AUSTRALIAN COMPETITION & CONSUMER COMMISSION

ACCC preliminary views on options for merger control process

1. The ACCC welcomes the opportunity to comment on the November 2023 Competition Review merger reform consultation paper.
2. To assist the review by the Taskforce, the ACCC is providing this submission outlining the ACCC's preliminary comments on the options put forward in the consultation paper. The ACCC will later provide a further substantive submission.
3. The ACCC's comments are made in the context where there are concerns about the effectiveness of Australia's current merger [1]regime, namely:
    a. Non-notification of mergers.
    b. Inadequate or insufficient information being provided.
    c. Increased gaming of the system.
    d. That the forward-looking test defaults to allowing mergers to proceed.
    e. Challenges with serial acquisitions.
    f. Insufficient transparency of the rationale and reasoning behind the ACCC's merger decisions.
    g. Lack of cost recovery.
    h. Australia's merger regime being an international outlier.
4. The Competition Review provides a window to address these concerns now, through reforms to Australia's merger control process.
5. Concerns about the effectiveness of the current regime relate, in large part, to the incentives that are created by the fact that it is a voluntary notification regime requiring enforcement through the courts. Merger parties engage with the ACCC in a way that puts them in the best position to get their deal through.
6. We see this play out in various strategic decisions about whether and when to notify proposed transactions, in the incremental provision of information throughout a review, and threats to complete before the ACCC has conducted its assessment. This strategic behaviour is designed to put pressure on the ACCC to ultimately clear (or at least not oppose) a merger in a context where if the ACCC decides to object the ACCC (and therefore the public) bears the litigation risk. It results in a process that is subject to legal brinkmanship, and in turn introduces uncertainty and inefficiency.

[1] In this submission we use the terms "merger" and "acquisition" interchangeably regardless of the legal structure of the transaction.

7. While these tactics may reflect rational commercial behaviour, such an approach does not facilitate an effective and efficient decision-making process when it comes to merger control. It also does not support the public interest in promoting and protecting competitive markets. When workable competition is lost, it is consumers and other businesses that supply to or acquire from the merged entity, that bear the costs – including from higher prices, lower product and service quality, less innovation, lower productivity, and less choice in Australian markets. These costs can be enduring.
8. The Competition Review consultation paper identifies many policy considerations that are relevant to merger control, and with which the ACCC agrees, namely:
    a. Competition is an important driver of dynamism, productivity and wages growth.
    b. There is evidence that the intensity of competition has weakened in many parts of the economy, accompanied by increasing market concentration and price mark-ups in many industries.
    c. This reduction in competition is likely to have contributed to Australia's declining productivity performance over a long period.
    d. Merger control is about maintaining competitive market structures which lead to better outcomes for customers.
    e. Most mergers do not raise competition concerns. However, a small proportion, if allowed to proceed, would be anti-competitive.
    f. Merger control enables a competition authority to review mergers that could be harmful to the competitive process and, if necessary, amend or prevent harmful mergers.
    g. Merger control ideally targets those that are anti-competitive and allow mergers that are benign to proceed.
9. The ACCC has closely considered the three options put forward in the consultation paper. The ACCC considers that Options 1 and 2 do not address the incentives that exist with the current merger regime and do not achieve the policy considerations relevant to good merger control. These views are elaborated in the submission below.

Background

10. In this submission,
    a. **Option 1 refers to a voluntary formal clearance regime**, where businesses could choose to notify a merger and the ACCC could grant legal immunity from court action under the prohibition against anti-competitive mergers in section 50 of the *Competition and Consumer Act 2010* (Cth) if satisfied the merger would not be likely to substantially lessen competition; and
    b. **Option 2 refers to a mandatory suspensory regime**, with compulsory notification of mergers above a threshold. Transactions would be suspended for a period while the ACCC conducts a competition assessment. To prevent an anti-competitive merger, the ACCC would need to prove to the Federal Court that the merger would be likely to substantially lessen competition.
    c. **Option 3 refers to the ACCC's proposal of a mandatory administrative regime.** This would provide for compulsory notification of mergers above a

threshold and allow the ACCC to 'call-in' transactions below the threshold where there are competition concerns. The ACCC would grant clearance if it is satisfied the merger is not likely to substantially lessen competition. If clearance was not granted on competition grounds, a second stage public benefit test could apply. The ACCC's decision would be reviewable by the Tribunal.

