

19 January 2024

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: CompetitionTaskforce@treasury.gov.au

Merger Reform

Thank you for the opportunity to submit on the Merger Reform Consultation Paper (November 2023).

The Shopping Centre Council of Australia (SCCA) is the industry body representing the interests of shopping centre owners and operators across Australia. Our sectors activities include the building, management, and transaction of assets (shopping centres), and occasional company-level mergers.

As outlined below, ours is not a heavily concentrated market that would naturally give rise to competition issues. However, we appreciate that the Australian Competition and Consumer Commission (ACCC) has taken an interest in our sector at times; albeit the requirement to advise or intervene on mergers is rare.

Accordingly, the SCCA has a very keen interest in Treasury's consultation.

Recommendations

Treasury should recommend that Government:

1. Retain the existing *merger control process*, whereby notification and engagement with the ACCC remains voluntary and at the discretion of parties.

This would ensure that companies retain the flexibility to make their own determinations as to whether or not their proposed merger or acquisition complies with laws set by Parliament, including by the practice of seeking expert legal and market advice in relation to whether that merger or that acquisition does or does not lessen competition.

We are concerned that the ACCC's proposal (Option 3) is an overreach in that it seeks to adjudicate business transactions and take on the role of courts as a decision maker. It is inappropriate and unnecessary that the ACCC should be afforded such an interventionist remit.

To be clear, we do not support Option 2 or Option 3, however believe that there is merit in aspects of Option 1.

2. Retain the existing *merger control test*, being the 'merger factors' set out in section 50(3) of *Competition and Consumer Act 2010* (the Act).

Any prospective changes that would provide for subjective or untested determinations to be made (in particular if Option 3 is pursued) would introduce uncertainty to business transactions and there is no evidence that the same are required.

Market composition / sector characteristics

While we appreciate that the ACCC has in the past taken an interest in some larger mergers that have occurred within our sector, these transactions have not resulted, nor been concluded by the ACCC to be likely to result, in any substantial (or real) lessening of competition with respect to retail leasing opportunities (for existing or prospective tenants) or for members of the public to access retail goods and services.

Our members lease and license retail floor space to retailers and other businesses, who are afforded ready access to and reach out to consumers as one of many means through which retailers engage with and access consumers. They compete with owners of retail space in stand-alone shops, shops in traditional shopping strips, shops at transport hubs etc.

In 2013, as part of the existing informal voluntary clearance process, the ACCC did raise competition concerns with the proposed acquisition of the Karrinyup shopping centre in Perth where the proposed acquirer owned a nearby shopping centre at Innaloo (on the basis that the relevant market for assessing the proposed acquisition extended a mere 10kms north and south (and a lesser distance east and west)).

Similarly in 2015, the ACCC raised competition concerns with the proposed acquisition of the Bayside shopping centre south-east of Melbourne (around the Frankston CBD) where the proposed acquirer owned a

nearby shopping centre at Karingal (again on the basis that the relevant market for assessing the proposed acquisition was regional extending approximately 10kms in each direction).

What the above experience reveals and confirms is that whilst the Consultation Paper talks only about mergers, the existing section 50 of the Act prohibits acquisitions which "directly or indirectly:

- (a) Acquire shares in the capital of a body corporate; or
- (b) Acquire any assets of a person."

Any proposal to amend the existing regime therefore needs to take into account the fact that this regime applies to acquisitions of assets (shopping centres) and not just the "horizontal mergers" discussed in the Consultation Paper (which "involve the merging of actual or potential competitors in the same or similar industry") or the "vertical and conglomerate" mergers (which involve firms at different, adjacent, or unrelated levels of the production supply chain).

Take, for instance, the ACCC's proposal that all mergers/acquisitions with a global transaction value threshold of \$35 million should require ACCC clearance before being able to proceed. In our industry, this would mean that almost every sale of a shopping centre in Australia would need ACCC approval before being able to proceed (regardless of its likely or conceivable impact on competition in the relevant markets).

What the above experience also reveals and confirms is the difficulty any compulsory notification regime faces where notification is only necessary where a threshold has been set and that threshold is based on say a company's market share. In 2013 and 2015 the ACCC for its own reasons chose to assess the acquisition on the basis of markets with an arbitrary approximately 10km radius.

The below outlines the basis for our recommendations; broadly that our sectors normal activities do not give rise to any breaches of section 50 of the Act, structural issues, or substantial lessening of competition. For this reason we do not believe that a blanket approach to any/all mergers, economy-wide, is necessary or appropriate.

Market composition

- There are 1,300+ shopping centres in Australia (comprised of 57,000 tenancies) with 800+ separate owners.
- 27 SCCA members own or manage approximately 500 shopping centres, about one-third of all shopping centres in Australia.
- Unlike some other sectors, the shopping centre sector is not a concentrated market, it is highly competitive and diversified.
- Businesses and consumers benefit from the choice and competition that this provides for.

Other retail opportunities

- It is important to note that shopping centres comprise only approximately 45% retail space.
- 'High street' locations, large format retail precincts, online distribution channels etc. all provide retailers and consumers with ample alternatives to shopping centres and increase competition in retail leasing and accessing retail goods and services.

