number of expected notifications based on the current

parameters set. We note of course that FIRB would be only one source of data and would not offer data on transactions not involving foreign counterparties.

6. **Is market share or share of supply the appropriate metric to use for the market concentration threshold? Are there alternative indicators that Treasury should consider?**

   Members generally consider that a market concentration or share threshold is inherently fraught with uncertainty and ambiguity, and likely to lead to a very large number of acquisitions being notified out of caution. The Council suggests this approach is inconsistent with global best practice for mandatory, suspensory merger control regimes, and is not required.

   While parties under the current regime typically consider market share, in terms of assessing whether to approach the ACCC and whether potential competition concerns might arise – there is no 'bright' line for defining the relevant market. 'Market' is highly subjective, multiple markets may be possible and it is not uncommon for the ACCC to take a different view on market to that of the parties during the course of the ACCC's review.

   Additionally, there is frequently an absence of reliable data available to parties, and so calculation of 'shares' within any 'market' is also inherently uncertain. Relevantly, this occurs in what is currently a voluntary regime with an informal process. This is fundamentally different to a mandatory, suspensory regime where the consequences of failing to file is that the acquisition is void, and penalties will apply. The grey area that can exist in the current system is not appropriate for the proposed new regime.

   From the perspective of our members, the application of a market concentration test invites a significant amount of uncertainty into the process and the decision of whether an acquisition must be notified to the ACCC. It will mean that the industry must spend money and time on competition law advice and economists prior to each and every acquisition, regardless of whether there is or might be any competition law issue. In particular, it will necessitate all acquisitions, including those that do not meet the monetary levels (i.e. smaller value acquisitions), to engage additional legal and economic advisers to assist in both defining the relevant market and calculating market share. This imposes unnecessary administrative burden, complexity, cost, and delay on potentially small companies who can least afford such additional analysis. In each case, residual uncertainty as to the relevant 'market' or 'share' will – by default – tip towards approaching the ACCC for a waiver or making a full notification. This could inundate the ACCC.

   The Council submits that market concentration (irrespective of the numerical value) should not form part of the threshold for notification given the inherent subjectivity of estimating market concentration, and the risk of acquirers inadvertently breaching the legislation where there are legitimate and varying perspectives on the definition of the relevant 'market'.

   The above concerns apply equally to market share and 'share of supply'; however, the latter creates additional concerns as the concept is unknown in Australia and prone to even greater

ambiguity than market share. The phrase has no widely accepted or understood meaning. Such a concept is used only in the UK, in the context of a different regime, sitting at odds with regimes globally that adopt monetary thresholds.

Finally, members have noted concerns as to what would occur if the parties' analysis of the 'market' or 'shares' is viewed as incorrect by the ACCC, and the ACCC considers a notification should have been made. The consultation paper is silent on the mechanisms by which a dispute as to the 'correct' market definition could be raised, either by parties or the ACCC. It is also silent on any defence that parties could rely upon in terms of having exercised reasonable judgement and care in approaching their assessment of the relevant 'market' and calculation of 'share'.

Ultimately, in a new environment where there will be a material penalty for failure to file and the acquisition will be rendered void, any uncertainty around 'markets' and 'share' will expose the parties to the acquisition to legal risks in a way that monetary thresholds (however rudimentary as an indicator of competition) will not do because of the certainty the latter delivers.

7. Is the proposed two-tiered approach appropriate to target different levels of market concentration?

The Council refers to comments above and below with respect to the deficiencies associated with adopting a market concentration approach. This is compounded by Limb 1(b) and Limb 2(b) which set very low turnover thresholds as the additional component of each test, of only $20m and $10m, respectively. The vast majority of Australian businesses would meet these turnover tests, thereby capturing a large volume of acquisitions including those by small businesses.

8. What should be the numerical values for the market concentration threshold that appropriately captures mergers that have the potential to raise competition concerns and balances compliance costs?

As explained above, our members do not support market concentration thresholds being adopted. In terms of the form and numerical values proposed in the consultation draft, the Council notes that, as currently formulated:

- the market concentration thresholds do not require there to be any change in market share and can be met merely by the existing 'share' of one of the parties reaching or exceeding the 'combined' share; and
- the thresholds refer to a combined share in 'affected' horizontal markets or 'adjacent' markets.