Option 1 - voluntary formal clearance regime

11. In relation to Option 1, there are several issues that Treasury may wish to take into account including that it doesn't address the non-notification of mergers, it creates further incentives for non-notification, it leaves Australia as an international outlier in not requiring compulsory notification of mergers and it retains existing challenges with a judicial-enforcement model.

Doesn't address non-notification of mergers

12. The voluntary nature of Option 1 does nothing to address the current issue where merger parties are incentivised to not notify the ACCC of proposed transactions. Consequentially, this option would continue to undermine the effectiveness of Australia's merger notification and assessment process.
13. Option 1 fails to achieve a policy setting in which a competition authority has the ability to review mergers that could be harmful to the competitive process, and if necessary, amend or prevent harmful mergers before they occur. Under Option 1 it is likely that some competitively harmful mergers will continue to go through unnoticed. For transactions that occur in important sectors of the economy (including retail markets), the costs of any lessening of competition will be borne by consumers and businesses that acquire these products as inputs – usually in the form of higher prices or reductions in quality or service.
14. It is impossible to definitively state how pervasive the non-notification issue is (as we don't know what we don't know) but there are clear and compelling examples of firms choosing not to notify transactions.
15. A stark example of this is the large number of acquisitions Petstock undertook between 2017 and 2022 without notifying the ACCC, allowing it to become the second largest speciality pet retail chain in Australia (in a market with revenue of $3.7billion in 2023). It achieved this without any scrutiny at the time about the effects these acquisitions may have had on concentration, competition or pricing.
16. This behaviour has repeated across key sections of the economy including aviation (where Qantas, Australia's largest airline, acquired minority ownership in rival airlines without seeking clearance); healthcare (where Primary Healthcare, one of Australia's largest providers of pathology services, acquired the assets of the third largest pathology provider in Queensland) and agriculture.
17. Examples from New Zealand (which operates a voluntary notification regime) also illustrate this pattern of behaviour. Transactions such as Master Business System's acquisition of Objective were found by the New Zealand High Court to substantially lessen competition in circumstances where they were not notified to the New Zealand Commerce Commission. While the New Zealand High Court imposed penalties of NZ$1.54 million, the fact that the transaction had already completed meant it was impossible to unwind. While a penalty may provide a level of

deterrence, it does not aid customers who bear the enduring impacts of substantially less competition.[2]

18. The risk in a voluntary notification system is evident – any regime that does not require the mandatory notification of mergers creates a risk that non-notified transactions are unable to be unwound after a merger has completed or the impacts become enduring, even if they are subsequently found to be anti-competitive. While the informal merger regime worked well for many years, our recent experience is that voluntary compliance by merger parties and their advisors has diminished significantly. The absence of a mandatory-suspensory notification regime places the ACCC at a significant disadvantage when dealing with merger parties who are willing to push the boundaries of the informal, enforcement-based system.
19. Given the size and profile of the firms involved in many of the examples of non-notification it is not unreasonable to assume they are well advised and make conscious and strategic choices about whether to engage with the existing voluntary process.
20. This is evident in the transaction documents that the ACCC has seen after we find out about non-notified mergers. These documents sometimes reveal that parties are cognisant of potential competition concerns and choose not to notify. For example, they may contain conditions precedent that a transaction is conditional on competition clearance that are only enlivened if the ACCC contacts the parties, rather than a positive obligation to obtain clearance.
21. Implementing a voluntary formal clearance regime as proposed by Option 1 does not change the incentive for mergers not to be notified to the ACCC, and allows firms to continue to make strategic decisions about whether to notify – either because they consider that it is unlikely that the acquisition will come to light (and will thus escape scrutiny) or there is a strategic benefit in the acquisition being discovered after some period of time has elapsed in such a way that it is practically impossible to unwind.

