CHOICE

CONSUMERS' FEDERATION OF AUSTRALIA

Competition Taskforce
The Treasury
Via email: CompetitionTaskforce@treasury.gov.au

25 January 2024

**Merger reform — consultation paper**

CHOICE and the Consumers Federation of Australia (CFA) welcome the Federal Government's focus on merger reform as the first priority of the newly established Competition Taskforce.

Australia has many markets that are highly concentrated; supermarkets, airlines, banking, telecommunications, energy and insurance are all markets where a few dominant companies provide most Australians with essential products and services. Increasingly, we are also seeing the emergence of new highly concentrated markets in the digital economy, such as social media and online search services.

Consumers pay the price of highly concentrated markets, including through higher prices, poor customer service and lower product and service quality. There is also evidence that businesses in concentrated markets infringe consumer protections more often.[1] Effective merger control should help stop companies in already concentrated markets growing bigger and more powerful in ways that harm consumers. It should also prevent the emergence of new highly concentrated markets with poor consumer outcomes.

Preventing these mergers is important because addressing consumer harms after a market has become highly concentrated can be complex, often requiring further more specific regulation outside of competition policy. Notably, consumer advocates have been vocal about problems for consumers in many of the markets noted above, and market-specific regulation has been necessary as poor consumer outcomes arose.

**CHOICE and the CFA support the ACCC's proposed changes to Australia's merger control regime**, including a mandatory administrative merger clearance regime that requires merger parties to satisfy the ACCC that the merger is **not** likely to substantially lessen competition (SLC) (Option 3 in the consultation paper).

CHOICE and the CFA also support reforms to the SLC test to:

- modernise the list of factors to be considered under the SLC test;

[1] E61, The State of Competition in Australia, p 8https://e61.in/wp-content/uploads/2023/08/The-State-of-Competition.pdf

- expand the SLC test to cover mergers that entrench or materially increase or extend market power, and
- allow consideration of related agreements as part of considering the effect of mergers on competition (Options A, B and C in the consultation paper).

In addition, we urge the Competition Taskforce to recommend the Federal Government implement reforms to:

1. **ensure consumer advocates are notified of potential mergers** that may harm consumers and are invited to provide evidence;
2. **enable consumer advocates to access funding** required to participate throughout the merger control processes, noting that engaging with Australian Competition Tribunal (Tribunal) or Court-based processes can be particularly resource intensive; and
3. ensure the merger control test(s) enables consideration of **evidence about the effect of the merger decision on consumers experiencing disadvantage or vulnerability.**

Our submission is informed by three overarching principles:

1. The ACCC should be given the tools it needs to prevent harmful mergers
2. The merger control process should be designed to make it easier for consumer voices to be heard.
3. Competition policy processes, including the merger control test, should allow greater consideration of the experience of consumers experiencing vulnerability or disadvantage.

We expand on each of these principles below.

## The ACCC should be given the tools it needs to efficiently prevent harmful mergers

**The merger control regime should make efficient use of the ACCC's resources**

Consumers generally rely on the ACCC to protect their interests through the merger control regime and it is therefore important that the regime adequately addresses the information imbalance between companies and the ACCC. The ACCC's 2022 review of merger decisions suggests that the current regime is not working to correct this information imbalance as there is evidence of the ACCC relying on distorted or incomplete evidence when considering mergers.[2]

The merger control regime should be designed so that the ACCC receives notification and reliable information about relevant mergers, and is empowered to stop mergers without resorting to costly litigation. The regime should be designed to ensure large, well-advised and well-resourced companies are expected to demonstrate why a merger should proceed, rather than expecting the ACCC to expend its limited (taxpayer funded) resources on this information and evidence collection.

[2] ACCC, *Ex post review of merger decisions* (2022)

Many companies already expend significant resources on merger due diligence processes to ensure that a merger is in the interest of the company. In these circumstances, it is reasonable to expect these companies to make relevant information available to the regulator and satisfy the regulator that the transaction is not contrary to competition law.

**Creeping acquisitions can be harmful and must be addressed**

The consultation paper refers to well-publicised concerns about creeping acquisitions in the grocery, liquor and hardware sectors in Australia. Our discussions with international advocates suggest there are other markets where creeping acquisition strategies are leading to harmful market concentration and poor outcomes for consumers.

For example, in New Zealand and Canada, there are concerns about the large numbers of small acquisitions in the funeral and retirement home industries, leading to higher prices for consumers. Alarmingly, in some cases the business strategy of increasing scale and charging higher prices to consumers is proudly promoted. For instance, the publicly-listed funeral provider Park Lawn Corporation (which has grown from six North American locations in 2013 to more than 300) highlights its "acquisition growth strategy" and "margin expansion" in investor presentations.[3] Australia's demographic trends are similar to these international markets and we would not be surprised if there is a similar phenomenon occurring in Australia.

To ensure the ACCC has the tools it needs to address these acquisitions, CHOICE and the CFA support the expansion of the SLC test to cover mergers that entrench or materially increase or extend market power, as well as the explicit inclusion of creeping acquisitions as a merger factor to be considered.

### Recommendation 1

The Competition Taskforce should recommend the Federal Government implement a merger control process consistent with the ACCC's proposals.

