

24 October 2024

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee Chair and Members,

Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

Thank you for the opportunity to submit to the Committee on its consideration of the 130-page *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024*, as tabled on 10 October 2024 by the Treasurer, The Hon. Dr Jim Chalmers MP.

We have reviewed the Bill, Explanatory Memorandum, *Government Response to Consultation* (released on 10 October 2024) and related material such as the ACCC's 12-page *Statement of Goals for Merger Reform Implementation* (also released on 10 October 2024), which itself flags further issues for consultation (e.g. notification forms, draft process guidelines) including in Q1 2025.

At the outset, we place on the record our appreciation for the Government's engagement with us on this reform, including Treasury and relevant Ministerial offices.

The SCCA has engaged deeply with the Government on its proposed merger reform, noting principally our sector's activities include the ownership and acquisition of shopping centres (land and buildings), occasional development activity (noting provisions in the Bill relating to land), retail leasing (including to supermarket tenants), and occasional company-level mergers.

We have made several formal submissions on the review and have provided detailed analysis to the Government, including in relation to notification thresholds.

For the Committee's awareness, under the previously consulted thresholds, our detailed analysis highlighted that 91 commercial property acquisitions (1.8 per week) could be captured by mandatory notification thresholds and notifiable to the ACCC, including 38 shopping centre acquisitions (noting also an average of 7 bidding parties per acquisition). Additionally, approximately 95 leasing transactions would be notifiable.

Noting the *Government Response to Consultation*, which updated the monetary thresholds and abandoned market concentration thresholds, we are updating this analysis and have had preliminary discussions with Treasury.

Over a long period, we have engaged on relevant competition and consumer policy reforms that affect our sector, including unfair contract terms (including pre-compliance activity with the ACCC), the ACCC's designated complaints changes earlier this year, and the current / ongoing proposed unfair trading practices reforms.

We also have a standing ACCC authorisation for our *Casual Mall Licensing Code of Practice* (aka. 'pop-up' retail) and have had previous authorisations from the ACCC including in relation to the provision of rent-relief to SMEs during the COVID-19 period.

Comments and outstanding concerns

The Bill is not instructive in terms of how a new merger reform regime would operate

As the Committee will appreciate, the Bill in isolation does not provide a full indication of how the proposed merger reforms would be applied in practice, including noting that it is largely 'enabling' legislation including for yet-to-be determined (subject to the passage of the Bill) subordinate legislation.

For example, the Bill makes 21 references to 'legislative instruments' that can be made, subject to the passage of the Bill. These include instruments on central elements of the reform that would be determined potentially after the Bill is considered and passed by the Parliament.

These include potential legislative instruments in relation to:

- classes of acquisitions,
- notification thresholds,
- targeted Ministerial Determinations,
- notification waivers,
- fees, and
- acquisitions register.

Combined with additional consultation flagged by the ACCC (in the ‘Statement of Goals’ document) on other elements of the reforms, there are still many questions left unanswered and the Bill, thus, has a somewhat ‘theoretical’ application to central issues at this time.

A reliance on legislative instruments to give effect to this reform has, whether intentionally or not, resulted in a piecemeal process in which the impact of the reform has not and cannot be fully contemplated or understood. To give a simple example for the Committee’s consideration, sections 51ABU and 51ABV of the Bill dealing with the proposed ‘notification waivers’ provide little clarity or certainty as to what would be required to firstly make an application for a notification waiver, and then the criteria on which a notification waiver application would be assessed. Instead, both of those critical factors are left largely to further legislative instruments that have yet to be consulted on or developed.

This somewhat undermines the Government’s stated intention for the notification waivers to “*increase certainty and support efficient administration of the new system*” (as noted at section 1.34 of the Explanatory Memorandum), or at the very least doesn’t enable the intention of this proposed approach (which we support, in principle) to be properly considered.

Success would hinge on future legislative instruments and stewardship of the ACCC

A key issue for the Committee’s attention is that much of the success of the reform is reliant on the development of further legislative instruments, and the processes and stewardship of the ACCC, in moving from a judicial enforcement model to an administrative regime (including commitments made by the ACCC and Government in terms of the risk-based and targeted approach, efficiency, and transparency).

