



16 August 2024

Competition Taskforce
Treasury
Langton Cres
Parkes ACT 2600

By email: competitiontaskforce@treasury.gov.au

Dear Competition Taskforce

RE: Reforming mergers and acquisitions - exposure draft materials

Thank you for the opportunity to provide feedback on the proposed amendments to the laws that govern Australia's oversight of merger and acquisitions. This is a joint submission made on behalf of CHOICE and the Consumers' Federation of Australia.

We also made a submission in January in response to the previous consultation paper released by the Competition Taskforce.¹ While our preferred option was Option 3 in that paper, we still welcome the move to strengthen the merger review process. The need for reforms to merger laws remains very clear. Once a market becomes highly concentrated, consumers pay the price but it is very difficult to intervene to fix it. Intervention to protect genuine competition needs to happen before markets become too concentrated by stopping mergers and acquisitions that could harm competition.

The current legal framework does not contain sufficient guardrails and powers for the ACCC or the Government to intervene to prevent mergers that will lead to significant market concentration. It is also a system that provides limited opportunity for other perspectives, such as consumers, to be heard on a merger, despite often being directly affected by a proposed merger. A more robust merger review system is needed, along with expanded grounds on which a merger can be blocked, to better reflect the risks that come with market concentration.

We specifically support the following aspects of the Exposure Draft legislation (**Draft Bill**):

- Clarifying that a substantial lessening of competition can result from creating, strengthening *or entrenching* substantial market power, and ensuring that the ACCC can consider and aggregate serial or 'creeping' acquisitions over three years when considering a proposed transaction;
- Increased transparency about ACCC merger decisions, including the creation of a public register with key documents;

¹ Available at:

<https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2024/merger-reform>

- The introduction of a power for funding to be provided to consumer groups or associations to engage in matters before the Australian Competition Tribunal; and
- Clarifying that the Tribunal can also engage with Consumer Groups as it sees fit, for the purposes of a standard merger/acquisition review before it.

The remainder of our submission focuses on new mechanisms to support consumer group participation in merger review processes.

Avenue to seek financial assistance for consumer groups welcomed

We strongly support the inclusion of section 100R *Competition and Consumer Act 2010 (CCA)* in the Draft Bill. This provision would allow the relevant Commonwealth Minister to authorise a grant of financial assistance to a consumer association or consumer interest group (**Consumer Group**) to participate in the review of a merger decision by the Australian Competition Tribunal.

As noted in our submission to the previous consultation by the Competition Taskforce, the cost of engaging in a Tribunal review of a merger decision is normally prohibitively expensive for not-for-profit Consumer Groups. In some cases this can result in the loss of important insights and advocacy that would help inform the Tribunal. As consumers are often the end users of many markets, the consumer perspective on how a market currently operates and how a merger will impact it can often be extremely valuable information.

The provision of funding under section 100R is largely at the discretion of the relevant Minister, and creates no mandatory obligation for the Government to provide funding. It is also limited to cases where consumer groups are direct participants to a review or have already been granted permission to intervene in the case by the Tribunal. This ensures grant applications will only occur where the consumer group has shown it will add value to the Tribunal's review, and leaves no risk that the provision will create unnecessary costs or work for the Government.

However, section 100R(3) does specify that grants of financial assistance can only be made where the consumer group would not be able to participate (or continue to participate) in the Tribunal proceeding without it. This is a reasonable requirement, but we would welcome some brief guidance in the Explanatory Memorandum to clarify that it does not require applicants to demonstrate that involvement would be financially *impossible* without it. There may be some situations where a consumer group could afford to engage in the proceedings (for example, by spending its financial reserves) but to do so would require an impractical commitment of funds that would impact significant other outputs the group provides the community or the group's longer term financial sustainability.

Recommendation 1

Clarify in the Explanatory Memorandum that section 100R(1)(c) of the CCA in the Draft Bill may still be satisfied where participation by a consumer interest group or association in a Tribunal proceeding without financial assistance would be impractical, but not impossible.

Consumer groups as applicants for review at Tribunals

We welcome the guidance at paragraph 6.16 of the Explanatory Memorandum to the Draft Bill that Consumer Groups can be an applicant with ‘sufficient interest’ to mandate the review of an acquisition determination, under section 100C of the CCA. However, we recommend this guidance be included as a subsection of the Bill, rather than in the Explanatory Memorandum. Consumer Groups represent the interests of consumers that actually form many Australian markets. It should be made certain that such relevant Groups have standing to appeal decisions that will impact those markets.

Recommendation 2

Move the substance of paragraph 6.16 of the Explanatory Memorandum into the Draft Bill, to provide certainty that the Tribunal must review acquisition determinations where an applicant is received by a relevant Consumer Group.

The other financial barrier that currently significantly limits the involvement of Consumer Groups in merger reviews by the Tribunal is the risk of costs being awarded against the groups. The legal fees alone involved in a large merger or acquisition by major companies would routinely be far more than the entire annual revenue of many Consumer Groups. There should be guidance in the Explanatory Memorandum that the Tribunal should not award significant costs against Consumer Groups where their involvement in a review was in good faith and in the interests of consumers. This should at least apply for small Consumer Groups, which should also be eligible for exemptions from Tribunal fees that may act as a barrier to their involvement.

Recommendation 3

Specify in the draft materials that costs should generally not be awarded by the Tribunal against a Consumer Group that has been a participant in a proceeding, provided it did so in good faith.

Clarifying that the Tribunal may consult Consumer Groups

We also welcome the proposed section 100N of the CCA, which would explicitly empower the Tribunal to consult with any Consumer Group it sees fit about a standard review it is undertaking. This may provide an alternative pathway for Consumer Groups to engage with the Tribunal where doing so may provide value and useful expertise to the Tribunal, but without needing to commit the time and resources to formally participate or intervene in the proceeding.

However, any kind of engagement with a Tribunal can be resource intensive for Consumer Groups that operate on small budgets. We recommend an equivalent provision to section 100R be added to the Draft Bill under which the Minister can authorise grants of financial assistance to Consumer Groups that have been consulted by the Tribunal under section 100N.

Recommendation 4

Add a provision to the Bill that allows discretion for financial assistance to be provided to Consumer Groups that are consulted by the Tribunal in a matter.

Further information

Thank you for considering our submission. To discuss this further, please contact Tom Abourizk, Head of Policy at CHOICE, at tabourizk@choice.com.au.

Yours sincerely,



Rosie Thomas
Director, Campaigns and Communications
CHOICE



Gareth Downing
Chairperson
Consumers' Federation of Australia