Law Council
OF AUSTRALIA

Business Law Section

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Competition Taskforce
Treasury
Langton Cres
Parkes ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

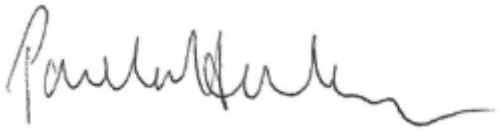
Dear Treasury

Reforming mergers and acquisitions—notification thresholds

This submission concerning merger notification thresholds is made by the Competition and Consumer Committee and Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committees**).

The Committees would be pleased to discuss any aspect of this submission. Please contact the Deputy Chair of the Competition and Consumer Committee, Simon Muys [redacted] if you would like to do so.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • [redacted]
PO Box 5350, Braddon ACT 2612, DX 5719 Canberra • Level 1, MODE3, 24 Lonsdale St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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Business Law Section

Reforming mergers and acquisitions—notification thresholds

The Treasury

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Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639
Email Jessica.Morrow@lawcouncil.au
PO Box 5350, Braddon ACT 2612, DX 5719 Canberra
Level 1, MODE3, 24 Lonsdale St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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Executive Summary

1. The Competition and Consumer Committee and Corporations Committee of the Business Law Section of the Law Council of Australia (**Committees**) welcomes this opportunity to provide feedback on the proposed notification thresholds included in the consultation paper (**Consultation Paper**) published on 30 August 2024 (**Proposed Thresholds**).[1]

2. Consistent with international best practice, the Committees submit that the objectives of merger notification thresholds should be for thresholds to be:[2]
    - clear and understandable; and
    - based on objectively quantifiable criteria.

3. At the same time, the Committees recognise that the Taskforce is focused on ensuring that the ACCC is able to identify and monitor smaller transactions that may fall under financial thresholds, but which nonetheless raise competition concerns. However, the Committees are concerned that this concern with "killer acquisitions" and other theories of harm associated with competition concerns in small markets (or involving low-value transactions) has led to the proposal of financial and concentration thresholds that are unnecessarily complex, overlapping, and uncertain, and which are out-of-step with international practice.

4. The approach proposed in the Consultation Paper would result in merger parties being required to assess deals based on a multifactorial approach with four potential tests comprising eight potential limbs in addition to thresholds of 'control' and 'material connection' to Australia.

5. For example, the proposed market concentration thresholds would require businesses and advisers to make complex judgments about relevant markets (an assessment in respect of which reasonable minds can and do differ) and then rely on potentially incomplete or inaccurate market share estimates to assess whether notification is required. This process must be repeated not just in relation to the markets in which the merger parties actually compete, but in all 'adjacent' markets and all 'substantial parts' of any of those markets. This occurs in circumstances where an incorrect assessment leaves the business open to the possibility of significant pecuniary penalties and the complicated practical consequences of a void transaction.

6. In addition to complexity, the thresholds as proposed risk substantially over-capturing transactions and lead to many more applications (including waiver applications) than the 300 to 500 currently anticipated. This risk is particularly acute given the practical reality that acquirers will elect to apply an overly cautious lens and decide to notify transactions in order to avoid potential penalties.

7. The Committees consider that the policy objectives above can be achieved through a combination of a single and well-calibrated monetary threshold together with use of

[1] Treasury, *Merger Notification Thresholds,* 30 August 2024.
[2] ICN Recommended Practices for Merger Notification and Review Procedures, pages 5-6.

mechanisms already incorporated into the draft legislation.

8. The specific modified monetary thresholds proposed are set out in Section 2.

The Committees make the following recommendations:

(a) The monetary thresholds proposed in the Consultation Paper should be amended in the matter set out below in Section 2. Essentially these changes involve:

(i) a modest increase in the monetary thresholds proposed in the Consultation Paper to avoid capturing a larger set of transaction than intended; and

(ii) deleting the 'global transaction value' trigger in paragraph (b) of each of Limb 1 and Limb 2, which creates complexities, and is unnecessary, given that any concerns with nascent or 'killer' acquisitions are better addressed through the means discussed in Section 2.

(b) The proposed market concentration thresholds should be removed. These create substantial and unnecessary uncertainty, are unnecessary (given the low monetary threshold and the other features of the regime that enable the ACCC or Minister to target specific markets or transactions) and are inconsistent with best international practice.

(c) If market concentration thresholds are to be considered (which the Committees do not support), they should not involve a 'share of supply' concept. This concept has proven profoundly difficult to apply in the United Kingdom and is wholly unsuited to a mandatory framework.

(d) Small transactions that fall below the monetary threshold, but which might otherwise raise competition concerns, would be addressed by a combination of the following:

(i) The second limb of the proposed financial thresholds would pick up targets with Australian turnover of $20 million or more, which would encompass many smaller or potentially 'serial' transactions. Prior deals (of any value) would also be considered and aggregated by the ACCC as part of the application of the substantial lessening of competition (SLC) test.

(ii) The Minister through regulation can require transactions in particular markets or industries to be notified or subject to alternative (and lower) thresholds or to other dimensions that are more suited to the specific market in question, as the ACCC has done in the past when analysing these markets. As noted

above, competition concerns raised in smaller markets have tended to occur in a relatively small number of industries and so use of this mechanism alone should largely address the issue.

(iii) To the extent that a transaction is not notified to the ACCC, it does not benefit from the anti-overlap provisions and the merger parties therefore remain subject to potential prosecution under section 45 (including the risk of private enforcement action). ACCC guidance can therefore reinforce and clarify the circumstances in which particular types of merger may give rise to legal risk for parties even where a deal falls below financial thresholds or outside a specific Ministerial direction. For example, the ACCC might provide guidance about how merger parties should approach local area or geographic analysis for the purpose of assessing competition effects and risks.

