Comments of

TechFreedom

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In the Matter of

Draft Merger Assessment Guidelines,

Australian Competition and Consumer Protection Commission

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INTRODUCTION

TechFreedom[1] welcomes the opportunity to comment on the Australian Competition & Consumer Commission's ("ACCC") Draft Merger Assessment Guidelines ("Draft Guidelines").[2] TechFreedom recently submitted comments to the Department of the Treasury (Australian Gov't) on *A New Digital Competition Regime* (Feb. 14, 2025).[3]

We are pleased to submit the following comments on the draft guidelines.

I. Final Guidelines Should Recognize That a Merger That Does Not Create or Enhance Durable Market Power Will Not Substantially Lessen Competition

The draft guidelines note that "a substantial lessening of competition can include creating, strengthening, or entrenching [] a substantial degree of power in a market."[4] The draft's phrasing – the use of "can" rather than "must" (or similar phrasing)—suggests that the guidelines' position is that post-merger market power is not a necessary requirement to finding that a merger may substantially lessen competition.

Final guidelines should recognize more clearly that for a merger to substantially lessen competition, the merger must create, strengthen, enhance, or entrench market power. This

[1] Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

[2] ACCC, *Merger Assessment Guidelines, Draft for Public Consultation* (Mar. 20, 2025), https://www.accc.gov.au/system/files/merger-reform-merger-assessment-guidelines.pdf.

[3] Comments of TechFreedom, In the Matter of A New Digital Competition Regime (Feb. 14, 2025), https://techfreedom.org/wp-content/uploads/2025/02/TechFreedom-Comment-to-Australias-New-Digital-Competition-Regime-Proposal-Paper.pdf. A copy of these comments is included with this submission.

[4] Draft Guidelines at 20 (emphasis added).

principle has been adopted in every iteration of the U.S. merger guidelines since 1982[5] and is a necessary condition for a merger to substantially lessen competition.[6]

More specifically, any final guidelines should recognize that only mergers that create, enhance, entrench, or strengthen **durable** market power (including through improved conditions for coordination) or facilitate its exercise may raise competitive concerns sufficient for a finding of a substantial lessening of competition. The requirement that market power be <u>durable</u> is implicit in the draft guidelines' recognition that post-merger entry (or expansion) can remedy short-term anti-competitive effects of a merger. Final guidelines should recognize this explicitly by articulating this as a core theme of the guidelines.

A firm is generally considered to have durable market power when it can profitably raise price above what would occur in a competitive market by restricting output or innovation below competitive levels, *without triggering timely expansion (or a timely and effective competitive response) by existing competitors or timely entry by new competitors sufficient to counteract the exercise of market power*.[7] (The ability to diminish quality without an offsetting competitive response may also be a sign of durable market power; however, quality characteristics or preferences of consumers are idiosyncratic.[8] Thus, a more

[5] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at 1 ("Mergers that substantially lessen competition ... increase, extend, or entrench market power."), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) at 2 ("The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."), https://www.justice.gov/atr/file/810276/dl?inline; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) at 2 ("The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise."), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf; U.S. DEPT. OF JUST. MERGER GUIDELINES (1982) at 1 ("The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance "market power" or to facilitate its exercise."), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf.

[6] It is not a sufficient condition, because a merger may also create efficiencies that create or strengthen the ability or incentive of the merged entity to increase output, improve service, or advance innovation.

[7] In the language of the U.S. merger guidelines, entry (or expansion) may be "uncommitted" or "rapid" and not incur significant sunk costs, or it may be "committed" and require a firm to incur significant sunk costs. See U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) at §5.1 (discussing rapid and committed entrants) and §9 (discussing committed entrants), https://www.justice.gov/atr/file/810276/dl?inline; See also U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at §4.4.A, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[8] For example, while one person might perceive an increase in advertisements on an otherwise free service to be a diminution in the quality experience of a service, because advertisements are a source of information,

searching inquiry may be needed to identify whether durable market power is associated with changes in (predicted) non-price competition than for (predicted) price changes.)

Final guidelines should adopt a durable market power standard, as it better incorporates and is consistent with the draft guidelines' discussion of countervailing factors. The following language (or similar) should be considered for inclusion into the final guidelines:

- A merger illegally or unjustifiably creates, enhances, entrenches, or maintains **durable market power** (or facilitates its exercise), and thereby substantially lessens competition, if it is likely to have the effect of allowing the merged firm, or a set of rivals, to raise price (or slow a decrease in price), adjusted for quality, or reduce output, diminish or slow innovation, or otherwise harm customers (or suppliers, including labor) at any level of production or distribution as a result of diminished competitive constraints, without any offsetting efficiency benefits.

