BCA
Business Council of Australia

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Australian Competition and Consumer Commission (ACCC)
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To whom it may concern

The Business Council of Australia (**BCA**) welcomes the opportunity to provide a submission on the ACCC's draft Merger Assessment Guidelines.

The BCA represents and advocates for its members, comprising more than 130 of Australia's largest and best-known employers. We are a member-led organisation, and our submissions reflect engagement with those members and the expertise and practical experience they bring.

With the passing of the *Treasury Laws Amendment (Mergers and Acquisition Reform) Act 2024*, Australian businesses have been preparing for the significant changes in how the ACCC will assess mergers that affect the Australian economy and its consumers from 1 July 2025.

The BCA welcomes the release of the draft guidelines, which not only reflect the most recent legislative changes but also replace guidance released in 2008 and 2018. The intent of the guidance—to explain the ACCC's approach to analysing the potential effects of mergers on competition, and to provide predictability to businesses, advisers, and the community—will be helpful as stakeholders interpret and prepare for the changes. We believe it would also be helpful for the ACCC to revisit these guidelines following the 12-month review of the thresholds.

We make the following observations for your consideration as you finalise the draft guidelines:

- Risk-focused tone: While we appreciate the ACCC's role in promoting competition and preventing anti-competitive mergers, the guidance at times appears overly focused on potential risks. As outlined in the Explanatory Memorandum to the *Treasury Laws Amendment (Mergers and Acquisition Reform) Act 2024,* this new approach seeks to be a faster, stronger, simpler, targeted, more transparent and streamlined system that better addresses anti-competitive mergers and acquisitions[1]. Further, we note in the Treasurer's seconding reading to the Bill that 'most mergers have genuine economic benefits and are an important feature of any healthy, open economy'[2]. We encourage the ACCC through this guidance to acknowledge the important role it will play in ensuring the new approach is more effective and efficient in support of the broader economic benefits of mergers and acquisitions—particularly in a dynamic environment shaped by inflationary pressures, geopolitical and trade tensions, evolving consumer behaviour, and accelerating digitisation and AI adoption. Supporting investment and business growth through proportionate regulatory clarity will benefit the wider economy. Indeed, the costs and risks of not proceeding with productivity-enhancing mergers should factor into decision making and in assessing and balancing risks. This is evident in the sections such as non-horizontal

[1] ParlInfo - Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024
[2] ParlInfo - BILLS : Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 : Second Reading

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mergers. Such mergers do not inherently raise the concentration concern that might be argued regarding horizontal mergers. They often create efficiencies or new entry to adjacent markets that require a more nuanced competition assessment than the draft guidelines' singular focus on potential concerns suggest.

- Businesses would see value in the ACCC including worked examples or more detailed examples from previous cases to illustrate how the guidelines may work in practice. For example, in the US FTC Merger Guidelines and the UK CMA Merger Assessment Guidelines there are thorough examples of previous cases to illustrate how the guidelines work in practice.
- Uncertainty in interpretation of the substantial lessening of competition test (SLC):
  - The approach the ACCC will take to applying the revised SLC test should be clarified. The section of the guidelines explaining the effect of the addition of the words "*creating, strengthening or entrenching a substantial degree of market power*" to the SLC test (paragraphs 1.26 and 1.27) repeats the explanatory memorandum in stating that the addition "*should be seen as an elucidation of the ways in which a substantial lessening of competition can arise rather than a change to the meaning of a substantial lessening of competition*". Set against this, in a separate section of the draft guidelines, paragraph 1.8 states that *"[t]he more market power a firm already has, the more likely it is that a merger will entrench that market power and be a 'substantial' lessening of competition*", without referencing any legal or economic authority. It also does not reference further contextual explanations from the explanatory memorandum, such as the examples of what constitutes market power at paragraphs 4.41 and 4.43, or what factors the ACCC would consider as constituting evidence of "strengthening" or "entrenching" a substantial degree of market power.
  - This incomplete explanation creates uncertainty over whether the ACCC does in fact see the amendment as a change in the meaning of SLC – that is, the circumstances in which the ACCC will see a small acquisition by a large business as an 'entrenchment' of market power and have an effect of SLC, particularly where the 'acquisition' is of an interest in land or other assets, rather than an existing business. If the ACCC does not consider there to be any change in the law, we suggest it states this clearly and removes the text that creates uncertainty at paragraph 1.8, leaving paragraphs 1.26 and 1.27 and its references to the explanatory memorandum.
  - To consider whether an acquisition has the effect of "creating, strengthening or entrenching a substantial degree of market power", the ACCC presumably needs to investigate whether the acquirer already did and whether the merged entity will have a "substantial degree of market power". This question is not currently an explicit part of the ACCC's review process. Businesses would be assisted by guidance on how the ACCC will determine whether a business has existing substantial market power under the new regime. If there is to be further guidance, businesses would value the opportunity to participate in further consultation on it. If there is to be no change in the investigation process, explicitly stating that would be of value.
- Inconsistency in evidence required: We see inconsistencies in the approach to evidence requirements. For example, when evaluating whether a target is a potential competitor (paragraph 5.5-5.16), the ACCC applies a relatively permissive standard, stating it "*may conclude that one of the merger parties would have entered the market absent the merger, without the*

