AustralianSuper

23 January 2024

Competition Taskforce
The Treasury
Langton Cres
PARKES ACT 2600

via email to competitiontaskforce@treasury.gov.au

Dear Competition Taskforce,

**AustralianSuper submission to Treasury Merger Reform Consultation Paper dated November 2023 (Consultation Paper)**

AustralianSuper welcomes the opportunity to provide a written submission in relation to the future of merger regulation in Australia.

AustralianSuper recognises the importance of ensuring Australia's merger control regulatory framework is periodically tested to remain robust, fit for the modern Australian economy, and consistent with best practice international standards. We support Treasury's review of the existing regime, and its consideration and consultation on possible improvements to better achieve these outcomes to ultimately benefit millions of everyday Australians, including our over 3.2 million members.

## 1. Summary

To be successful, a merger regulatory regime must properly balance effectiveness in maintaining competitive markets with workability for participants, including proper consideration of the commercial realities of complying with the regime. If an appropriate balance is not found this may increase the complexity, cost and time needed to implement transactions, potentially decreasing merger activity. Given the positive economic impact of the mergers particularly in terms of ensuring efficient allocation of resources, reduced activity could have unintended negative impacts on productivity growth and international competitiveness.

Our experience as an active market participant is that the overwhelming majority of parties respect and comply with the existing merger control regime. We are not aware of a significant prevalence of non-compliance or anti-competitive merger activity, nor of material amounts of such behaviour not being able to be identified and addressed by the ACCC within the current framework. This is not to say that a review is not beneficial, or that improvements should not be considered. However, given that, in our experience the existing framework remains fit-for-purpose, it is vital that full and detailed consideration, supported by objective evidence where possible, is given to ensuring that tangible incremental benefits of any reforms justify the potential additional burdens, including increased costs and delays.

## 2. Further detail

We have considered each of the 3 options proposed in the Consultation Paper (**Options**) and provide our further comments in the Attachment. We have focused on the elements of the proposed reforms that we consider most important to ensuring an efficient and fit-for-purpose regime, informed by our experience with domestic and offshore merger control regimes as a significant global asset owner. Table 1 of the Attachment sets out our general views on the workability of each Option. Table 2 provides



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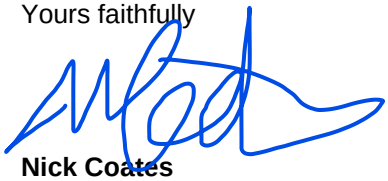
more detailed commentary on our key concerns, as well as elements of the Options we believe would benefit from further consideration and consultation.

### 3. Additional information

We note that the Consultation Paper focusses on a high-level overview of the reform proposals. As the Competition Review progresses, we would welcome the opportunity to provide further feedback on more detailed proposals as they are developed by Treasury.

We would be pleased to provide additional information or to discuss this submission in further detail. If that would be of assistance, please do not hesitate to contact me at **ncoates@australiansuper.com**.

Yours faithfully



**Nick Coates**
Head of Government Relations and Public Policy

# Attachment: Comments on merger reform options proposed in Consultation Paper

| Table 1: General comments on Options | | |
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| **Option** | **Workability** | **Comments** |
| **1** | We believe this framework provides the basis for a workable regime. | We note that of the Options proposed, Option 1 most closely resembles the existing regime. As set out in Table 2 we have concerns as to the appropriateness of the proposed appeal/review mechanisms, and the reversal of the onus of proof in the proposed merger clearance test to be applied by the ACCC. In addition, it is not clear from the description of Option 1 in the Consultation Paper how a review of an ACCC decision by the Tribunal interacts with the requirement that the ACCC must commence court action to block a merger. These concerns would be mitigated in part by:<br>• retaining the Federal Court as ultimate decision-maker applying the existing statutory test; and<br>• ensuring that merger parties continue to have access to a full merits review of an ACCC decision where evidence before the ACCC can be properly tested (including through the ability to adduce fresh evidence and conduct cross examination).<br>If these features are retained, the remaining concerns set out in Table 2 would not be as prohibitive for Option 1 as for Option 3. |
| **2** | We believe this framework provides the basis for a workable regime. | The framework of Option 2 appears to provide the basis for a workable regime as it seeks to provide certainty for both market participants and the ACCC, as well as continuing to incorporate appropriate judicial oversight. We agree with the comments in the Consultation Paper regarding there needing to be careful consideration of several important implementation issues were this Option to be adopted. These include setting appropriate notification thresholds, ensuring any "call-in" power is clear and transparent, creating an expedited process for transactions with no competition concerns, and providing robust time frames for review. |
| **3** | We believe material modifications to this framework are required for it to be a workable regime. | We have several serious concerns regarding certain elements of this Option, most notably the reversal of the onus of proof in the proposed merger clearance test to be applied by the ACCC and the limiting of review/appeal processes. In addition, we believe it is important in this 'administrative' model that proper procedural fairness safeguards are present, including measures to ensure transparency in decision making. Should this Option be further pursued, we believe reconsideration of these elements is required to ensure that proper checks and balances are present. |