II. Final Guidelines Should Clarify the Framework for Identifying A Future Competitor

The draft guidelines correctly note that the acquisition of a future competitor (or the combination of two future competitors) can substantially lessen competition that would have occurred in the future, but for the transaction.[9] The guidelines should provide more clarity on how to identify a future competitor, and how to evaluate the competitive impact of a future competitor.

The guidelines should adopt a definition of a future competitor:

- A future competitor is a non-incumbent firm[10] that has both the ability and incentive to enter a relevant market.[11] A non-incumbent firm that does not have both the ability and incentive to enter a relevant market is not a future competitor. The relevant market need not be the same market that an incumbent firm presently operates in,

another person might consider an increase in advertisements as an increase in access to information. Similarly, while some view the collection of more personalized data as a diminution in quality, or a higher price for the provision of zero-(monetary) price services, another person may appreciate the benefits of greater collection of personal data, as it may lead to an improved advertising experience—the receipt of more advertisements for products or services that person desires.

[9] Draft Guidelines at 38-40.

[10] A non-incumbent firm is a firm that is not presently in the relevant market, and whose presence outside the relevant market (or in other markets) does not affect present competition in the relevant market.

[11] Ability, as used here, means objective capabilities consistent with successful entry, but does not presume successful entry. Incentive, as used here, means successful entry would be profitable.

but is a market in which the incumbent and non-incumbent will both compete in, in the future.[12]

Assuming a non-incumbent has both the ability and incentive to enter a relevant market, the draft guidelines should identify a framework for evaluating the competitive effect of the elimination of this future entry. The draft guidelines focus only on the likelihood of entry.[13] But the guidelines' analysis of "countervailing" entry does not focus only on the likelihood of entry; there, the competitive effect of future entry is also a function of the materiality (or sufficiency) of entry, and the timing (or timeliness) of entry.

Final guidelines should adopt the "timely, likely, and sufficient" framework for evaluating the competitive significance of future entry:

- The acquisition of a future competitor will substantially lessen competition when, absent the merger, entry into the relevant market was reasonably likely to occur within a reasonable period of time and that entry was reasonably expected to have a material effect on competition in the relevant market.
- Certain principles should be adopted to guide the competitive analysis of an acquisition of a future competitor, consistent with those adopted elsewhere in the draft guidelines:
    - The degree of likelihood of entry is relevant to the competitive assessment of the acquisition of a future competitor.[14]
    - While "the evaluation of timeliness will vary with each merger, the relevant industry and market dynamics, "generally the further in the future that entry ... is likely to occur, the less certainty the ACCC can place on such entry or expansion occurring."[15]
    - "The likely entry ... must be of sufficient scale, with a sufficient range of the relevant goods or services, to provide an effective competitive constraint on the [incumbent] firm. Entry at the fringe of the market is unlikely to be sufficient to constrain any attempted exercise of market power by the

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[12] This is intended to capture situations where future competition between the merging firms will take place in a future market or alternative to the market the incumbent operates in (e.g., competition from an "adjacent" market).

[13] Draft Guidelines at 39-40 (discussing only those factors that go to likelihood of entry).

[14] See Draft Guidelines at 47 (discussing likelihood of entry, where entry is a countervailing factor in a competitive effects analysis).

[15] See Draft Guidelines at 49 (discussing timeliness of entry, where entry is a countervailing factor in competitive effects analysis.)

> [incumbent] firm. For example, individual entry that is small-scale, localized or targeted at niche segments is unlikely to represent an effective constraint [on the incumbent firm]."[16]

- Where the material effect from future entry is expected to be substantial, it may be appropriate to accept greater uncertainty in the likelihood of entry, or accept greater delay in the timing of entry (and vice versa).

The identification and evaluation of a non-incumbent firm as a future competitor should be symmetrical with the evaluation of the competitive effect of entry as a countervailing factor as a defense to an otherwise anticompetitive merger.

III. Final Guidelines Should Recognize "Cumulative Efficiencies" When Evaluating the "Cumulative Effect" of Serial Acquisitions.

The draft guidelines recognize that a series of mergers may harm competition through a cumulative effect even if no specific merger is anticompetitive.[17] We have doubts that a series of mergers, no one of which may violate the antitrust laws, can violate the antitrust laws when considered cumulatively: zero times one, or zero times 100, is still zero.

