From: Aparna Reddy <areddy@insurancecouncil.com.au>
Sent: Friday, 26 August 2022 12:20 PM
To: More Competition
Cc: Merric Foley
Subject: Treasury Consultation - Competition and Consumer Reforms

To whom it may concern

The Insurance Council of Australia (ICA) is the representative body for the general insurance industry of Australia. The ICA represents approximately 95% of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of $59.2 billion per annum and on average pays out $148.7 million in claims each working day ($38.8 billion per year).

The ICA acknowledges the proposal to strengthen the penalty regime implements one part of the Government's Better Competition election commitment and aims to align the penalty regime with international jurisdictions. The ICA thanks Treasury for the opportunity to comment on the *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices.* Given the time constraints, in lieu of a formal submission, we would like to raise some areas for consideration.

An increase in the maximum penalty for body corporates for breaches of Part IV of the CCA from $10 million to $50 million would enhance the penalty regime as a deterrent to anti-competitive conduct.

Under the current penalty regime, there is a three-limb test which is applied in determining the maximum penalty for a body corporate. The maximum penalty is the greater of either: i) $10 million; ii) three times the value of the benefit obtained as a result of the misconduct; or iii) if the benefit cannot be determined, 10% of the body corporate's annual turnover. The reforms propose to increase the first limb from $10 million to $50 million, retain the second limb unchanged, and increase the third limb from 10% to 30%.

We note that courts can face challenges in determining any benefit that a body corporate has obtained as a result of misconduct, as often, acts or omissions do not result in any clearly identifiable benefits. In circumstances where benefits cannot be clearly identified, the third limb is relied upon in determining the maximum penalty applicable. The concept of turnover may be problematic for low margin businesses, like general insurance, which does not account for the substantial costs of paying claims and other costs such as reinsurance. The turnover test is not a reflection of profitability, which arguably is a measure which better reflects the concept of "benefits" obtained in the second limb. Importantly, determining penalties by reference to turnover can also result in a significantly disproportionate maximum penalty amount when considering the misconduct in question, and this will be exacerbated by the proposed reforms to the third limb. These challenges are not addressed by the proposed change from "annual turnover" to "adjusted turnover".

We suggest that further consideration is given to how effective the turnover test is in determining appropriate penalties proportionate to the misconduct being penalised. Retaining the existing thresholds in the third limb does not diminish the effectiveness of the reforms, as the penalty regime would be substantially enhanced through the proposed five-fold increase in the first limb from $10 million to $50 million. The Treasury may wish to consider keeping the third limb unchanged pending further consideration.

Finally, as a general comment, the ICA notes that competition law going forward will need to consider broader social and government priorities, particularly climate change. Action on climate change may require increased collaboration by businesses and this may challenge traditional concepts of competition law.

Kind regards
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