Microsoft

Submission to Treasury consultation on merger reform proposals

25 Jan 2024

Introduction

We appreciate the opportunity that the Treasury's Competition Taskforce gives in its November 2023 Merger Reform Consultation Paper (**Consultation Paper**), to provide information and views that can inform options for modernising Australia's merger regime.

From Microsoft's perspective as a global technology company with experience in the merger clearance processes worldwide, our overall view is that current Australian merger laws have been effective in achieving their stated goals.

We offer the following views in relation to the proposals in the Consultation Paper:

- The proposal to reverse the burden of proof in Australia's merger clearance test is considerably stricter than the merger control regimes of comparable jurisdictions and likely to unduly stifle merger activity, including the overwhelming majority of mergers that have positive effects on the Australian economy;
- Merger reforms should be thoughtfully constructed to preserve the positive impact of mergers on competition, innovation, economic growth, and investment in new businesses, particularly in the tech sector; and
- The right to obtain a full merits review of merger review decisions is not only critical for the rule of law and to ensure due process but will also improve the overall efficiency of the review process.

1. Reversing the burden of proof in Australia's merger test is internationally inconsistent and not necessary for a robust merger review regime

Microsoft cautions against the proposal to shift the burden of proof on to merger parties, which has the effect of presumptively prohibiting all mergers and does not appear commensurate to the potential harm sought to be addressed.

1.1 This proposal is inconsistent with international norms

Reversing the onus of proof vastly increases the evidentiary burden for merger applicants and is out of step with international counterparts. No other comparable jurisdiction, including those with a mandatory notification regime (e.g., the US, EU, UK and Canada), places the burden on merger parties to prove a negative in order to obtain merger clearance.

In the US, it is well-established that the ultimate burden of persuasion remains with the government at all times and past court decisions have rejected proposals of a legal standard that effectively shifts the government's ultimate burden of persuasion to the defendant.[1] To the extent U.S. DOJ-FTC Merger Guidelines contain "presumptions", it is important to note that these reflect a starting point for the agencies' review, rather than a final conclusion or a legal presumption, and they are not legally binding on a Court.

[1] *See United States v. Baker Hughes Inc., 908 F.2d 981* and 991-2 (Noting courts have "discarded Philadelphia Bank's insistence that a defendant 'clearly' disprove anticompetitive effect"

Microsoft supports the Taskforce's consideration of overseas regimes to inform the best approach for Australia. Here, the consideration of international norms and points sharply against changing the merger test to reverse the onus of proof.

1.2 This proposal erroneously presumes all mergers should be blocked, when most mergers are beneficial to society

In the enforcement context, burden shifting (which might reflect applying a "precautionary principle") is common where the conduct will likely cause material community harm.[2] In the merger context, however, many leading Australian competition officials – including past ACCC Chair Sims, economist Professor Maureen Brunt, and current Australian Competition Tribunal (**Tribunal**) President Justice O'Bryan – have noted that very few mergers are likely to be anti-competitive.[3]

In light of the broad consensus that the overwhelming majority of merger activity is beneficial to society, it is not justifiable to shift the burden to effectively create a presumption that all merger activity is anti-competitive unless parties can prove otherwise.

1.3 The proposal raises significant practical challenges

In requiring merger parties to prove a future negative to the ACCC (i.e. that, in all circumstances, the merger is not likely to substantially lessen competition in the future), the burden of the proposed test is significant. Notably, in all four merger authorisation applications decided in the past 18 months that applied a similar reversed onus test, the ACCC considered that it was not satisfied in all the circumstances that any of the transactions would not substantially lessen competition.[4] Ultimately, two of these merger authorization applications were cleared with undertakings on the basis of being found net beneficial to society.

1.4 Lack of evidence to support need for change

Finally, there is no clear evidence to indicate such deep-seated issues in Australia's merger control regime that a drastic change such as the reversal of burden of proof is necessary or likely to increase competition.

As noted in Justice O'Bryan's in-depth exploration of the burden of proof in Australia's merger regime:

> '*It is not apparent from the cases that there is a problem with the location of the burden of proof in merger cases….it is difficult to conclude that there are such deficiencies in the framing of the*

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[2] As the Consultation Paper notes, discussed by Justice Jagot, 'Some thoughts about proof in competition cases', Judicial address, University of South Australia & ACCC Competition and Economics Law Workshop, 15 October 2021.