ACCC forming a conclusive view on the precise characteristics of the entry" (paragraph 5.11) and may find removal of a potential entrant substantially lessens competition "*even when there is evidence to suggest that entry might ultimately be unsuccessful*" (paragraph 5.16). Conversely, when assessing whether the new entry or expansion would constrain the merged entity (paragraph 6.2-6.13), the ACCC imposes a stringent standard requiring "*robust evidence, typically including previous recent examples*" (paragraph 6.2) that entry would be "*likely, timely and sufficient*" with all conditions "*satisfied simultaneously*" (paragraph 6.8).

We also see inconsistencies regarding contractual restrictions. There is a suggestion in paragraph 2.15 that long term contracts might prevent rivals from being able to expand readily, or may create switching costs for customers, both of which are likely to make unilateral effects more likely. Likewise in box 8 on page 48 there is a suggestion that long term contracts will limit customers' ability to switch to a new entrant. Conversely the guidance notes that the '*ACCC may not place material weight on submissions that the merged firm is unable to foreclose rivals because of contractual protections... over time, contracts may be renegotiated or terminated, and firms may waive their rights to enforce any breaches due to an inferior bargaining position (which may reflect the change in market structure brought about by a merger)*' (paragraph 4.11).

In our view, there should be a consistent evidence-based approach to all matters, grounded in commercial reality. This should include conclusions about the likelihood of entry by a merger party absent the merger, new entry or expansion as a constraint, and the effects of contracts, regardless of whether those conclusions tend to support a potential SLC or support the position put by the merger parties.

- Uncertainty regarding the analytical framework for multi-sided platforms: The guidance describes the concept of multi-sided platforms and network effects[3] in paragraphs 5.23 to 5.27. The guidance provides a list of features of multi-sided platforms the ACCC will consider in determining whether a merger gives rise to unilateral effects. However, there is no reference to the legal or economic authority which explains how mergers involving multi-sided platforms could result in a SLC or why distinct analysis is required for these markets. Further guidance to clarify mergers involving multi-sided platforms would be welcomed.
- Absence of guidance on the acquisition of equitable or legal interests in land: The draft guidelines do not provide any insight into the ACCC's approach to analysing the potential effect of property transactions on competition, leading to unpredictability and uncertainty for businesses and relevant stakeholders. Businesses would be assisted by the ACCC providing guidance on how it intends to assess the acquisition of leases / land generally, and specifically in respect of the acquisition of land for a supermarket business. This is particularly important in circumstances where Treasury has proposed introducing a requirement for all acquisitions of land by certain supermarkets that meet certain thresholds be notified to the ACCC. This issue is also problematic due to the lack of guidance on the relevant timeframes against which the ACCC will review mergers, in circumstances where the development of vacant land into turnover-generating assets can take many years.

[3] We also note that the ACCC's example of how network effects may operate in one direction (at paragraph 5.26) by saying a "social media network will be more attractive to advertisers if it has more users, but not vice versa". This suggests that having more advertisers on a social media platform makes it less attractive to users. In our view, this is not accurate. For example, more advertisers on a social media platform can result in higher quality and more relevant advertising delivered to users, which can result in a better user experience.

