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Merger Notification Thresholds

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to contribute to the consultation on the Merger Reforms Thresholds.

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.

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. The vast majority of mergers in Australia are not controversial and pose negligible risk to competition.

ACCI reiterates the point made in earlier submissions that the existing framework to assess mergers is fit-for-purpose and sound. The current regime is voluntary, with no compulsory pre-notification requirement for mergers. However, the proponent risks Federal Court proceedings if the Australian Competition and Consumer Commission (ACCC) subsequently decides to review the merger and considers it may be anti-competitive. This is a sufficient deterrent, providing ample incentive for entities to notify the ACCC to seek clearance before proceeding with a merger. The fact that around one quarter of proponents pre-notifying the ACCC and seek clearance before proceeding with a merger, suggests that the framework is working effectively.

There is little evidence of any recent mergers being anticompetitive. The fact that the 93 per cent of the merger reviews that were pre-assessed by the ACCC were able to proceed without conditions indicates the existing framework is working. The consultation paper does not show any examples of a recent merger with negative impacts for consumers in Australia, although it does allude to anticompetitive mergers that have occurred in other jurisdictions.

The merger reforms are yet another example of the government taking a voluntary regime that is working effectively and making it mandatory. Its effect would be to needlessly increase the influence of government, compounding the regulatory /

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administrative burden to the detriment of business, without a clear benefit to the community.

This approach does not provide any greater certainty for entities seeking to merge. Nor does it provide any greater assurance to consumers and the public that anticompetitive mergers will be blocked. It simply adopts a blanket approach, with arbitrary thresholds. There is no evidence to support the thresholds. It is possible that some mergers will slip through the cracks, as parties that may have voluntarily notified the ACCC, don't meet the arbitrary thresholds, so aren't required to notify.

Merger review period

The consultation paper stipulates that for mergers that are not controversial, the ACCC will process them and provide a determination on whether they can proceed in 30 days. If the ACCC considers the merger raises competition concerns, there is the option for it to extend the review to 90 days. However, there is no clear criteria that the ACCC must abide by in extending a review to 90 days. Without clear criteria, the ACCC is at liberty to redirect any merger notification to the extended 90-day review period. With a significant increased workload due to the reformed merger regime, there is a real risk that without clear criteria, the ACCC will direct an increasing number of mergers to the extended 90-day period to manage the backlog of assessments.

The ACCC isn't being given any additional funding to administer the new merger regime, yet there is expected to be a substantial increase in the number of mergers that will be assessed by the ACCC. ACCI is concerned that this increased workload, without additional resources, will lead to a substantial and growing backlog of merger assessments. The footnote indicates that *… (T)he ACCC estimates that 80% to 90% of notified mergers will be cleared within 4 weeks*. This will either require the ACCC to divert resources to merger reviews, distracting from the ACCC's other important work, or lead to a significant backlog in assessments, with an increasing number of mergers directed to the extended 90-day review period. The government should make clear which parts of the ACCC will be defunded (to make space for the new merger regime costs), and what impact that defunding will have on the ACCC's current activities.

Risk-based approach to designing notification thresholds

The thresholds set under the framework are arbitrary, with no evidence that mergers above the thresholds have been shown to be anticompetitive. In setting the thresholds at the medium-sized business level, the consultation paper implies the thresholds were chosen simply to maintain the number of mergers notifications received by the ACCC each year at a similar level (300-500) to that assessed under the current voluntary notification regime. It is simply making the means meet the ends, with no obvious benefit.

The proposed mandatory merger regime adopts a far more rigid approach to the notification requirement, but there is little to indicate it would be more effective in preventing anticompetitive mergers. The mandatory system is not flexible enough to detect the different levels of risk between industries and sectors.

Before progressing these merger reforms and the notification thresholds, the government must show a clear rationale for setting the thresholds at the chosen levels, with examples where anticompetitive mergers have occurred under the current settings and how under the new thresholds these anticompetitive mergers would have been prevented from proceeding.

Serial acquisitions

The merger reforms appear targeted at serial acquisitions of smaller nascent competitors by a larger business with substantial market power. The larger business engaging in a 'killer acquisitions' to prevent future competition. The consultation paper highlights an example of Facebook purchasing its smaller competitor, Instagram, to maintain its market dominance. It also points to an OECD study which raises concerns in the technology, chemical and pharmaceutical sectors in the United States. However, there is no evidence of mergers such as these occurring in Australia, nor is there evidence that a merger of this nature would not be notified and contested under the current framework.

Australia has no authority over mergers by tech giants or big pharma in other jurisdictions. Even if a multinational enterprise was to acquire a small Australian emerging technology entrepreneur or pharmaceutical innovator, it would be the role of the Foreign Investment Review Board, not the ACCC, to review and make a determination on the merger, i.e. it is outside the scope of this legislation.