(iv) The issue can be revisited as part of the review of the merger regime scheduled for three years following enactment to test whether the ACCC is satisfied that it is seeing those transactions in smaller markets that it considers are warranted.

(e) As noted in (a), the Committees consider that the low Australian turnover level ($20 million), together with the fact that turnover associated with past acquisitions will be reflected in the Acquirer Group should offer sufficient scope to capture serial acquisitions. This should mean that no further 'look back' element is required as part of the thresholds. If a specific legislative mechanism is included, it needs to address the risk of double counting (i.e. given that the turnover associated with past deals will be reflected in current Acquirer group turnover) and clarity is needed around the point in time at which the turnover of past targets is calculated. Given the complexity of the issue, the Committees submit it is better left for later review (to identify if it remains an issue given the low turnover threshold and other factors above) or it can be addressed through the Ministerial direction regarding thresholds.

(f) While the Committees support the concept of a broad waiver power, we strongly believe that the waiver process is not a solution to overly complex or inclusive thresholds. Moreover, where a transaction is waived by the ACCC, it should benefit from the anti-overlap provisions and not be exposed to potential prosecution.

(g) **The concept of 'merger parties' should be defined or replaced with more specific language identifying which parties' turnover is to be considered (namely, the acquirer group, the target and its subsidiaries).**

Submission

1. Dealing with smaller or lower value transactions

Much of the complexity in the Proposed Thresholds appears to result from trying to ensure that small (or low-value) but sensitive transactions are captured.

9. If hard cases make bad law, trying to capture small transactions that raise competition concerns makes for unwieldy merger thresholds.

10. In recent years, antitrust regulators globally have faced a challenge in seeking to ensure that they are notified of, and have an opportunity to review, small transactions which may give rise to competition concerns. Examples of the theories of harm where this issue has been raised are acknowledged by the Taskforce in the Consultation Paper and would include:

    - so-called "killer acquisitions" by firms with substantial market power which have the effect of foreclosing the emergence of new or nascent competitors;[3]
    - the aggregation of market power through serial acquisitions or that involve a pattern or strategy of growth through acquisition;[4]
    - acquisitions in geographically small or localised markets;[5] and
    - acquisitions involving recent entrants or highly innovative players.[6]

11. Global approaches for dealing with small transactions that raise these issues remains unsettled. There is certainly no 'best practice' position. To the contrary, approaches which have been adopted in other jurisdictions have tended to raise problems and attract criticism. For example:

    - Very recently, in *Illumina / Grail*,[7] the European Court of Justice (**ECJ**) rejected the approach that had been adopted by the European Commission over recent years which sought to rely upon a referral power under Article 22 of the EU Merger Regulation. In essence, the ECJ reinforced the importance of merger thresholds in providing certainty to merger parties and that transactions that did not trigger a requirement to notify in a Member State did not avoid this lack of jurisdiction by being referred to the European Commission under Article 22. The ECJ found:[8]

      > *…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*

[3] See Department of Justice, 2023 US Merger Guidelines, at page 20.
[4] See Department of Justice, 2023 US Merger Guidelines, at page 23.
[5] A recent Australian example is the ACCC opposition on 26 May 2023 to the acquisition of SUPA IGA in Karabar by Woolworths (https://www.accc.gov.au/media-release/accc-opposes-woolworths-acquisition-of-supa-iga-karabar).
[6] European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021.
[7] European Court of Justice, Illumina v European Commission (Joined Cases C-611/22 P and C-625/22 P), 3 September 2024 https://curia.europa.eu/juris/document/document.jsf?text=&docid=289718&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=276108).
[8] Illumina /Grail at [208].

able easily to 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.

- In the United Kingdom, there has been considerable criticism of the "share of supply" test as flexibly and expansively applied by the Competition Markets Authority (**CMA**). More detail on this test and the relevant criticism is discussed below and in **Annexure A** to this submission.

- Following *Illumina / Grail*, several Member States appear to be revisiting the potential for expanded "call in" powers.[9] Again, this has been criticised as a retrograde step that would create uncertainty in relation to the notification thresholds and one that would undermine the 'one stop shop' which had existed through the European Commission process under Article 22. The Committees support the policy approach proposed by the Taskforce of not including a wide call-in power as part of the regime.

- The Taskforce rightly identified that, in some cases, jurisdictions have sector-specific regimes that target smaller acquisitions in addition to, or outside, the general merger thresholds.[10]

12. None of these solutions is entirely satisfactory. The Committees therefore encourage the Taskforce to develop an approach which is better suited to the Australian experience.

13. The policy objectives here are clear enough, being to provide the following:

    - a merger notification threshold that offers a simple, quantifiable and clear framework for the vast majority of mergers which do not involve markets with these more complex characteristics; and

    - appropriate flexibility within the regime to ensure that any specific competition concerns held by the ACCC in relation to smaller markets can be targeted.

14. The Committees are concerned that, at present, the introduction of general market concentration thresholds in the Consultation Paper, in addition to financial thresholds, appears aimed primarily at ensuring that competition concerns arising from deals in smaller markets are captured.[11] This seeks to achieve the second objective but at the clear expense of the first. The consequence is a highly complex set of overlapping thresholds which are likely to 'over capture' transactions and lead to uncertainty, delay and frustration for the ACCC and stakeholders.

