Law Council
OF AUSTRALIA

Business Law Section

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Senate Economics Legislation Committee
Senate Standing Committees on Economics
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Dear Senators

Senate Economics Legislation Committee consultation on Treasury Laws Amendment (Mergers and Acquisitions) Bill 2024

1. The Competition and Consumer Committee and the Corporations Law Committee of the Business Law Section of the Law Council of Australia (the **Committees**) welcome this opportunity to provide this submission to the Senate Economics Legislation Committee (the **Senate Committee**) about the Treasury Laws Amendment (Mergers and Acquisitions) Bill 2024 (the **Bill**).

2. The Committees have actively engaged with the Treasury Taskforce through earlier consultation processes about the exposure draft bill and, more recently, consultation on merger notification thresholds. We acknowledge the constructive nature of this engagement, which has been reflected (amongst other things) in material improvement in the Bill.

3. The Committees do not intend to re-canvass our earlier submissions in any detail. This submission is focused on briefly providing the Senate Committee with our general position in response to the changes as well as some specific observations regarding the requirements for notification of mergers under the Bill and the thresholds announced by the Treasurer.

General observations on merger reform

4. The Committees support the overall policy objective of improvements that deliver a faster, stronger and simpler merger clearance system.

5. From the outset, however, the Committees have noted that our current regime has supported flexible, robust and timely deal-making in Australia and has contributed to our economy remaining attractive to global capital. The reforms being proposed in the Bill reflect a very substantial legal and policy reorientation and rebalancing of the merger process, towards a more restrictive and potentially more administratively complex and costly regime.

6. Within this context, the workability and effectiveness of Australian merger control under the Bill will be critically influenced by:

    - the notification thresholds determined by the Minister in accordance with sections 51ABP and 51ABQ (which run the risk of compounding these concerns by "over-capturing" deals and overloading the new regime at an early stage); and

    - the culture, degree of transparency and general decision-making approach of the ACCC, which itself will be influenced by the resources available to the agency.

7. The Committees therefore welcome both the commitment to additional funding for the ACCC to support transition to the new regime during 2025 and 2026 and the statutory review of merger notification thresholds scheduled for 12 months after commencement of the mandatory regime. For the reasons set out below, the Committees continue to hold significant concerns that the thresholds announced by the Treasurer will 'over-capture' transactions required to be notified. There is a real and pressing risk that this will place a significant burden on the ACCC and introduce delay and uncertainty for merger parties as the new model is first being introduced.

8. The Committees are also concerned at the very limited implementation timeframe that is proposed. While the extension of the transition period to six months (i.e. allowing voluntary notifications from 1 July 2025) is welcome, it highlights the very significant challenge of "standing up" an entirely new process within eight months, in circumstances where it will then need to operate in parallel with the existing informal clearance regime. This will also happen in circumstances where the relevant regulations, relevant application forms and requirements and substantive ACCC guidance are unlikely to be consulted upon or settled until early 2025, just weeks before filings commence. The Committees would again urge that Treasury consider pushing back the commencement date for the regime by six months to allow the ACCC, Treasury, advisers and merger parties time to properly consult upon and settle the rest of the framework, to prepare systems and processes, and to familiarise themselves with the new process in order to enable a sensible transition without major disruption.

Notification thresholds

9. In our response to the recent merger notification threshold consultation undertaken by Treasury,[1] the Committees stressed the following:

    1) Any thresholds need to be clear, understandable and based on objective (i.e. quantifiable) criteria. Amongst other things, this would mean not adopting any market concentration thresholds. This is consistent with international best practice and the recommendations of relevant international bodies.[2]

[1] Law Council of Australia submission in response to Reforming mergers and acquisitions – notification thresholds, dated 23 September 2024.

[2] The European Court of Justice has very recently observed in *Illumina/Grail*:
…the thresholds set for determining whether or not a transaction must be notified are of cardinal importance. Undertakings that are potentially subject to notification and standstill obligations must be able easily to

2) To the extent that there is a policy focus on smaller transactions that may raise competition concerns (such as serial acquisitions or 'killer acquisitions' in particular sectors), these should be the subject to targeted thresholds through Ministerial determination and not by lowering the monetary thresholds applicable to all mergers.

