Computer & Communications Industry Association
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CCIA Comments on the Australian Treasury's Merger Reform Consultation

The Computer & Communications Industry Association ("CCIA")[1] welcomes the opportunity to submit comments to the Australian Government's Treasury Department ("Treasury") in response to its Merger Reform Consultation ("Consultation").[2] CCIA appreciates the continued work of the Treasury to develop a forward-thinking merger control framework for the development of competitive markets in Australia.

These comments provide CCIA's general observations on merger control as well as specific comments on some of the proposals in the proposed reform package.

1. Merger Regulations Should Consider the Benefits and Procompetitive Effects of Mergers

Mergers and acquisitions often lead to significant cost savings and other benefits. Numerous studies have found that most mergers are procompetitive, or at least competitively benign, as they allow companies to better serve consumers and increase efficiencies.[3] As a result, a primary benefit of mergers is their potential to enhance a merged entity's abilities and incentives to compete through efficiencies that may result in lower prices, improved quality, enhanced services, or new products.[4]

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[1] CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

[2] Merger Reform Consultation Paper, Australian Government, The Treasury (Nov. 2023), https://treasury.gov.au/sites/default/files/2023-11/c2023-463361-cp_0.pdf; Merger Reform, Australian Government, The Treasury (Nov. 2023), https://treasury.gov.au/consultation/c2023-463361.

[3] *See, e.g.,* David L. Meyer, "Merger Enforcement is Alive and Well at the Department of Justice," U.S. DEP'T OF JUST. (Nov. 15, 2007), at.1, https://www.justice.gov/atr/file/519351/download; *see also* Maureen K. Ohlhausen and Taylor M. Owings, "The Case for M&A: Evidence of Efficiencies in Consummated Mergers," (Aug. 29, 2023), at 1, https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf; Mark J. Niefer, Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s, 29 Antitrust 53 (Summer 2015) at 57, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622795.

[4] *See*, *e.g.,* U.S. Department of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 1 (2010), at 29, https://www.justice.gov/atr/file/810276/download (a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.);" U.S. Department of Justice & Fed. Trade Comm'n, 1997 Merger Guidelines (1997), at 27, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf ("Mergers have the potential to generate

As competition authorities have often noted, the vast majority of transactions do not raise competitive concerns.[5] Moreover, most notified transactions are approved unconditionally, while only a small percentage of them, which may raise competitive concerns, are subject to remedies or an attempted block.[6] As the Australian Competition & Consumer Commission (ACCC) notes, if the proposed Option 3 in the Consultation document were adopted, nearly 90 percent of the notifiable transactions in Australia would receive a notification waiver given their lack of competitive harm.[7] Taking into account the benefits of a proposed merger is a necessary and crucial component of merger analysis. Without efficiency considerations, all horizontal mergers could be considered anticompetitive as they may involve some sort of loss of direct competition.[8] Economies of scale, an increase in efficient management, as well as the R&D

significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies."); U.S. Department of Justice & Fed. Trade Comm'n, 1992 Merger Guidelines (1992), at 28, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf ("The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. Therefore, in most cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Agency.").

[5] *See*, *e.g.,* "How Mergers are Reviewed," Federal Trade Commission, https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review ("The vast majority of deals reviewed by the FTC and the Department of Justice are allowed to proceed after the first, preliminary review."); Australian Competition & Consumer Commission, "Outline to Treasury: ACCC's proposals for merger reform" (Mar. 2023), at 1, https://www.accc.gov.au/system/files/submission-to-treasury-regarding-merger-reform.pdf ("The ACCC recognises that most mergers are not anti-competitive and can be beneficial, for example by allowing firms to achieve efficiencies, diversify risk or enter new markets.")