First, this appears to adopt an EU concept of 'affected' market, however this concept is not used as a component of the EU's mandatory thresholds, rather as part of the notification process, including to identify and analyse competitive effects of acquisitions requiring notification. Second, it is unclear how a 'combined' share with respect to an 'adjacent'

market is intended to operate – it presumably is not intended to require aggregating shares across different markets into a 'combined' share, but greater clarity is needed on the practical operation of this component it is unclear how to apply the thresholds in circumstances where the 'target' is (or is an interest in land) or a patent, or other asset where 'turnover' is unclear or not applicable.

Given the above, any acquisition by a party with more than 25 per cent share or 50 per cent share in any market where the low turnover threshold is also met (which would be met for the vast majority of Australian businesses, as it is set at only $20 million or $10 million) would require notification, irrespective of whether the acquisition impacts the party's competitive position, irrespective of whether there is any horizontal overlap and irrespective of whether it could plausibly give rise to any vertical or conglomerate/ecosystem effects.

The numerical value of 25 per cent is too low and will capture a large number of businesses and acquisitions. Given this is intended to capture acquisitions by businesses with a significant market position, this should be set at a higher level – for example, 40 per cent.

If market concentration is retained as a concept in the thresholds, it requires an additional filter to only capture acquisitions where there is an increase in market share or increased vertical integration – it must involve a factor that reflects the extent a particular transaction increases the market share/power of the acquirer. This would, however, still require markets to be defined and analysed, which is costly and time-consuming process – something that should be avoided as part of an exercise to determine if a threshold is met.

9. Is the administrative approach for market concentration an alternative to the market concentration thresholds? If so, what design should the administrative form take?

The Council considers that market concentration thresholds applying to all acquisitions is not appropriate as a threshold due to it casting an ambiguous and uncertain net.

From a policy perspective, the Council understands the policy concern that a monetary threshold test alone may 'miss' small acquisitions by a dominant player, or acquisitions in smaller local or regional markets. However, the Council considers that targeted alternatives could be deployed which enable the ACCC to scrutinise acquisitions in areas of concern, without subjecting every party to every proposed acquisition to undertake a market concentration analysis.

For example, this might be identification of specific industries which require notification if certain (lower) thresholds are met, or identification of specific businesses with a strong market position for whom acquisitions over certain (lower) thresholds would be required.

The Minister can, via regulation, require acquisitions in particular markets or industries to be notified or set at alternative (and lower) thresholds, thereby providing a mechanism to address any perceived gap, and noting serial or creeping acquisitions are already dealt with via the ACCC's ability to take these into account in undertaking its competitive effects analysis. This would be a more targeted approach that removes the burden of undertaking

an inherently uncertain market concentration analysis to determine if a mandatory notification is or might be triggered.

10. What guidance would be helpful from the ACCC? Are there particular sources of data or methodologies that would assist the ACCC in its role as administrative steward of the new merger system and in providing more certainty to businesses when engaging with the system?

The Council considers it critical that the ACCC provide detailed guidance on the new system, including acquisitions which are caught, how the thresholds should be applied in practice and (if market concentration tests are retained in some form) how the ACCC approaches market definition for the purposes of the notification thresholds. This should include worked examples across a wide variety of acquisitions (and forms of transaction structure, including minority interests, joint ventures, and co-investment), various corporate and fund investment structures (including PE and VC). This guidance should provide clear and certain guardrails for parties to adopt and apply in practice.

The Council strongly recommends that such guidance should be first released in draft, for consultation and input, to ensure the guidance is fit for purpose.

Given the ACCC has given guidance on the approval times for matters that are notified to it, regular reporting by the ACCC on how it is tracking against those approval times and other relevant accountability reporting would help with investor confidence in the process.

Finally, and while this has not been flagged, if the ACCC is intending to use AI or other automated tools to manage or process applications, we would expect full disclosure of the use of those tools and confidence that the tools have been trained accurately.

11. How can the Government improve the certainty of the application of market concentration thresholds? Will the proposed approach address potential concerns regarding uncertainty?

