THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:BMslh180124

18 January 2024

Dr Kerry Schott
Chair
Competition Review Taskforce
Treasury
Langton Cres
Parkes ACT 2600

By email: competitiontaskforce@treasury.gov.au

Dear Dr Schott,

Merger Reform

The Law Society of NSW appreciates the opportunity to make a submission to the Treasury consultation paper, *Merger Reform*.[1]

Background

The consultation paper acknowledges the concerns of the Australian Competition and Consumer Commission (ACCC) that Australia's merger control regime is not as effective as it needs to be.[2] It also states there is evidence across the economy that competition intensity has weakened, while market concentration and markups have increased in many industries. This reduction in competition is said to be a contributing factor in Australia's declining productivity performance since 2000.

Australia's current merger control regime is based on a voluntary non-suspensive model. The consultation paper presents three possible policy options for reform, which can be summarised as follows:

- Option 1 - A voluntary formal clearance regime
- Option 2 - A mandatory suspensive regime
- Option 3 – A mandatory formal clearance regime[3]

Each of the reform options represents a stricter merger control system than under the existing arrangements. They are also predicated on a risk tolerance weighted in favour of disallowing anti-competitive mergers at the potential expense of blocking benign or pro-competitive

[1] The Treasury Competition Review, *Merger Reform* consultation paper, November 2023, https://treasury.gov.au/sites/default/files/2023-11/c2023-463361-cp_0.pdf.
[2] Cass-Gottlieb, Gina *The role of the ACCC and competition in a transitioning economy*, address to the National Press Club, 12 April 2023. https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023.Transcript.
[3] *Merger Reform* consultation paper, n1, p6.

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mergers. We note this is a reversal of the current default position, which the ACCC argues works to the detriment of the public, as it is they who must bear the risk of anti-competitive mergers.[4]

We also note there is an argument for maintaining the status quo. The Business Law Section of the LCA has highlighted the need for careful and rigorous testing of the costs and burden associated with establishing a new merger control system, both for the regulator and for merger parties "where there is evidence that companies on the whole respect the existing regime (and that only a very small number of mergers give rise to significant competition concerns)".[5]

General Comments

The Law Society's comments are provided as issues for consideration and potential mechanisms for improvement, whether the existing merger control system is retained, or one of the reform options adopted. Our comments are also informed by the observations of the Business Law Section of the Law Council of Australia (LCA) in its discussion paper dated 23 May 2023.[6]

Consultation Questions

- Risk and design principles for Australia's merger control regime

  1. Are these the appropriate principles to use when considering reform of Australia's merger control regime? Are there any others? If so, please identify them.

  We agree that merger notification and review procedures should be based on the following principles:

  - be effective, efficient, timely and transparent
  - avoid imposing unnecessary costs, set reasonable information requirements, establish clear and objective notification criteria, and expedite review of mergers that do not raise material competitive concerns; and
  - be procedurally fair, by providing the right to respond, the right to seek review, to hear from third parties and protect confidential information.[7]

  Timing of notifications

  Using the above guiding principles, we would support the setting of timeframes to allow for early notification. Prompt commencement of the assessment process will facilitate timely completion, particularly with respect to cross-border mergers, which have been identified in the consultation paper as becoming increasingly important,[8] and transactions where confidentiality is an imperative until the agreement or bid becomes public. Such a mechanism is available in the European Union (EU)[9] and is recommended by the International Competition Network.[10]

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[4] n2.
[5] LCA, *ACCC's updated merger law reform proposals – discussion paper in response*, May 2023 2023 05 23 - S - ACCC s updated merger law reform proposals discussion paper in response.pdf (lawcouncil.au) p5.
[6] Ibid.
[7] OECD, OECD Recommendation on Merger Review, 2005 - as cited in The Treasury (Cth), *Merger Reform* Consultation Paper (November 2023) p11.
[8] Ibid p20.
[9] Compare Council Regulation (EC) 139/2004 Art.4(1).
[10] 2 ICN, ICN Recommended Practices for Merger Notification and Review Procedures, 2018, p 11.

To ensure ACCC resources are not expended on assessing purely speculative merger proposals, it would be appropriate to require parties to provide evidence that they expect to proceed with the transaction, for example, on the basis of a letter of intent, agreement in principle or certification of good faith intention.