[3] R. Sims, "Protecting and promoting competition in Australia keynote speech", 27 August 2021,; M. Brunt, 'Legislation in Search of an Objective', *Economic Record*, September 1965, 41(95); Justice M. O'Bryan, 'Should the Burden of Proof be Shifted', *Current Issues in Competition and Consumer Law*, 2021, p185.

[4] While the ACCC rejected all four applications for merger authorisations on competition grounds, two were cleared on the basis of off-setting public benefits, subject to undertakings: Linfox Armaguard Pty Ltd and Prosegur Australia Holdings Pty Ltd proposed merger | ACCC; ANZ proposed acquisition of Suncorp Bank | ACCC; Brookfield LP and MidOcean proposed acquisition of Origin Energy Limited | ACCC; Telstra Corporation Limited and TPG Telecom Limited proposed spectrum sharing | ACCC.

substantive law that it requires further review and revision, particularly relating to the burden of proof.'[5]

In light of this, Microsoft urges the Taskforce to review the proposal to reverse the burden of proof in the merger test with care and while taking into account the many positive aspects of M&A activity, as detailed in the section below.

2. Mergers can positively impact competition, innovation, and economic growth

Most mergers positively impact competition, innovation, and economic growth, particularly in global tech markets. Australia's tech industry has grown into a critical pillar of the economy. It contributes $167 billion, or 8.5% of Australia's total GDP, per year.[6] CSIRO forecasts that digital technologies will add $315 billion to the Australian economy by 2028. Australia's tech industry will likely surpass primary and manufacturing industries' GDP contribution in the next decade.[7]

2.1 The pro-competitive benefits of mergers

As recognised by both the ACCC and the Taskforce, mergers represent an important way for firms to achieve economies of scale and scope, diversify risk and exit businesses.[8] In particular, there is extensive research showing that vertical mergers generally encourage product innovation, lower business costs, and result in reduced prices and increased quality for consumers.[9] For example, a single firm incorporating separate, closely related production processes can often be far more efficient than various independent entities transacting to produce the same offering.[10]

There is substantial economic evidence that concentration alone is a poor predictor of competitive performance, productivity growth and economic wellbeing.[11] As the Taskforce and the ACCC have repeatedly observed, mergers often benefit Australians and most mergers do not raise competition concerns.[12]

As such, Microsoft supports merger control regime standards that do not unduly burden pro-competitive merger activity, preserving these benefits for consumers. Microsoft echoes the ACCC's view that there is much at stake if Australia adopts the wrong merger policy settings. To avoid this, it is critical that there is clear evidence to support changes to the current regime.

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[5] Justice M. O'Bryan, Ibid.
[6] Tech Council of Australia and Accenture, 'The economic contribution of Australia's tech sector', August 2021, p8.
[7] Ibid, p13.
[8] ACCC, 'Outline to Treasury: ACCC's proposals for merger reform', March 2023, p1, 2; Taskforce Consultation Paper, p9.
[9] Hovenkamp, Competitive Harm from Vertical Mergers (2020); see also Alberta Gas Chems. Ltd. v. E.I. Du Pont De Nemours & Co., 826 F.2d 1235, 1244 (3d Cir. 1987); Bork, The Antitrust Paradox: A Policy at War with Itself 231 (Bork Publishing 2021)
[10] Comcast Cable Communications, LLC v. FCC, 717 F.3d 982, 991 (D.C. Cir. 2013); It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 689 (4th Cir. 2016)
[11] See, e.g., Global Antitrust Institute, Antonin Scala Law School, 'On the ACCC Digital Platforms Services Inquiry's Discussion Paper for Interim Report No. 5', p8.
[12] See, e.g., ACCC, 'Preliminary views on options for merger control process', 20 December 2023, p8.

2.2 A healthy merger ecosystem incentivises investment

Overseas investment plays an important role in Australia's start-up ecosystem. The possibility of future acquisition alone can impact a start-up's valuation and their ability to fundraise. Fewer exit opportunities through restrictive merger laws will not only lead to fewer mergers but can also reduce Australian businesses' access to capital to fund organic growth. This is particularly applicable where the heightened regulatory barriers arise from domestic merger laws that do not impact similar overseas businesses who may be competing for the same funding sources. With more barriers to acquisition, Australian entrepreneurs are likely to face greater hurdles in scaling their businesses to international success.[13]

In practice, imposing a handbrake on acquisitions like a reversed onus of proof would serve as a barrier to entry to many Australian businesses, most notably for those competing in a global market for venture capital funding. Investors commit funding in start-ups because there are various exit opportunities, including the possibility of acquisition.

