19 January 2024

The Hon Dr Jim Chalmers MP
Treasurer
The Treasury
Langton Crescent
Parkes Act 2600
Australia

The Hon Dr Andrew Leigh MP
Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment
The Treasury
Langton Crescent
Parkes Act 2600
Australia

RE: Comments of ACT | The App Association to the Australian Treasury regarding *Merger Reform Consultation paper (November 2023)*

ACT | The App Association (App Association) respectfully submits its views to the Australian Treasury in response to its Competition Review examining (1) whether Australia's current merger rules and processes are effective, enabling beneficial mergers while addressing those that could be anti-competitive; and (2) in what ways Australia's merger rules and processes could be improved.[1]

The App Association represents small business application developers and connected device companies, located both in Australia and around the globe. These companies drive a global app economy worth more than AUD 2.3 trillion, and this economy continues to grow. App Association members leverage the connectivity of smart devices to create innovative solutions that introduce new efficiencies across consumer and enterprise use cases and rely on a predictable and fair approach to competition and merger regulation to succeed and create new jobs; therefore, the Australian government's approach to mergers is directly relevant to us, and we urge the careful consideration of our views.

The App Association shares the Treasury's goals of protecting competition through appropriate guidelines that elevate the dynamic and diverse digital economy for the small business community. However, we have significant concerns with proposals that would upend Australia's merger policy and review processes in ways that may discourage pro-competitive and pro-consumer mergers that are a primary pathway for success for our small business and startup community, ultimately derailing innovation.

[1] https://treasury.gov.au/consultation/c2023-463361.

For App Association members, a barrier to exit is a barrier to entry. Success for a startup or small business can take a variety of forms and be accomplished through different means, including but not limited to being acquired by a larger company with the resources and knowledge to improve the product and/or streamline market entry or an initial public offering (IPO), all to the benefit of end-consumers. Acquisition is often the best of these options for the business owner(s) and consumers, as IPOs are expensive and fraught with risk and thus reduces likelihood of consumer benefit.[2] App Association members often start businesses with the understanding that once an idea is brought to fruition, the business may be acquired, allowing them to move on to develop new businesses. The Australian economy and consumers have benefitted immensely from the freedom to combine novel products with the resources, technical knowledge, and commercial knowledge of businesses that later acquire these innovations. A merger that helps deliver better products or services for consumers is often the anticipated outcome and is desirable from a competition policy standpoint. It is vital that the Treasury ensure that any changes made to Australian merger policy and processes guidelines do not have negative effects on App Association members' ability to innovate and compete, affecting their ability to fully realize success.

At the outset, the App Association does not see a demonstrated need to significantly revise or rewrite Australia's existing merger guidance given the clear indicators of vibrant competition across Australian markets and the success of the net public benefit test. Today's system, which includes a high likelihood of the detection of concerns (e.g. as a result of a Foreign Investment Review Board review) along with the Australian Competition and Consumer Commission's power to assess penalties with respect to, and even unwind, an acquisition, have proven more than sufficient to incent merger parties to voluntarily seek review of their transactions. If, however, the Treasury decides that Australia's merger guidelines must be revisited, we encourage cautious and narrowly-scoped amendments be made to the existing guidelines, rather than a blanket rewrite that reduces our members' ability to realize success and a reward to their innovation and entrepreneurial risk-taking through an acquisition. Any modifications should maintain a deference to thorough economic analysis as a foundation of any merger review or enforcement, build on decades of economic and legal learnings, and appropriately guide businesses through the competitive analysis in order to support pro-consumer, pro-competitive merger activity in Australia. Notably, diminishing the role of, or eliminating, economic analysis from the merger guidelines will produce uncertainty for small businesses and harm their ability to achieve success through pro-competitive mergers.

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[2] *See* Will Rinehart, "Welcome to the Kill Zone? A closer look at merger and start-up data suggests it's a cultivation zone," THE BENCHMARK (Feb. 27, 2020), *available at* https://medium.com/cgobenchmark/welcome-to-the-kill-zone-852339601fbb ("For startups, going public isn't a sure path to success. Companies typically sign away 4 to 7 percent of their gross proceeds to an investment bank to sell shares of the stock. They also tend to incur an additional $4.2 million in costs to go through the process of getting listed. On top of this, a company will have to fork over another $1 to $2 million for federal compliance every year. Most IPOs perform worse than the overall market.").

In updating Australia's merger policy and processes, it is crucial that the Treasury base any changes in settled law and experiences/effects that are well-demonstrated. The merger guidelines should avoid making policy-level decisions based on edge cases or hypotheticals that do not reflect the reality of the business environment. Further, the Treasury should ensure that Australia's merger policy and processes do not erroneously frame mergers as innately anticompetitive or harmful for consumers.

Building on the above, the App Association has concerns with any proposed shifts in merger policies and processes that would significantly lower the threshold to which a merger is presumed to be anticompetitive through substantial departures from existing well-grounded approach to mergers. We consider these sweeping proposed shifts in policy to broadly discourage pro-competitive transactions that the small business innovator community relies on to succeed without benefit to the public.

With respect to potential process changes, including a potential shift from a voluntary notification system to one that is mandatory, we caution against changes that would widen the scope of required merger activities (the App Association notes its strong opposition to the lower financial threshold proposed by the ACCC of parties having a revenue of AUD 400 million or the global transaction having a value of AUD 35 million, which are unreasonably low thresholds that would effectively sweep in most mergers) as well as frontload and significantly expand the filing of documents and data required in filings supporting merger transactions when there is no clear benefit to the Australian public's interest. The Treasury's Options 2 and 3, as proposed, would greatly increase disclosure burdens and expenses on parties (even for clear pro-competitive mergers that simply meet financial thresholds), as well as delay or prevent pro-competitive transactions, regardless of whether the transaction raises any competition issues, damaging a primary means of success for the Australian small business innovator community: being acquired.

Finally, the App Association discourages proposed changes to Australian merger policies and processes that might align with unsupported or outdated legal theories in other jurisdictions with respect to market definition and competition law, many of which have been rejected by the courts. Such theories include the U.S. Federal Trade Commission and Department of Justice's recent assertions that a merger resulting in a dominant firm in one market entering a new and different market that firm is not present in may violate competition laws; that a firm engaging in multiple small acquisitions may violate competition, even if no individual acquisition would violate the competition laws; alleging that mergers result in lowered wages/reduced wage growth, diminished worker conditions and benefits, and reduce workplace quality; and taking inappropriately narrow approaches to market definition that disregard significant substitutes.[3]

[3] https://actonline.org/2023/10/12/from-ideas-to-ipos-potential-changes-for-startups-in-a-new-merger-landscape/.

The Australian economy is an exceptional and unique means of empowerment and opportunity for the App Association's small business and startup members – much more so than any other market or jurisdiction in the world. Changes to foundational laws and regulations impacting this dynamic should be carefully considered before enactment. We strongly urge the Treasury to ensure that updates to Australian merger policy and processes do not impose substantial burdens on small businesses and close off a primary pathway to success for our members.

The App Association appreciates the opportunity to provide its views to the Treasury on potential updates to Australian merger policy review and processes and commits to collaborating in an effort to promote a competitive ecosystem.

Sincerely,

Brian Scarpelli
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