| Table 2: Key concerns and considerations regarding Consultation Paper options | | | |
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| **#** | **Concern/ consideration** | **Relevant Options** | **Summary** |
| **1** | **Relevant test and reversal of onus of proof** | 1, 3 | Currently, to obtain an injunction to prevent a merger, the ACCC must prove to the Federal Court that on the balance of probabilities the merger would have the effect, or be likely to have the effect, of substantially lessening competition (**SLC**) in any market. Options 1 and 3 each contemplate changing the relevant test for the ACCC to apply in assessing mergers to whether the ACCC is satisfied that the merger is *not* likely to SLC.<br><br>This is a fundamental change as it shifts the onus of proof from the ACCC to merger parties, who would be required to positively satisfy the ACCC that the merger is unlikely to SLC. This 'satisfied' test is, in essence, a subjective test that would give the ACCC a high degree of discretion regarding whether or not it is satisfied. It would also create the rebuttable presumption that the merger is negative, unlawful and should not be approved. Given that the vast majority of mergers are not anti-competitive and involve normal economic activity, we do not believe it is appropriate that there should be a requirement that they *satisfy* a regulator.<br><br>In addition, we believe this reversing of the onus of proof from the existing regime and the statutory test will not only significantly increase the burden on the merger parties, as rebutting this presumption would be an onerous task only exacerbated by significant evidentiary disadvantages for merger parties vs the ACCC (e.g., unlike the ACCC, parties would not be able to compel third parties to provide information or even cooperate), but would also result in a greater number of legitimate mergers being blocked. The proposed test is also inconsistent with international practice in the majority of other comparable jurisdictions. As such it may result in transactions being blocked in Australia but approved by offshore competition regulators. Consideration must be had to the determinantal effects these outcomes may have on market activity and the reputation of Australia as a merger jurisdiction.<br><br>We do not believe that the proposed test is appropriate and contend that it should be reconsidered. Instead, we believe that the test applied by the ACCC in assessing mergers should match the existing statutory test - i.e., a merger should only be 'blocked' where the ACCC positively establishes that it would likely SLC. |
| **2** | **Restrictions on the review/ appeal processes** | 1, 3 | We do not believe that proposals to restrict or limit the review/appeal avenues of ACCC decisions are appropriate. Proper review and appeal procedures are key to the quality and robustness of any legal or regulatory process, including merger regimes. We acknowledge and respect the expertise of ACCC practitioners and members of the Australian Competition Tribunal (**ACT**); however, we have serious reservations regarding any of the proposals that may restrict or limit the review/appeal avenues of ACCC decisions. In particular, we have concerns about a limited review/appeal process providing appropriate checks and balances on review and decision-making powers, particularly under Option 3 where merger parties are prohibited from completing mergers without ACCC clearance. Failure to provide appropriate checks and balances on review and decision-making powers would significantly increase the uncertainty and complexity of implementing mergers in Australia. A limited review/appeal regime also raises numerous procedural fairness issues, including the rights of merger parties to properly test and challenge evidence, which needs to be closely reconsidered and addressed.<br><br>We believe it is important that the Federal Court remains the ultimate decision-maker in relation to merger clearance, which preserves the basic tenet of legal due process, and the accountability of all market participants (including regulators). If, however, the Government were minded to limit merger parties' access to the Federal Court for review of ACCC decisions, it is key that the ACT review process be reconsidered and restrictions be removed to allow for a full merits review of merger decisions. In our view, any review of ACCC decisions by the ACT should be a full merits review, with the ability for the Tribunal to adduce and consider fresh evidence and for the parties to conduct cross-examination. Empowering the ACT to undertake a full merits review will both provide for a more comprehensive review of decisions made by the ACCC, and preserve an important check and balance on the power of the ACCC in making such decisions. |

