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Committee Secretary
Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

By email to: economics.reps@aph.gov.au

Inquiry into the implications of common ownership and capital concentration in Australia

IFM Investors welcomes the opportunity to comment on several issues raised by the Committee's inquiry into the implications of common ownership in Australia.

IFM is an asset manager established more than 25 years ago by a group of Australian industry super funds to help protect and grow the retirement savings of their members. On behalf of more than 500 like-minded pension funds and other institutional investors worldwide, we invest across four asset classes, including listed equities.

We believe we have an important role to play as responsible stewards of working peoples' retirement savings. Our approach to the responsible investment of these savings is publically available on our website.¹

In line with major institutional investors and best practice in responsible investment globally, we consider active ownership to be an important and effective mechanism to reduce risks and maximise long-term returns for our investors and their beneficiaries, which include over 30 million working people worldwide. Details of our approach to how we vote and engage in relation to the listed equities we manage are on our website.²

In this submission we note that the theory that common ownership causes anti-competitive outcomes has already been extensively debated elsewhere and shown to have significant flaws. As a result, a number of competition authorities have concluded that the theory and available evidence does not warrant making changes to how they already police anti-competitive practices.

Further, we note there is currently no evidence in an Australian context that common ownership is a problem that requires policy change.

The theory of common ownership

In the relevant academic and policy literatures 'common ownership' refers to the simultaneous ownership of equity in competing companies by a single investor where none of the equity holdings is large enough to give the investor control of any of the competing companies.

¹ <https://www.ifminvestors.com/about-us/responsible-investment>

² <https://www.ifminvestors.com/about-us/responsible-investment/stewardship>

There is some evidence that common ownership in a number of countries and industries has increased over the past three decades. This has been due to consolidation in the asset management industry and growth in index investing, as well as continued global growth in savings.

However, at issue is not the existence of common ownership in some places and industries, but its alleged influence on investment decisions, market behaviour and competition. The argument that common ownership may be having negative impacts in such areas has become known as ‘common ownership theory.’

In recent years common ownership theory has been extensively debated by a number of academic researchers, particularly in the United States. This has given rise to a set of complex methodological debates about whether econometric studies have established a causal link between common ownership and consumer harm. These debates remain ongoing and unresolved.³

Hearings hosted by the OECD in 2017 and the US Federal Trade Commission in 2018 have considered common ownership theory in detail, drawing attention to a number of important flaws. These include that the theory relies on implausible assumptions that minority shareholdings translate into control over competing firms’ pricing strategies when, in practice, owners of such firms often have divergent interests and investment goals.

Evidence to the OECD hearings included arguments that a more logical assumption, and one that informs the economic theory underpinning competition policy, is that firms with minority shareholders seek to maximise own-firm profits:

‘...this assumption is consistent with laws on fiduciary obligation, which require corporate directors to act in the best interests of the corporation and of the shareholders as to their interests in the corporation. Under this assumption, common ownership does not have anticompetitive effects.’⁴

In Australia the law is clear on these obligations. Under the Corporations Act directors must exercise their powers and discharge their duties in good faith in the best interests of the corporation.⁵ The Court of Appeal has held that:

‘A director occupies a fiduciary position in the company and owes fiduciary duties to it. The general principle established for well over 100 years is that a director’s fiduciary duties in relation to the company’s affairs are owed to the company...

³ Claims by some advocates of common ownership theory that common ownership has caused high prices for consumers in US airlines have been questioned on methodological grounds by Dennis, P.J., K. Gerardi and C. Schenone (2021) ‘Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry,’ available at SSRN: <https://ssrn.com/abstract=3063465>. See also Backus, M., C. Conlon and M. Sinkinson (2019) *The Common Ownership Hypothesis: Theory and Evidence*, available at: https://www.brookings.edu/wpcontent/uploads/2019/02/ES_20190205_Common-Ownership.pdf.

⁴ O’Brien, P.J. (2017) *The Competitive Effects of Common Ownership: Ten Points on the Current State of Play*, paper to the OECD hearing on Common Ownership by Institutional Investors and its Impact on Competition. Criticisms that common ownership theory lacks an empirically convincing theory of consumer harm that takes into account the diversity of incentives and goals that operate across investment entities are offered by: Burnside, A. J. and A. Kidane (2020) ‘Common ownership: an EU perspective,’ *Journal of Antitrust Enforcement*, Vol. 8, pp. 456-510; Hemphill, C. Scott and M. Kahan (2020) ‘The Strategies of Anticompetitive Common Ownership,’ *Yale Law Journal*, Vol. 129, No. 5.