15. We discuss our concerns with the market concentration thresholds in more detail at Section 3 below.

[9] Several Member States, including Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden have recently expanded their national merger control rules to provide for "call-in" powers, even where traditional revenue-based thresholds are not met.
[10] The Consultation Paper refers to the site registration process for grocery stores in the United Kingdom and sectoral regimes in Germany and Norway (at page 25). In Europe, the Digital Markets Act also includes obligations on relevant firms to notify acquisitions even where these are not otherwise notifiable under EU merger laws.
[11] Consultation Paper, p 20

16. We are confident that a more streamlined approach which simplifies the Proposed Thresholds but retains flexibility for the ACCC and Minister to target deals in key markets, can achieve both of the desired policy objectives above.

In Australia, market concentration tests have been of limited value to the ACCC in assessing small or localised market effects.

17. Any attempt to use a market concentration threshold to seek to capture small transactions is inconsistent with the practical ACCC experience in these markets.

18. The ACCC has closely examined mergers and acquisitions in smaller markets for many years, in industries including retailing (supermarkets and liquor stores, including leases and greenfield site acquisitions), fuel and convenience, medical technology (imaging, fertility treatment), private hospitals (including leases), and funeral services.

19. The ACCC seldom assesses market shares in these smaller markets and as far as the Committees are aware has never assessed share of supply. Rather, the ACCC generally considers the products and services offered by the merging parties, the extent of overlap, and the location and identity of other operators and/or sites within a defined geographic area and considers matters such as travel times and distances as an important determinant of competitive constraints.[12] The ACCC has opposed several proposed acquisitions in these smaller markets, applying this approach.[13]

A recommended way forward

20. For all these reasons, the Committees consider that use of a generally applicable merger threshold (such as a merger concentration threshold) to target small markets with specific competition concerns will lead to unnecessary complexity and uncertainty—and is unlikely to prove particularly helpful or workable for the ACCC.

21. Market shares have not proven especially useful to the ACCC to date in these markets. Instead, features of the merger framework as already proposed in the draft legislation can, taken together, adequately address the issue.

22. Specifically:

    (a) The monetary thresholds proposed in the Consultation Paper should be amended in the manner set out below in Section 2. Essentially these changes involve a modest increase in the monetary thresholds proposed in the Consultation Paper to avoid capturing a larger set of transaction than intended, and deleting the 'global transaction value' trigger in paragraph (b) of each of Limb 1 and Limb 2, which

[12] See, for example, Statement of Issues 8 December 2022 Woolworths Limited - proposed acquisition of the Karabar SUPA IGA supermarket; Statement of Issues 14 December 2023 Endeavour Group Limited – proposed acquisition of the Prince Consort Hotel; Statement of Issues 6 June 2024 Icon –proposed acquisitions in the radiation oncology sector; Public Competition Assessment 14 July 2011 InvoCare Limited - proposed acquisition of Bledisloe Group Holdings Pty Ltd; Public Competition Assessment 25 October 2013 Woolworths Limited - proposed acquisition of supermarket site at Glenmore Ridge Village Centre; Statement of Issues 11 September 2015 Coles Supermarkets – proposed acquisition of nine Supabarn supermarkets; ACCC review of Coles Supermarkets' proposed acquisition of five Supabarn supermarkets – 10 March 2016; Public Competition Assessment 6 November 2018 BP Australia Pty Ltd - proposed acquisition of Woolworths Limited's network of retail service station sites (re local overlaps); Icon Group proposed acquisition of a lease at St Andrews Ipswich Private Hospital 15 August 2024; LALH Group Pty Ltd (75% owned by Woolworths Limited) - proposed acquisition of a lease for a new BWS outlet in Ayr, Queensland 26 July 2012; Public Competition Assessment 7 May 2024 Viva Energy – proposed acquisition of OTR Group.

[13] See, for example, Woolworths proposed acquisition of the Karabar SUPA IGA supermarket (2009 and 2023); Woolworths Limited - proposed acquisition of supermarket site at Glenmore Ridge Village Centre

creates complexities, and is unnecessary, for the reasons given in Section 2.

(b) The Minister through regulation can require transactions in particular markets or industries to be notified or set at alternative (and lower) thresholds—or subject to other dimensions that are more suited to the specific market in question, as the ACCC has done in the past when analysing these markets. As noted above, competition concerns raised in smaller markets have tended to occur in a relatively small number of industries and so use of this mechanism alone should largely address the issue.

(c) To the extent that a transaction is not notified to the ACCC, it does not benefit from the anti-overlap provisions and the merger parties therefore remain subject to potential prosecution under section 45 (including the risk of private enforcement action). ACCC guidance can therefore reinforce and clarify the circumstances in which particular types of merger may give rise to legal risk for parties even where it falls below financial thresholds, or outside a specific Ministerial direction—for example, the ACCC might provide updated guidance about how merger parties should approach local area or geographic analysis for the purpose of assessing such competition effects and risks.

(d) The issue can be revisited as part of the review of the merger regime scheduled for three years following enactment to test whether the ACCC is satisfied that it is seeing those transactions in smaller markets that it considers are warranted.

23. The Committees submit that this combination of features strikes the right balance by ensuring that the generally applicable monetary thresholds are simplified, clear and capture economically significant deals while at the same time:

- allowing flexibility to ensure the ACCC continues to monitor smaller deals in sensitive markets or which otherwise give rise to potential competition concerns; and

- creating incentives for merger parties (and their advisers) to continue to voluntarily notify deals that fall below the threshold or other requirements if they are identified as raising potential competition risks.

2. Monetary thresholds

Overview

24. The monetary thresholds proposed in the Consultation Paper are low compared to other comparable economies and have the potential to catch a very large number of transactions. The Committee has therefore proposed an increase in the turnover thresholds across Limbs 1 and 2.

25. The Committee also submits that the 'global transaction triggers' in paragraph (b) of each of Limbs 1 and 2 is unnecessary and should be deleted.

