Competition Taskforce Division
Treasury Building
Langton Cres PARKES
ACT

3 February 2024

## Dear Competition Taskforce Division,

I am submitting a brief response to the merger-reform consultation to endorse the ACCC's proposal. The ACCC is proposing to reform the Australian Merger Control Law and its policy to create a mandatory regime with a mandatory suspensory clearance with a reverse burden of proof, where the ACCC would be the decision-maker. Its decisions will be subject to review by the Competition Tribunal and the Federal Court and the High Court in the final instance.

The proposition by the ACCC would align the Australian merger-control law regime with other well-established, long-standing regimes. It will improve its effectiveness based on: (1) the accuracy of the analysis when determining if there is a substantial lessening of competition, and (2) time efficiency. To change the current Australian merger control regime is even more pressing to address issues arising from the current digital economy effectively and in a timely manner.

**Mandatory Regime**

The most well-established, long-standing regimes, including the EU and the USA (which is also a common-law jurisdiction), are mandatory regimes.[1] This means that merging entities have to notify and register their merger or acquisition if they meet certain thresholds, and they cannot finalise their merger or acquisition until a certain period for review of the merger or acquisition has passed and/or a formal clearance has been obtained.

For instance, in the USA, the primary federal merger control legislation is Section 7 of the *Clayton Act*, which prohibits mergers and acquisitions that may substantially lessen competition. The *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (Section 7A of the *Clayton Act*) requires pre-merger notification of proposed mergers and acquisitions that meet certain requirements, including a threshold. Meeting the requirements indicates that the particular merger or acquisition could, potentially, lessen competition substantially.[2] Such mergers and acquisitions then need to be assessed under the mandatory regime by the Department of Justice or the Federal Trade Commission to determine whether they will substantially lessen competition.

Adopting the mandatory regime in Australia, similar to the USA or the EU, would improve the Australian regime significantly for the following reasons:

[1] Although the UK is also one of very few voluntary regimes, the UK competition law authority the CMA makes biding decisions whether a particular merger or acquisition is anticompetitive.

[2] In the USA, mergers may also be challenged at the court under the Sherman Act 1890, or Section 5 of the Federal Trade Commission Act 1914 (the "FTC Act").

- It will allow the ACCC to obtain all the documents it needs to assess individual mergers and acquisitions that meet certain requirements, indicating the likelihood of substantially lessening competition. This would also allow these mergers and acquisitions to be assessed in a timely manner. For instance, like in other areas of competition law, the ACCC would or should have the same or similar investigatory powers and tools, including available remedies for non-compliance.
- The mandatory regime decreases the chance of missing the assessment of potentially anticompetitive mergers and acquisitions. Such a mandatory regime (to be truly mandatory) needs to be equipped with relevant and effective remedies, including penalties for not registering mergers and acquisitions once they meet certain requirements, including thresholds.
- This will also allow the ACCC to spend more resources assessing relevant mergers and acquisitions rather than detecting them.
- The proposed mandatory regime will make the investigatory process more time-predictable, as discussed below.

**Enforceable decisions by the ACCC on SLC**

In many well-established and effective competition-law regimes, including the UK common-law regime, competition law authorities have the power to make a binding, enforceable decision as to whether a particular merger or acquisition infringes competition law, as well as the power to block the merger or acquisition as part of such a decision. These decisions are then subject to a tribunal and/or judicial review. In line with these regimes, the ACCC has put forward a proposal to become a decision-maker with regards to mergers and acquisitions and whether they substantially lessen competition. The ACCC's decisions in this matter should be reviewed by the Competition Tribunal, as a tribunal specialising in competition law. In order to ensure justice, including that the merger parties' rights to due process are fully respected, judicial review should be included in the new regime. Such a process would also lead to a change in the test applied in the first instance; it would be the merger parties that would take the matter to the Competition Tribunal, arguing that their merger (or acquisition) will not substantially lessen competition or that the likely lessening of competition will outweigh the public benefit(s).

The main reason as to why such a change would improve the Australian merger regime is the technical difficulties that arise from the *ex-ante* nature of merger control law and time.

Unlike other areas of competition law, merger control law requires an *ex-ante* assessment, meaning that two counterfactuals need to be correctly determined and evaluated. Compared to ex-post cases and decisions on substantially lessening competition, this is even more technical and requires significant economic evaluation. As recognised in other competition-law regimes, including the UK regime, a specialised authority and a specialised tribunal are better equipped to evaluate the economic features of such an assessment. In order to do so, the merger regime needs to be mandatory for the ACCC to be able to collect all of the relevant information and documents in a manner similar to the ACCC's investigation in other areas of competition law.

Like in other jurisdictions with mandatory merger control law regimes and with competition-law authorities as decision-makers, the various stages of investigation and decision-making need to have time limitations.[3] Time limitations and deadlines can also be incorporated into appeals to Competition

[3] For example, see Competition & Markets Authority, /Mergers: Guidance on the CMA's jurisdiction and procedure' (January 2022) p. 8, available at

Tribunals, providing merging parties with time-framework predictability and security, both of which the current regime lacks.

The above-discussed changes will make the Australian regime more effective. The suggested changes are crucial for the Australian economy, including consumer welfare. Considering the reported trend towards the concentration of markets, and the issues and features of the digital economy we currently live in (such as the high speed of ongoing changes and dynamism) and the fact that our markets are going to be more and more digitalised, it is more crucial than ever for Australia to modernise its merger control law regime and toughen its regime.

Sincerely,

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