However, we recognize that an interpretation of case law that requires the agencies to establish a minimum prima facia case of harm from a merger, or case law that requires a showing of more than a de-minimis lessening of competition from a merger, or other factors – such as notification thresholds or limited agency resources – may create hurdles to identifying and challenging a merger with small but reasonably probable anticompetitive effects. Where the acquiring firm has engaged in a series of such acquisitions, a cumulative approach may be defensible.

Efficiency improvements can also be cumulative. For example, a series of small horizontal acquisitions that combine otherwise substitutable capacity may cumulatively (but not individually) increase production sufficient to obtain economies of scale; non-horizontal acquisitions can create economies of scope and can combine complementary assets to allow for an increase in innovation, the speed of innovation, and the distribution of new products.

To be credited as a countervailing factor in support of a merger, the draft guidelines require efficiencies to (i) be merger specific and (ii) be verifiable.[18] But the merger specificity

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[16] See Draft Guidelines at 49-50 (discussing sufficiency of entry, where entry is a countervailing factor in competitive effects analysis).

[17] Draft Guidelines at 44.

[18] Draft Guidelines at 52-53.

requirement may not be symmetrical with the draft guidelines' position that harm from so-called serial acquisitions does not require a showing of harm from any specific merger.

Final guidelines should make clear that efficiency claims will be evaluated symmetrically with claims of competitive harm. Where the showing of harm is not transaction-specific but cumulative, final guidelines should make clear that efficiency claims will be evaluated on a cumulative basis and that cumulative efficiencies associated with a series of mergers may be sufficient to counter the cumulative anticompetitive effects associated with a series of acquisitions.[19]

IV. Final Guidelines Should Prioritize Areas of Competitive Rivalry In Evaluating Competitive Effects

The draft guidelines recognize that "both price and non-price aspects of competition are integral to the competitive process" and identify as a "potential point of [competitive] differentiation" "anything of value to customers." The long list of potential differentiators identified in the draft guidelines – "locally based customer service, enhanced interoperability ... a diverse range of goods or services, more staff in stores, generous returns or price-matching policies, enhanced levels of privacy, or environmental sustainability"[20] – may not place adequate limits on the ACCC's market definition and effects analysis.

If the final guidelines recognize harm across many forms of competitive rivalry, the ACCC should adopt and provide a framework for articulating a trade-off between what have long been considered primary areas of competition (price, innovation) and what are likely for most consumers to be secondary areas of competition (environmental sustainability) or areas of important rivalry. The draft guidelines do not explain if, and how, the ACCC will weigh alleged harm in one area of competitive differentiation with benefits to another area of competitive differentiation.

Such weighing is necessary when there are efficiencies, or when customers have different preferences. When preferences are idiosyncratic, harm to one group (i.e., those who like environmental sustainability and would be worse off if a merger made the combined firm less environmentally oriented) may be counterbalanced by benefits to another group (perhaps the environmental degradation lowers costs and thus prices, and a larger group of customers like low prices). Similarly, some customers may prefer less interoperability if it

[19] The ACCC may wish to take the same position with respect to balancing cumulative efficiencies in one market with cumulative harm in another market, where the acquisitions under review have effects in multiple markets.

[20] Draft Guidelines at 16-17.

enhances security or usability. Final guidelines must better articulate if and how the ACCC will make such tradeoffs.

V. Final Guidelines Should Adopt a Two-Tiered Approach to Market Concentration Changes

The draft guidelines adopt the general principle that mergers that take place in concentrated markets are more likely to result in harm[21] and define a market with an HHI greater than 2000 as highly concentrated, and a merger-related change in concentration of 100 points as a significant increase in concentration.[22]

The draft guidelines' suggestion that a merger may substantially lessen competition with a relatively small increase in concentration in an otherwise highly concentrated market risks over-enforcement. The 2010 Horizontal Merger Guidelines (U.S.) address this issue more deftly than the draft guidelines. They distinguished mergers in highly concentrated markets that raised concentration between 100 and 200 points (and were considered to "potentially raise significant competitive concerns" and thus "often warrant scrutiny") from those mergers that raised concentration by more than 200 points (which were presumed to be likely to enhance market power).[23]

Final guidelines should adopt a similar two-tiered approach to the identification of mergers in highly concentrated markets that may trigger substantive concerns.

