Competition Taskforce
The Treasury
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26 September 2024

Dear Competition Taskforce,

The Australian Food and Grocery Council (AFGC) welcomes the opportunity to make a submission to The Treasury in response to the Merger Notification Thresholds Consultation Paper.

The AFGC is the leading national organisation representing Australia's $162.7 billion food, beverage and grocery manufacturing sector – the makers of the essential food and grocery products Australians know and trust every day. The industry has a clear view, outlined in Sustaining Australia: Food and Grocery Manufacturing 2030, of its role in the post-COVID19 recovery through an expansion of domestic manufacturing, jobs growth, higher exports and enhancing the sovereign capability of the entire sector.

The AFGC supports the merger reform proposal put forward by the Competition Review Taskforce (the Taskforce). Mergers and acquisitions play an important role in driving innovation, dynamism and productivity in the economy. However, in some cases, mergers can significantly reduce competition, allowing businesses to raise prices and withhold economic benefits from consumers. Preventing such mergers is essential for easing cost of living pressure.

Australia's food and grocery manufacturing industry faces the challenge of operating in one of the world's most concentrated supermarket retail markets. With approximately two-thirds of the market controlled by just two major supermarkets, these dominant players wield a significant asymmetric bargaining power over suppliers. Additionally, high entry costs mean these dominant players face little competitive pressures from new entrants, reinforcing their dominance in the market.

In recent years, these major supermarket retailers have pursued a series of mergers and acquisitions to strengthen their vertical and horizontal integration and expand into adjacent markets. This expansion of the retailers' ecosystems risks further entrenching their market and bargaining power, harming both consumers and supplying businesses, and ultimately driving up the cost of living.

In particular, the AFGC welcomes the recognition of other risk factors, such as small acquisitions within specific sectors or local markets, which could raise competition concerns. The proposed legislative instrument of a ministerial determination to require notification for mergers posing a high risk to competition is a positive step. This instrument would be highly relevant for alleviating pressures from the expanding grocery retailing ecosystem. However, clear guidelines are needed on when and how this determination will be used, ensuring certainty and consistency for businesses.

We also support the monitoring approach in the proposal, particularly the involvement of the Australian Centre for Evaluation to conduct statutory reviews and assess the effectiveness of the system. Combined with regular merger risk assessments and annual reports, this framework helps ensure the system adapts to the evolving economic and competitive environment.

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Regarding the proposed thresholds, the AFGC notes that the International Competition Network (ICN)[1] advises that "*mandatory notification thresholds should rely solely on objectively measurable criteria*" such as assets or turnover. Metrics like market shares and potential effects of transactions are not considered objectively measurable. Similarly, the Productivity Commission in their submission on the Merger Reform[2] advises that:
"to be effective, a mandatory notification process would need to be clear and the thresholds for notification should be based on non-manipulable metrics like revenue rather than arguable metrics such as market share, which may lead to legal disputes".

While the use of market shares is fundamental at other stages of the merger control system, using them as a threshold can create uncertainty. This is because it relies on defining the relevant market, which is often one of the most contested aspects in merger clearance processes.

The market share thresholds aim to capture mergers involving nascent firms or startups that do not meet the monetary threshold. However, this approach risks increasing the financial and administrative burden on merging parties. This could undermine economic dynamism, influence investment decisions, and ultimately hinder the overall competitiveness of the sector.

To align Australia's new merger control system with the recommendations from the ICN, the AFGC recommends using objective, quantifiable criteria such as turnover, revenue or transaction value as the primary metrics for thresholds. If market share thresholds are to be implemented, Treasury and the ACCC should develop clear guidelines to help merging parties accurately and objectively define the relevant market. This will help avoid lengthy, costly processes and ensure that mergers continue to support innovation and productivity in the economy.

We welcome opportunities to work with government to support the Merger Reform, emphasising the importance of clear, objective thresholds that promote competition and drive innovation, while acknowledging the competitive pressures faced by our industry.

For further enquiries and assistance regarding this submission, I invite you to contact Samantha Blake, Deputy CEO via samantha.blake@afgc.org.au.

Yours sincerely,

Barden.

Tanya Barden
Chief Executive Officer
Australian Food and Grocery Council

[1] International Competition Network (2018), ICN Recommended Practices for Merger Notification and Review Procedures, accessed 23 Sept 2024
[2] Productivity Commission (2024), Submission to the Competition Review: Merger Reform, Canberra

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