



8 April 2024

Competition Review Taskforce

The Treasury

Langton Crescent

PARKES ACT 2600

via email: annalisa.heger@treasury.gov.au

Dear Sir/Madam,

Merger reform

The ASBFEO appreciates the opportunity to reiterate comments provided to the Competition Review Taskforce on 24 November, 2023 and 5 December, 2023 as a formal submission.

Mergers can have significant downstream, supply-chain effects on small and family businesses, where those businesses are unaware of the potential impacts of merger activity on them in their specific situations. This issue is especially likely to arise in regional markets, where there may be more limited channels to market.

A pertinent example is the Woolworths' purchase of PFD Food Services. Most small businesses would have been unaware of the proposal, and many may not have appreciated future secondary impacts of this acquisition, notably the limiting of supplier options outside the already-concentrated major supermarket sector.

When a major supermarket player takes a strategic stake in a distribution intermediary for food and grocery products outside the direct area of market concentration, this curtails customer opportunities within this area and enables the harvesting of market intelligence.

Even when small businesses are aware of a merger proposal, it is difficult and resource-intensive for them to engage effectively in processes that relate to widely defined markets. Conversely, where markets are tightly defined, a small business would struggle to convince others of important secondary effects in adjacent markets.

Accordingly, competition analysis should identify and properly weight impacts on small and family business, including by:

- taking account of effects that might be considered 'minor' for an individual small business, but which are nonetheless felt across a large number of small businesses
- conducting detailed investigations of impacts that are likely to extend or replicate a dominant player's power into adjacent markets
- appreciating how minimising routes to market (even minor encroachments) can adversely affect specific small businesses in already-concentrated markets, in terms of available customers and scaling opportunities
- understanding that small businesses are already constrained by significant compliance burdens and resource limitations; and placing proper weight on the cost for a small-business



owner of changing their business models (that is, not simply assuming that small businesses can easily modify their approach).

Further, the ASBFEO recommends that the Australian Government implement the Harper Review proposal for a mandatory merger notification regime (as prevails in the United States and Canada).

Mandatory notification could be built in as a logical step, without imposing a high administrative burden and while affording proponents the opportunity to present why there should be no concern for the Commission or need for a further detailed examination (including steps intended to be taken to alleviate possible areas of competition concern) for initial ‘first pass’ examination

The Australian Consumer and Competition Commission could advise of ‘no objection’ for the merger or acquisition to proceed, with a direction to the parties to publicly notify their intention. This would raise visibility of the intended transaction and allow interested parties to make representations to the commission on the need (or not) for a formal investigation, or to commence a formal investigation (with suspensory effect) based on the material supplied by the proponent on the basis that the transaction has the potential to breach competition law.

The Commission’s administrative decision should be subject to appeal either to:

- on the merits of the case, a reformed Australian Competition Tribunal, which would be obliged to supplement its legal proficiency with commercial expertise relevant to the markets likely to be affected, or
- on a matter of law, the Federal Court of Australia.

The ‘Substantial lessening of competition’ test is ineffective in oligopolistic markets and does not adequately deal with:

- creeping acquisitions
- further consolidations that impede new entrants, innovation or market dynamism
- adverse supply chain effects
- ‘harvesting’ of market intelligence or risks of this dominance adversely impacting on vertical and adjacent markets
 - for example, PFD in the food services and supply market (which is vital for remaining independents and alternative customers for food and grocery suppliers) and Endeavour Group, in terms of the impact on market conditions, supply-chain pressures and access to taps.

The government should apply a higher test to merger and acquisition proponents involving already ‘dominant’ parties in the target and adjacent markets. The government should also examine the risk of dominance ‘contagion’ where a dominant player seeks to leverage its market power in adjacent, vertical or interdependent markets.

The definition of markets can be legally gamed and can represent a tactical ‘play thing’ that needs to be countered by practical commercial considerations and appropriate market behaviour. The ‘substantial lessening of competition’ test, supplemented by a stronger test for dominant parties (perhaps incorporating a positive factor, such as ‘material improvement in market dynamism’) would be helpful.



In addition, a more robust and complete test should be accompanied by a reasonable consideration of likely future conduct and credible competitive detriment, especially where players have demonstrated form, or that conduct is signalled in a published business strategy.

The government and regulators should also bear in mind that:

- Being bought by a dominant player is a preferred exit strategy for some small businesses.
- Codes are good at regulating behaviour, but small businesses need to be able to make a complaint and feel empowered to do so. Relying on the ACCC to address code infringements or economic harm to a small business arising from a suspected breach of competition laws or conduct safeguards is unrealistic, given the Commission's enforcement priorities, litigation criteria and limited resources.
- The effectiveness of the range of requirements under industry codes of practice is limited owing to the ability (or willingness) of small businesses to raise issues and enforce requirements under the codes.
- Introducing a Federal Small Business and Codes List in the Federal Circuit and Family Court of Australia, to provide small businesses with an affordable and timely means of directly enforcing their legal rights. The process could be tailored to be efficient, with damages capped and no adverse cost orders.

The list could also be open to use by regulators (such as the ACCC) to achieve more timely outcomes at a lower cost. Such a list would complement the government's plan to establish a dedicated and accessible mechanism for the Fair Work Commission to deal with disputes over unfair contract terms for independent contractors earning below a high-income threshold and deal with matters outside that coverage.

If you require any further information, please do not hesitate to contact the ASBFEO Policy & Advocacy Team via advocacy@asbfeo.gov.au.

Yours sincerely,

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman