

Melbourne Climate Futures



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Submission to Treasury's consultation on merger reform

Commonwealth Treasury is seeking information and views to inform options for modernising Australia's merger regulation. Input will help to assess whether Australia's current merger rules and processes are effective and in what ways these rules and processes could be improved.

The author of this submission is associated with Melbourne Climate Futures (MCF)'s Sustainable Finance Hub at the University of Melbourne. MCF brings together academics from across all disciplines at the University, to develop evidence-based and practical solutions to climate related challenges.

The observations and recommendations in this paper come from the author's expertise as a climate change researcher. As such, the submission does not respond to each consultation question in turn but instead concentrates on climate-related themes. In short, Treasury might consider the following matters:

1. Further research be conducted into the relationship between competition and climate change.
2. Consider whether merger reform may have unintended consequences including for mitigation and adaptation goals.
3. Public interest should remain a fundamental part of the merger test.

Competition and climate change

Recommendation 1

Conduct further research into the relationship between climate change and competition including:

- (a) the competition implications of firms' responding to climate change risks; and
- (b) balancing the need for competition and cooperation in responding to climate change risks and opportunities.

Competition is seen as essential to well-functioning markets. Well-functioning markets, in turn, are seen as essential to Australia's economic prosperity.

Sims and Woodbridge, for example, describe three reasons to protect competition through strong competition law enforcement. First, competition ensures that the private pursuit of profit works in the broader public interest. Second, competition is seen as the most effective way to ensure the most efficient firms prosper. Third, competition helps to engender trust in markets (2021, p.29).

Relevant to this consultation, mergers are regulated because they can have anti-competitive outcomes. The ACCC, in particular, has a role here to ensure that the "welfare of Australians" is enhanced "through the promotion of competition and fair trading and provision for consumer protection" (*Competition and Consumer Act 2010* (Cth) s 2, emphasis added).

This submission does not dispute the benefits of competition and the need to regulate mergers. However, it does suggest that further research is needed on the relationship between competition and climate change, and the implications this could have for merger reform.

This includes research on the following matters:

- a) What are the competition implications of firms' responding to climate change risks? For example, mandatory climate risk disclosure legislation will be introduced in Australia this year and will require firms to, inter-alia, disclose scope 3 supply chain emissions and conduct scenario analysis on future climate risks. This will be challenging for all

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entities, especially smaller firms. It could, in turn, have implications for competition, for example, if larger firms are unwilling to contract with smaller firms in their supply chains due to lack of climate information. This could have flow on effects to mergers.

- b) How effective is competition as mechanism for responding to climate change risks and opportunities? For example, net zero investor coalitions have proliferated in the last several years including the Glasgow Financial Alliance for Net Zero, Net Zero Banking Alliance, Net Zero Asset Owner Alliance, Net Zero Asset Manager Initiative, Paris Aligned Asset Owners, and the Net Zero Insurance Alliance. These initiatives recognise that some cooperation is needed to respond to climate mitigation and adaptation challenges but are concerned about potential breaches of anti-competition provisions. There are therefore questions about balancing both cooperation and competition to effectively respond to climate challenges. Given the need for some level of cooperation, this could have implications for mergers regulation.

(Unintended) consequences of merger reform

Recommendation 2

Consider whether merger reform may have unintended consequences including for achieving mitigation and adaptation goals.

Australia's merger control regime is one way that competition law aims to promote competition that enhances the welfare of Australians. The "welfare of Australians" arguably includes ensuring that competition contributes to climate mitigation and adaptation goals.

Merger regulation might therefore be characterised as outcomes focused. Outcomes-based regulation "focuses more on the outcomes that are sought to be achieved than on the processes that the regulated population should follow to achieve those outcomes" (ALRC, 2021, p.79).

This submission suggests that Treasury consider possible unintended consequences of merger regulation that might undermine achieving this outcome.

For example, could requiring companies to show that the merger will *not* be likely to substantially lessen competition in the marketplace make Australia a less attractive place to do business and invest? From a climate perspective, this is significant because business and investment will be crucial to achieving the net zero transformation and adapting to the impacts of climate change.

Moreover, could the "not likely to substantially lessen competition" test provide the ACCC with less discretion overall to consider whether or not the merger ought to proceed? This is because the onus would largely be on companies to show that the merger is not anti-competitive, rather than the ACCC conducting the investigation. A finding that the merger will not be likely to have anti-competitive outcomes could end the inquiry and leave the ACCC has little scope to consider other factors including those relevant to climate change.

The public interest test

Recommendation 3

Public interest should remain a fundamental part of the merger test.

This submission supports retaining the public interest test as part of merger law, irrespective of whether the test is that the merger is or is not likely to substantially lessen competition.

This position is supported by the purpose of the *Competition and Consumer Act 2001* (Cth) in Australia. In this regard, competition is not framed as a good in and of itself. Rather, as s 2 sets out, the object of the Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection" (emphasis added).

In other words, the welfare of Australians is the first and paramount consideration in competition and consumer law. Effective climate change mitigation and adaptation is part of this. Indeed, the ACCC's approval of Brookfield's acquisition of Origin last year is an example of where the public benefits of contributing to the net zero transition outweighed detrimental consequences for competition.

As such, Treasury might consider framing the public interest as two-stage test, as suggested in the Consultation Paper. Possible outcomes would be as follows:

1. If the merger is *not* anti-competitive, consider whether it:
 - a. Should still be refused in the public interest; or
 - b. Should not be refused in the public interest (with or without conditions attached).
2. If the merger *is* anti-competitive, consider whether it:
 - a. Should still be refused in the public interest; or
 - b. Should not be refused in the public interest (with or without conditions attached).