BCA
Business Council of Australia

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Senate Economics Legislation Committee
By email: economics.sen@aph.gov.au

To whom it may concern,

Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to the Senate Economics Legislation Committee's (the Committee) inquiry into the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (the Bill) which provides for a new mandatory and suspensory merger review regime to commence from 1 January 2026 and voluntarily from 1 July 2025.

Mergers play a critical role in Australia's economy, including enabling businesses to achieve economies of scale that improve innovation and productivity – driving economic growth that benefits consumers and businesses.

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 Australia with appropriate guardrails to prevent the degradation of competition. A poorly functioning regime will lead to a loss of confidence to invest in Australia, increase regulatory and transactional complexity, and limit Australia's economic growth.

The BCA considers the improved legislation is a useful step in the right direction compared to the original proposal and presents an opportunity to achieve greater certainty, more simplicity and increased timeliness for merger proponents.

The BCA notes the following key improvements from consultation drafts:

1. **Excluding acquisitions where the acquirer does not obtain control where the definition of control broadly aligns with the Corporations Act.**

The Bill makes clear that acquisitions that do not result in the acquirer obtaining control as a consequence of the transaction are not required to be notified (see 51ABS), with 50AA of the *Corporations Act 2001* (Cth) being broadly used as the basis of the definition of control (even if the acquisition otherwise meets the monetary threshold).

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The BCA considers this a sensible and workable way of determining control for the purposes of the merger regime recognising that 50AA is a well-understood provision in accounting and law[1].

2. Ministerial determination of classes of acquisitions

The Bill sets out clear consultation requirements and considerations that the Minister must take into account when making a determination about a class of acquisitions for the purposes of 51AB0(b).

The BCA welcomes the inclusion of these requirements which will assist to ensure that businesses subject to these targeted notification requirements are adequately consulted and that the legislative instruments must be considered in a holistic way including the regulatory impact on the affected businesses.

3. Strengthening the legal standard for competition assessments

The Bill strengthens the legal standard that the Australian Competition and Consumer Commission (ACCC) must use when determining that a proposed acquisition be assessed under Phase 2 determination and when the Commission determines that an acquisition must not be put into effect.

The Bill now requires the ACCC to be satisfied, in all the circumstances that the acquisition would have the effect or be likely to have the effect of substantially lessening competition in any market (or 'could' in the case of moving to Phase 2 determination) and ensures that there is a stronger basis compared to the earlier Exposure Draft requiring only that the regulator have a particular state of mind (reasonable suspicion or belief).

4. Improved definition of substantially lessening competition

51ABZH makes clear that the focus of the competition assessment is around the question of whether a merger or acquisition would result in a substantial lessening of competition in a market whilst articulating issues that the ACCC may consider including the competitive effect of the acquisition within the context of the market structure (51ABZH(4)) and cumulative acquisitions in the same or substitutable goods or services market (51ABZH(6)).

The BCA welcomes the explanatory memorandum's articulation of the competition assessment to focus on "the competitive impact of acquisitions, based on economic and legal analysis of evidence, information and data"[2].

5. Reverting to a net public benefit test

The Bill broadly retains the existing public benefit test that is used for merger authorisations under the CCA in that the ACCC may determine that an acquisition be put into effect if the acquisition would or is likely to result in public benefits, and that these benefits outweigh any likely or expected detriment to the public (see 51ABZW(2)).

The BCA supports this approach recognising that where an acquisition provides a net benefit to the community it is appropriate that parties are able to put the acquisition into effect. This is particularly important noting 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.*

[1] The BCA notes the Government's intention to require notification for acquisitions of private and unlisted companies where a party's turnover is $200 million and the acquisition is for an interest of 20 per cent or more. This appears to sit out of alignment with the 51ABS which effectively carves out acquisitions that do not result in a party acquiring control.

[2] Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 Explanatory Memorandum, p53.

6. Notification waiver

The BCA supports the Bill's provision for the ability of the ACCC to waive notification requirements for otherwise notifiable transactions as set out in 51ABU and 51ABV of the Bill. The BCA notes that the detail of the notification waiver remains to be determined through legislative instruments.

Matters to be resolved in the development of legislative instruments include clarifying the interplay between the waiver process, pre-notification consultation, and Phase 1 determination, and the volume of information that it will be necessary for merger parties to provide to satisfy the ACCC that a waiver is available. To be effective as a waiver, the assessment period must be swifter than Phase 1 notification and require less information than notifiable acquisition.