As explained above, members do not support market concentration thresholds being adopted.

12. Will the availability of an ACCC notification waiver, if there is uncertainty as to whether the notification thresholds are met, appropriately address the need for business certainty about compliance with notification obligations? Should the availability of the notification waiver be broader than proposed?

In principle, the proposed waiver concept is a useful tool for parties in circumstances where there is residual uncertainty as to whether notification is required, and to otherwise enable the ACCC to expeditiously clear non-controversial transactions without requiring a full notification.

In practice, a waiver process still requires parties to (i) examine and assess whether any acquisition meets the notification thresholds (ii) engage with the ACCC for each and every acquisition where the thresholds 'might' be met (given the uncertainty and breadth of the thresholds), (iii) collate, analyse and provide information to the ACCC to obtain a waiver, and (iv) to build in such a process into transaction timelines, and to adjust such timelines if – despite using the process – a waiver is not provided and parties must revert to, and undertake, a full notification. This involves cost, work, and delay.

Additionally, the effectiveness of the waiver process will also depend very much on its 'form', details of which have not been provided. Issues with the waiver process will arise if it requires too much information or at least as much information to submit a notification waiver as it is to submit a notification itself. The proposed period of 30 days for the ACCC to determine if it will grant a waiver seems unduly long – the ACCC routinely and confidentially clears transactions under the current process in much shorter periods.

While a necessary component of the new regime (to provide some necessary residual flexibility for the ACCC to not require full notifications), this is not a panacea to deficiencies in the design and calibration of thresholds that create ambiguity and over-capture. It remains important to set clear, certain thresholds that can be easily applied in a manner that is objective, and avoid the subjectivity and complexity associated with market concentration thresholds.

In addition, the waiver process should also not be seen as a panacea to deficiencies in respect to the exposure draft legislation. Uncertainty in this respect may prompt heavy reliance on the waiver process and create unnecessary burden on parties and the ACCC. Further, as a discussed below, the publication of waivers on a register may deter investment, because publicising a confidential acquisition risks deal certainty and/or leads to interlopers.

13. Does the level of transparency of the ACCC notification waiver process appropriately meet the interests of all relevant stakeholders?

Members have expressed concern that the 'register' of notified acquisitions, including publication of waivers, removes the existing ability to seek and obtain ACCC clearance confidentially, a feature of the existing regime upon which many transaction parties routinely rely. There has been no explanation as to why this 'transparency' is required in circumstances where the confidentiality of the current system (used to expeditiously clear most non-controversial transactions) appears to operate successfully.

The publication of all waivers, and notified acquisitions, is also not consistent with practice in Australia (for example, FIRB does not publish acquisitions/transactions notified to it) or globally. In the UK, for example, the Competition and Markets Authority (CMA) operates a confidential 'briefing paper' process through which parties engage with the CMA to obtain clearance.

For at least some transactions, the publication of waivers and notified transactions will function as a sufficient deterrent that parties do not proceed. In competitive bid scenarios,

the breadth of the proposed thresholds may mean that some potential acquirers must notify (and have their proposed acquisition published on the register) while others do not – thereby favouring some bidders over others, and also publicising the bidder pool which may otherwise not be known by other bidders. It may also render the ability to conduct on-market takeovers and offers of listed companies, completely impossible, thereby significantly impacting and fundamentally changing acquisition activity in Australia.

While publication of notified acquisitions may be a course adopted to provide third parties with the ability to provide their views on the acquisition ahead of the ACCC's decision, the Council submits that there should be no publication of acquisitions for which waivers are sought and provided. This recognises that acquisitions which are amenable to waivers, and for which waivers are provided, are likely to be inherently non-controversial and pose little to no competition risk.

Finally, as per the Council's previous submission, depending on what is published on the proposed public register (details of which have not been released for consultation) and when it is published, such a register could potentially lead to the disclosure of significant confidential commercial information which would previously have been limited to disclosure between the ACCC and the applicant under the current system. An extensive public disclosure regime could lead to unintended consequences around internal corporate disclosures (for fear these may one day be made public) and lead to the unintended disclosure of confidential information.