10. While we understand that the thresholds do not form part of the Bill, the Committees take this opportunity to urge further consultation in relation to them. The Committees are concerned that the thresholds, as announced by Treasury along with the Bill, run the risk of over-capture. For example;

    - A monetary threshold of $10 million Australian turnover (not specific to target turnover) is likely to result in very large numbers of competitively irrelevant transactions being notified by large Australian companies (for example, investments in businesses/assets that have no connection with Australia such as joint investments by large Australian funds in overseas businesses).

    - The $50 million and $10 million thresholds in Limb 1(b)(i) and Limb 2(b) only require that at least two merger parties meet the relevant turnover requirement. These limbs do not require that the target be one of those parties. In circumstances where the target does meet these thresholds, the current test has the potential to over-capture deals where the target has limited or vague connection to Australia. If this test is amended to require that the target be one of these parties in Limb 1(b)(i) and Limb 2(b), the 'material connection to Australia' test could be done away with, since, by virtue of the target meeting the relevant turnover thresholds, it would be connected to Australia on an objective turnover measure.

11. Given that the proposed thresholds also maintain a global deal value threshold, which the Committees had suggested be removed, it will be important for more detailed consultation to occur around the concept of a "material connection to Australia"—to avoid the risk of the Australian regime creating undue burden for deals with little, if any, local connection. For example, Treasury has indicated that this connection might also extend to firms that have "plans to carry on a business in Australia". This kind of ambiguity (i.e. what amounts to a 'plan' to enter Australia?) weakens the regime and introduces unnecessary uncertainty. Notification obligations need to be based on objective, clear and quantifiable criteria. This is especially the case for global transactions, where multi-jurisdictional filings are being assessed.

12. We also reiterate our view that market share thresholds are inappropriate and out of step with global best practice. Despite the Treasurer's statement, the position in the Bill and Explanatory Memorandum continues to anticipate that such thresholds could be introduced,[3] through ministerial direction or otherwise. The Minister's power to declare certain classes of acquisitions should not extend to acquisitions

determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected.
The International Competition Network recommended practices for merger notification and review procedures (2018) states:
Given the increasing number of multi-jurisdictional transactions and the growing number of jurisdictions with merger notification requirements, the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable "bright-line" tests.
[3] Section 51ABP(3) and paragraph 2.34 of the Explanatory Memorandum.

based on market share thresholds. Such a declaration would undermine the certainty and clarity achieved by the monetary thresholds and deviate from international best practice.

13. The Committees now make a number of specific comments about the application of the Bill to particular types of transactions.

Surprise Hostile Takeovers

14. While the provisions allowing for confidential review of proposed surprise hostile takeovers are welcome, some of the drafting of the relevant provisions is unduly restrictive and does not reflect the reality of public markets transactions.

15. The Committees make the following specific comments on the approach taken in the Bill:

1) *The provisions only allow for confidential review of takeover bids which are for all of the shares in the target and which are either unconditional, or subject only to a prescribed occurrence condition. We believe this should extent to hostile surprise conditional takeovers.*

16. This is obviously only a small subset of hostile takeover bids. Presumably the intention here is that, if the takeover bid is subject to conditions, the bidder can wait until after the bid is made public and then make its notification and that the bidder in those circumstances will not be disadvantaged by the fact that the Commission is precluded from deciding that notification for 15 business days after it is made (and may take longer to make a decision). However, there will be conditional takeover bids that raise no competition issues but which now have to be notified under the new regime, where the bidder will be disadvantaged by the fact that they will not be able to obtain competition clearance ahead of making the bid. For example, where the proposed takeover bid is subject to a minimum acceptance condition, the bidder will not want the bid to be subject to an ACCC condition while the Commission is completing its processes, as target shareholders will not in practice accept the bid while that ACCC condition remains outstanding, meaning that the bidder will not be able to get the minimum acceptance condition satisfied until later than may otherwise have been the case.

17. We query whether there is a policy basis for excluding hostile surprise conditional takeovers (which are the majority of surprise takeovers) from the confidential clearance regime.