Different tests and review bodies create incentives not to notify

22. We consider that Option 1 exacerbates the incentive not to notify the ACCC of relevant transactions because it creates a regime where there are different tests and review bodies depending on whether a transaction is voluntarily notified or not. This is because firms may seek to gain an advantage by avoiding the requirement to satisfy the ACCC or the Tribunal under the voluntary formal process, and instead require the ACCC to prove on the balance of probabilities in the Federal Court that a transaction substantially lessens competition in breach of the Competition and Consumer Act. Given these incentives, it is likely that fewer mergers will be notified to the ACCC (even compared with the status quo) and it will necessitate the ACCC expending further resources to imperfectly monitor merger activity in an attempt to become aware of transactions.
23. While Option 1 identifies the Tribunal as the review body when mergers are notified, unless the merger is voluntarily notified the Tribunal will not have a significant role. The Tribunal is a very important part of the ACCC's proposed clearance regime and ensures that ACCC decisions are subject to review. The Tribunal's membership comprises a Federal Court judge and two members with business or economic expertise. The Tribunal has expertise in making competition assessments and it will gain more experience in merger reviews with the benefit of creating important

2 New Zealand Commerce Commission, [Investigations show Commission's commitment to acting on non-notified mergers](), 9 August 2022.

guidance for future transactions. Other jurisdictions, such as New Zealand, don't have the same constitutional limitations around judicial appointments and have lay members (including those with economic expertise) contributing to the consideration of merger cases in their judicial system.

Challenges with the judicial-enforcement model and the forward-looking test

24. For any merger not voluntarily notified or for any merger the ACCC or the Tribunal declines to clear and the parties choose to complete, the status quo is retained, whereby the ACCC would be required to commence legal action in the Federal Court to restrain a merger. This model requires the ACCC to take legal action and prove an alleged breach of the law in a court on the balance of probabilities in relation to future events. This also creates disincentives and challenges for third party participation and entrenches the present dynamic whereby the merger decision-making is skewed towards a default of allowing mergers to proceed, including for mergers that raise significant competition concerns. This concern is also applicable to Option 2.

Australia remains as an international outlier

25. Option 1 leaves Australia as an international outlier in not requiring mandatory notification of mergers. As the OECD observes, Australia is one of only three jurisdictions of the 54 OECD countries with merger control in place that does not have a mandatory regime. Key international judications such as the US, Canada and the European Union all have mandatory notification regimes. As Treasury also notes, the OECD has recently recommended that Australia should consider compulsory notification of transactions to address the fact that some indicators of competitive intensity in the Australian economy have weakened.
26. This difference has practical consequences when it comes to global transactions that involve firms that carry on business in Australia. Merger parties frequently prioritise other jurisdictions that require mandatory notification and clearances over our voluntary informal regime. For example, the ACCC has become aware of global transactions in the software and manufacturing sectors (either because they have FIRB notification requirements or complaints have been received from third parties) where the merger parties have not sought clearance and there are prima facie competition concerns. The issue arose with the proposed merger of Cargotec and Konecranes about which the ACCC expressed competition concern before this proposed transaction was ultimately abandoned by the merger parties.

It does not provide an opportunity to achieve cost recovery

27. The voluntary nature of Option 1 means that it is unlikely there will be a significant likelihood of achieving or contributing to cost recovery without creating further disincentives for parties to avoid filing notifications.
28. As Treasury notes under cost recovery principles, where an identifiable group creates extra or specific demand for a specific regulatory activity, they should generally be charged for the activity – that is, fees should reflect the resources the competition authority needs to efficiently carry out the regulatory work associated with investigating and approving mergers.

29. In a voluntary regime, the setting of a filing fee is likely to alter the calculus for at least some firms about whether they notify the ACCC about prospective transactions. In such a scenario consideration may be given to setting lower fees in order not to dissuade notification, and therefore will be less likely to achieve or contribute to cost recovery.

Option 1 – if a call-in power is included

30. Under Option 1, the consultation paper also contemplates the possibility of including a call-in power. Assuming this is included in Option 1 and is practical and simple to use, the ability to call-in mergers attenuates some of the concerns discussed above but does not remove them. This is for four reasons.
31. First, it does not address situations where a competition authority is unaware of a transaction prior to completion.
32. Second, the optionality around notification creates uncertainty for businesses about whether they should seek clearance or take the risk that a transaction will be called in.
33. Third, a call-in power may also encourage strategic behaviour from firms – such as announcing and completing mergers in a single day (sometimes referred to as midnight mergers). In doing so they force contested litigation on a post-merger basis and so may foreclose some remedies that could restore competition to its state pre-merger – resulting in enduring anti-competitive outcomes.
34. Fourth, if implemented under Option 1 a call-in power is likely to become a focal point of the regime. Under the ACCC's preferred option, the call-in power would only be relevant for a subset of transactions that fall below the notification requirements, but under Option 1 with a call-in, the call-in power would be a central linchpin of the regime for *all* transactions because notification is voluntary. This has a number of consequences, including that the ACCC would have to expend resources monitoring transactions in the hope that it can identify and call-in relevant mergers.