⁵ Directors’ duties to a company are set out in sections 180-183 of the *Corporations Act 2001* (Cth).

If fiduciary duties owed by directors to their companies were also owed to the shareholders, directors would be liable to harassing actions brought by minority shareholders. Since in that event each shareholder would have a personal right, directors would be exposed to a multiplicity of actions. There are therefore good reasons behind the established rule that in general a director's fiduciary duties are owed only to the company.⁶

We further note that regulators with extensive experience of policing markets and enforcing competition laws have been unconvinced that there is a problem to be solved.

In its paper to the OECD hearings, the United States Mission to the OECD made clear that while common ownership theory raised some interesting academic issues, US anti-trust agencies were not prepared to alter their existing policies or practices with respect to common ownership by institutional investors. Where there is specific evidence that particular acquisitions may substantially lessen competition, the relevant agencies will take appropriate action.⁷

In his testimony to the Federal Trade Commission hearings, Commissioner Robert Jackson from the Securities and Exchange Commission said that the available evidence 'may not carry the heavy burden that, as a Commissioner sworn to protect investors, I would require to impose costly limitations on the diversified investments that American families count on to fund their education and retirement...the unintended consequences of such a change could be far-reaching.'⁸

We understand this remains the position of US anti-trust agencies today. Further, we note that while the Biden administration has detailed an extensive competition policy agenda, common ownership does not feature as a problem to be solved.⁹

The Australian context

Earlier this year, in a paper co-authored by the Deputy Chair of the Committee, the first attempt to quantify the extent of common ownership in Australia has estimated that out of the 443 industries examined, 49 exhibit 'common ownership' (i.e. a single shareholder owns at least 5 per cent of two of the largest four firms in an industry). Industries that exhibit such ownership include commercial banking, general insurance and fuel retailing.

Across the 49 industries the common owners are overwhelmingly institutional investors. When instances of common ownership occur, ninety two per cent of the time the common owners are either Vanguard (51 per cent of the time) or Blackrock (41 per cent of the time).¹⁰

⁶ *Bunninghausen v Glavanics*, Supreme Court of New South Wales, Court of Appeal, 23 June 1999, available at: <https://www.caselaw.nsw.gov.au/decision/549f9ea33004262463b263de>

⁷ United States Mission to the OECD (2017) Paper to the OECD hearing on Common Ownership, p. 9.

⁸ Jackson, R.J. (2018) Testimony before the Federal Trade Commission hearing on Competition and Consumer Protection, *Common Ownership: the Investor Protection Challenge of the 21 Century*, available at <https://www.sec.gov/news/testimony/jackson-testimony-ftc-120618>

⁹ The White House (2021) Executive Order on Promoting Competition in the American Economy, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

¹⁰ Leigh, A. and A. Triggs (2021) *Common Ownership of Competing Firms: Evidence from Australia*, available at SSRN: <https://ssrn.com/abstract=3830223>

While this research provides some useful insights we are not aware of evidence that common ownership is generating harm to consumers or the broader economy. We note that the Australian Competition and Consumer Commission (ACCC) has recently advised the Committee that ‘there appears to be no consensus in the research on the effects of common ownership on competition.’¹¹

The ACCC has also recently stated that it does not currently have cause to believe that competition concerns relating to common ownership have arisen in relation to superannuation.¹²

In summary, the theory that minority holdings in competing firms leads common owners to dampen competition remains unproven and primarily of academic interest. In the US, where research and debate on the theory has been most extensive, regulators have not formed the view that common ownership is a problem that requires new rules and powers.

Thank you again for the opportunity to comment.

Yours sincerely

David Whiteley
Global Head of External Relations

¹¹ ACCC (2021) Submission to the House of Representatives Standing Committee on Economics’ Inquiry into the Implications of Common Ownership and Capital Concentration in Australia, 8 September 2021.

¹² ‘Common share ownership statistics pour fuel on proxy war,’ *Australian Financial Review*, 9 June 2021