26. We understand that Limb 1 is intended to capture 'economically significant transactions'. We would argue that, unless at least two of the merger parties have the necessary $40 million in turnover, the transaction is clearly not economically significant from an Australian perspective, so that the additional 'global transaction value' trigger in Limb 1(b) is unnecessary and unwarranted.
27. In Limb 2, the 'global transaction value' trigger is unnecessary and creates unwarranted complexity, including because:

- If the intention of Limb 2 was to capture 'nascent' or 'killer' acquisitions, then this is more appropriately achieved through targeted thresholds (in sectors where these raise a particular concern) together with the anti-overlap and other measures discussed above in Section 1.

- To the extent that Limb 2 is also aimed at ensuring smaller transactions in the form of 'serial' acquisitions are captured, this will in most cases be achieved by the low monetary threshold of $20 million turnover. This is also addressed by the turnover associated with prior transactions being reflected in the total turnover of the Acquirer group and by the ACCC being able to have regard to all acquisitions over the last three years (whether or not notified) in the course of undertaking its SLC analysis. To the extent that more is needed, this can be addressed both through the Ministerial direction and the future review of the regime.

28. A benefit of taking this approach is that it substantially reduces complexity, avoids the difficulty and uncertainty associated with trying to define the 'material connection to Australia' concept. Such a concept should only be regarded as satisfied where the target meets objective and quantifiable standards in relation to the conduct of significant business activities in Australia (not just where it has a registration here or makes ad-hoc supplies to a limited number of customers or generates negligible revenue in Australia). Otherwise, the thresholds, and particularly Limb 2, will have the unintended consequence of capturing transactions which are not truly connected to Australia[14]. It is difficult to articulate a clear and practical test, as it will not always be clear whether the target's assets, employees etc are to be regarded as being located in or outside of Australia (Australian turnover is easier to measure, as it is captured already in GST and other tax legislation).

29. For the reasons developed below, the Committees therefore strongly recommend that the monetary and market concentration thresholds be amended and the market concentration thresholds be removed entirely, so that notification is required when:

    (a) the merger parties (i.e. both the Acquirer group and the target and subsidiaries) have a combined Australian turnover of at least $300 million and the target and at least one other merger party each have an Australian turnover of at least $60 million; OR

    (b) the acquirer group has Australian turnover of at least $500 million and the target and subsidiaries together with at least one other merger party have an Australian turnover of at least $20 million.

30. The Committees submit that these amended monetary thresholds are preferable to those proposed in the Consultation Paper for the following reasons:

    - The monetary thresholds have been increased slightly to avoid 'over-capturing' transactions under Limb 1 and Limb 2.

    - It does not appear that the additional global transaction value trigger is relevant to Limb 1, which we understand to be a threshold really aimed at capturing transactions that have a real economic impact in Australia.

[14] For example, where an Australian company with more than $500m of Australian revenue acquires a US business with less than $10 million of Australian turnover, but which happens to have some immaterial customers here, or merely has some representation here.

- Likewise, the additional 'global transaction value' trigger is not necessary or warranted in Limb 2, given that its use in that limb seems targeted at 'nascent' or 'killer' acquisitions where the target has less than $20 million in turnover. As noted in Section 1, these transactions can be more efficiently captured under the Ministerial determinations, which can be targeted at particular markets or industries where this concern arises due to historical conduct or market concentration concerns. This approach also avoids the concern, apparent in the Proposed Thresholds, of trying to clearly and objectively define transactions (which do not involve material revenue) but otherwise have a 'material connection to Australia'.

Suggested amendments to the proposed monetary thresholds

31. The Committees' suggested amendments to the monetary threshold are set out below.

An acquisition will be notifiable if at least one of the monetary ~~or market concentration~~ thresholds limbs are met ~~:~~			
~~**Monetary thresholds**~~	**Limb 1** a. Combined Australian turnover of merger parties (including acquirer group) is at least ~~$200~~ $300 million AND b. ~~Either~~ The Australian turnover is at least ~~$40~~ $60 million for each of the target and at least one other ~~two~~ of the merger parties ~~OR the global transaction value is at least $[200] million~~	**OR**	**Limb 2** a. Acquirer group Australian turnover is at least $500 million AND b. ~~Either (i)~~ the Australian turnover is at least $20~~10~~ million for each of the target and at least one other ~~two~~ of the merger parties. ~~OR (ii) the global transaction value is at least $10050 million~~

Advantages of a single and streamlined monetary thresholds.

32. The Committee's proposed amendments have the following advantages:

    (a) At these low monetary thresholds, no additional market concentration threshold is needed or justified. This has the benefit of being more certain to apply compared with market concentration thresholds (as discussed further below at Section 3).

    (b) Notification is triggered for economically significant deals, although the relatively low transaction value for Limb 2 ($20m) is likely to pick up most serial acquisition concerns, together with the other features discussed above.

    (c) There is more clarity and certainty as to when the thresholds are triggered compared to the proposed multifactorial approach which, in practice, creates four potential tests and eight potential limbs in addition to merger parties being required to navigate thresholds of 'control' and 'material connection' to Australia.

    (d) Transactions below the monetary thresholds but which raise potential competition concerns can be captured both by Ministerial determination as well as ACCC guidance in relation to the risks for non-notified transactions that have the effect of substantially lessening competition (see commentary above at Section 1)

    (e) The approach is aligned with the monetary thresholds applied by the European Commission and in countries such as the United States, Germany and Canada, achieving greater certainty and efficiency for companies doing deals in Australia.

