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Competition Review Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: competitiontaskforce@treasury.gov.au

11 January 2024

Dear Competition Review Taskforce

Re: Merger Reform

The Council of Small Business Organisations (COSBOA) is focussed on promoting, supporting, and advancing the interests of privately owned businesses and family-owned enterprises in Australia.

COSBOA is of the view that the Australian economy is best served by markets that comprise both big and small businesses. The successful coexistence of big and small business requires that national competition laws provide smaller businesses with protection against anti-competitive conduct by businesses that hold a significant share of a given market.

COSBOA welcomes the Australian Government's Competition Review and welcomes the Taskforce's review into Mergers and whether any changes should be made to Australia's current merger rules and processes.

The following submission is directed at issues more broadly and touching on the consultation questions where relevant.

General Comments

Small businesses are vulnerable to being exploited and taken over by big businesses, monopolies, and duopolies. This vulnerability threatens the capacity of small businesses to continue trading, retain local jobs, and enhance local communities by providing support to local sporting clubs and community organisations.

As highlighted in COSBOA's Advocacy Framework, COSBOA is committed to working with all stakeholders to ensure that national competition laws provide an effective deterrent to any damage to competition created by the actions of other businesses – with a particular focus on preventing larger businesses from misusing their market position.

COSBOA agrees that any merger control regime should also be consistent with good regulatory design principles. The OECD's recommendation on principles for a merger review are appropriate and should be in line with international best practice.

Mergers can have both positive and negative impacts on the operating environment for small businesses in Australia. Whilst mergers can drive improvements in productivity, put downward pressure on prices and deliver more choices for consumers, anti-competitive mergers can contribute to structural entrenchment, higher prices and create less choice for smaller businesses that are consumers of the products or services of merged entities.

Given that Australia is one of three OECD countries that still has a voluntary notification regime for mergers, it is high time that this is being reviewed.

Concerns about the current system that should be considered in the design of a new regime.

In a time where the cost of living and doing business is expensive, small businesses need more assurance than ever that the regulatory authorities in place are doing all they can to ensure anti-competitive behaviour does not take place. The ACCC themselves have highlighted that Australia's economy is being impacted by weakened competition, which results in higher prices for consumers and businesses.

Australia's concentrated markets continues to create lower labour mobility, less market entry, lower technology adoption and decreased productivity overall. These are just some factors that should be considered as desired improved outcomes when developing the new merger review regime.

The voluntary nature of the current regime is one of the biggest concerns that needs to be addressed in the design of the new regime. The ACCC noted that they do not have the current tools required to prevent all anti-competitive mergers. Meaning that harmful mergers may already be taking place under the current system. The other concern is that the ACCC requires appropriate funding and resources to protect all businesses, especially small businesses that do not have built in governance, compliance and policy teams that can provide assistance to small businesses when anti-competitive behaviour is taking place within their industry.

Proposed Regime

COSBOA is most comfortable with Option 3, an administrative model, as proposed by ACCC being implemented. The ACCC would be the ultimate decision maker with checks and balances in place. However, the success of this option is dependent on ACCC being provided appropriate powers and resourcing to undertake their obligations.

In any judicial enforcement model, including the current model, COSBOA agrees that court proceedings are time and resource intensive.

A mandatory notification regime linked to appropriate thresholds are necessary. Understanding that this may evolve over time, COSBOA recommends that in the reform's initial stage, thresholds need to relate to the turnover size of the parties, market share or transaction size. The United States *Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976* requires the Federal Trade Commission to revise monetary thresholds annually. This may be relevant to the Taskforce in designing the notification thresholds and whether an annual review is relevant or another period. Alternatively, the Taskforce may consider it relevant to base mandatory notification thresholds related to the percentage of market share a proposed merger will take over.

Statutory timelines for ACCC should also form part of the new regime to ensure that businesses are provided with certainty when a merger notification is made.