[6] For example, during the fiscal year 2021, less than 2 percent of the notified transactions in the United States required an in-depth review, so called Second Request. *See* Fed. Trade Comm'n, "Hart-Scott-Rodino Annual Report Fiscal Year 2021" (Feb. 10, 2023), at 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf. In the EU, in recent years 95 percent of mergers have been cleared in Phase 1, in about 3 percent an in depth, Phase 2 investigation was required, 0.5 percent of mergers were blocked or withdrawn by the parties, while the remaining decisions were returned to the national jurisdictions or ended in another way. *See* Pauline Affeldt, Tomaso Duso and Florian Szücs, Deutsches Institut für Wirtschaftsforschung "EU Merger Control Database: 1990–2014" (2018), at 8, https://www.diw.de/documents/publikationen/73/diw_01.c.599387.de/diw_datadoc_2018-095.pdf.

[7] Australian Competition & Consumer Commission (ACCC), "ACCC preliminary views on options for merger control process" (Dec. 20, 2023), at 10, https://www.accc.gov.au/system/files/accc-submission-on-preliminary-views-on-options-for-merger-control-process.pdf.

[8] Farrell, Joseph and Shapiro, Carl, Scale Economies and Synergies in Horizontal Merger Analysis (Oct. 2000), UC Berkeley, Center for Competition Policy Working Paper No. CPC00-15, at 2, http://dx.doi.org/10.2139/ssrn.502846.

benefits[9] that result from the integration of complementary functions are all factors that benefit competition and are often achieved through a merger.[10]

When considering the substantial lessening of competition ("SLC") standard in merger analysis, it is important for agencies and policymakers to illustrate what is considered a SLC, and further elaborate on the test applicable to determine if a transaction substantially lessens competition.[11] This would provide merging parties with the necessary clarity as to what to expect when facing a review of their transaction by the ACCC.

The adaptability of the existing test for determining if a transaction substantially lessens competition[12] allows the decision maker to evaluate mergers with novel theories of harm, while prohibiting only transactions that may raise competitive risks and allowing procompetitive deals to move forward. However, if a "satisfaction" test approach were to be adopted as proposed by the ACCC,[13] the burden of proof would shift to make all transactions presumptively illegal, forcing parties to prove a negative (that the deal is not anticompetitive). This would increase the burden for notifying parties and would further hinder the merger ecosystem in Australia.

CCIA recommends that the Treasury maintain the current SLC standard that allows procompetitive transactions to move forward and subjects to further review only deals that may raise competitive concerns.

2. Reform of the Merger Notification Regime

One of the key points of the Consultation is the proposal to change the current voluntary merger notification regime to a mandatory notification regime.[14] Importantly, voluntary

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[9] From fiscal year 2011 to 2020, mergers have increased R&D expenditure by as much as $13.5 billion annually in the U.S. *See* Robert Kulick & Andrew Card, Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications, NERA ECONOMIC CONSULTING (Feb. 2023), at 24, https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf.

[10] Maureen K. Ohlhausen and Taylor M. Owings, "The Case for M&A: Evidence of Efficiencies in Consummated Mergers," (Aug. 29, 2023), at 3, https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf.

[11] American Bar Association, "Joint Comments of the American Bar Association's Sections of Antitrust and International Law on the Fiscalía Nacional Económica's Draft Horizontal Merger Guidelines" (Jul. 9, 2021), at 4-5, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/july-2021/comments-chile-7921.pdf.

[12] Competition and Consumer Act 2010 (Cth) s 50(3).

[13] *Supra* n. 1, Test for the decision maker to apply, at 39.

[14] *Supra* n. 2*,* at 6, Changes to the merger control process.

notification regimes, such as those in Australia and the UK,[15] can reduce the regulatory burden for proposed mergers that are unlikely to raise competition concerns.[16]

In mandatory notification regimes, such as in the U.S. and EU,[17] clear and reasonable thresholds are paramount to provide certainty to businesses about when to notify the proposed merger to the competition authority. Effectiveness, efficiency, transparency, and predictability are key objectives that sound merger control regimes should follow at all stages of the merger review process.[18] As the Treasury notes in the Consultation paper, "an efficient and effective merger control regime should seek to achieve its policy objective at the lowest cost possible and in a timely manner, with appropriate powers and resources for the competition authority."[19]