7. Improvements to ACCC discretion to "stop the clock" and "restart the clock" during determinations

The BCA welcomes the Bill's inclusion of maximum determination periods for ACCC's decision-making under Phase 1-3 determinations. However, the true length of time an applicant must wait for ACCC determination includes any periods where the ACCC determines to "stop the clock" or "restart the clock" which is excluded from the maximum determination periods provided in the Bill.

The BCA recognises that the ACCC from time to time may need to "stop the clock" depending on how a merger party responds to an information request from the Commission (including section 155 notices) or that the clock may need to be "restarted" if an application is materially incomplete or misleading, or following a material change of fact. It is appropriate that this discretionary power is well-defined and subject to appropriate checks.

Accordingly, the BCA welcomes additional limits on the use of these measures including limits to "restarting the clock" for materially incomplete or misleading applications (51ABY) and material change of fact (51ABZB) to the Phase 1 determination phase and only providing the ACCC with discretion to stop the clock for section 155 notices after 10 business days and confined to a party to the proposed acquisition.

Reducing the period to obtain an internal review from 90 days to 7 days at the Commission or 14 days at the Tribunal will allow disputed matters to be resolved in a timelier manner.

8. Improved procedural fairness at the Tribunal

The BCA is pleased to note that the Bill includes provision for parties to provide additional information, documents or evidence subject to the discretion of the Tribunal (100S) provided the material did not exist at the time the ACCC made its determination or where the material is relevant to the ACCC's decision, but parties were not provided a reasonable opportunity to respond to. This is an important procedural safeguard for parties and supports decision-making based on all material information, documents and evidence.

The BCA also welcomes the inclusion of clear criteria for consideration of applications for leave to appeal a determination at the Tribunal (100C(4)).

It is important to note that for many transactions, time will be of the essence, and a portion of deals will be timed out in a commercial sense even if parties believe there are compelling grounds for appeal. Accordingly, the Tribunal's review function will not serve directly as a safeguard for all notifiable acquisitions, but only those with flexible transaction timeframes. Nonetheless, the opportunity to seek review of an ACCC determination will provide an important "check-and-balance" on the ACCC's decision-making and will over time engender confidence in the merger review system.

9. Transitional provisions

Noting that parties will no longer be able to seek merger authorisation after 30 June 2025, the BCA supports the Bill's provision for voluntary notification of acquisitions from 1 July 2025 (Schedule 1, section 188). Further, the BCA welcomes provision for providing parties who have obtained a merger authorisation or written advice from the ACCC that the ACCC does not intend to take action under the CCA under section 50, to be granted 12 months from the date of authorisation or written advice to put the transaction into effect (Schedule 1, section 189).

These additional provisions will allow the existing merger review arrangements to operate entirely up until the commencement of the new regime whilst providing merger parties an appropriate period to put into effect their transaction. Allowing voluntary notification will be particularly important for parties who may seek to rely on public benefit grounds to obtain merger clearance but otherwise would be precluded from doing so for a six-month period between merger authorisation applications ceasing and the commencement of the new merger review system.

Nonetheless, the BCA wishes to raise the following issues for the Committee's consideration concerning the Bill:

1. Notification thresholds

The Bill provides for notifiable acquisitions to be determined by legislative instrument rather than in the Bill itself. The BCA does not object to this approach but is concerned that the notification thresholds including those included in classes of acquisitions are based on objectively knowable criteria. For example, 51ABP (concerning notification thresholds) allows for specified thresholds to be set with reference to the level of concentration in a market (51ABP(3)(c)) whilst 51ABQ(2) includes a range of metrics including amongst others, "a market or a class of markets" and "an industry of a class of industries".

As noted by the International Competition Network in their Recommended Practices:

> *Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.*[3]

The BCA noted at the time of the notification threshold consultation that the Treasury consultation paper conceded that "using market share thresholds may create uncertainty in a mandatory merger control system" given different market definitions.[4] The information needed to establish whether such a threshold is met will also be costly for business to acquire and submit. Moreover, parties face substantial penalties if their assessment differs from the ACCC's as the BCA made clear in its response to consultation on the merger legislation exposure draft.

Following the Treasury's consultation on notification thresholds, the Treasurer elected not to proceed with notification thresholds based on the level of market concentration. This decision is welcomed.

