Senate Economics Legislation Committee
The Senate
Parliament House
Canberra
ACT 2600

23 October 2024

Dear members of the Senate Economics Legislation Committee,

I am submitting a brief response to the invitation I received on 15 October to make a submission with regards of the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024. This submission is in line with the submission I made to the merger-reform consultation in February 2024.

In general, I endorse the proposed Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024. If enacted, the bill will replace the current merger-control law regime with a mandatory and suspensory administrative system that will be in line with other, well-established merger control law regimes and will be more effective than the current regime.

Mandatory Regime

Almost all well-established merger control law regimes, including the EU and the USA (which is also a common-law jurisdiction), are mandatory regimes.[1] This means that merging entities have to notify and register their merger or acquisition if they meet certain threshold(s), and they cannot finalise their merger or acquisition until a certain period of review of the merger or acquisition has passed and/or a formal clearance has been obtained.

For instance, in the USA, the primary federal merger control legislation is Section 7 of the *Clayton Act*, which prohibits mergers and acquisitions that may substantially lessen competition. The *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (Section 7A of the *Clayton Act*) requires pre-merger notification of proposed mergers and acquisitions that meet certain requirements, including a threshold. Meeting the requirements indicates that the particular merger or acquisition could, potentially, lessen competition substantially.[2] Such mergers and acquisitions then need to be assessed under the mandatory regime by the Department of Justice or the Federal Trade Commission to determine whether they will substantially lessen competition.

[1] Although the UK is also one of very few voluntary regimes, the UK competition law authority, the CMA, makes biding decisions as to whether a particular merger or acquisition is anticompetitive.
[2] In the USA, mergers may also be challenged in court under the *Sherman Act 1890*, or Section 5 of the *Federal Trade Commission Act 1914* (the "FTC Act").

Adopting a mandatory regime in Australia, as proposed in the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024, will improve the Australian regime significantly for the following reasons:

- Unlike the current regime, the proposed regime will allow the ACCC to obtain all the documents it needs to assess individual mergers and acquisitions that meet certain requirements, indicating the likelihood of substantially lessening competition. This will improve the accuracy of assessments, as well as time efficiency. This is further strengthened by the proposed investigatory powers of the ACCC and tools, including available remedies for non-compliance.
- The mandatory regime decreases the chance of missing potentially anticompetitive mergers and acquisitions. Such a mandatory regime (to be truly mandatory) needs to be equipped with relevant and effective remedies, including penalties for not registering mergers and acquisitions once they meet certain requirements and/or threshold(s), not providing information or providing false information. This is included in the bill. However, what needs to be considered is whether the proposed remedies are effective enough to deter parties of mergers and acquisitions from doing these.
- This will also allow the ACCC to spend more resources assessing relevant mergers and acquisitions rather than detecting them.
- The proposed mandatory regime will make the investigatory process more time-predictable, as further discussed below.

Enforceable Determinations by the ACCC

In many well-established and effective competition-law regimes, including the UK common-law regime, competition law authorities have the power to make a binding, enforceable decision as to whether a particular merger or acquisition contravenes competition law, as well as the power to block a merger or acquisition as part of such a decision. These decisions are then subject to a tribunal and/or judicial review.

In line with these regimes, the bill gives the ACCC the role of a decision-maker with regards to making binding determinations as to whether specific mergers and acquisitions substantially lessen competition and, if they do, if there are public benefits which would outweigh the negative effects on competition. The ACCC's determinations can be reviewed by the Competition Tribunal, as a tribunal specialising in competition law. The bill includes a judicial review of Competition Tribunal determinations to determine any errors of law, which ensures justice, including the merger parties' rights to due process.

This review process, as in other well-established suspensory administrative regimes, places the burden of proof on the merger parties in the first instance review. This is because it is the merger parties, and not the ACCC, who would take the matter to the Competition Tribunal to argue that their merger (or acquisition) will not substantially lessen competition or that the likely substantial lessening of competition will be outweighed by the public benefit(s).

Ex-ante Nature

The principal reason as to why the proposed mandatory and suspensory administrative system will improve the Australian merger regime is the technical difficulties that arise from the *ex-ante* nature of merger control law.

Unlike other areas of competition law, merger control law requires an *ex-ante* assessment, meaning that two counterfactuals need to be correctly determined and evaluated. Compared to ex-post competition-law cases, the *ex-ante* evaluation of the impacts of future mergers and acquisitions is even more technical. It requires significant economic assessment. As recognised in other competition-law regimes, including the UK, a competition-law authority and a specialised tribunal are better equipped to evaluate the economic features of such an assessment. Thus, the ACCC and the Competition Tribunal are better placed to make determinations of whether a merger or an acquisition would substantially lessen competition and whether there is significant public benefit(s) which could overweigh such a lessening of competition.

In order to do so, the merger regime needs to be not only administrative and suspensory, but also mandatory so that the ACCC can collect all of the relevant information and documents in a manner similar to the ACCC's investigation in other areas of competition law.

Predictability and Time Efficiency

The proposed administrative and mandatory regime will improve time efficiency. This is further strengthened by clear suspensory timelines incorporated in the proposed legislation. As in other jurisdictions with mandatory merger control law regimes and with competition-law authorities as decision-makers, the various stages of investigation and decision-making need to have deadlines,[3] including time limitations of, and deadlines for, appeals to Competition Tribunals. This provides merging parties with a predictable time-framework, something which the current regime lacks due to its dependency on judicial decision-making.

Transparency

The clear suspensory timelines also assist with transparency.

An important aspect for ensuring transparency is the establishment of a public register of notified mergers and acquisitions. However, it is crucial that this does not negatively impact information which is truly confidential.

One transparency and legal certainty issue in the bill is the notification thresholds that are proposed to be determined by the "Minister by legislative instrument". While this can allow for flexibility that can be useful for the effective evaluation of mergers and acquisitions in the dynamic digital economy, it negatively impacts transparency and legal certainty. The notification thresholds are principal elements of the merger control law; they are crucial for determining and self-evaluating whether

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[3] For example, see Competition & Markets Authority, /Mergers: Guidance on the CMA's jurisdiction and procedure' (January 2022) p. 8, available at <https://assets.publishing.service.gov.uk/media/61d71895e90e070375c22f1a/CMA2_guidance_publication.pdf>.

merger parties must notify the ACCC. Such thresholds need to be transparent and stable enough to ensure that merging parties can make a qualified decision as to whether to merge or acquire considering that such a decision can be a lengthy process. For example, in the EU, the notification thresholds are part of enacted law: they are clearly set in Article 1 of the EU Merger Regulation.[4]

Overall, the above-discussed proposed changes will make the Australian regime more effective. The suggested changes are crucial for the Australian economy, including consumer welfare. Considering the reported trend towards the concentration of markets, and the issues and features of the digital economy we currently live in (such as the high speed of ongoing changes and dynamism) and the fact that our markets are going to be more and more digitalised, it is more crucial than ever for Australia to toughen and modernise its merger control law regime.

Sincerely,

[redacted]
TC Beirne School of Law
The University of Queensland
W315, Forgan Smith Building (1)
Brisbane Qld 4072 Australia

T +61 7 3365 8863
E [redacted] W law.uq.edu.au

[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.