Consideration could also be given to a two-prong approach whereby certain mergers over a monetary threshold requiring mandatory notification and those falling below the threshold having the option to voluntarily notify the ACCC. The ACCC could still undertake informal merger reviews as is the current practice. The ACCC would also then consider whether there is a substantial lessening of competition including the impact on market structure the proposed merger may have.

The current substantial lessening of competition test requires comparison of a future with the merger and a future without the merger to determine whether it has an anti-competitive effect or not. The question whether the competition test be amended to include acquisitions that 'entrench, materially increase or materially extend a position of substantial market power' should be included and should consider the effect of the acquisition on the overall structure of the market and the potential harm the merger and acquisition may result in. Mergers can impact market structure by not improving product or service offerings but rather result in increased prices, reduced quality, and lower wages. This is especially relevant in a concentrated market. Consideration of market structure is also relevant given the broader impacts on economic strategy and even privacy policy.

As mentioned above, if Option 3 is the successful option going forward, the ACCC should be ultimate decision maker with checks and balances in place. With any administrative decision-making regime, review rights should exist. COSBOA does not have firsthand experience of determining whether the limited merits review, as is current practice remains appropriate, or whether a full merits review is more appropriate and leaves the detail of this to the legal experts.

Periodic evaluation of the effectiveness of Australia's merger regime

The ACCC should consider undertaking post-merger impact evaluations on those mergers that meet the mandatory notification threshold recommended above. Such evaluations are important for assessing effects of a merger on prices, investments or quality of goods and services. This data will provide the evidence base for future merger reviews as the evaluation allows insight into what would have happened without the merger and how the merger influenced the market, including lessons to be learned for future cases. It will also allow the ACCC to learn whether it needs to improve its methodologies and assess its effectiveness. As noted by the US Federal Trade Commission and Antitrust Division of the US Department of Justice, "how does an agency learn if it is being aggressive enough, or too aggressive, in challenging mergers...evaluating the impact of previous merger enforcement decisions, and the accuracy of predictions made in the course of reaching those decisions helps answer these questions and improve future enforcement."¹

The period in which the post-merger evaluation should be aimed at around the three-to-five-year mark unless there is a valid reason for an earlier evaluation. The three-to-five-year period allows time to assess not only financial impacts but also structural impacts in an organisation and in employee retention. Organisational and structural changes often take time to be implemented and the experience in year one post-merger is very different to year three post-merger.

The ACCC can obtain the necessary information through data collection, whether this is through an external commercial data provider or liaising with the companies that were merged. There will be costs associated with undertaking data collection and analysis and consideration needs to be given to the most effective means in doing so.

Conclusion

COSBOA supports the need to reform the current merger review system and supports the establishment of a formal merger control regime as proposed by the ACCC in Option 3. In designing the detail of the formal merger control regime, consideration should be given to international best practice and to ensure that mergers can be blocked if one of the merger parties already has a substantial market power that would be entrenched, materially increased or materially extended as a result of the merger. Including in significantly impacting market structure in Australia.

COSBOA recommends that the ACCC be given greater power and resources to make the above changes whilst also ensuring small businesses are protected and considered when merger reviews are taking place. Small businesses make up 97 per cent of all Australian businesses and are the backbone of the Australian community and economic growth.

Furthermore, as Treasury undertake the Competition Review, COSBOA recommends the review take a look into better understanding the competitive environment in the growth

¹ Delegation of the United States, [Roundtable on Impact Evaluation of Merger Decisions](#), 20 June 2011.

areas of economy, the role of data and the digital economy, and the implications for competition and public policies in certain markets.²

COSBOA welcomes further consultation on what considerations ACCC may want to make when reviewing merger applications and the impact it has on small businesses.

Yours sincerely,

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² OECD (2023), OECD Economic Surveys: Australia 2023, OECD Publishing, Paris, <https://doi.org/10.1787/1794a7c9-en>. Page 57.