8 February 2024

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Taskforce

Merger regulation reform

A review of Australia's merger regulation is timely. It takes place at a time when there are concerns as to the declining productivity of the Australian economy and the role of competition in enhancing productivity, and encouraging the pass through of improvements to productivity to the Australian community whether as consumers, workers, shareholders or superannuants. It also takes place at a time when the relationships between market concentration, competition and higher prices are increasingly understood to be complex and not reducible to simplistic propositions. The RBA has observed that the prices of hairdressers, dining out and recreational activities are rising strongly but no one would suggest that the markets for these services are concentrated.

I have practised in the fields of competition and consumer law for over 40 years and have observed numerous reforms to competition law and the outcomes of those reforms. The views expressed in this submission are personal. They are not those of my law firm or of any of its clients.

My comments are directed specifically to aspects of the ACCC's proposed reforms.

The ACCC proposes a range of significant changes to the regulation of mergers in Australia.

First, the ACCC seeks a mandatory notification/suspension regime in place of the current voluntary regime. The current system works well – it is flexible and well-understood. A mandatory notification/suspension regime will impose significant additional costs on the ACCC and merger parties. It will do this because the stated objects of this reform are to require more transactions to be notified and for more information to be supplied in respect of them. The ACCC's evidence of the need for this change is flimsy at best – there is very little evidence of competitively harmful transactions slipping through the net. This lack of evidence of a significant problem with the current regime suggests that it is very unlikely that the significant increase in costs associated with a mandatory notification/suspension regime will result in any material improvement in Australia's productivity.

Secondly, the ACCC proposes a regime in which the merger clearance decision would be its administrative decision, requiring that it be satisfied that a transaction would not be likely to have the effect of substantially lessening competition, which would be subject to a very circumscribed review mechanism.

Although not expressed in these terms, the ACCC's proposed regime seems intended to change the balance between the risks of types 1 and 2 errors in merger control. The ACCC appears concerned that the intended result of the features of the current system (to prohibit transaction, a court must be satisfied, on admissible evidence, that there is a real chance that a transaction will result in a substantial lessening of competition) is to minimise the likelihood of type 1 errors – that is, to minimise the risk of mistakenly prohibiting transactions which are procompetitive or competitively benign. This setting is thought by the ACCC to increase the risk of type 2 errors – that is mistakenly permitting transactions which are competitively harmful.

The ACCC's proposed regime seems designed to reverse the current setting: it is intended to reduce the risk of mistakenly permitting anti-competitive transactions at the cost of increasing the risk of mistakenly prohibiting transactions which are procompetitive or competitively benign.

Both types of error impose costs on consumers and businesses, but the magnitude of those costs and their sensitivity to the extent of the change to the likelihood of one or other type of error are disputed and not susceptible of easy assessment.

I consider that the evidence in support of the changes proposed by the ACCC is not persuasive, but more importantly I think that the various components of the regime proposed by the ACCC are not all essential.

Specifically, if the view is formed that, to reduce a perceived risk of mistakenly permitting anti-competitive transactions, the merger clearance decision should be an administrative decision by the ACCC requiring it to be satisfied that a transaction would not be likely to have the effect of substantially lessening competition, it does not follow that the review mechanism should be circumscribed in the way proposed by the ACCC.

My concern is that the limited review mechanism proposed by the ACCC does not provide sufficient protection against type 1 errors of mistakenly prohibiting transactions which are procompetitive or competitively benign.

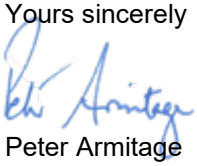
The review mechanism proposed by the ACCC mirrors the current review mechanism for merger authorisations, which has material shortcomings. Not least of those shortcomings are the fact that merger parties have very little visibility of material obtained by the ACCC and very little ability to test it and the Australian Competition Tribunal is statutorily precluded from considering new material and its procedures do not contemplate testing of evidence through cross-examination or otherwise. For example, the ACCC's second submission to this Taskforce includes an economist report. That report has appeared at a point in time in the process which makes it difficult to test. This is not a criticism of the report or its timing in this process, but similar events occur in the merger authorisation process and the consequences of the statutory and procedural limitations in the Tribunal are that such evidence and the information on which it is based cannot be properly tested.

My view is that, if the ACCC's reform proposals are to be adopted, the review mechanism should be a merits review by the Federal Court. It is common ground that such proceedings would be very infrequent and that they may take longer than review by the Tribunal, but that review mechanism would importantly reduce the risk that the overall merger control regime would mistakenly prohibit transactions which are procompetitive or competitively benign.

An analogy frequently comes back to bite the person that uses it, but I will take that risk. Assume, for cricket matches, video and modelling technologies are available which provide multiple views at various speeds of an event and which can predict likely subsequent events. Under the ACCC's proposal a cricket umpire determines that a batter is out only if she is satisfied that the batter is not not-out and the review of that decision is not permitted to take advantage of the multiple views and modelling predictions, but is limited to the umpire's view point. In my view it would lead to better decisions if the review could have regard to multiple views and modelling predictions in determining whether the umpire's decision should be upheld or not.

I think that, in its desire to reduce the risk of mistakenly permitting anti-competitive transactions, the ACCC's proposed regime unnecessarily and harmfully increases the risk of mistakenly prohibiting transactions which are procompetitive or competitively benign. That risk would be materially mitigated if the review mechanism is a merits review by the Federal Court of the ACCC's decision.

Yours sincerely



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