Option 2 - mandatory and suspensory regime

35. Option 2 solves the problem of non-notification for mergers above the thresholds. However, there are several issues that Treasury may wish to take into account including the incentives this option will create for strategic behaviour; and a lack of transparency and difficulty for competitors and consumers to participate in the process vis-à-vis other options. It retains the challenges inherent in the existing enforcement model, and results in inefficient expenditure of public resources.

Creates incentives for strategic behaviour

36. Merger parties engage with the ACCC in a way that puts them in the best position to get their deal through. We see this play out in various strategic decisions about the incremental provision of information throughout a review and the way in which they engage with the ACCC. We are not surprised by these tactics; they reflect rational commercial behaviour. Parties want to place themselves in the best possible position to avoid or defend litigation.
37. Option 2 effectively mirrors the US model of merger enforcement, and in doing so retains a system whereby the parties have strong incentives to undertake strategic conduct to attenuate the scrutiny transactions face.

38. For example, Option 2 creates incentives for merger parties to provide insufficient or inaccurate information to the ACCC during the suspensory period while they hope to 'run down the clock'. Where the competition agency bears the onus of proof and needs to litigate, there is a strategic advantage in withholding and delaying information for as long as possible.

39. The corollary to this is that it introduces inefficiencies in that a competition agency needs to issue broader, and more burdensome, information and document requests in order to be in a position to assess a transaction and prepare for litigation. This is because, in order for a competition agency to determine whether it needs to pursue legal action to restrain a merger before the suspensory period expires, it requires data, information and documents that cover a range of potential arguments that could be raised by the merger parties.

40. In the US this process is known as issuing a 'Second Request' for information (the first request being the initial information filed with the application). A Second Request extends the suspensory period and prevents firms from completing an acquisition or merger until they have "substantially complied" with the Second Request and observed a second suspensory period. A Second Request asks for business documents and data that will inform the agency about the company's products or services, market conditions where the company does business, and the likely competitive effects of the merger. The model Second Request used by the Department of Justice and Federal Trade Commission is publicly available and requires extensive amounts of information.[3]

41. Some estimates are that it costs merger parties between US$5 – 10 million to respond to a Second Request, and for larger deals average costs are in the range of US$10 – 20 million.[4] The amount of data and documents compelled is extensive. Data from 2013 indicates that the median Second Request response totalled 28.8GB, more than 300,000 documents and 1.6 million pages.[5] At the upper end of the range, some Second Request responses totalled 747GB, almost a million documents and five and half million pages. These estimates are now dated – and it is likely the amount of information, data and documents and the costs to provide such information have increased.

42. As noted above, issuing a Second Request triggers a second suspensory period that only commences once merger parties have substantially complied with the request. This creates timing uncertainty for merger parties, and typically runs to many months.

43. The judicial process also adds to timing uncertainty for merger parties. Administrative decisions (either from the ACCC or the Competition Tribunal) would be subject to legislative time limits that provide timing certainty for parties. Litigation in the Federal Court would not be subject to the same timing limitations, and while Courts typically endeavour to decide merger cases efficiently, it is subject to a range of factors including the workload of the courts.

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3 Department of Justice, Model Second Request: Request for Additional Information and Documentary Material Issued to Weebyewe Corporation, 28 November 2016.

4 J Sims, R Jones and H Hollman, Merger Process Reform: A Sisyphean Journey?, *Antitrust*, 2009, 23,(2).

5 P Boberg and A Dick, Findings from the Second Request Compliance Burden Survey, *The Threshold*, 2014, XIV(3), p 30.

Will not improve transparency

44. A model predicated on judicial enforcement usually precludes regulators from publishing detailed reasoning for decisions at the time a decision is made because it may prejudice later enforcement action. Therefore, Option 2 doesn't improve upon the levels of transparency that are currently provided under the current informal merger control system.

45. The ACCC recognises and supports the requirement in a formal administrative regime (Option 3) to provide greater levels of transparency in respect of the final decision. We consider it is important to afford merger parties, third parties and the Australian public with transparency about the ACCC's rationale and reasoning for clearing or opposing mergers. However, in the US, upon which Option 2 is based, no reasons are normally given by the competition agency for merger matters. The only transparency the public is given into merger decisions in the US is when matters are litigated.

