

Competition Taskforce

By email: CompetitionTaskforce@treasury.gov.au

Dear Competition Taskforce

Re: Reforming mergers and acquisitions – notification thresholds

The Council of Small Business Organisations Australia (**COSBOA**) thanks the Competition Taskforce for its continuous consultation throughout the merger and acquisition reform process.

Notification Threshold

COSBOA understands the Government’s proposed new market share and turnover thresholds will likely capture a great deal more merger activity through notification than the current system.

However, it is likely that the new mandatory notification thresholds (both in terms of monetary amounts and market concentration) in isolation may miss the opportunity to capture for review small business acquisitions which may lead to a substantial lessening of competition in certain local markets, particularly in the retail sector.

The Consultation Paper notes that *“consolidation of small to medium sized businesses can raise concerns where it leads to greater market concentration [and] the thresholds are not designed to capture acquisitions involving low-value assets or small businesses.”*¹

The current system encourages voluntary notification to the ACCC in circumstances where the merged firm will have a post-merger market share of more than 20% in a relevant market(s). COSBOA notes that under the current voluntary system, the ACCC has over the years examined a not insignificant number of individual small business acquisitions particularly in the grocery and liquor retailing sectors. COSBOA is concerned that under the new proposals in instances of single acquisitions of small enterprises that do not meet notification threshold, creeping acquisitions will still occur without the benefit of proper scrutiny. Both the monetary notification threshold and concentration thresholds will not capture acquisitions of individual small businesses with less than 10 million in turnover, or those that have less than 25 per cent of an affected market. In essence, without an adequate safeguard, the notification threshold proposals make the likelihood of substantial lessening of competition in certain local retail markets more likely than before.

The Exposure Draft of the *“Treasury Laws Amendment Bill 2024: Acquisitions”* and explanatory materials, explicitly acknowledge that the ACCC must have powers to actively consider creeping acquisitions to prevent entrenched market power.

A clear example of this rationale was demonstrated in the 2023 analysis of Woolworth Group Limited’s acquisition of a 55 per cent stake in PETstock Pty Ltd. When consideration of the competitive effects of the acquisition commenced, the ACCC’s market inquiries revealed that

¹ Merger Notification Thresholds Consultation Paper, p 9 and 10.

PETstock's previous acquisitions of many independently owned pet shops across many local markets that had not been voluntarily notified to the ACCC despite their potential to substantially lessen competition in those local markets. These prior acquisitions of individual stores had impacted local markets and removed the *"remaining chains of speciality pet retail stores that competed against PETstock and Petbarn."*²

Following the ACCC's investigation the relevant competition concerns were raised with the merger parties and resolved by PETstock agreeing to court-enforceable undertaking to divest 41 stores and 25 co-located vet clinics. Following the acquisition and subsequent divestment of smaller independent stores to a larger market player, it is impossible to equate precisely what the competitive landscape in each of the relevant local markets would look like now had the individual acquisitions by PETstock been properly scrutinised in the first place if a mandatory notification regime had been in place.

COSBOA submits that in circumstances that the proposed new mandatory merger thresholds had been in place, the acquisition of PETstock by Woolworths Group Limited would have been captured (as it was by the voluntary system). However, it is unlikely that the proposed thresholds would have triggered the mandatory notification of the individual pet stores acquired by PETstock unless they met a \$10 million turnover threshold.

COSBOA recognises the objectives of competition law is to protect competition in a market, not competitors from competition. However, it cannot be emphasised strongly enough that in local markets, small local retailers provide an extremely strong competitive restraint against which larger businesses need to compete fairly. Strong competition in local markets results in greater choice, better prices and better quality for consumers which was a clear conclusion in ACCC's opposition of Woolworths Limited's proposed 2008 acquisition of Karabar Supermarket³ when the ACCC found that having different players in the market, *"provides consumers with the ability to shop around and to take advantage of the differing specials on fresh produce."*⁴

Ministerial Determination

Given the concerns raised above, COSBOA strongly agrees with the proposal that would permit a Ministerial Determination imposing additional notification requirements for specific identified sectors following further consultation with small business industries. COSBOA submits such a Determination would ensure that the competition effects of creeping acquisitions of independent small business would be properly analysed. COSBOA supports the suggestion that Ministerial Determinations could target the groceries, fuel, liquor and oncology-radiology sectors. However, we believe the anti-competitive effects of small business acquisitions in local markets could affect a much broader range of sectors, particularly in the retail space and we therefore recommend consideration be also given to broader other industries such as timber and hardware, insurance and pharmacies/chemists.

The ACCC needs to have the ability to analyse individual acquisitions to protect competition in local markets. COSBOA and seven of our members are currently appointed to the ACCC's Small Business Franchising Consultative Committee. This Committee would be one appropriate forum to inform

² ACCC Media Release, Woolworths' acquisition of controlling interest in Petstock not opposed, as Petstock gives undertakings relating to past acquisitions, 14 December 2023.

³ ACCC Public Competition Assessment, Woolworths Limited - proposed acquisition of Karabar Supermarket, 11 July 2008.

⁴ Ibid, p 7.

Government about sectors in which Ministerial Determinations will be vital to ensure appropriate merger consultation and analysis is carried out. It is essential that further consultation is carried out regarding how the Ministerial Determination process will work in pragmatic and effective manner so that it does not just pay lip service to the aim of protecting competition in local markets.

Conclusion

Small businesses provide the livelihood of Australia's local communities and small towns. They provide unique and different offerings from larger market players whether that be customer service or product choice. Small businesses provide effective competitive constraints in markets in which they operate.

COSBOA welcomes further consultation regarding the process for ensuring effective future Ministerial Determinations in the small business mergers and acquisitions space to ensure ongoing choice, quality and competitive pricing for consumers.

Kind regards



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COSBOA