19 September 2024

Competition Taskforce
The Treasury
1 Langton Cres
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By email: CompetitionTaskforce@treasury.gov.au

Dear Taskforce

Merger Notification Thresholds

Thank you for the opportunity to make this submission concerning the draft merger notification thresholds forming part of the proposed new merger control system published by The Treasury on 30 August 2024 (**Discussion Paper**).

We generally support the policy objectives of the proposed new merger control process as promoting the objective under the *Competition and Consumer Act, 2010* (**CCA**) of enhancing the welfare of Australians. We also recognise the benefit of having clear thresholds for the proposed mandatory notification process so as to give business clear guidance when considering a merger. Our comments are limited to what we consider may be some unintended consequences under the thresholds for mergers which on any objective analysis are unlikely to result in a substantial lessening of competition.

We note that an acquisition will be notifiable if any one of the four monetary or market concentration thresholds (two limbs each for the monetary thresholds and the market concentration thresholds) is met and there is a material connection to Australia. Our concern is specifically with the monetary thresholds which are based on turnover of the parties and/or deal value, neither of which of themselves are good indicators of likely anti-competitive impact.

Monetary thresholds

Under the proposed monetary thresholds Limb 1 is satisfied if the combined Australian turnover of the merger parties is at least $200 million AND either the Australian turnover for at least two of the merger parties is $40 million OR the global transaction value is at least $200 million. Limb 2 is satisfied if the acquirer group Australian turnover is at least $500 million AND either the Australian turnover for at least two of the merger parties is $10 million OR the global transaction value is at least $50 million.

In our submission, the use of monetary thresholds without reference to market share or market power will capture many transactions which are unlikely to have an anti-competitive impact. Reference is made in the Discussion Paper[1] to larger acquirer's having greater reach or greater potential to affect the prices of goods or services, quality and/or range, and that this is particularly the case in oligopolistic markets. However, it seems unlikely that a large acquirer (not market-specific) will have the ability to lift

[1] p9 Discussion Paper

prices in a particular market unless it has (or is acquiring) significant power in that market. And if the market is oligopolistic, then this will be reflected in a high level of market concentration, which is not considered under the monetary thresholds.

The Discussion Paper makes the point that the thresholds are not designed to capture acquisitions of low value assets or small businesses, however, that is what the monetary thresholds under Limb 2 are likely to do ($10 million is not a large turnover). If a series of acquisitions when considered together under the proposed three-year lookback does not result in a significant increase in market concentration or market power, why should it need to be notified?

There is also reference in the Discussion Paper[2] to a concern regarding local and/or regional markets. Again, any anti-competitive effect is likely to be reflected in greater concentration in that local market, rather than the size of the company making the acquisition.

Regarding the risk of 'killer acquisitions' (the example of Facebook's acquisition of Instagram is cited in the Discussion Paper[3]), such acquisitions are only likely to be undertaken by a company which already has substantial market power which it seeks to entrench. This will be reflected in the acquirer's market share. Under the draft market concentration thresholds, each limb refers to market concentration and turnover of at least two parties to the transaction. If the desire is to capture 'killer acquisitions' it would be preferable to make the test a combination of market shares of the merger parties (rather than turnover of the acquirer group) and the size of the transaction.

Finally, there is a concern noted in the Discussion Paper[4] that the size of the acquirer *per se* is relevant as larger companies have larger financial power which could result in anti-competitive conduct. Presumably, the concern here is predatory behaviour rather than an ability to increase prices (the latter being a function of power in the relevant market rather than size) but this type of conduct should be adequately dealt with under the market conduct provisions in the CCA, specifically section 46. A financially powerful company is likely to have substantial market power in at least one market. It raises the question how the Australian Competition and Consumer Commission (**ACCC**), once notified of a merger, would be able to reach a conclusion regarding the likelihood of future predatory behaviour by the financially powerful acquirer. Surely, that should be left to be dealt with if there is subsequently evidence of such market behaviour.

We have a number of clients with high turnover but which, because of the size of the relevant market, have less than 10% market share. It seems an unnecessary imposition to require notification of relatively small acquisitions by such a business where there is no discernible increase in market concentration (including when applying the 3-year lookback).

Proposal for exemption certificates

If the Treasury intends to retain the current monetary thresholds, we have one suggestion for a mechanism which might ameliorate the effects referred to above.

The Taskforce may be aware of the process under the foreign investment review framework for the granting by Treasury of exemption certificates for certain types of foreign acquisitions which are deemed unlikely to be contrary to the national interest. These exemption certificates are intended to reduce regulatory burden for foreign persons by allowing them to obtain up-front approval for a program of lower-risk investments[5].

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[2] Ibid
[3] P 10 Discussion Paper
[4] P9 Discussion Paper
[5] See Treasury Guidance Note 9 Version 2 (1 July 2023)

Although the context is different, it seems to us that a system of exemption certificates issuable by the ACCC would ease the regulatory burden for acquirers making a series of acquisitions which, taken together, are unlikely to substantially lessen competition.

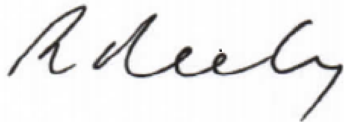
Like the foreign investment certificates, a notification exemption certificate would specify parameters within which the holder would be permitted to make acquisitions without the requirement to notify the ACCC. These parameters could be based on transaction value (total and individual) and/or incremental market shares and would specify the period during which such exempted acquisitions could be made.

There would be transaction reporting requirements under such a certificate, such that it is clear to the ACCC that each acquisition is permissible and was made under the exemption certificate. Further, it would be possible (as for non-notifiable transactions under the exposure draft of the *Treasury Laws Amendment Bill 2024*) for the ACCC to require a certificate holder to make a notification or otherwise provide information about a proposed or past transaction, notwithstanding the exemption certificate, where the ACCC has concerns regarding the effect of the exempted transactions based on new information.

A system of exemption certificates would not only reduce the regulatory burden on businesses when making lower-risk acquisitions, but would also reduce the volume of such transactions that the ACCC would be required to consider under the proposed notification thresholds.

We would be pleased to discuss any aspect of these comments and suggestions with the Taskforce.

Yours faithfully



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