[3] International Competition Network, Recommended Practices for Merger Notification and Review Procedures, 2002-2018, p. 6. https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/
[4] Treasury, Merger Notification Thresholds, 30 August, 2024. p. 21

Nonetheless, these issues should be addressed in the Bill itself. Accordingly, the BCA recommends that 51ABP(3)(c) is removed as it refers to "the level of concentration in a market" and that an additional limb be inserted into 51ABQ(3) requiring that any class or classes of acquisitions be determined with reference to objectively quantifiable or knowable criteria.

2. Changes to the ordinary course of business exemptions

The Bill also seeks to remove 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 (Section 51ABN(2)).

Concerning land, the BCA welcomes the Government's announcement to exempt residential property development and certain commercial property transactions from notifiable acquisitions although the extent of this carve-out remains to be determined. The BCA remains concerned about the practical challenges of notifying and obtaining clearance for acquisitions involving land that may be subject to competitive processes, including auctions (where transactions can proceed quickly including in a matter of days or minutes) and whether the effect of this change will mean certain businesses will be practically timed out awaiting clearance.

To the extent that there are competition law concerns with certain classes of land transactions, the BCA considers it important to limit notification requirements to those transactions rather than drawing in all land transactions.

To this end, the BCA recommends that Treasury undertake further work to better target notification requirements for acquisitions that concern "land, or an interest in land" which could be achieved as part of the development of legislative instruments provided for in the Bill.

3. Annual reporting on the performance of the merger review system

Improving transparency around the performance of the merger review system is an important step to build confidence in Australia's merger review arrangements and provide transparency and accountability around its administration.

The BCA welcomes the Bill's provision for annual reporting on various performance metrics including details of notification waivers made, notified acquisitions, notifiable acquisitions subject to Phase 2 determination, and acquisition determinations subject to conditions.

However, the Bill does not provide for additional reporting where the ACCC exercises its discretion to "stop the clock" or "restart the clock" (see item 7 above). The BCA has previously recommended that detailed data be captured and collated on an aggregate basis for the use of section 155 notices in merger and acquisition review, and "stop the clock" and "restart the clock" frequency and where relevant, duration.

While we note that Section 171 of the *Competition and Consumer Act* 2010 (Cth) provides for annual reporting of the issuance of requests under section 155, reporting is aggregated across all aspects of the ACCC's activities under the CCA and not particular to merger review. Nor does it capture the duration of "stopped clocks" or other discretionary decisions concerning "restarting" the clock.

BCA members are concerned about the frequent use of section 155 notices presently used to gather information and evidence as part of current merger and acquisition assessment activities by the ACCC. The BCA acknowledges that there will invariably be occasions where the ACCC may need to rely on section 155 notices following the introduction of the new merger review regime. However, the BCA would expect the reliance on these notices to diminish given the creation of new forms to support the new regime.

Given the discretion provided to the ACCC, and the impact on the overall timeliness of the merger review system, the BCA recommends additional merger-specific reporting requirements to improve transparency around the system's operation.

Finally, the BCA believes there is opportunity to provide this performance information on a more frequent basis and recommends it be provided quarterly.

Further matters

In addition to the primary legislation that is subject to consideration by the Committee, the merger review regime will be dependent on a range of legislative instruments and the operation and resourcing of the institutions responsible for administering the regime – the Australian Competition and Consumer Commission and the Australian Competition Tribunal.

There are many details still to be worked through in the short time before the regime is due to commence on a voluntary basis in July 2025. The further consultation, including ministerially determined thresholds, will be critical to ensuring the final detail achieves the right balance and we urge further detailed consultation with the business community to support this.

As noted above, the BCA welcomes the decision to remove market concentration from the notification thresholds noting it is inconsistent with international best practice. However, the BCA remains concerned that the announced thresholds are likely to lead to a significant increase in notifications from historical levels and therefore a significant increase in the regulatory burden for businesses undertaking transactions in and outside of Australia.

The Treasurer's commitment to reviewing notification thresholds after 12 months of operation ahead of the three-year review of the proposed regime is a very significant element of the reform package. It will provide a pathway to recalibrate the regime based on real world experience – of both businesses and the ACCC – and mitigate against any unintended consequences.

Conclusion

Mergers and acquisitions are an important and integral component of a market-based economy, and the Bill presents the opportunity to achieve greater certainty, more simplicity and increased timeliness for merger proponents.

These changes provide for significant national reforms that must ultimately be delivered by the regulator where the proof will be in the pudding of its implementation.

Yours sincerely

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