Time frames for decisions

In accordance with the above guiding principles, it is critical that clear and reasonable time frames are set for review and clearance of proposed mergers. In our view, the design of a reasonable period for review will take into account the time-sensitivity of merger transactions, as well as the potentially complex legal and economic issues that may be presented for assessment. In addition, we suggest there should be provision for suspending time periods where notifying parties have been requested to provide additional information.[11]

- Emerging concerns

3. What concerns about the current system should be considered in the design of a new regime?

Effectiveness of Australia's merger control test and third parties

The ACCC has highlighted difficulties in establishing that a merger is likely to have the effect of substantially lessening competition in the future, as required under section 50 of the *Competition and Consumer Act 2010* (Cth).[12] However, the ACCC's approach to proving whether a merger is likely to substantially lessen competition has also been criticised for tending to rely on "theoretical economic arguments".[13]

One way of addressing this might be to require the ACCC to actively seek input from actors in relevant markets. This recognises the valuable insights that can be gained from the actual experience of third parties such as suppliers, customers and competitors on the market pressures in which the merger will operate and the potential effects on the competitive environment if the merger is cleared. It is noted that time constraints and reluctance by third parties to engage in the merger review process[14] are factors which may have an impact on obtaining third party evidence, and which should be considered in designing a new system.

Interlocking directorships

The consultation paper has identified interlocking directorships as potentially facilitating collusion and dampening competition. While we do not disagree, we consider the main issue with common directors is access to and sharing of information, a problem that applies generally as a competition concern. Therefore, we suggest problems that go to information exchange should be dealt with as a general competition law issue that is not confined to merger control.

[11] Compare Council Regulation (EC) 139/2004 Art.10(4).
[12] *Merger Reform* consultation paper, n1, p13.
[13] Ibid p14.
[14] Ibid. Third parties may be reluctant to provide evidence due to time, cost and confidentiality concerns as well as fear of retribution.

- Foreign investment and competition approval processes

  12. Are there any issues arising for foreign investors from the interaction of the foreign investment and competition approval processes?

  The Law Society notes the comment in the consultation paper that if a formal merger regime was to be introduced, it must work effectively together with Australia's foreign investment framework. This is particularly important in competitive bids which have the potential to disadvantage foreign investors.

  We also note that the ACCC is a consultation partner for foreign investment and that the list of consultation partners is expanding, particularly for businesses prescribed as sensitive to national interest considerations. It may be useful for the Foreign Investment Review Board (FIRB) or the Department of Foreign Affairs and Trade to act as facilitator for foreign investors to assist them in navigating the complex regulatory framework for investing in Australia. Notably, this approach has been adopted by States with investment agencies (such as Investment NSW, Invest and Trade WA, Invest Victoria and Invest in South Australia.)

- Key elements of a merger control regime

  14. Should a merger regime include a 'call-in' power for mergers either falling below the notification threshold or not voluntarily notified which may raise competition concerns? If so, what should the criteria for exercising such a power be?

  The consultation paper notes that a number of overseas jurisdictions have the ability to deal with non-notified mergers by way of "call-in" powers where competition concerns have been raised. This mechanism acknowledges that potentially anti-competitive mergers, regardless of size, should be subject to assessment. However, there is an argument that the inclusion of "call-in" powers undermines a claimed benefit of mandatory notification, that is, certainty for merger parties about when they need to notify competition authorities.

  We agree with the Business Law Section of the LCA that, if a "call-in" power is to be introduced, safeguards should be included, such as a time limit for the exercise of the power, and clear guidance as to when the ACCC will exercise the power.[15] We further propose that the exercise of any "call-in" power in respect of a foreign investor should be co-ordinated in consultation with the FIRB and other relevant consultation partners.

  15. Should filing fees be introduced? How should they be set?

  As a general comment in relation to cost of regulatory compliance, we note that businesses in many market sectors experience high operating costs driven by the challenges of navigating Australia's federal legal structure and unique geography. Transaction costs associated with regulatory burden should be considered in this context. Further, increased regulation has the potential to make Australia less attractive to foreign investment. Careful consideration should be given to whether this may have the impact of substantially lessening competition, by reducing the number of potential investors, or the withdrawal of industries altogether (for example, car and light bulb manufacturing).

  If filing fees for merger clearance applications are to be introduced, we propose that consideration is given to reviewing other fees being paid by the applicant for government approvals, for example, a FIRB filing fee for a foreign investment application. Notably, FIRB filing fees were doubled for foreign investors in 2022 and are increased annually on 1 January.

[15] LCA, *ACCC's updated merger law reform proposals – discussion paper in response*, n5.

16. Should mergers be suspended for a period of time while they are reviewed?

The Law Society sees no issue with this proposal, as many sale and purchase agreements have a standard condition precedent that provides for merger control clearance approval to be obtained.

If you have any questions about this submission, please contact Sonja Hewison, Policy Lawyer at sonja.hewison@lawsociety.com.au or on (02) 9926 0219.

Yours sincerely,

Brett McGrath
President