Challenges with judicial-enforcement model and the forward-looking test

46. Option 2 entrenches the present dynamic whereby merger decision-making is skewed towards a default of allowing mergers to proceed, including for mergers that raise significant competition concerns, and doesn't provide a role for the Tribunal. As discussed previously, the Tribunal brings expertise and allows for the development of important guidance for future transactions.

47. Instead, it results in the retention of the status quo, whereby the ACCC is required to commence legal action in the Federal Court to prevent a merger.

48. The judicial enforcement model that applies in the current regime means that when the ACCC has competition concerns, and the merger parties do not voluntarily abandon or amend their proposal, the ACCC must commence Federal Court proceedings and prove a breach of section 50 of the Competition and Consumer Act to prevent the transaction. This requires the ACCC to establish, on the balance of probabilities, that the proposed merger would have the effect, or be likely to have the effect, of substantially lessening competition in the future. Alternatively, some matters proceed via a Federal Court declaration process, but similar issues arise.

49. Merger parties will almost always have access to more evidence about the market and potential future developments than the ACCC, and third parties may be reluctant to give evidence if they perceive a risk of reprisals by the merger parties. This raises ongoing challenges for the ACCC in identifying sufficient admissible evidence, including witnesses willing to engage in the court process.

Inaccessibility for affected third parties and consumers

50. Option 2 raises barriers to participation for affected third parties – be they competitors, suppliers or customers. As Treasury recognised, evidence from competitors, customers, suppliers and other third parties is important in demonstrating the likely effect on competition of a merger.

51. There are already existing concerns about the willingness of third parties to engage in the process or give evidence in court because of the time, cost, divulgence of confidential information, possible retribution or adverse consequences. These concerns are heightened in a litigation environment compared with an administrative

model. This is because in litigation third parties often need legal representation, and the process is more adversarial (e.g. their witnesses may be examined by the merger parties, rather than their evidence being tested by the decision maker).

52. Option 2 also disenfranchises consumers from having their voices directly heard in the process. Where the ACCC acts as administrative decision maker, it encourages and receives submissions from affected consumers and takes these into account in the decision-making process. Federal Court litigation poses insurmountable barriers for consumers to participate unless there is a well-funded consumer advocacy body. This may result in less emphasis being placed on the effects that mergers may have on consumers – whether these be higher prices, or a reduced quality or range of products and services.

Inefficient expenditure of public resources

53. Option 2 also doesn't achieve the policy objective of preventing anti-competitive mergers at the lowest possible cost. Litigation is expensive to prepare for and run. For any matter the ACCC litigates, costs incurred by the ACCC are typically in the many millions of dollars, and costs for merger parties are likely to exceed this.

54. Even where the ACCC has successfully prevented an anti-competitive acquisition, such an outcome under the current merger regime often comes with significant cost and inefficiency. This would persist under Option 2.

55. For example, in a recent matter the ACCC obtained an interlocutory injunction in the Federal Court to restrain merger parties from completing an acquisition until merger litigation proceedings were completed. Though the parties did not proceed with the transaction, the process of seeking an injunction was costly and had large timing and resource implications for the ACCC (and the merger parties). During the peak of the ACCC's investigation into the acquisition, it consumed approximately one third of the ACCC's mergers resources in that period.

Option 3 - mandatory administrative regime

56. In March 2023 the ACCC outlined a proposal to reform Australia's merger laws to address concerns about the effectiveness of Australia's merger regime and the fact that it is not fit for purpose. We believe that if these concerns are not addressed with merger reform now, then it will make it harder to achieve the themes and objectives that Treasury has identified in its consultation paper. It is imperative that these changes create an efficient system that efficiently clears beneficial mergers while addressing those that could be anti-competitive.

57. As we note at the beginning of this submission, commercial parties act rationally to put themselves in the best position to get their deals through. Because of this, close attention needs to be given to the incentives that any reform option creates for merger parties. Option 3 is designed to take into account these incentives, address the current concerns about the effectiveness of Australia's merger control regime, and achieve the policy considerations that Treasury has identified are relevant to merger control.

