Australian Chamber of Commerce and Industry
ABN 85 008 391 795
T: +61 2 6270 8000
info@acci.com.au
www.acci.com.au

13 August 2024

Competition Taskforce
Treasury
Langton Cres
Parkes ACT

(e)CompetitionTaskforce@treasury.gov.au

RE: Reforming mergers and acquisitions – exposure draft

The Australian Chamber of Commerce and Industry (ACCI) is Australia's largest and most representative business association. Our members are all state and territory chambers of commerce, which in turn have 430 local chambers as members, as well as over 70 national industry associations. Together, we represent Australian businesses of all shapes and sizes, across all sectors of the economy, and from every corner of our country.

ACCI appreciates the opportunity to comment on the exposure draft legislation to reform Australia's merger rules.

Mergers offer considerable economic benefits by enabling businesses to grow and become more competitive, by achieving greater economies of scale and accessing new resources, technology, and expertise. While the government is arguing that the proposed merger reforms will boost competition and productivity, there is little evidence that recent mergers have stifled competition.

ACCI considers Australia's existing framework to assess mergers is fit-for-purpose and sound.

The current regime is voluntary, with no compulsory pre-notification requirement for mergers in Australia. However, the proponent risks Federal Court proceedings if the ACCC subsequently decides to review the merger and considers it may be anti-competitive.

If the proponent considers there is a risk the merger may be anti-competitive, it can seek advice from the ACCC under the *Competition and Consumer Act 2010*, through either:

- informal clearance by the ACCC, where businesses provide relevant information to ACCC to assess the economic impact of these mergers. It is a quick and a low-cost process for businesses, benefitting both the merger parties and the regulator.

Canberra
Commerce House
24 Brisbane Avenue
Barton ACT 2600

- Alternatively, mergers can apply for formal authorisation from the ACCC or seek clearance through a Direct Federal Court process. This is a more rigorous process involving public review through market inquiries and submissions from affected parties, such as competitors and consumers. However, it provides businesses with immunity from court action under competition law, ensuring the subsequent merger is not likely to substantially lessen competition.

The ACCC will only authorise a merger if it is satisfied that in all the circumstances a merger will not be anti-competitive or that, if it is not likely to substantially lessen competition.

The fact that most mergers are not controversial is reflected in the ACCC's assessment process, which shows that 93 per cent[1] of the merger reviews that were pre-assessed by the ACCC were able to proceed without conditions.

The proposed new merger reforms take what is a voluntary process and makes it mandatory. All mergers will be required to be assessed by the ACCC, with the ACCC given greater powers to identify and scrutinise transactions that pose a risk to competition, consumers, and the economy. The draft legislation sets a two phased approach, where all acquisitions must be reviewed by the ACCC in the initial stage under phase 1, with a determination period of 30 days. If the ACCC is unable to make its determination within the stipulated time period, the acquisition automatically moves onto the phase 2, which is 90 business days.

This proposed framework imposes more regulatory hurdles on businesses, requiring merger applications to be more resource intensive. Unlike, the current regime where businesses provide the ACCC with the pertinent information, the Exposure Draft introduces various information requirements for an application to be deemed 'complete'. Additionally, ongoing obligations would be imposed on businesses to notify the ACCC of any material changes of fact in the notification until the ACCC makes its determination.

It is claimed this will reduce the risk of economic harm when firms are solely focused on squeezing out competitors to capture a larger percentage of the market. However, ACCI questions whether the government's concerns are justified.

A poorly designed mandatory notification regime will only delay much needed investment. Reviewing mergers that do not present competition issues will consume limited ACCC resources that could be better devoted to assessing mergers that do pose a risk to competition.

[1] The Treasury, Merger Reform, Consultation Paper- Appendices,

Moreover, the notification threshold is still unclear. Any threshold applied in Australia would need to be consistent with the approach taken in the United States and other overseas jurisdictions, which have a higher level of control for a filing requirement. If the threshold is low, then certain global transactions would need to be notified in Australia, but nowhere else, leading to increased administrative burden for businesses.

Mergers and acquisitions are time sensitive and prompt decision making is critical. In the past year, only 300 of the 1400 mergers were reviewed by the ACCC under the current voluntary arrangements. Subjecting all acquisitions to a mandatory phased approach is likely to quadruple the workload of the ACCC. These changes are only likely to lead to a backlog of assessment, which will act as a hand brake on mergers. Struggling under the increased workload, it is likely that many mergers will unnecessarily be pushed into Phase 2, the 90-day assessment period.

Businesses already voluntarily advise the ACCC of their merger intentions, with safeguards in place. The ACCC already has the power to scrutinise and block mergers it considers will lessen competition. However, with the mandatory regime, any compulsory notification forms will inevitably over capture, putting an unnecessary administrative burden on businesses to meet these reporting requirements. What we need is a simplified and streamlined reporting for the mergers. This requires information requests to be targeted and specific rather than broadly framed particularly for non-merger parties.

A better approach would be to retain the current system and allow businesses in sectors where the risk to competition is very low, the flexibility to self-select, whether they want their mergers to be assessed by the ACCC (the current system). This would save the ACCC the time and resources in assessing all the mergers and enable them to focus on mergers that require in-depth analysis under the Phase 2 process.

The existing merger control framework is robust to block anticompetitive mergers. Very few mergers end up being subject to the Federal Court under the current regime. Establishing an entire new merger control regime will result in increased regulatory burden for businesses.

With business productivity at its lowest level in over 60 years, we need reforms to boost our business investment and improve our attractiveness as a destination for global capital. The merger reforms are an example of government regulatory overreach, where it takes voluntary practices and makes them mandatory, at a significant cost to business, but with no clear benefit to the community.

Yours sincerely

David Alexander
Chief of Policy and Advocacy