The ACCC's proposal calls for a mandatory regime with threshold notification, while it also maintains the ACCC's so-called "call-in" powers.[20] Under these "call-in" powers, the agency can review any transaction considered to have competition concerns.[21] However, before proposing a mandatory notification regime, it would be important to have a deeper empirical analysis about why the current voluntary system has not worked well and why changing to a mandatory regime would be necessary. Moreover, there seems to be no direct correlation between the cited productivity and market concentration issues and how the current merger enforcement regime in Australia is functioning.[22] As the Treasury is contemplating merger reform and different policy options, it is paramount for merging parties to have a clear

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[15] CMA, "A Quick Guide to UK Merger Assessment," "Do businesses have to tell the CMA that they are merging?" (2021), at 10, https://assets.publishing.service.gov.uk/media/6051eac7d3bf7f045dc8408a/CMA18_2021version-.pdf; "United Kingdom: Merger Control," Legal 500 (2023), https://www.legal500.com/guides/chapter/united-kingdom-merger-control/.
[16] *Supra* n. 2*,* at 24, Voluntary or mandatory notification.
[17] *See, e.g.*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section18a&edition=prelim; European Commission, "Competition: Merger control procedures" (2013), https://competition-policy.ec.europa.eu/system/files/2021-02/merger_control_procedures_en.pdf.
[18] ICN Merger Working Group, Revised Recommended Practices for Merger Notification Procedures (2017), at18, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.
[19] *Supra* n. 1 at 10, Risk and design principles for Australia's merger control regime.
[20] *Supra* n. 2, at 40, Possible policy option.
[21] *Supra* n. 7, at 10.
[22] *Supra* n. 1, Emerging Concerns, at 12.

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understanding of the potential concerns and, as a result, a transparent and predictable merger control regime.[23]

CCIA has concerns that the proposed Option 3[24] approach may hinder the Australian merger ecosystem and prevent parties from pursuing competitively benign transactions. Merging parties should have sufficient certainty as to whether the ACCC will review their deal, even if it falls below the notification threshold. If Option 3 were adopted, merging parties would have to interpret the ACCC's "call-in" power in the abstract, as there is no clear indication of what the ACCC might consider a competition concern. A clear and precise threshold for mandatory notification, including for when call-in powers could be used, should be defined to provide parties with a clear understanding of when and if the ACCC will review their deal.

There is no one-size-fits-all approach: many jurisdictions have mandatory notification regimes but differ in their details, and policymakers should carefully consider what fits best the Australian economy and enforcement resources. Therefore, CCIA would recommend that the Treasury carefully analyze the risks and benefits that both mandatory and voluntary merger regimes bring to the country's economy and its merger ecosystem, relying on more country-specific data and empirical evidence regarding merger enforcement.

3. Australia's Slowed Productivity Does Not Call for a Merger Reform

As the Consultation paper notes, productivity in Australia has slowed since the mid-2000s.[25] From 2010 to 2020, the productivity growth was the slowest during the past 60 years, while productivity growth over the past 20 years has been around 1.2 percent.[26] There are many theories as to why Australia has experienced such a decline in productivity growth, with the ACCC and the Treasury pointing to market concentration as one of those reasons.[27] However, a

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[23] *See, e.g.*, Best practices of the International Competition Network ("ICN") Merger Working Group, Merger Remedies Guide (2016), at 5, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf; ICN Merger Working Group, Revised Recommended Practices for Merger Notification Procedures (2017), at 18, https://icn2017.concorrencia.pt/downloads/materials/MWG-RP-Notification-Definitions-Nexusand-Thresholds.pdf.
[24] *Supra* n. 1, at 39.
[25] *Supra* n. 1, at 12, Emerging Concerns.
[26] The Treasury, Australian Government, "Measuring What Matters," "Productivity" (Jul. 2023), https://treasury.gov.au/policy-topics/measuring-what-matters/dashboard/productivity.
[27] *Supra* n. 1, at 12, Emerging Concerns.