VI. Final Guidelines Should Clarify the Analysis of Conglomerate Effects & "Anti-Competitive Efficiencies"

The draft guidelines suggest that a non-horizontal merger that creates or strengthens the ability and incentive of the merged firm to "link sales" by, for example: (i) offering products at a lower price if purchased together; (ii) restricting sales of multiple products to the purchase of a bundle; (iii) integrating products within a digital ecosystem; and (iv) "tying" products, may be anticompetitive.[24] The draft identifies the potential harms as (i) monopoly extension (leveraging) or (ii) foreclosure.[25]

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[21] Draft Guidelines at 27.

[22] Draft Guidelines at 66.

[23] That presumption was rebuttable. See U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) at 19. The U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) abandon this distinction, adopting lower concentration thresholds and abandoning separate tiers for changes in concentration.

[24] Draft Guidelines at 36.

[25] Draft Guidelines at 37.

In discussing conglomerate effects, the draft guidelines fail to recognize that such conduct may create significant efficiencies that benefit consumers, even if they act as an impediment to a rival's entry into or expansion in a relevant market. (The draft guidelines correctly note elsewhere that "cross-selling" and "bundling" may support entry.) While the draft guidelines recognize that mergers may result in efficiencies that counter anticompetitive harms, the discussion of conglomerate effects identifies (potential) efficiencies or as a (potential) source of anticompetitive harm. The draft fails to provide a framework for evaluating possible harms (to competitors) from potential benefits or efficiencies (to consumers) where the products (or services) of the merging parties are sold solely as a package and disadvantage rivals but not harm competition.

The "merger-specificity" requirement for evaluating efficiencies associated with a merger is especially in-apt for this analysis, unless the ACCC does not intend to allege harm from the linking of sales if such linkage could have occurred through some other reasonable means short of merger. (The draft guidelines recognize, correctly, that non-merging parties may be able to counter any alleged illegal or anticompetitive "linking" by entering into agreements with other parties to offer "linked" sales.)

Final guidelines should address this limitation by recognizing that the merged firm must have monopoly power or a reasonable probability of obtaining monopoly power (and not merely market power) in at least one of the linked products for a merger of firms offering products sold as a package to have the potential to substantially lessen competition (taking into account the pro-competitive effects of combining complementary products). The efficiencies associated with the combination of bundled products (or services) (especially where offered at a lower price) may still suggest the merger is welfare-enhancing.

In final guidelines, the ACCC should consider adopting the test for illegal predatory pricing in *Brooke Group,* the safe harbor in *Peace Health*, and the cautious analysis of technological tying in *Microsoft* to set forth a competition-sensitive framework for evaluating conglomerate effects.[26] Final guidelines should also address how the ACCC will weigh short-term benefits to consumers (from discounting and bundling practices, and integration of complementary technology into a digital platform or device) with the potential for longer-term harm from exclusionary or predatory conduct (e.g., exclusion of a competitor, or alleged extension of a monopoly to a second market).

[26] *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *United States v. Microsoft*, 253 F.3d 34 (2001).

VII. Supply-Side Factors are Not Relevant for Market Definition

The draft guidelines suggest (or could be read to suggest) that supply-side characteristics of products or firms supplying products may be a determinant, or a factor, in defining markets. Examples in the draft of reference to supply-side characteristics being used to define markets include:

- the identification of "breadth of product lines and level of specialization" as a factor to be considered in assessing the degree of substitutability of different products;[27] and,
- the discussion of supply-side substitution in applying the Hypothetical Monopolist Test.[28]

Relevant markets are defined around demand-side characteristics.[29] The draft guidelines recognize this, noting that "the boundaries of the relevant market are generally determined by reference to demand-side substitution."[30] But the draft guidelines discusses supply-side substitutability as relevant to market definition under some conditions. This discussion – with its focus on a firm's ability to rapidly shift production from one product to another without substantial expenditure – aligns more with the existing discussion of market share and market concentration and can be included as a new section on market participants.[31] The firms that meet the characteristics described in paragraphs 29 and 30 of Appendix 1 are market participants.

Keeping market definition focused on demand-side characteristics is cleaner and is less likely to encourage or allow a court to define markets around broad supplier characteristics – not solely the ability to enter and exit rapidly without sunk costs - which can have the effect of incorrectly broadening a relevant market.

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[27] Draft Guidelines at 22.

[28] Draft Guidelines at 63.

[29] See, e.g., U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at §4.3.D.3 (" Market definition focuses solely on demand substitution factors.") https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[30] Draft Guidelines at 63.

[31] See, e.g., U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at §4.4.A (market participants), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

Respectfully submitted,

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