Sufficiently extensive scope

33. The Committee's proposed thresholds are consistent with the practical goals described in the Consultation Paper since the thresholds:

    - involve the spectrum of medium businesses and very large businesses, including taking into account the revenue of the acquirer, not just that of the target;[15] and

    - will have the potential to apply to deals at a national, state, regional or local level, including serial acquisitions that seek to gradually concentrate market power.

Alignment with overseas jurisdictions

34. The Committees consider consistency with merger control thresholds in other jurisdictions would enhance the workability and efficiency of the Australian regime. For example, the EU, Germany, Canada and the US do not have market concentration thresholds. In particular:

    (a) The European Commission's monetary threshold for the application of merger control includes traditional turnover-based thresholds and does not include a market-share based threshold.

    (b) Germany's monetary threshold for the application of merger control includes a traditional turnover-based threshold. It also does not include a market-share based threshold.

[15] ATO defines medium businesses as those with group turnover of $10 million to $250 million. This responds to Treasury's comments on p16 of the Consultation Paper about the breadth of Limb 1.

(c) Germany's competition regulator, the Federal Cartel Office, is also permitted to declare certain sectors at risk and require companies to notify transactions where:

- the company has a turnover of more than EUR 500 million worldwide;
- the company has a market concentration of at least 15 per cent in the respective sector; and
- there are objectively viable indications that future concentrations could considerably impair effective competition in Germany.

35. The ability for the FCO to declare certain sectors at risk is also similar to the ability proposed under the draft legislation for the Minister to define alternative or targeted notification requirements for particular industries or in particular circumstances.

Transactions concerning only property should be exempt from the regime.

36. Notwithstanding that the Committee considers the above proposed thresholds more commercially workable, without an exemption for property transactions they have the potential to require notification of significant numbers of property transactions which raise no competition issues.

37. In particular, the Consultation Paper states that a turnover value may be attributed to property acquisitions "*based on the attribution of turnover generated by the acquired assets, such as the lease income*". This raises the spectre that, once a corporate group has made a threshold level of acquisitions in any 3-year period, every further asset acquisition including every BAU acquisition of land, lease or a lease renewal (or potentially even lease variations etc)—may need to be notified to the ACCC. The Consultation Paper states the government is considering establishing a notification waiver process. It would be absurd if companies need to go through this process every time for ordinary BAU acquisitions such as lease renewals once they have made a threshold level of acquisitions in a 3-year period. The Committee considers that the status of land transactions has the potentially to materially undermine the workability and credibility of the regime, both in Australia and globally.

38. Similar to other jurisdictions, the Committee considers that an exemption should apply to property transactions. The US Hart-Scott-Rodino (***HSR***) Act and Rules which set out the thresholds for mandatory merger filings in the US exempts certain types of acquisitions from merger reporting requirements even if they would otherwise meet the filing threshold requirements. For example, the following are exempt:

- acquisitions of goods and realty in the ordinary course of business;
- acquisitions of several categories of real property, such as unproductive real property, office and residential property, and hotels.

39. The reasoning for this in FTC guidance is that the Federal Premerger Notification Program is *'designed to facilitate antitrust review. It, therefore, does not require notification for transactions that have been determined to be unlikely to violate the antitrust laws.'*

40. Conversely, the Exposure Draft proposed by Treasury in July expressly removes acquisitions of an interest in land or any kind of property from the *'ordinary course of*

business' exception to acquisitions of assets in s4(4) of the CCA so the '*ordinary course of business*' exception will not apply to land acquisitions under the CCA.[16]

41. If the Government considers that land transactions in certain sectors warrant ACCC review, these could be identified through the targeted notification requirements for vulnerable industries set by the Minister. At minimum, there should be a *de minimis* exemption to avoid capturing BAU land transactions, including renewal or variation of leases.

3. Market concentration thresholds

Market concentration thresholds create uncertainty and are out of step with global practice.

42. As noted above in Section 2, the Committees consider that no market concentration threshold is required since most mergers giving rise to concerns would be caught by the proposed amended financial thresholds. To the extent that smaller or unique transactions warrant review, this can be addressed through the targeted approach recommended in Section 1 (and it is unlikely that generally applied market concentration thresholds would usually be suited to such markets, in any event).

43. The Committees consider that the 'market concentration' thresholds proposed in the Consultation Paper lack a precise criterion that can be easily followed by merger parties.

44. The uncertainty created by the thresholds is exacerbated by them applying not only in relation to any market in which the merger parties actually compete, but in all markets that are *'adjacent by product, geographic or functional level*' to any such markets, and in respect of all *'substantial parts'* of such markets. The term 'adjacent' has no defined or established legal meaning in this context, and the question of how much of any of these markets constitutes a 'substantial part' is entirely unclear - leaving merger parties in an invidious position of having to attempt to divine what is intended by the thresholds.

45. This lack of clarity and certainty is more likely to result in substantial levels of noncompliance or overreporting due to the unworkability of regime. This in turn undermines the legitimacy of the competition regulation process.

46. The approach is also inconsistent with global best practice. The ICN Guidance recommends that *'notification thresholds should be clear and understandable'*.[17] It 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.*

47. The ICN also recommends that *'mandatory notification thresholds should be based on objectively quantifiable criteria'*, which specifically excludes market share criteria:[18] Specifically:

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[16] See proposed s 51ABN of the Treasury Laws Amendment Bill 2024 exposure draft.

[17] ICN, 'ICN recommended practices for merger notification and review procedures' (2018) p 5.

[18] ICN, 'ICN recommended practices for merger notification and review procedures' (2018) p 6.

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.

48. Because of this, most international jurisdictions have moved or are moving away from market concentration thresholds.