2) *Under section 51 ABZZL(2), a request by a proposed bidder for confidential review of its notification by the Commission must state that, if the Commission does not decide that the notification is subject to phase 2 review and makes a determination under section 51ABZE(1)(a) that the acquisition may be put into effect, then the bidder will give a bidder's statement to the target within 1 business day after the day the Commission gives notice of that determination to the bidder. We submit that the word "will" in this provision needs to be changed to "intends to".*

18. This is so for a number of reasons:

    - While a proposed bidder may have an intention at the time of making the notification that it will make the bid within 1 business day of getting the Commission's approval, whether it does or not will depend on market conditions at the time, which will not be known for at least 15 business days (as the Commission cannot make a determination until after the 15 business day period has elapsed). If, for example, in the intervening period, the target's share price has traded well above the price at the time of the notification, and potentially above the proposed bid price, then the bidder cannot be bound to go ahead and make the bid.

    - A bidder cannot be bound to make the bid if the determination under section 51ABZE(1)(a) that the acquisition may be put into effect is subject to conditions that are unacceptable to the bidder.

    - For all other transactions (i.e. transactions other than takeover bids), a proposed acquirer can give a notification to the Commission under section 51ABX(1)(d)(ii) even though the proposed contract, arrangement or understanding has not been entered into, if the parties *intend to enter* into it, without the parties being compelled by the Act to enter into the transaction if the Commission approves it. The position should not be different for hostile takeover bids.

3) *The 17 business day period for a confidential review is too short given that the phase 1 determination period for a notification is 30 business days after the effective notification date.*

4) *Under section 51ABZZL(5), during the 15 business day period after the notification and request for confidential review is made, the Commission can determine that section 51ABZZL does not apply to the notification if the Commission is satisfied that the bidder intends to obtain the target board's support for the bid, or that it is unlikely that the bidder will give the bidder's statement within 1 business day after approval by the Commission.*

19. If the Commission determines that section 51ABZZL does not apply, the section is taken never to have applied in relation to the notification. If the Commission makes a determination under section 51ABZZL(5), this may have materially adverse consequences for the party that has made the notification on the assumption that it is the subject of a confidential review. The Commission would at that point be required to enter the notification on the public acquisitions register and it would become public that the party had originally proposed to make a hostile takeover bid for the target. This will be the case even though the party may be still deliberating whether to make the bid because of market conditions and movements in the target's share price since the time of the notification.

20. As well as the adverse impact on the party making the notification, it is also likely to lead to a false market in the target's securities for a period until the notifying party's intentions become clear.

21. We would therefore recommend that section 51ABZZL(5) be deleted in its entirety, or that, at a minimum:

    - the Commission be precluded from making a determination under that subsection until the notifying party has given notice by the ACCC that it intends to do so, and has time to withdraw the notification, so that it will not go up on the register (section 51ABZZL(4)), and

    - the subsection should not be triggered merely because the notifying party intends to get board support for the bid in the future. Every bidder will be intending to get board support at some stage during a bid (after the announcement of the bid) if it is able to do so. Section 51ABZZL(5)(d) should only apply if the bidder has obtained the agreement of the target, or intends to obtain that agreement, during the 15 business day period.

22. In the scenario where the Commission does give approval for a hostile takeover bid, the bid is made, but a third party then makes an application to the Tribunal for review of the determination, there is an inconsistency between the provisions of the Corporations Act which prohibit the bidder from withdrawing the bid, and section 45AY of the CCA which state that the bidder contravenes the section if they put an acquisition into effect at a time when the acquisition is stayed. Under the Corporations Act, the bidder will be required to leave the offers open for acceptance, while under the CCA the bidder commits an offence and any acquisitions as a result of acceptances are void. Under the Corporations Act, it is not possible for the bidder to retrospectively include a condition that the Tribunal approve the acquisition of the target.

Approval of bids prior to final agreement or the completion of a competitive sale process

23. The effect of the new section 51ABX(1)(d) is that a proposed bidder under a conditional takeover bid, or under a scheme, cannot give a notification to commence the Commission's review process until the takeover bid has been publicly proposed or made, or the scheme of arrangement has been publicly proposed by the target.

24. There may be situations where a bidder and the target agree that the bidder should get started on its ACCC approval process, even though a bid has not yet been made or a scheme has not yet been publicly proposed so as to reduce the conditionality of the bid or scheme as soon as possible if the bid or scheme is subsequently made.

25. We would therefore suggest that section 51ABX(4) be amended to include the situation where the target has consented to the notification, even if no bid has been publicly proposed or made, and that section 51ABX(1)(d)(iv) be amended to include the situation where the target has consented to the notification being made, even though the proposed scheme has not yet been publicly proposed.