- Future competitors: The guidelines raise several possible concerns in regard to mergers that remove possible future competitors. However, the guidance does not require for sufficiently strong evidence of either party having intentions or capability to enter or expand and does not provide a framework for assessing multiple hypothetical factors that would be necessary to support a loss of future competition theory. As such this could lead to excessive enforcement. Without clearer evidence requirements, there's a risk that challenges, on the basis of a loss of future competition, will be based on speculation rather than comprehensive evidence.
- Dynamic competition: The guidance focuses on consideration of longer-term harm to competition, even when there is no immediate or adverse impact on customers. However, the guidelines do not mention considering future changes caused by a merger that could improve competition. In our view, it is important for the ACCC to explore both possibilities, consistent with the Treasurer's second reading speech noted above. Further, the guidelines on page 11 do not appear to acknowledge the inherent uncertainty of future developments in dynamic digital markets, including the likelihood of entry, expansion, or the ability of nascent competitors to constrain incumbents. In our view, this could prejudice merger parties and lead to excessive intervention.
- Counterfactual: The guidelines do not comprehensively outline how the ACCC will set a counterfactual. For example, the guidelines set out the ACCC's approach to assessing whether customers of the merged firm could have sufficient countervailing power to constrain an attempted exercise of market power by the merged firm. Paragraph 6.16 notes that '*For the countervailing power to prevent any exercise of market power by the merged firm, it will usually not be sufficient if only one customer or category of customers is able to bypass the merged firm post-merger. For example, the merged firm may be able to increase prices charged to smaller customers that are unable to bypass it, while larger customers with countervailing power may be able to avoid the increase.*' This could suggest that the ACCC wouldn't consider an exercise of countervailing power by large customers to be a 'sufficient' competitive constraint. However, this fails to recognise that as a matter of commercial reality, increasing prices for smaller customers is unlikely to be a profitable exercise of market power in circumstances where large customers can bypass the merged firm. Similarly, in relation to efficiency arguments, the ACCC's notes in paragraph 6.27 that merger parties "*should provide all relevant information in their possession to demonstrate that there are no less anti-competitive alternatives to achieve the claimed efficiencies.*" This applies a very high standard when assessing whether efficiencies are 'merger specific'. This approach risks placing greater emphasis on theoretical alternatives identified by the regulator, at the expense of the commercial rationale guiding the parties.

  In summary, we submit that unless the ACCC has clear evidence of a particular counterfactual, the default should be the status quo. Without such, the ACCC risks being overly speculative on counterfactuals that are not grounded in market realities.
- Change of focus from previous guidance:
  - Bundling and tying conduct: It would assist businesses if the ACCC could confirm that it does not view most bundling or tying conduct as anticompetitive and clarify the factors which may make this conduct anticompetitive and how it will scrutinise in its assessment of conglomerate mergers. We draw this to your attention as we note the current 2008 guidelines acknowledge that bundling and tying practices are common commercial

arrangements that often have no anticompetitive consequences[4]. However, the section on conglomerate mergers in the draft guidelines (paragraphs 4.27-4.31) no longer has this acknowledgement.

  - In the conglomerate mergers section of the draft guidelines it focuses on the concept of 'linking sales'. It explains that may include "integrating the products within a digital ecosystem" at paragraph 4.26. It would be useful for the ACCC to clarify that simply integrating products into a digital ecosystem may not necessarily result in 'linking sales.' Further, in our view, it should not be implied that the integration of new products into a digital ecosystem is anticompetitive, particularly if users are not forced to use the products.

- Further information on:
  - Consumer welfare: The guidance correctly points out that the purpose of the Competition and Consumer Act 2010 (Cth) is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. However, the guidelines rarely mention the concept of consumer welfare. In our view, the guidance would benefit from including more detail on the ACCC's approach to considering the impact on consumers when assessing potential theories of harm and impact on competition.
  - Assessment of theories of harm: The guidelines identify types of mergers that may raise competition concerns and provide further detail on the ACCC's approach to assessing these mergers. In our view, there is scope for clarification to the guidance to provide more certainty to businesses and ensure challenges relying on these theories of harm are grounded in market realities and do not risk over-enforcement.

We additionally note the ACCC has publicly stated that in addition to the merger assessment guidelines, merger parties may be assisted by review of previous public competition assessments. We consider that the ACCC should commit to the publication of outstanding public competition assessments prior to 1 July 2025. The ACCC's register states in relation to several mergers that "a Public Competition Assessment will be published in due course". In a small number of instances, this statement has remained on the ACCC's website for more than a year and a half after the ACCC announced its opposition to the proposed acquisition. We would welcome the opportunity to discuss these comments further and remain available to engage as the ACCC finalises its guidance.

Yours sincerely

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[4] ACCC, 'Merger Guidelines' (November 2008), paragraph 5.25.