Monetary Thresholds

The monetary thresholds for Limb 1 — a combined turnover of the merged entity of $200 million — appears designed to capture businesses (merged entities) that are, or will become following the merger, a large business.[1] The lower threshold — an Australian turnover of $40 million for at least two of the merger parties — appears set at a level to capture the top 20 per cent of medium-sized business. While global transaction value of at least $200 million for the acquired party, also appears to be focused on larger businesses, or small to medium businesses with inflated values.

Limb 2 appears focused on serial acquisitions involving large businesses acquiring small businesses, with a higher threshold for the acquirer group — a turnover of at

[1] The lower bound of the Australian Securities and Investment Commissions (ASIC) definition of large business is a turnover of $200 million.

least $500 million — and a lower threshold for the party being acquired — an Australian turnover of at least $10 million or global transaction value of at least $50 million. In practice, it would be a very rare case that a Limb 2 threshold would be applied to a merger that is not already be captured by the Limb 1 thresholds.

ACCI agree that the thresholds will reduce the burden on medium and small businesses from needing to notify the ACCC of their intention to merge. Small businesses and lower-level medium-sized businesses are least able to bear the additional administrative burden of getting a merger approved from the ACCC. Yet, this is beside the point, as mergers involving parties in the medium-sized business range, and even the middle of the large business range, are unlikely to pose a risk of anticompetitive behaviour. As the consultation paper identifies … *the size of a merger is not a perfect indicator of its potential effects on competition*…

The thresholds should not take a one-size fits all, blanket approach. They should be sector based and set at levels that recognize the different risks to anticompetitive behaviour in different industries. The turnover of a business, while providing an indication of the size of a business, has very little relationship to the risk of anticompetitive behaviour. The size of the market that the businesses operate in is far more important. In most sectors the business turnover would have to be many orders of magnitude of the proposed thresholds to have any influence over competition. In many sectors, such as resources, communications and technology, manufacturing, retail, wholesale trade, transport, utilities, banking and finance, businesses operate in a national /global market so need to be large, with turnover and asset value in the billions of dollars, to be competitive.

Similarly, the high value startups with little revenue that the legislation is targeting, in many cases the turnover is likely to be below the $10 million small business or $40 million medium-sized business thresholds proposed. In the example of included in the consultation paper, at the time of its acquisition by Facebook, Instagram had 'no turnover'.

Just as important, it needs to be recognized that Australian businesses operate in a global market. Australian businesses need to be large to have the economies of scale necessary to compete with large multinationals in both Australian market and international markets. It is not just a business' Australian footprint that determines its competitiveness or the pricing of its products or services.

The consultation paper quotes the OECD and ICN in justifying its approach to the thresholds. However, the recommendations of the ICN report clearly state that competition agencies should only investigate mergers that pose competition concerns in their jurisdictions. It does not suggest taking a blanket approach to assess all mergers of businesses of medium-sized businesses and above, but recommends a risk-based approach.

Market Concentration Thresholds

The market concentration threshold for Limb 1 sets the combined market share of the merged parties to be at least 25 per cent and the combined turnover of two of the merger partis of at least $20 million. Limb 2 sets the combined share of the merger parties at greater than 50 per cent and the turnover of two of the merger parties at $10 million.

Market concentration thresholds only apply if monetary thresholds are not met. These thresholds simply add another layer of complexity to the notification requirements for businesses seeking to merge.

As noted in the consultation paper, the OECD and ICN recommend that market share should not be used as it is not clear or objective. It is too difficult to calculate the market share threshold with any accuracy, particularly if applied at the sub-national level. When viewed at the regional or local level, defining the market with any level of precision can be very difficult, as it is very unclear where the boundaries are. This is particularly so with the increasing presence and reach of online sales and greater mobility of service industries, giving businesses a much wider geographical reach.

It would be totally inappropriate to hold up a merger of two parties on the basis of a determination that the market concentration in one local government area where they are resident was determined to be at least 25 per cent, particularly if the merged entity will operate in multiple jurisdictions. The merged entity would lose all of the benefits of economies of scale and its ability to compete in other markets would be restricted.

The turnover threshold is very low, set at the bottom of the medium-sized business range. These would only be relevant if applied to businesses at a very local level, most likely a small regional town. Businesses in small regional towns are struggling to remain viable, due to increasing costs and the shrinking populations in regional areas. Even if historically two businesses have operated in a town in competition, a merger may be the only way either business can continue to operate in that region. Also, with online sales, businesses are not just competing with other businesses with a physical presence in the town.

Under the current guidelines, merger parties are encouraged to notify the ACCC if the post-merger market share is greater than 20 per cent. There is no indication that businesses are ignoring these voluntary guidelines and not notifying the ACCC if the market share of the merged entity is greater than 20 per cent.

As noted above, it needs to be shown that the current system is not functioning effectively, before introducing this more onerous regime.

What is not clear is the problem that the government is trying to fix with the merger reforms, other than to increase the influence of government in a merger by adding to the complexity and compounding the compliance burden on businesses seeking to merge.

Yours sincerely

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