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review of the economic literature does not seem to support that industrial concentration has been a major driver in the recent decline of Australian productivity. Research suggests that other factors, such as lead times in the mining industry, increased demand in the utilities industry, declining business dynamism, and slower growth in capital stock have been the key drivers behind the country's decline in productivity.[28]

In particular, there does not seem to be a clear link between mergers and Australia's productivity issues that do stem from insufficient competition. As Treasury economists have concluded, regulatory burdens on entry, or financing frictions that prevent innovative firms from entering, growing, and challenging incumbents, are part of the reasons behind Australia's productivity issues.[29]

Multiple reports discuss that both labor and multifactor productivity have fallen the most sharply in the mining and utilities industries. Commentators note that this is due to long lead times in bringing modern mining projects to full production.[30] They expect that labor and multifactor productivity will rebound strongly once these projects are completed. Papers also report that hours worked in Australia's utilities sectors have increased, decreasing productivity.[31]

Another report also supports the theory that the broader national productivity decrease in Australia is driven by the declines in the mining and utilities industries.[32] This report further claims that increases in the demand for energy and minerals in the mining sector have led to an increase in hours worked, while the real value of the sector's productivity capital stock has increased by nearly 80 percent. However, long lead times have caused an output increase of only 37 percent. As a result, both labor productivity and multifactor productivity have declined.[33]

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[28] *See, e.g.,* Saul Eslake and Marcus Walsh, Grattan Institute, "Australia's productivity challenge" (2011), at 18, https://grattan.edu.au/wp-content/uploads/2014/04/069_productivity_challenge.pdf.
[29] Iris Day, Zac Duretto, Patrick Hartigan and Jonathan Hambur, The Treasury, "Competition in Australia and its impact on productivity growth" (Oct. 2022), at 6, https://treasury.gov.au/sites/default/files/2022-10/p2022-325290-productivity-growth.pdf.
[30] *See, e.g.,* Saul Eslake and Marcus Walsh, Grattan Institute, "Australia's productivity challenge" (2011), at 18, https://grattan.edu.au/wp-content/uploads/2014/04/069_productivity_challenge.pdf; Saul Eslake, In The Australian Economy in the 2000s, Proceedings of a Conference, Reserve Bank of Australia, "Productivity: The lost decade" (2011), at 229, https://www.rba.gov.au/publications/confs/2011/pdf/conf-vol-2011.pdf.
[31] *Id.*
[32] Saul Eslake, In The Australian Economy in the 2000s, Proceedings of a Conference, Reserve Bank of Australia, "Productivity: The lost decade" (2011), at 229, https://www.rba.gov.au/publications/confs/2011/pdf/conf-vol-2011.pdf.
[33] *Id.*

They find that in the utilities sector, electricity and gas companies invested heavily due to continued growth in demand, and as a result, increased hours worked to replace aging transmission infrastructure and to meet government-mandated renewable energy targets caused labor productivity and multifactor productivity to fall.[34]

Even the handful of reports that support the claim that industry concentration might have an impact on productivity cite factors other than merger control that are decreasing productivity in Australia. A recent e61 Institute Policy Paper suggests that rising barriers to the emergence of productive firms and efficient matching of workers to these firms, less frequent entry and exit by firms, increased firm age, increased concentration in labor and product markets, market leaders remaining leaders for longer, and fewer workers switching jobs are all factors leading to a decrease in Australia's productivity.[35] Another study found that the decline in productivity in wholesale trade and retail trade is also due to lower business dynamism, particularly decreasing entry rates.[36] Other researchers found additional explanations for decreased productivity in Australia. A recent study found that slowed productivity can be explained by slower growth in capital stock, and it can be offset if there are technological improvements.[37]

At the same time, a study published in the Australian Economic Review found that industries that saw concentration increasing actually had strong productivity growth.[38] Additional OECD research indicates a similar finding in North America and Europe, reporting that, although some increases in concentration could be linked to anti-competitive regulations or the competition policy environment, "it could just as well be related to technological developments, integration of global markets or sustained innovation [that] allow the most efficient firms to increase their competitive edge over other firms, contributing to welfare gains