49. With respect, the limited examples cited within the Consultation Paper (Spain, Portugal and Israel) do not provide strong support for the introduction of the Proposed Thresholds, including because:

    (a) In each case, the references given are to self-evaluations by Spain, Portugal and Israel and not to any independent evaluations by the OECD.[19]

    (b) Spain itself has recognised that *'the market share threshold presents as a potential drawback an increase in uncertainty for the notifying parties*' though it nonetheless believed *'appropriate communication channels with the competition authority may effectively mitigate that risk'*.[20]

    (c) The examples in the Spanish and Portuguese submissions of mergers that would have been caught if a market concentration threshold were in place at the time of the relevant merger are also not convincing. The examples cited include the *Apple/Shazam* and *OLX/CustoJusto* mergers.[21] However, at least one company involved in each of these mergers had revenues of over $1 billion at the relevant time and would have been caught by most monetary thresholds, and certainly at the lower monetary threshold as proposed by this Committee.

    (d) Spain has *significantly higher* monetary thresholds of aggregated turnover in Spain of the companies is greater than EURO240m (AUD396m) and each of at least two parties have annual turnover of greater than EUR60m (AUD99m).[22] This is compared to the proposed Australian monetary thresholds of AUD200 million and AUD40 million.

    (e) Spain has a specific exception that the market concentration threshold applies to combined shares of more than 30 per cent (as opposed to the proposed 20%) and *does not apply* to shares less than 50% where the turnover of the target in Spain is *less than EURO10 million*.[23] That is, it specifically grants an exception for target revenue that is *de minimis*. The proposed monetary thresholds here achieve the contrary—Limb 2 requires only notifications of mergers where the turnover of the target is greater than $10 million—but with the concentration threshold seeks to 'reach into' de minimis transactions where the target value is less than $10 million.

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19 OECD, 'Start-ups, killer acquisitions and merger control – Note by Spain, 2020'; OECD, 'Start-ups, killer acquisitions and merger control – Note by Portugal', 2020; OECD, 'Competition Law and Policy in Israel 2011', 2011.

20 OECD, 'Start-ups, killer acquisitions and merger control – Note by Spain, 2020', p 3.

21 OECD, 'Start-ups, killer acquisitions and merger control – Note by Spain, 2020', p 3; OECD, 'Start-ups, killer acquisitions and merger control – Note by Portugal', 2020; p 4.

22 Ley 15/2007, de 3 de julio, de Defensa de la Competencia ("LDC"), available at: https://www.boe.es/buscar/pdf/2007/BOE-A-2007-12946-consolidado.pdf.

23 Ibid.

(f) The Portuguese market concentration thresholds are also higher and more targeted than those proposed by Treasury, only tripping deals where:

(i) market share of 50% is created, acquired or increased in a national market within the Portuguese territory, or in a substantial part of it; or

(ii) market share of 30 - 50% is created, acquired or increased in a national market within the Portuguese territory, or in a substantial part of it and the individual turnover of at least two undertakings was more than €5 million in the preceding financial period.

(g) Israel observed that the trade-off for *'eliminating the market share screen would require lowering the turnover threshold'*, and this underpins why the Committees have generally accepted the Taskforce's low turnover thresholds.[24]

(h) Finally, none of the jurisdictions cited in the Consultation Paper (nor any other jurisdictions that the Committees are aware of) requires merger parties to notify based on unclear and undefined concepts such as shares of 'adjacent' markets or shares of any 'substantial part' of any market.

50. The introduction of market concentration thresholds in Australia would therefore take place against the flow of international practice. It is rightly acknowledged by the ICN that market share thresholds lack clarity and create uncertainty. This concern is particularly relevant for smaller, globally exposed economies such as Australia (where we often form only one of several jurisdictions in global transactions).

51. The Committees submit that this concern is not addressed merely because the ACCC has previously framed Merger Guidelines by reference to a market share threshold. The operation of guidance in relation to a voluntary notification regime is fundamentally different to a mandatory notification threshold. Even then, the guideline set out in the ACCC's Merger Guidelines does not operate by reference to ambiguous concepts such as shares of 'adjacent' markets or shares of any 'substantial part' of any market.

52. Calculating market concentration shares can also be complex and onerous in mergers involving private equity firms, which typically invest widely across various industries and globally.

If there are to be market concentration thresholds, it should not be based on share of supply.

53. The 'share of supply' test canvassed by the Consultation Paper is highly problematic.

54. In contrast to market share, 'share of supply' is not a term of art in economics and has no widely accepted or understood meaning to economists. Experience with the concept in the UK has demonstrated it to be highly uncertain and open to flexible interpretation by the regulator. It is not an appropriate measure for a mandatory regime.

55. A more detailed analysis of the share of supply test, including as applied in the UK, is set out in **Annexure A**.

[24] OECD, 'Competition Law and Policy in Israel 2011', 2011.p 37.

Recommendations in relation to the proposed market concentration thresholds

1. **Market concentration thresholds should not be adopted. These are out of step with international practice and will introduce significant and unnecessary uncertainty and complexity to the Australian regime. They are also unnecessary if appropriate financial thresholds are in place, together with mechanisms providing for targeted review of transactions that fall below those thresholds. The thresholds as proposed also include concepts such as 'adjacent markets' or 'substantial part' of markets, which are unique globally and further undermine its workability.**

2. **If market concentration thresholds are to be considered (which the Committees strongly submit should not occur), they should not involve a 'share of supply' concept. This concept has proven profoundly difficult to apply in the United Kingdom and is wholly unsuited to a mandatory framework.**

4. Pre-notification waiver

56. The Committees have previously noted their support for a waiver power to be granted to the ACCC to facilitate the flexible and workable operation of the merger framework.