Ownership type

- Our sector comprises a diverse ownership group, with different drivers and reasons for investing in and divesting assets:
 - Listed Diversified Financials
 - Listed Real Estate (Diversified)
 - Listed Real Estate (Retail Only)
 - Private Investors/Developers
 - Unlisted Diversified Financials
 - Unlisted Real Estate (Diversified)
 - Unlisted Real Estate (Retail Only)

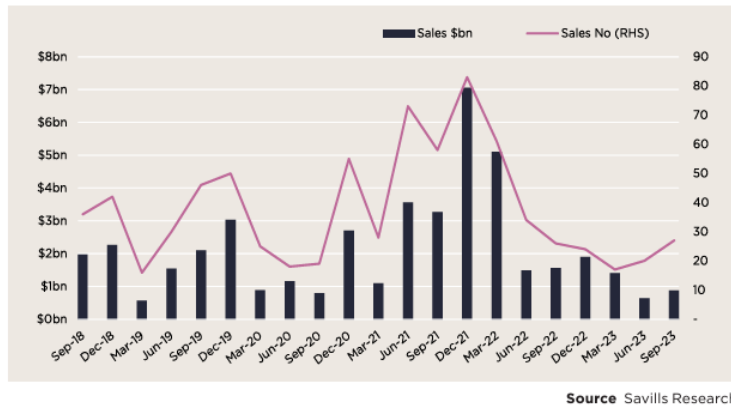
Geographic spread

- Shopping centres are located in metropolitan, suburban, regional, and rural locations across Australia, comprising small (Neighbourhood) to very large (some CBD and Regional) shopping centres.
- Shopping centres attract consumers from very large trade catchment areas, which typically overlap with other shopping centres and retail offerings.
- Our members typically diversify their portfolios to focus their efforts on different catchments and reduce their exposure to outside influences (i.e. climatic conditions, government policies etc.).

Mergers/acquisitions are commonplace

- As shown below, the transaction of shopping centre assets occurs relatively frequently, characterised by numerous transactions each quarter.
- Merger reform that would introduce an additional administrative and compliance burden would disrupt these transactions.

Transaction volumes (\$10M+) vs number of sales, quarterly to September 2023



Merger control process

It would be very problematic and disruptive for the sales and acquisitions of shopping centre assets to be subject to the compulsory notification and ACCC review regimes referred to in the Consultation Paper.

Transactions, including auctions and other competitive bidding processes for the sale of shopping centre assets, cannot be suspended for a period while the ACCC conducts its own assessment of the proposed acquisitions (an assessment which can take months, if not longer, as the ACCC makes its own inquiries and seeks to gain an understanding of a market in which its representatives may have no experience or expertise in).

As the Virtus example outlined in the Consultation Paper indicates, the seller of the asset may not be willing nor able to sell the asset subject to ACCC approval. The result of a compulsory notification and review regime may then be the exclusion of buyers from the market (an anti-competitive outcome of itself).

As is said in the Consultation Paper, compulsory merger notification and review procedures should “be effective, efficient, timely and transparent; avoid imposing unnecessary costs and set reasonable information requirements”. They should not apply to sales of assets, such as shopping centre assets.

It should continue to be left available to the participants in the market to make their own determinations as to whether or not their proposed merger or acquisition complies with the laws set by Parliament, including by the practice of seeking expert legal and market advice in relation to whether that merger or that acquisition does or does not lessen competition.

Those participants, unlike the ACCC, are better able to make those determinations speedily, so as to take advantage of commercial opportunities as they may arise, as they are typically already in a position to assess the likely impact of the acquisition on the applicable markets based on their own experiences in the applicable industry and do not need to make those assessments on the “theoretical economic arguments” and “theoretically based speculation” of representatives of the ACCC.

This is particularly the case in relation to the sale of assets such as shopping centre assets which, unlike mergers, are relatively easily reversible in the unlikely event that a Court subsequently finds that the acquisition has the likely effect of substantially lessening competition in a market.

Currently, many shopping centre transactions occur and are publicly announced on the same day, with no engagement with the ACCC. This is not always considered necessary, based on an assessment of relevant legal and market issues. Transactions typically occur in quick time: a risk-based approach is adopted, and independent legal/expert advice obtained with respect to section 50 of the Act.

We seek to retain the flexibility to make determinations and ensure compliance with laws set by the Parliament, and so not be delayed or have an additional administrative and compliance burden of engaging with the ACCC on any/all transactions as a matter of course. Accordingly, we support the retention of the status quo.

The SCCA and its members are aware that the ACCC has extensive powers to issue wide and effective information gathering notices under section 155 of the Act and that these are supported by extensive penalties for non-compliance. We do not support the extension of these powers nor these penalties.

Merger control test

We oppose the ACCC's proposal to reverse the onus and for proposed mergers to be cleared only if the ACCC, or the Tribunal on review, is satisfied that the merger is not likely to substantially lessen competition. The status quo should be maintained.

In terms of creeping acquisitions, we refer to and rely on the numerous submissions (including our own in response to Treasury's Consultation Paper 'Creeping Acquisitions – The Way Forward' (2009) and the Harper Competition Policy Review (2015)) which addressed specifically the issue of creeping acquisitions. We support the conclusions of the Harper Review, which did not recommend further changes to address this type of acquisition.

We further do not believe that the merger factors in section 50(3) should be amended to increase the focus on changes to market structure as a result of a merger. Nor do we support the removal of the merger factors entirely. We believe that the public benefit test should be maintained.

It follows from the above that we do not support a revised merger control test and consider that section 50(3) of the Act is appropriate. Any prospective changes that would provide for subjective or untested determinations to be made (in particular if Option 3 is pursued) would introduce uncertainty to business transactions and is not evidenced.

Contact

The SCCA would welcome an opportunity to discuss this submission and our industry's perspective with Treasury further. Please do not hesitate to contact me if or as required.

James Newton

Head of Policy and Regulatory Affairs
Shopping Centre Council of Australia
m. 0424 254 281 e. jnewton@scca.org.au