[34] *Id.*
[35] e61, "Better Harnessing Australia's Talent: Five Facts for the Summit," e61 Institute Policy Paper (2022), at 3 and 11, https://e61.in/wp-content/uploads/2022/09/Better-harnessing-Australias-talent-five-facts-for-the-Summit.pdf.
[36] Campbell, Simon; Nguyen, Thai; Sibelle, Alexander; Soriano, Franklin (2019): Measuring productivity dispersion in selected Australian industries, Treasury-ABS Working Paper, No. 2019-02, The Australian Government, The Treasury, Canberra, at 29, https://www.econstor.eu/bitstream/10419/210403/1/twp-2019-02.pdf.
[37] Jonathan Hambur and Keaton Jenner, "Can Structural Change Account for the Low Level of Non-mining Investment?" (2019), at 129, https://www.rba.gov.au/publications/bulletin/2019/jun/pdf/can-structural-change-account-for-the-low-level-of-non-mining-investment.pdf.
[38] Bakhtiari, Sasan. "Trends in market concentration of Australian Industries," Australian Economic Review 54, no. 1 (2021), at 58, https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8462.12393.

and productivity growth."[39] In addition, the Centre for Economic Policy Research published a report that found a positive and significant correlation between rising sector-level concentration and increases in sector-level productivity and allocative efficiency in Europe.[40]

In sum, the economic literature and empirical findings do not seem to support that industrial concentration has been a major driver in the decline of Australian productivity. Importantly, the decline in the country's productivity does not call for a reform of the merger control regime.

4. Merger Review Requires a Robust Appeal Process

The ACCC claims that a limited merits review incentivizes parties to put all relevant information to the first-instance decision maker.[41] However, as the Treasury notes, some parties have criticized limited merits review as lacking procedural fairness.[42]

To function properly, any antitrust enforcement regime requires proportionate enforcement procedures that enhance accuracy, ensure fairness, promote confidence in the overall system, and provide sufficient legal certainty and predictability to prevent abuses of power.[43]

The limited merits review proposed in Option 3 does not provide sufficient procedural fairness to merging parties.[44] As international organizations also underscored, the merger review and appeal process should provide merging parties with the opportunity to have adequate access to the evidence the competition authority uses to make its decision, and a proper opportunity to

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[39] Bajgar, M., et al., “"Industry Concentration in Europe and North America,” ", OECD Productivity Working Papers, No. 18, OECD Publishing, Paris, (2019), at 10, https://doi.org/10.1787/2ff98246-en.
[40] Bighelli, T., di Mauro, F., Melitz, M., and Mertens, M., Centre for Economic Policy Research, “Increasing market concentration in Europe is more likely to be a sign of strength than a cause for concern” (Oct. 13, 2020), https://cepr.org/voxeu/columns/increasing-market-concentration-europe-more-likely-be-sign-strength-cause-concern.
[41] *Supra* n. 8, at 70.
[42] Law Council of Australia, “ACCC's updated merger law reform proposals – discussion paper in response” (23 May, 2023), at 23, https://lawcouncil.au/publicassets/c70f36f7-786c-ee11-948c-005056be13b5/2023%2005%2023%20-%20S%20-%20ACCC%20s%20updated%20merger%20law%20reform%20proposals%20%20%20discussion%20paper%20in%20response.pdf.
[43] Yoo, Christopher S. and Wendland, Hendrik M., “Procedural Fairness in Antitrust Enforcement: The U.S. Perspective,” In ANTITRUST PROCEDURAL FAIRNESS (D. Daniel Sokol & Andrew Guzman eds., Oxford University Press 2019), at 24, https://scholarship.law.upenn.edu/faculty_scholarship/2049.
[44] *Supra* n. 1, at 35, Review of administrative decisions.

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respond and address the issues presented and any competition concerns the agency might have.[45] After all, competition law enforcement should be fair, predictable, and transparent, to combine effective rules, impartial and independent institutions, and sound practice.[46]

A limited merits review might erode important safeguards against over-enforcement from the agency, by placing parties at a disadvantage as they are unable to properly test third parties' submissions and evidence, or submit new evidence to the Tribunal except in very limited circumstances.[47] Therefore, a full merits review, by the Tribunal or the Federal Court, would provide merging parties with the necessary due process protections, which could further improve the merger review system and would be unlikely to substantially increase costs or timelines.