57. However, a broad waiver power does not provide an alternative to unduly complex or overly broad merger thresholds. The merger process should not rely upon or incentivise waiver applications (in order to provide a practical means for merger parties to overcome or address uncertainty or complexity in the way in which the notification thresholds operate). Waiver applications still consume the time and resources of merger parties and the ACCC and reliance on waivers introduces unnecessary uncertainty and delay into the clearance process. The waiver process involves a 30-day assessment and an administrative decision, with a requirement for reasons to be published.

58. These provisions need to be efficient and workable with clear requirements as to process, cost, and timing. A number of matters remain unclear including the interplay between the waiver process, pre-notification consultation, and fast track clearance. The likely result of this uncertainty is that merger parties will proceed to full notification from the outset rather than risk navigating these uncertainties.

59. The notification waiver is unlikely to be helpful in reducing complexity for merger parties without addressing higher turnover thresholds, particularly in the case of multijurisdictional transactions.

60. Moreover, there is no sound reason for preventing merger parties that obtain a waiver from gaining the benefit of the same anti-overlap protection that apply to other merger decisions of the ACCC. If merger parties have taken steps to formally seek a waiver from the ACCC, which is a discretionary remedy, they should gain the benefit of protection from later Part IV prosecution.

61. The absence of anti-overlap protection is therefore likely to fundamentally undermine the attractiveness and workability of the waiver process, especially given the uncertainty and complexity of the thresholds themselves. Instead, parties are more likely to look to the pre-notification exemption process or any fast-track review—which provides proper and fulsome protection. To that end, the Committees remained

concerned about the currently lack of detail in relation to pre-notification consultation, requirements and availability.

5. Other comments

Look back period.

62. The Consultation Paper notes that, in order to address serial acquisitions, all acquisitions within the previous three years within the same product or service market by the acquirer/acquirer group will be aggregated for the purposes of assessing whether the monetary thresholds are satisfied.

63. This 'look back' period creates additional complexity for monetary thresholds which would appear to require an assessment and aggregation of target turnover in previous transactions. In particular:

- It is unclear what point in time that assessment of target turnover would occur in applying this 'look back' approach for those thresholds. That is, it is unclear whether turnover of the previous target at the date of the prior acquisition of that target is considered, or whether turnover of the previous target at the date of the most recent acquisition is considered. If the assessment is to occur on the date of the most recent acquisition, this could give rise to material practical challenges because turnover from assets or businesses acquired in prior transactions may not be readily separable from other turnover (e.g. because those assets or that business have been integrated into the acquirer's business).

- Further, the Consultation Paper does not include an approach for avoiding the 'double counting' of this revenue in both the revenue of the acquirer group and the revenue of each target acquired in the past 3 years. The issue of 'double counting' would arise regardless of whether the turnover of the assets previously acquired are considered at the time of their acquisition or at the time of the most recent acquisition, because acquirer group turnover is always to be assessed at the time of the most recent transaction (and so will always include any turnover from the previous target assets, as at the date of the most recent filing).

64. The Committee's view is that an additional 'cumulative turnover threshold' assessment is unnecessary given:

- the relatively low Australian turnover threshold proposed for the target under Limb 2 ($20 million);

- any turnover from earlier deals will be reflected in the current turnover of the Acquirer group; and

- the ACCC is expressly empowered to consider the impact of acquisitions made in the past 3 years when making its SLC assessment.

65. For these reasons, the Committees submit it may be preferable to wait and assess whether there continues to be an issue when next reviewed. Alternatively, the issue of aggregation can be addressed through the Ministerial direction on thresholds, to allow greater flexibility over time. At the least, if Treasury nonetheless wishes to include a mechanism which separately requires a '3 year lookback' of revenues earned by previous targets, it will need to incorporate a mechanism to avoid any double counting of these revenues figures and will need to ensure sufficient certainty over the time at which such past turnovers are to be determined.

Use of "merger parties"

66. A range of terms are used in the proposed thresholds in the Consultation Paper to describe the parties to an acquisition.

67. For example, the monetary thresholds in the Paper refer to turnover of 'at least two of the merger parties', which then requires an assessment of who constitutes the 'merger parties' (and whether a seller is included as a merger party) in circumstances where the ostensible intent of the thresholds is to assess the turnover of the parties to the concentration—in which case, it would be clearer to simply refer to the turnover of the acquirer group and target.

68. The Committees consider that the concept of 'merger parties' should be removed from the thresholds, and replaced with language specifically identifying which parties' turnover is to be considered (namely, the acquirer group, the target and its subsidiaries).

Annexure A: Share of supply

Summary and conclusion on share of supply

69. In contrast to share of a 'market', 'share of supply' is not a term of art in economics and has no widely accepted or understood meaning to economists. In the event a share of supply concentration threshold was adopted for the new Australian merger regime, the available guidance as to its interpretation would therefore be limited to:

    - any definitional material that may ultimately be included in regulatory instrument used to give effect to a share of supply threshold under the new regime; and/or
    - experience with share of supply as a jurisdictional threshold in the United Kingdom's (UK's) voluntary notification regime, and how this has differed from a market share threshold.