In some respects, it is less that the ACCC is well resourced but that there is clarity for notifying parties (again, much of which relies on further legislative instruments), that the ACCC has appropriate expertise on what ‘markets’ they are assessing and how (e.g. market studies), and the administrative burden and expectations placed on a notifying party in terms of required studies, other information requirements, along with any potential conditions may be imposed on parties.

The proposed monetary thresholds would likely capture benign transactions

Throughout the consultation process we have maintained that the central focus and principal thresholds of the proposed reforms should be focussed on market concentration (given market concentration issues were the central feature of the logic in development the proposed reforms) and the clear prospect or likelihood of anti-competitive outcomes. The consultation process gave rise to a potential acquisition value threshold, and then a combination of monetary and market concentration thresholds.

Rather than have a central ‘market concentration’ focus, the proposed reforms now have an ‘economy-wide’ approach (through the proposed monetary thresholds), with mechanisms to then try and enable efficiency to deal with potentially benign acquisitions include through the proposed notification waiver process and exemption (e.g. for certain land for commercial property transactions – as announced by the Government including in the *Government Response to Consultation* and as noted in Dr Chalmer’s second reading speech, as outlined below – from page 11 of the Government response:

To ensure benign land acquisitions are not captured, there will an exemption from notification for land acquisitions made in relation to residential property development or by any business that is primarily engaged in buying, selling or leasing property and which does not intend to operate a commercial business (other than leasing) on the land, unless those acquisitions are captured by additional targeted notification requirements.

The Government has also proposed, as it enabled in the Bill, the ability to make specific Ministerial Determinations, including (as the Government has flagged) for sectors such as supermarkets and, potentially, liquor and fuel.

We anticipate that such a determination would have an impact on our sector, including through supermarket leasing (and related) activity.

We note and support that the Government has announced that the notification thresholds would be reviewed, over time.

Key issues remain outstanding

Noting the above, we believe that a large number of 'benign' acquisitions would be captured under the broad monetary thresholds, highlighting the need for a clear and effective 'notification waiver' regime and exemption regime for relevant commercial property acquisitions. As noted previously, both of these key issues are not the subject of detailed provisions in the Bill and remain the subject of ongoing consultation.

While the proposed waiver process enables a party to seek relief from the obligation to notify an acquisition that would otherwise be required to be notified (but noting also that any waiver granted does not exempt that acquisition from the operation of section 50), we are concerned that requirements could end up being fairly onerous, unnecessary, and thwart the real intent and success of this proposed approach.

Recommendations

1. Noting that much of the central elements of the proposed reforms are not detailed in the Bill, but would be determined through further legislative instrument (subject to the Bill's passage), the Committee should recommend, to enable the proper consideration of the Bill by the Parliament and ahead of its potential passage:
 - The Government provide an addendum to the *Explanatory Memorandum* detailing more specific potential policy and operational 'requirements' particularly for the following potential legislative instruments (so they can be considered, in full):
 - **Section 51ABP – Notification thresholds** set by legislative instrument, which would determine the acquisitions that are required to be notified.
 - **Section 51ABQ – Classes of acquisitions** determined by legislative instrument, which would enable the Minister to introduce targeted notification requirements for certain sectors, acquisitions, or regions.

Further clarity should also be provided under the above proposed legislative instruments to ensure that the proposed exemption for benign commercial property land acquisitions is appropriately targeted and structured.
 - **Section 51ABU(3) and Section 51ABV(3) – Notification waiver process** which permits the Minister to determine the form and assessment criteria for a notification waiver.
 - **Section 51ABX(2) – Notification fee** which is to be set by the Minister through a legislative instrument, yet there has been no indication of the amount the fee would be set at or how it would be determined.
2. Given the proposed notification waiver under section 51ABV would be granted after consideration of the likelihood of an acquisition substantially lessening competition, the Committee should recommend that the Bill explicitly provide protection from retrospective action taken under section 50 of the *Competition and Consumer Act 2010*.
3. The Committee should recommend that the Bill include provisions to reflect the Government's commitments to review the thresholds set by legislative instrument under the proposed section 51ABP of the Bill after the first 12 months of being introduced, and to conduct an overall review of the proposed regime after 3 years of it being operational. Importantly, these provisions should require the reviews to be conducted independently of Treasury and the ACCC.

The SCCA would be pleased to provide additional information or assist the Committee, if required. Thank you for the opportunity to provide this submission to the Committee.

Kind regards,



James Newton

Head of Policy and Regulatory Affairs, SCCA

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