ARA SUBMISSION

COMPETITION REVIEW – MERGER REFORM

JANUARY 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments on modernising Australia's merger rules and processes, as part of the Australian Government's Competition Review.

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 believe that mergers play an important role in driving innovation, dynamism and productivity in the Australian economy, and lead to a more competitive retail sector for Australian consumers.

Productivity gains as a result of mergers can be passed onto consumers through lower prices, increased access and higher quality. Mergers drive investment in innovation that improves service offerings and product variety, building a more dynamic economy that maximises efficiency of scale and the use of scarce resources.

However, we also recognise concerns highlighted in Treasury's consultation paper regarding Australia's merger control regime, highlighting the need for reform to address a perceived weakening of competition.

The consultation paper outlines a number of proposed control measures, including voluntary notification of proposed mergers - as is currently the case in Australia, New Zealand and the United Kingdom - and mandatory notification of merger to the competition authority - as is the case in the United States and Europe.

The ARA supports the current voluntary notification model, whereby merger parties choose to notify a proposed merger to the Australian Competition and Consumer Commission (ACCC). We believe this voluntary notification regime reduces the administrative burden for managing proposed mergers, which are unlikely to raise competition concerns, particularly as the ACCC provides guidance on when merger parties should notify.

While we are cognisant that this option could increase the risk of proposed mergers of concern not being notified to the ACCC, we are also concerned that a mandatory notification regime presents an unacceptable administrative burden on the vast majority of mergers that are of low concern, which could unnecessarily impact innovation, dynamism and productivity.

Should the mandatory notification regime be the chosen model, parties would be required to notify the ACCC if certain predefined thresholds are met. If these thresholds were set too high, some mergers of low concern may not proceed due to the cost and complexity of notification. If the thresholds were set too low, there could be an excessive number of notifications, imposing unnecessary costs on both merger parties and authorities.

While our preference is for voluntary notification, we support more clarity and certainty regarding the ACCC's assessment timeframe and process for merger clearance applications, irrespective of whether the system is mandatory or voluntary. Given the increasing timelines for ACCC merger clearance processes to conclude, it is important that merger parties are afforded certainty regarding the timeframe and process of any such process. We recommend a statutory timeline for assessment and decisions to provide greater business certainty.

The ARA also supports an administrative assessment model, whereby the ACCC investigates and adjudicates cases, typically with some form of separation between the investigators and the decision-maker. This is similar to the current merger authorisation process in Australia.

However, we are concerned with any reversal of the current assessment criteria that would require merger parties to positively establish that a particular merger is not likely to substantially lessen competition. The current test retains an appropriate balance between preventing potentially anticompetitive mergers - where the available evidence indicates this to be the case - without subjecting merger parties to an overly burdensome requirement to positively refute remote or unsubstantiated assertions regarding the likely effect of the relevant transaction on competition.

Regarding decision reviewal, the ARA would support the ACCC's decision being reviewable by the Australian Competition Tribunal, with the Federal Court to provide judicial review. However, this would only provide businesses access to a limited merits review of ACCC merger authorisation determinations, conducted by the Competition Tribunal, whilst parties may also seek judicial review on points of law in the Federal Court.

We would like to see the expansion of the scope of limited merits reviews so that parties can test evidence before the Tribunal, to streamline this process.

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Thank you again for the opportunity to provide a submission on modernising Australia's merger regulations consultation paper.

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.