5. The ACCC's Merger Reform Proposal May Hinder Transactions for Small and Medium Sized Businesses

Startups and small and medium sized businesses (SMBs) rely on mergers and acquisitions to enter a market, grow within it, and better compete with the larger participants of the market. As studies have shown, for technology startups, "exits via acquisitions are five times more likely than IPOs," which brings an innate incentive to innovate.[48] A large proportion of startups seek to be bought by bigger companies[49] and use this as an incentive to innovate and develop their ideas and products. Being acquired is part of their business-building strategy,[50] as they have an "exit-based" mentality in which they enter the market wanting to be acquired. The

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[45] ICN, "ICN Recommended Practices For Merger Notification And Review Procedures" (2017), at 23-24, https://www.ftc.gov/system/files/attachments/merger-workshop-competition-authorities-caribbean/rec-practices-merger-notification.pdf.
[46] OECD, Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement, OECD/LEGAL/0465, at 3, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465.
[47] *Supra* n. 2, at 36, Review of administrative decisions.
[48] Froeb, Luke M. and Sokol, D. Daniel and Wagman, Liad, Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines (Aug. 10, 2023), at 6, Southern California Law Review, Forthcoming, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425; Dan Wang, Emily Cox Pahnke, & Rory M. McDonald, "The Past Is Prologue? Venture-Capital Syndicates' Collaborative Experience and Start-Up Exits," 65 ACAD. MGMT. J. (2021), at 5, https://foster.uw.edu/wp-content/uploads/2021/04/Wang-Pahnke-McDonald-2021.pdf.
[49] *See* "Reasons why startups get acquired" (Jun. 13, 2023), https://fastercapital.com/content/Reasons-why-startups-get-acquired.html#:~:text=Acquisitions%20of%20startups%20are%20often,to%20build%20something%20from%20scratch;
[50] *See* "Getting acquired is a legitimate strategy for building your business" (Aug. 2, 2022), https://techcrunch.com/2022/08/02/getting-acquired-is-a-legitimate-strategy-for-building-your-business/.

harder it is for investors and founders to exit a company, the higher the cost of entering the market, as increased requirements for merger clearance disincentivize buying and financing start-ups and SMBs.[51]

CCIA recognizes the importance of reviewing mergers that may eliminate nascent competitors. The ACCC and the Treasury have stated their concerns that the potential anticompetitive effects of "creeping acquisitions" or "killer acquisitions"[52] – incumbents' acquisitions of "innovative targets solely to discontinue the target's innovation projects and preempt future competition" – are not adequately captured by current competition laws.[53] However, concerns that large firms are harming competition by acquiring technology startups are not borne out by the results of the tech acquisitions over the last decades.[54] On the other hand, sufficient evidence shows that the prospect of being acquired has inspired innovators to create, invent, patent, and commercialize new technology to the benefit of consumers.[55]

A recent study that looked into the European Commission's merger cases in the digital space showed how the idea of "killer acquisitions" does not hold under all three tests of competitor perception, expansion, and disruption, undermining proposals for a stricter regulatory approach for transactions in these markets.[56] Nascent technology firms look to prospective acquisitions as their most reliable source of market growth and income generation,[57] as the