70. The principal learning from the Competition and Markets Authority's (CMA's) use of share of supply in the UK is that the CMA has proactively used the extent of flexibility and discretion associated with share of supply to claim jurisdiction when seeking to review a particular merger.
71. Consistent with this experience in the UK, adoption of a share of supply test would give the ACCC substantially more flexibility to define the 'supply of what' in any way it saw fit in interpreting and applying such a mandatory notification threshold. By contrast, a market share-based concentration threshold would require any form of pre-notification and/or notification enforcement process to engage in a market definition exercise, even if a simplified approach was used.
72. By consequence of the discretion involved in a share of supply test, its adoption would substantially increase uncertainty for merger parties as to whether concentration thresholds were met (presumptively, in circumstances where the revenue thresholds were not met) and so notification was required. Such uncertainty would not conform with the OECD and ICN recommendations cited in the Treasury's consultation paper for the use of 'clear and objective criteria' when setting merger notification thresholds.[25]

Proposed share of supply thresholds in Australia

73. In its discussion of a potential share of supply notification threshold in Australia, the Treasury has proposed that one option for the merger threshold is for them to be based on the 'share of supply'. This is said to be the:[26]

    > *…share of supply of goods or services by the businesses involved in the acquisition, calculated based on the activities of the acquirer and target in the areas where they are active.*

74. The Treasury claims that the benefit of a share of supply measure of concentration is that a market does not need to be defined, and it is not necessary to consider the substitutability of products.[27]

[25] Treasury, *Merger notification thresholds*, August 2024, p 12.
[26] Treasury, *Merger notification thresholds*, August 2024, p 22.
[27] Treasury, *Merger notification thresholds*, August 2024, p 22.

75. However, the consultation paper does not acknowledge that this 'benefit' needs to be weighed against the substantial uncertainty that would apply to merging parties as to how such a test may be interpreted and applied.

Share of supply test in the United Kingdom

76. A share of supply test applies to CMA jurisdiction to examine mergers in the UK. However, the implications of the UK's share of supply test are different from those that would arise if such a notification threshold was adopted in Australia.
77. The UK has a voluntary, non-suspensory merger regime, ie, there is no formal requirement to notify a merger to the CMA. Subject to the jurisdictional thresholds being met, the CMA can investigate mergers which have been notified, as well as initiate investigations of mergers not notified but for which its mergers intelligence function identifies that the transaction may give rise to a substantial lessening of competition.
78. The CMA has jurisdiction to review mergers if:

    - the target's UK turnover is more than GBP 100 million (recently increased from 70 million)—this is called the turnover test; or

    - the merger creates or enhances a share of 25% or more in the supply or consumption of goods or services in the UK (or in a substantial part of the UK).

79. A new threshold was recently introduced to address killer acquisitions, so that the CMA will be able to review transactions where at least one party (most likely, the acquirer):

    - has a share of supply of goods or services in the UK (or substantial part of the UK) of at least 33%; and
    - UK turnover of at least GBP 350 million, provided that the other party (ie, the target) has a UK nexus—essentially this requires that the target has activities in, or supplies goods or services, in the UK.

80. The Competition Appeals Tribunal (CAT) in the UK has found that the CMA has a broad discretion when applying the share of supply test and can use any criteria it considers appropriate in the circumstances of the case.[28]
81. In one case reviewed by the CAT, the CMA calculated the share of supply using the number of bookings made through BA's indirect distribution channels. On this basis, the CMA found that the acquiring party, Sabre, had a share of supply of services that facilitated the indirect distribution of airline content of between 30–40%. The indirect distribution services provided by Farelogix to BA were found to constitute the required, small post-merger increment, even though Farelogix had no revenue or customers in the UK. However, the existence of a contractual right to receive a fee from BA was found to be sufficient to satisfy the small increment element of the share of supply test and thereby for the CMA to conclude the test was satisfied.

[28] https://www.herbertsmithfreehills.com/notes/crt/2021-06/cat-confirms-cmas-broad-approach-to-share-of-supply-test-in-sabre-farelogix-appeal

82. The parties argued that it was inappropriate for the CMA to determine that the share of supply test is met based on contractual right to sales to a single airline customer. The CMA disagreed, noting that it has a wide discretion in describing the relevant goods and services for the purpose of determining the scope of the share of supply test.

83. Consistent with these developments, competition practitioners in the UK have expressed concerns at the operation of the share of supply test—because it gives the CMA a great deal of flexibility. For example, Herbert Smith Freehills has noted that this flexibility has allowed the CMA to take jurisdiction more frequently:[29]

> *Over the last few years the CMA has taken an expansionist and creative approach in applying the share of supply test in order to take jurisdiction where it wants to review a particular merger.*

84. Skaddens also recently said that:[30]

> *While there will be no reform of the current share-of-supply test, the outgoing UK government had acknowledged criticism of the uncertain application of existing rules. The government had previously stated that it will continue to monitor the test's application, however it remains to be seen whether future governments will consider further amendments.*

85. Ashurst has said that:[31]

> *While the highly (and some would say unpredictably) flexible share of supply test has not been changed, the Act creates a new safe-harbour from review for transactions where each of the parties have UK turnover of less than GBP 10 million.*

86. Finally, Linklaters has said that:[32]

> *The more intellectually honest solution is to drop the entire 33% share of supply test concept and substitute it with a transaction value test, as set out in more detail below.*

[29] https://www.herbertsmithfreehills.com/notes/crt/2021-06/cat-confirms-cmas-broad-approach-to-share-of-supply-test-in-sabre-farelogix-appeal
[30] https://www.skadden.com/insights/publications/2024/05/uk-revamps-merger-control
[31] https://www.ashurst.com/en/insights/dmcc-act-key-changes-to-the-uks-merger-control-regime/
[32] https://www.linklaters.com/en/insights/publications/platypus/platypus-uk-merger-control-analysis/fourteenth-platypus-post---when-is-a-jurisdictional-goat-not-good-enough

Annexure B: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 1000 members. It currently has 14 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Professor Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech
- Mr Chris Pearce

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

The Section's website is www.lawcouncil.asn.au/business-law.