Finally, overseas investment is not only critical for Australia's growing tech sector but also important to maintaining competitive markets. As the Deputy Chair of the Productivity Commission has observed, '[o]penness to foreign investment can be an important source of competitive pressure and innovation'.[14] Similarly, Austrade has noted that '[Australia's] success comes from being an open and adaptable trading nation that is deeply connected to the global economy'.[15]

3. Full merits review is fundamental to fairness and efficiency

Irrespective of whether it is Federal Court of Australia or Tribunal conducts the review, Microsoft strongly supports ensuring that merging parties have the right to seek full merits review of the merger decision.

3.1 Impact on fairness

The availability of full merits review is a critical safeguard on executive decision-making. As we have previously noted, the ACCC is widely-respected agency with deep experience and highly-competent decision makers.[16] However, maintaining substantive and procedural fairness requires institutional checks and balances on the exercise of regulatory discretion. Although there is currently only limited review of merger authorisation decisions, we note that the impact of this recent change is limited by the relatively rare use of the merger authorisation process. Microsoft strongly advocates against limiting the scope of merits review for other merger review decisions.

Another important aspect of procedural fairness is ensuring merger parties have access to the evidence that informed the ACCC's decision. Significant issues of procedural unfairness may arise where the parties do not have access to the ACCC file until after the ACCC decision, and no opportunity to test the evidence provided by third parties via further discovery and/or cross

[13] D. Reilly et al., 'The Importance of Exit via Acquisition to Venture Capital, Entrepreneurship, and Innovation', *Minnesota Journal of International Law,* 2023, 32(1), 159, 164.
[14] A. Robson, Deputy Chair of Productivity Commission, Standing Committee on Economics, Inquiry into promoting economic dynamism, competition and business formation, Productivity Commission public hearing transcript, 16 March 2023, p4.
[15] Austrade, Why Australia: Benchmark Report 2023, March 2023, p43.
[16] See, e.g.: DPB - DPSI - September 2022 report - Submission - Microsoft - Public.pdf (accc.gov.au); Microsoft.pdf (accc.gov.au); Microsoft (24 April 2020).pdf (accc.gov.au).

examination. Although the ACCC does not consider that full merits review, including testing evidence on cross-examination, is necessary to ensure procedural fairness, the Tribunal decision that the ACCC references in support of its views did not in fact evaluate procedural fairness. Instead, in that decision, the Tribunal made clear that its review is not a means for ensuring procedural fairness:[17]

> '*It is not the case that a failure to reveal confidential information to an applicant for authorisation will necessarily constitute a breach of the requirements of procedural fairness by the ACCC. Nor is a review by the Tribunal a process to correct perceived failures of procedural fairness by the ACCC.*'

Finally, full merits review ensures the Court or Tribunal's attention is appropriately directed to the question of whether a merger is pro-competitive or anti-competitive based on all available evidence, rather than on the less relevant question whether the ACCC made the right decision based on the evidence available at the time.

Microsoft supports the Organisation for Economic Co-operation and Development's (**OECD**) conclusion that merger regimes must be procedurally fair, including by giving parties a meaningful opportunity to respond to concerns raised. We urge the Taskforce to safeguard this procedural fairness in Australia's merger review regime.

3.2 Impact on efficiency

Limiting merits review in Australia's current merger authorisation process has created a significantly more burdensome and inefficient initial review process. Knowing that new evidence cannot be introduced on appeal, applicants are incentivised to provide all possible information before having any visibility over the relevant markets or theories of harm that are most likely to interest the ACCC. And yet, in over 85% of merger cases that had a negative initial decision between 2002-2022, the parties did not seek review but abandoned the transaction.[18] It is hugely inefficient to impose a uniformly burdensome upfront process on both merger parties and the ACCC when only a small minority of decisions will undergo further review.

In addition to inefficiency, it is also unrealistic to expect merger parties or the ACCC to predict with precision the issues and evidence that could become relevant many months (sometimes even years) later. This is especially applicable in complex merger reviews involving vertical or conglomerate mergers, complex supply chains, overlapping product or service markets, or novel theories of harm which comprise a large number of merger review cases that undergo the ACCC's informal merger review process.