26. This issue also arises in relation to competitive sale processes for non-listed targets. Under the current regime, it is possible for bidders to seek clearance from the ACCC for an acquisition during the sale process to limit conditionality and shorten the time required between any successful bid being determined and completion of the transaction. It is not clear that this kind of pre-emptory clearance, which is valuable to merger parties, would still be available.

Exemptions

27. The Committees also note that there are three specific exemptions from the notification requirement included in the original exposure draft bill that are not included in the Bill:

    - acquisitions by a person in their capacity as an administrator, receiver and manager or liquidator (within meaning of section 9 of the Corporations Act);[4]

    - acquisitions that take place pursuant solely to a testamentary disposition, intestacy or right of survivorship under a joint tenancy; and

    - temporary holding of shares by financial institutions and authorised insurance companies.[5]

28. It is not clear from the Bill or the Explanatory Memorandum the reason for these important exemptions being apparently removed or whether the intention is that other processes (such as the general waiver power of the ACCC) are intended to be used instead.

29. The Committees would welcome further consultation or clarification on this issue.

30. The Committees also urge the Senate Committee to consider the appropriateness of conferring upon the Commission the power to unilaterally remove the protection currently afforded to merger parties through the goodwill exception to cartel laws. The Bill provides that the Commission may determine that these existing protections do not apply to restrictions in business sale contracts for notifiable acquisitions if it is satisfied that the restrictions are not solely to protect the goodwill of a business for the purchaser. The Committees believe that this is a matter that should be left to the Courts to determine, as will be the case for those merger parties that are not required to obtain ACCC approval for their transactions under the new regime.

Implications of ministerial determination on control for private transactions below $200 million

31. The Government Response indicates that an acquisition of a private company where one merger party has Australian turnover of at least $200 million and results in the acquirer's share exceeding 20% voting power may be required to be notified in accordance with a ministerial direction (Ministerial Direction Requirement).

32. However, the control test under the Corporations Act (referred to in section 51ABS of the Bill) is the capacity to determine the outcome of decisions regarding the target's financial and operating policies. The Committees wish to note their concern that the requirement to notify all acquisitions over 20% would undermine this concept of control in the Bill. This would have the practical effect of meaning that a very large number of transactions (that were above 20%) would be required

[4] The Committee had submitted that this exemption should be extended to include acquisitions of legal or equitable interests in shares or assets that result solely from a person granting or creating a security interest.
[5] Again, the Committee had previously submitted that this exemption should be extended both in duration and coverage to specifically include private credit funds, non-bank underwriters and entities whose ordinary course of business included moneylending activities.

to be notified, even though they did not satisfy the standard of 'control' referred to in section 51ABS.

Other matters

33. Finally, the Committees acknowledge several welcome and important amendments made following the Taskforce's consultation process. These include:

    - the more targeted introduction of changes to the "substantial lessening of competition test" (combined with guidance in the Explanatory Memorandum) and expressly limiting its application to merger clearance;
    - improvements to timeframes—although we note that there remain a large number of additional elements that risk introducing delays (including a new and unexpected 'blackout' period over the period 23 December to 10 January each year, which appears excessive);
    - an extension of the transition period to allow voluntary filing from 1 July 2025;
    - greater flexibility for the ACCC to avoid congestion through use of a general ability to waive notification obligations; and
    - material improvement to the limited merits review process by providing the Tribunal with greater power to accept or request additional expert and other evidence and information.

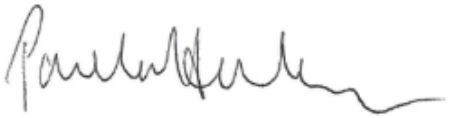
34. Overall, the changes introduced in the Bill are substantial and complex and the implementation period is short.

35. Given this challenge, a successful launch of the regime hinges on ensuring that notification thresholds and requirements are appropriately targeted and that the ACCC is both transparent and flexible in its approach to implementation.

36. The Committees look forward to continuing to work constructively with Treasury and the ACCC to help ensure that our merger regime remains workable through this period, and would be pleased to discuss any aspect of this submission.

37. Please contact the chair of the Competition and Consumer Committee, Peta Stevenson [redacted] if you would like to do so.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section