ARA SUBMISSION
REFORMING MERGERS & ACQUISITIONS – EXPOSURE DRAFT

AUGUST 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments on the exposure draft of the *Treasury Laws Amendment Bill 2024: Acquisitions*, to reform Australia's merger rules.

The ARA is the oldest, largest and most diverse national retail body, representing a $420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

In principle, the ARA supports the review of merger rules and processes by the Competition Review Taskforce, established by Treasury. We support the proposal for a faster, more robust and streamlined system that better targets anti-competitive transactions. However, we are concerned if the proposed reforms will drive these positive outcomes, or simply create additional complexity within a system that is already largely fit-for-purpose.

While the government argues that these merger reforms will enhance competition and productivity, there is little evidence to suggest that recent mergers have diminished competition. On the contrary, these mergers have often provided substantial economic benefits by enabling businesses to expand and become more competitive, for the benefit of consumers.

According to the Australian Competition and Consumer Commission's (ACCC) own data, these non-controversial mergers represent 93% of those mergers pre-assessed by the ACCC proceeding without any conditions.

We believe there are many uncertainties in the new proposed regime as they are untested new concepts, as part of a system that has limited effective judicial review on the merits.

As consistent with our position in our previous submission, the ARA supports the current voluntary notification model, whereby merger parties choose to notify a proposed merger to the ACCC. We believe this voluntary notification regime reduces the administrative burden for managing proposed mergers, which are unlikely to raise competition concerns.

However, under the current regime, the lack of a compulsory pre-notification requirement means that merger proponents risk facing Federal Court proceedings if the ACCC subsequently decides to review the merger and deems it potentially anti-competitive. We believe that this reform process provides an opportunity to rely entirely on the voluntary notification regime without the risk of Federal Court proceedings on non-controversial mergers.

The proposed reforms would grant the ACCC greater powers to identify and scrutinise transactions that pose risks to competition, consumers, and the economy. Compared to the current system, this new framework would impose additional regulatory burdens on businesses, requiring more resource-intensive merger applications.

The government asserts that these changes will reduce the risk of economic harm from firms focused solely on eliminating competition to gain market share.

However, the ARA questions whether these concerns are justified. A mandatory notification regime, as proposed, could delay much-needed investment by reviewing mergers that do not present competition issues and could divert limited ACCC resources away from mergers that genuinely pose risks.

Mergers are time-sensitive, and subjecting all acquisitions to a mandatory approach would significantly increase the ACCC's workload. Businesses already voluntarily inform the ACCC of their merger intentions, and sufficient safeguards are in place. The ACCC already possesses the authority to scrutinise and block mergers that it believes will lessen competition. However, under a mandatory regime, compulsory notification would likely place an unnecessary administrative burden on businesses and the ACCC.

We are also concerned about the proposed establishment of a threshold in the new reforms. If set too low, it could impose significant unnecessary costs on both merger parties and authorities. If set too high, it might allow problematic mergers to go undetected. The current framework allows the ACCC the flexibility to focus on transactions that pose genuine risks.

Specifically, the new laws extend the concept of SLC to encompass "creating, strengthening or entrenching" a substantial degree of power in a market. Such a provision would effectively mean every acquisition by a party with an alleged degree of market power would automatically satisfy this definition. This would present a consistent barrier to many proposed mergers.

Furthermore, the current draft legislation proposes the expanded SLC definition will apply to all other prohibitions in the *Competition & Consumer Act 2010* subject to an SLC test including misuse of market power (s46), exclusive dealing (s47), anticompetitive agreements and concerted practices (s45). There are currently no explanatory materials that provide sufficient detail as to whether this includes loyalty programs, lowest price guarantees or other initiatives that are designed to benefit consumers. The ARA believes clarity should be given on this matter as a priority.

Increasing the ACCC's powers would raise the regulatory burden and compliance costs for businesses. Additionally, requiring all mergers to be assessed by the ACCC risks slowing investment and mergers, potentially undermining our international competitiveness and slowing productivity.

A more effective approach would be to retain the current system, allowing businesses the flexibility to decide whether they wish to have their mergers assessed by the ACCC. This would save the ACCC time and resources, enabling it to focus on mergers that require in-depth analysis.

The existing merger control framework is robust and effective in preventing anti-competitive mergers, with only a small number of mergers subject to Federal Court proceedings under the current regime. Establishing a new merger control regime would result in increased regulatory burdens for businesses for minimal gain.

Should the Government decide to proceed with establishing a new merger control regime, we believe it should ensure it does not inhibit or make it prohibitive and slowing investment and mergers. We believe utilising the European "Decisive Influence" test, which would align Australia with other international regimes should be an option that is explored further.

To ensure certainty and not inhibit investment we believe that there should be a grandfathering for acquisitions signed but not completed before 31 December 2025. Without grandfather this regime, it could create a huge backlog for the ACCC from the outset.

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Thank you again for the opportunity to provide comments on the exposure draft of the *Treasury Laws Amendment Bill 2024: Acquisitions.*

We look forward to a continued open consultation now and into the future. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.