58. Option 3 ensures that the right transactions are notified to the ACCC before they are completed, and for the transactions that matter to competition and consumers there is a clearance test that appropriately protects the public interest.

59. In an administrative regime with clear and appropriate notification thresholds there would be more certainty for business about when to engage with the system. There

would be guidance about what information to provide and timeframes for the review. The ACCC would publish the reasons for its decisions.

60. The ACCC recognises that the vast majority of merger transactions do not harm competition and Option 3 includes measures to ensure they can be dealt with expeditiously. We expect that around 90% of transactions will be dealt with by a notification waiver which will triage the majority of transactions before they even come into the formal process.

61. However, some mergers can cause a long-term change in the structure of a market that results in an enduring lessening of competition, to the detriment of consumers, businesses relying on acquiring from or supplying to the merged entity, and the economy. It is for this small number of more contentious, concerning mergers that the proposed changes are important.

62. While the informal merger regime worked well for many years, our recent experience is that voluntary and satisfactory compliance by merger parties and their advisors has diminished significantly. The absence of a mandatory-suspensory notification regime places the ACCC at a significant disadvantage when dealing with merger parties who are willing to push the boundaries of the informal, enforcement-based system.

63. In an increasing number of cases, merger parties are threatening to complete their transaction before we have finalised our review and, in some cases, we are not notified at all.

64. Presently, with the enforcement model, decisions by the ACCC to not oppose mergers, do not necessarily mean that we have concluded that they were unlikely to substantially lessen competition. In a small number of public reviews each year, we identify significant concerns but, in the time available, and the information provided there is insufficient evidence to prove a contravention in court. This means the ACCC is left with little alternative but to reluctantly clear mergers that are likely to adversely affect competition.

65. The ACCC's proposed clearance model would ensure that where the material before us, as the administrative decision maker, does not provide the basis to answer the question – are we satisfied this transaction is not likely to substantially lessen competition – the transaction will not be cleared.

66. Requiring applicants to satisfy the ACCC that the merger would not be likely to substantially lessening competition is not novel. It is part of the current test that must be applied by the ACCC and Tribunal (on review) for merger authorisations. Moreover, it has always been the requirement for merging parties seeking a declaration from the Court that an acquisition will not breach section 50 of the *Competition and Consumer Act 2010* (Cth) to prove on balance of probabilities that it is not likely to substantially lessen competition in any market. Parties have been prepared to meet, and have met, this test. A satisfaction requirement appropriately places the risk of any uncertainty about the future with the merger parties rather than consumers and the economy.

67. We believe this is appropriate because, when workable competition is lost, it is customers that bear the costs – including from higher prices, lower product and service quality, less innovation, lower productivity, and less choice in Australian markets. These costs can be enduring.

68. Under the ACCC's proposals, the Tribunal will play a very important role in ensuring that the ACCC is held accountable in the way the test is applied. We expect that the Tribunal will create important guidance for future transactions.

69. The Tribunal would apply the same clearance test as the ACCC and take into account the information that was provided to the ACCC, with new evidence to be limited to events that occur after the conclusion of the ACCC's review and impact on the competitiveness of the relevant markets.
70. This is consistent with the current position that applies to Tribunal reviews of ACCC merger authorisation determinations.[6] This model incentivises parties to put all relevant information to the first instance decision maker (in contrast to full merits review that will dampen these incentives and allow parties to game the system). It also increases the timeliness and efficiency of the review as there is no risk of delay caused by the Tribunal needing to deal with large amounts of new evidence.
71. This approach includes an appropriate degree of flexibility in that it allows the Tribunal the discretion to allow clarifying evidence, and for parties to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the ACCC made its determination.
72. It is erroneous to suggest that full merits review is necessary because procedural fairness is not afforded unless evidence has been 'tested' through cross examination on appeal. This contention has been expressly rejected by the Tribunal.[7]
73. Limited merits review appropriately balances the interests of all parties and facilitates an effective and efficient consideration of mergers, including that it does not have a chilling effect on the willingness of third parties to provide information.
74. For all these reasons, our view is that a system with a mandatory suspensory model with the ACCC as an administrative decision maker and limited merits review by Tribunal will create a regime that is fit for purpose; deliver greater benefits to the economy and to consumers, and provide certainty to business.

6 *Competition and Consumer Act 2010* (Cth), ss 102(9)-(10).

7 *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1, at [97]-[101].