Finally, there is no sensible reason for highly-motivated merger parties to deliberately withhold relevant evidence from the ACCC and reserve it for a Tribunal or Court hearing. Such action would incur considerable additional delay, uncertainty, and legal fees – any or all of which may ultimately prove fatal to a precarious acquisition. If these compelling factors alone failed to discourage parties from wilfully withholding relevant evidence from the ACCC, it would be preferable to introduce limited amendments specifically to target any such conduct rather than to introduce sweeping restrictions on merits review for all future merger decisions.

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[17] Applications by Telstra Corporation Limited and TPG Telecom Limited [2023] ACompT 1, [86].
[18] Justice M. O'Bryan, 'Should the Burden of Proof be Shifted', *Current Issues in Competition and Consumer Law*, 2021, p185.

4. Other comments

4.1 Additional 'entrenching, materially increasing or materially extending a position of substantial market power' test

Microsoft cautions against the proposed inclusion of "entrenching, materially increasing or materially extending a position of substantial market power' to the well-established test under section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The current section 50 test applies a familiar and consistent legal standard that has been in force since 1977. In numerous past substantive inquiries into Australia's competition laws, the current "substantial lessening of competition" test used throughout the CCA has been found to be suitable and effective.[19] This is also demonstrated by the ACCC's track record in successfully addressing both a series of small-scale acquisitions and entrenchment of substantial market position.

Section 50 currently applies the same 'substantial lessening of competition' test that is applied in many other provisions throughout the CCA. One argument for amendment is that this novel element may enable the ACCC to better address 'creeping acquisitions' described by the ACCC Chair as 'a particular concern in digital platform markets'.[20] However, legislative amendments to address 'creeping acquisitions' have already been introduced in 2011.[21]

There are numerous examples the existing section 50 test already provides the ACCC with effective powers in addressing such 'creeping acquisitions'. Most recently, in the ACCC's review of Woolworths' proposed acquisition of Petstock, the ACCC included a detailed analysis of numerous historic acquisitions made by Petstock in reaching its decision.[22] Moreover, the ACCC's Merger Guidelines clearly state that it considers entrenchment of market position may amount to a 'substantial lessening of competition' that meets the current section 50 test.[23]

As such, we do not consider there to be compelling evidence to demonstrate the proposed reform is necessary. And in the absence of such evidence, there does not appear to be sufficient countervailing benefit to introducing inconsistency and legal uncertainty into the current section 50 merger test.

4.2 Voluntary or mandatory regime

We consider that our perspectives above regarding preserving the current burden of proof and ensuring a full merits review process can be accommodated in either a voluntary or mandatory regime, which both have their advantages and disadvantages.

A voluntary regime would maintain the status quo and grants the ACCC considerable flexibility in how it approaches informal merger clearances, with correspondingly greater uncertainty as to timing for merger parties that is partially mitigated by the familiar and well-established process run by the ACCC.

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[19] Justice M. O'Bryan, ibid.
[20] ACCC, 'Outline to Treasury: ACCC's proposals for merger reform', March 2023, p10.
[21] Removing the word "substantial" from the definition of "market", to confirm the ACCC/Court can examine any market regardless of size; and change the test to "any market", so the ACCC/Court can consider multiple markets in its assessment: 'Competition and Consumer Legislation Amendment Bill 2011: Explanatory Memorandum', 1.7, 1.14.
[22] See ACCC media release, Woolworths' acquisition of controlling interest in Petstock not opposed, as Petstock gives undertakings relating to past acquisitions', 14 December 2023.
[23] ACCC, 'Merger Guidelines', November 2017, 5.7.

In contrast, a mandatory and suspensory regime would require greater resourcing from both merger parties and from the ACCC, though accompanied by relatively more timing certainty.

Ultimately, the efficacy of either process depends on the finer details of how they are designed and implemented in practice. Should it be useful, we would be happy to provide our global perspective on effective elements of design for either a voluntary or mandatory regime.

Conclusion

Microsoft welcomes the Taskforce's thoughtful review process, including first thoroughly evaluating whether any change to the current rules is required, and then considering the full breadth of ways the current rules could be improved, before committing to any potential changes. As previously stated, Microsoft supports the need for appropriate scrutiny and oversight of mergers, including in relation to digital platforms.[24] We are grateful for the opportunity to provide our comments and would welcome the opportunity to discuss our observations directly with the Taskforce if that would be useful. We look forward to continuing to engage with the Government in this important process.

[24] Microsoft, Submission to the ACCC Discussion Paper for Interim Report No. 5, 1 April 2022.