Professor Allan Fels AO

30 October 2024

The Senate
Senate Economics Legislation Committee

Dear Sir/Madam,

SUBMISSION
TREASURY LAWS AMENDMENT (MERGERS AND ACQUISITIONS REFORM) BILL 2024

The merger reforms herald a significant shake-up for competition policy in Australia. Once implemented, they will deliver direct benefit to consumers, small business, farmers, and even big business itself (although it may deny it).

The reforms will strengthen merger law and compel it to operate more efficiently and less legalistically. They will be implemented at a time when there is increasing evidence of the damaging impact of reduced competition in Australia.

The key change is to move merger decision-making from the courts to the Australian Competition and Consumer Commission. This will mean more economics and less legalism. As a safeguard, however, there will be a right of appeal to the Australian Competition Tribunal, which is headed by a judge and includes members from the business community and economists. Historically, the tribunal has not hesitated to overturn commission decisions, as it did recently in the ANZ/Suncorp merger.

The introduction of compulsory pre-notification of big mergers is a no-brainer. Nearly every other OECD country has this. Australia's an outlier. The combination of ACCC decisions, compulsory notification, and some other proposed procedural reforms will lead to better and quicker processes.

The test relating to which mergers should be rejected has been significantly improved. The current law requires the ACCC to prove in a court of law that the merger would substantially lessen competition.

Courts are good at deciding what has happened in the past; say a crime. However, they struggle with attempts to prove future economic outcomes of complex mergers. Moreover, the current legal interpretation of the words "substantial lessening of competition" has led to more of a focus on the uncertain and hard to ascertain likely behaviour of a market sometime in the future. The more tangible and immediate effect on the degree of concentration and the structure of the market has tended to be downplayed.

All reforms propose a much-needed clarification to the "substantial lessening of competition" test: it will now apply if the merger "creates, increases or entrenches" substantial market power. This will emphasise the effect on the structure of the market.

The need for this key change has been magnified by the fact that these days, the ACCC – competent and formidable litigator that it is – normally faces an army of corporate lawyers and silks, economists, consultants, business advisors, and well-rehearsed business witnesses in court. This has contributed to a recent string of losses in merger cases.

The new law also will help curb creeping acquisitions. If a big retailer acquires a store in a country town, this does not "substantially lessen competition". But now, the aggregate effect of a number of acquisitions over a period of up to three years can be considered. The ACCC may decide that, taken as a whole, the acquisitions substantially lessen competition.

This change also addresses in part the habit of digital platforms acquiring small "nascent" competitors before they threaten the platform.

The reforms reject the somewhat problematic ACCC reverse onus of proof test that would have required applicants to satisfy the commission that the merger would not substantially lessen competition. This proposal is now less needed, given the effect of the overall reforms.

The government does not propose to introduce divestiture powers to compel big businesses to be broken up when a court finds that they have acted illegally and concludes this is the best remedy. But for the record, the USA, the home of free markets, has used divestiture power carefully and only occasionally but to great effect.

One point made by the government should be qualified: ever anxious to show a light-handed approach, the proposal says – not incorrectly – that only a small number of mergers are affected by the change of law. True, but the number of anticompetitive mergers that would occur if there was no merger law in this country is huge and would likely involve banks, supermarkets, energy and oil businesses, telcos, and countless others.

In other words, the merger law is our best and most substantial protection against a highly monopolised economy.

Let's hope when the federal government – in conjunction with state and territory leaders – turns to the broader question of reinstituting the national competition policy of the 1990s (triggered by the 1992 Hilmer Review) that its policies are as consequential as its merger proposals.

An issue for the Committee is whether the merger reform thresholds are of the right magnitude. My impression is that they are about right.

The merger reforms are substantial. It may be that there will be no appetite for further major substantive changes to the law in the immediate future.

In that case, I would urge that attention be given to a change that would improve the law but not change its substance very much. This would be to express the law more simply and briefly thereby bringing Australia into line with most of the rest of the world. The competition party of our law is about 20,000 words. The Sherman Act in the USA is a sentence or two. The Treaty of Rome which applies to Europe, is about half a page.

I have often said that if the Competition part of the law was reduced to a single proposition it would not change the substance of our law very much. That proposition would prohibit any such behaviour by business that substantially lessens competition is prohibited unless authorised where there is a sufficient public benefit. I would retain a few outright restrictions on price-fixing and the like and probably reluctantly have a more detailed section on criminal cartels. I first publicly raised this idea in 1991 and progress has been at a snail's pace at best with little interest from the legal profession.

It would be useful if the Committee recommended more attention be given to this topic.

Yours sincerely

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