## The merger control process should be designed to make it easier for consumer voices to be heard.

Consumers and consumer advocates are even more resource constrained than regulators, and there will inevitably be a limit to their capacity to engage with merger control processes. Nevertheless, there can be substantial value in bringing the voice of consumers to regulatory processes, including ensuring decision makers are presented with evidence and submissions about consumer experiences that no other parties will provide.

[3] For more information, see The hidden trend reshaping and hurting the economy: serial acquisitions

Currently, consumer advocates are often informed and invited to provide submissions when the ACCC is considering an application for authorisation, which may relate to merger authorisation or other competition law issues. There are limited examples of consumer advocates engaging with these processes due to resourcing constraints. However, two recent case studies we encourage the Taskforce to consider are the:

1. Consumers Federation of Australia's submissions about ANZ's proposed acquisition of Suncorp Bank[4] and
2. the Consumer Action Law Centre's (CALC) report on representing the consumer interest in the Tribunal.

In both examples, consumer advocates were made aware of the authorisation application by the ACCC. The process of notifying consumer advocates about the application for authorisation prompts advocates to consider if they have unique expertise or evidence to offer. We recommend that similar processes be established as part of any reformed merger control regime. We consider that this should go beyond simply publishing details and should require the ACCC (or other decision maker) to proactively notify and invite engagement from consumer advocates. Ideally, these invitations to contribute would be accompanied by offers of funding support to recognise the resource impost.

Consumer advocates typically cannot engage with Tribunal or court based processes without funding support. CALC's intervention in the Tribunal process above was made possible by funding support from Energy Consumers Australia. Due to lack of resources, neither the Consumers Federation of Australia nor its members could continue to participate in the ANZ-Suncorp merger process once it entered the Tribunal. This is despite the CFA submissions being heavily referenced in the reasons for the ACCC determination, suggesting that the evidence was valuable.

We recommend the Taskforce consider mechanisms that would enable consumer advocates to access funding to participate in any Tribunal or court-based merger control processes which may have a significant impact on consumers. For example, a court or tribunal could be empowered to appoint consumer advocates as a contradictor, with the costs borne by the merger parties. There are similar processes for other court processes that involve consideration of the interests of a group that may not otherwise be represented—for example, during class action proceedings and when trustees seek judicial advice about the administration of a trust.

### Recommendations 2-3

The Competition Taskforce should recommend the Federal Government implement reforms to:

2. ensure consumer advocates are notified of potential mergers that may harm consumers and are invited to provide evidence;

[4] CFA submission before the ACCC's preliminary decision (January 2023), CFA submission after the ACCC's preliminary decision (April 2023)

3. enable consumer advocates to access funding required to participate throughout the merger control processes, noting that engaging with Australian Competition Tribunal (Tribunal) or Court-based processes can be particularly resource intensive.

## Competition policy processes, including the merger control test, should allow greater consideration of the experience of consumers experiencing vulnerability or disadvantage

Current competition policy processes, including the merger control regime, tend to focus on macro-level economic cost benefit analysis. The impact of merger clearance or authorisation—or other competition policy decisions—on consumers experiencing vulnerability and disadvantage, cannot always be quantified at a scale that satisfies current tests.

The result of this approach is that the evidentiary bar is set in a way that prefers industry or market-wide data over data that is linked to a consumer advocacy organisation's client base, case work or surveys. CALC ultimately concluded that "it is difficult, if not impossible, for consumer advocacy organisations to present evidence that satisfies Tribunal processes, given [consumer advocate] reliance on the experience of individual consumers that seek assistance as the basis of our evidence."[5] This is despite the fact these case files are likely to represent the tip of the iceberg when it comes to consumer harm.

Competition policy processes, including the merger control test, should adopt a broader approach that might allow greater consideration of consumer vulnerability and the experiences of consumers experiencing disadvantage. Competition policy decisions should not just be derived from an economic cost-benefit analysis at the macro level. Public benefits are achieved when all consumers are protected and empowered, not just those that are more capable of engaging in the marketplace or who can afford to shoulder the cost when the market fails them.

Addressing this issue for merger control will likely require a more nuanced approach to the merger control test. In addition to the additional factors and expansion to the test proposed by the ACCC, CHOICE and the CFA recommend amending the merger factors and the second-stage public benefit test to ensure the impact of a merger proceeding (or not proceeding) on consumers experiencing disadvantage or vulnerability is considered.

This approach is consistent with the ACCC's consideration of the benefits to Australia's renewable energy transition in deciding to allow the acquisition of Origin energy - this involved consideration of factors beyond traditional economic efficiency considerations. In New Zealand, we also note that courts have confirmed that the New Zealand public benefit test is not limited to economic considerations and allowed consideration of the benefits of media diversity when

[5] Consumer Action Law Centre, THE NEW ENERGY TECH CONSUMER CODE: representing the interests of consumers at the Australian Competition Tribunal (2021)

deciding to block a media merger.[6] We consider that the public benefit test in Australia could be clarified to ensure the experience of consumers experiencing disadvantage or vulnerability can be adequately considered.

### Recommendation 4

The Competition Taskforce should recommend the Federal Government implement reforms to ensure the merger control test(s) enables consideration of evidence about the effect of the merger decision on consumers experiencing disadvantage or vulnerability.

You may contact me on rthomas@choice.com.au to discuss this further.

Yours sincerely,

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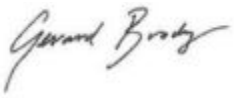

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[6] NZME Limited v Commerce Commission [2018] NZCA 389