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[51] *See* Noah Joshua Phillips, Competing for Companies: How M&A Drives Competition and Consumer Welfare (May 31, 2019), at 17, https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf.
[52] *See* Colleen Cunningham, Florida Ederer, & Song Ma, Killer Acquisitions, 129(3) JOURNAL OF POLITICAL ECONOMY (Mar. 2021), at 39, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707; *see also*, Gautier, Axel and Lamesch, Joe, Mergers in the Digital Economy (2020), CESifo Working Paper No. 8056, at 25-27, https://ssrn.com/abstract=3529012.
[53] *Supra* n. 1, at 19.
[54] *Supra* n. 54.
[55] *See* Jan Bena & Kai Li, Corporate Innovations and Mergers and Acquisitions, 69 J. FIN. 1923 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917215; *see also* Marianna Makri, Michael A. Hitt & Peter J. Lane, Complementary Technologies, Knowledge Relatedness, and Invention Outcomes in High Technology Mergers and Acquisitions, 31 STRATEGIC MGMT. J. 602 (2010), https://www.jstor.org/stable/40587498.
[56] Marc Ivaldi, Nicolas Petit, and Selçukhan Ünekbaş, "Killer acquisitions in digital markets may be more hype than reality" (Sep. 2023), https://cepr.org/voxeu/columns/killer-acquisitions-digital-markets-may-be-more-hype-reality.
[57] *See, e.g.,* Susan Woodward, Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital (Nov. 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf; Jeffrey Bartel, "Exploring Trends In Venture Capital Acquisitions For 2023" (Dec. 1, 2022), https://www.forbes.com/sites/forbesfinancecouncil/2022/12/01/exploring-trends-in-venture-capital-acquisitions-for-2023/?sh=3bb28c54443c; Gordon M. Phillips and Alexei Zhdanov, "Venture Capital Investments, Mergers and Competition Laws around the World" (Jun. 16, 2018), Tuck School of Business Working Paper No. 3072665, at 32, https://ssrn.com/abstract=3072665.

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primary long-term goal of nearly 60 percent of start-ups in the UK, Canada, and the U.S. is to be acquired.[58]

Multiple proposed changes in the Consultation paper focus on sector-specific issues and examples, most notably as they refer to digital markets.[59] While these proposed changes are generally offered as examples or extensions of principles, it is important for competition authorities and policymakers to rely on consistent and robust fact-based economic scrutiny across all sectors of the economy as a guiding concept for any merger reform.[60]

A focus on general concepts facilitates more uniform and equitable enforcement of antitrust laws across the economy.[61] Overly burdensome and sector-specific regulations may risk asymmetric treatment and overregulation of the sector, potentially discouraging investment and R&D, and leading to decreased consumer welfare over time.[62]

Therefore, any proposed reform to Australia's merger regime should be economy-wide and promote the country's start-up ecosystem, innovation, and economic growth.

6. Conclusion

It is paramount for any proposed changes to Australia's merger review regime to have proportionate enforcement procedures that enhance accuracy, ensure fairness, promote confidence in the overall system, and provide sufficient legal certainty and predictability. Procedural fairness and due process factors are crucially important elements to consider in any proposed merger reform. Further, merger regimes should recognize the procompetitive benefits

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[58] Silicon Valley Group, "2020 Global Startup Outlook" (2020), at 7, https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf.

[59] *See, supra* n. 2, at 31, Merger factors.

[60] By way of example, the U.S. merger review focuses on the application of "first-principles," *i.e.,* the application of general economic and legal concepts that apply to most sectors, industries, and environments.

[61] *See, e.g.,* American Bar Association, "Comments of the American Bar Association Antitrust Law and International Law Sections in response to the request of the Japan Fair Trade Commission ("JFTC") request for comments on its proposed revised Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination and revised Policies Concerning Procedures of Review of Business Combination" (Nov. 4, 2019), at 2, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/nov-2019/comments-japan-11419-englishversion.pdf.

[62] *See* Bernard (Barry) A. Nigro, "Big Data" and Competition for the Market, Remarks at The Capitol Forum and CQ: Fourth Annual Tech, Media & Telecom Competition Conference (Dec. 13, 2017), at 4, https://www.justice.gov/opa/speech/file/1017701/download.

of mergers and prohibit only transactions that are clearly anticompetitive. Given that many start-ups, SMBs, and investors rely on acquisition as their main exit strategy, an overly burdensome merger regime may unintentionally harm these companies and the broader innovation ecosystem.

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CCIA appreciates the opportunity to provide input on these important issues and is available to provide any additional information the Treasury may require.

Respectfully submitted,

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