| # | Concern/ consideration | Relevant Options | Summary |
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| | | | For completeness, we also note that it is not entirely clear from the description of Option 1 in the Consultation Paper how a review of an ACCC decision by the ACT interacts with the requirement that the ACCC must commence court action to block a merger. |
| **3** | **Notification system and thresholds** | 2, 3 | We note Treasury's comments that the design of mandatory notification thresholds is an implementation issue that would be further considered if the Government elects to adopt a mandatory notification regime. We would welcome the opportunity to provide further feedback in that circumstance, as we believe it is key that notification thresholds are carefully considered to ensure that they are workable and effective for all parties. We are conscious that if thresholds are set too low this may undermine the effectiveness of any mandatory notification regime, as it would result in a significant increase in transactions becoming the subject of review. This in turn may negatively impact the timing of the ACCC's review process (a key factor in considering the workability of the regime, as noted below), even assuming that ACCC resourcing is materially increased to accommodate such a regime. In addition, it is important that consideration is given to ensuring that the cost and administrative burden incurred by merger parties in being required to make such filings in 'smaller' mergers is justified.<br><br>A key advantage of a mandatory notification regime is that it provides parties with certainty as to when a notification is required. However, the ability for the ACCC to "call-in" transactions that do not meet prescribed thresholds can undermine this by creating uncertainty for market participants. As such, it is key that any "call-in" powers are carefully considered, and if pursued, the scope of any such powers are limited (e.g., to firms or sectors of strategic importance where market-wide competition issues have been identified), clear and transparent, and subject to strict time limits on exercise. |
| **4** | **Streamlined system for benign mergers** | 2, 3 | If a mandatory notification regime is ultimately adopted it is key that a simplified or short-form process is available for mergers that technically meet the prescribed thresholds, but do not raise any competition concerns. Under this process such mergers should be able to be assessed in a streamlined and expedited manner, with significantly lower administrative burdens placed on the parties (e.g., not being required to submit long form notifications). We note that the ACCC has previously commented that it is supportive of such a "waiver" type process, and inspiration for such a regime may be able to be taken from similar regimes in the US, Canada, and EU. This will limit the burden on merger parties and the ACCC by seeking to eliminate "technical filings" in situations which do not pose competition risks. |
| **5** | **Decision making and review timing** | 1, 2, 3 | Further consideration must be given to statutory decision making and review timelines. Time has a significant impact on the likelihood of success of a transaction, with delays increasing both cost and execution risk for parties. In order to minimise any negative impacts of the increased review timeframes that we believe would result from each of the Options proposed compared to the existing regime, it is key that parties have certainty as to timing. As such, we believe that any regime should:<br>• have robust timeframes, similar to other international competition regulators, as these provide a suitable guide, and ensure that Australian competition reviews do not unnecessarily delay cross-border transactions;<br>• ensure that circumstances warranting extensions and pauses to review timelines are limited, prescribed, clear, with the additional requirement (as applies in other comparable jurisdictions) that regulator-required extensions are consented to by applicants; and<br>• operate such that if the ACCC does not reach a decision within the prescribed timeframe, the merger should be deemed to be approved and any "suspension" cease to apply. This is consistent with the practice of a number of other comparable jurisdictions, such as the US. |
| **6** | **Upfront information requirements** | 1, 2, 3 | Each Option includes the introduction of mandatory upfront information requirements. We believe that close consideration should be given to ensuring that any such requirements are as clear, simple and targeted as possible to avoid being unnecessarily onerous for market participants, whilst still providing the ACCC with necessary information required to complete its review. Ideally, this would be |

| # | Concern/ consideration | Relevant Options | Summary |
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| | | | without the need for subsequent requests which would delay transactions and increase costs for parties. In our opinion, an overly fulsome requirement (e.g., being required to provide information on every possible issue) could:<br>• result in significant, and often avoidable, effort and corresponding cost for merger parties; and<br>• potentially counteract any hoped efficiency benefits by materially increasing the volume of material the ACCC is provided, increasing the risk of delayed decision timelines.<br>This is particularly apparent when compared to the existing process where information provided can be flexibly tailored to the expected issues, and later supplemented based on ACCC and market feedback.<br><br>In addition, consideration should be given to ensuring that information requirements are linked to the potential for competition issues to arise, so as not to put parties to unnecessary effort and expense in mergers that do not raise competition concerns (e.g., implementing a truncated requirement for mergers eligible for the 'streamlined' process noted in Row 4 above). |