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SUBMISSION ON TREASURY LAWS AMENDMENT (MERGERS AND ACQUISITIONS REFORM) BILL 2024

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The e61 Institute - a not-for-profit, non-partisan economic research institute - welcomes the invitation to make a submission to the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024*. This submission focuses on the Bill's proposal to replace the current merger notification scheme with a mandatory reporting system for mergers and acquisitions that meet defined thresholds, as well as creeping acquisitions.

Merger notification thresholds

- Prior e61 Institute research highlights that notification threshold settings are consequential to how many mergers get reviewed. The relaxation of thresholds in 2008 in Australia was followed by a substantial decline in the number of mergers reviewed by the ACCC.
- International research suggests that some merging parties will seek to adapt their transactions to avoid a new reporting threshold. Considering this, it is desirable that the ACCC would have the flexibility to investigate acquisitions below any new thresholds.
- International research also suggests that the highest regulatory burden of merger notification is likely to fall on the most anti-competitive proposals.

Creeping acquisitions

- To address concerns about 'stealth' or 'creeping' acquisitions, the Bill also proposes a 'substantial lessening of competition' test that would, among other things, allow for consideration of the cumulative effect of all mergers within the previous three years.
- International research suggests that this is an important issue to address: a sequence of smaller acquisitions can result in a material lessening of competition and worse consumer outcomes.

Merger notification thresholds

e61 research

Merger notification procedures are a feature of many advanced economies. They give antitrust authorities time to investigate potential anti-competitive effects before the merger is completed, as it's difficult to undo mergers after they've been consummated.

Currently, it is not a legal requirement for companies to notify the ACCC of a merger. Most mergers that were notified to the ACCC were via an informal channel, where the process is governed by a set of ACCC guidelines.

The proposed amendments would move this process to a formal approvals process, where mergers above a certain threshold must be notified to the ACCC, and cannot proceed without the ACCC's approval.

The current arrangements followed a relaxation in 2008 of the recommended thresholds for notification. Subsequently, the only suggested reasons to notify the ACCC were:

- If the merging parties operated in the same market or markets that were closely intertwined…
- … and the deal would result in the new company being more than 20% of the relevant market.

Prior e61 analysis highlighted that the relaxed guidelines appear to have decreased the frequency of public ACCC reviews. In 2004, the ACCC reviewed a total of 79 mergers, compared to just 35 in 2022. In particular, the greatest fall in reviews was for smaller deals that would not have shown up otherwise in public proprietary M&A databases.

As additional evidence, we also found that the average time the ACCC spent publicly reviewing a M&A deal has doubled since 2008. This may represent an intentional resourcing decision to focus on more contentious cases, however, we could not find sufficient evidence that the merger opposition rate increased during this time.

International evidence

When designing notification thresholds, there's a trade-off between reducing regulatory burden and maintaining oversight of potentially problematic mergers. For this reason, small mergers are often exempt from notification requirements, with the rationale being that they are lower risk.

Notification thresholds can distort merger activity in unintended ways. Take for example the 2001 amendment to the Hart-Scott-Rodino Act in the United States, which raised the size threshold for horizontal merger notifications. Wollmann, 2019 found not only a sharp reduction in the investigations of mergers of newly-exempt competitors, but a significant increase (50%) in the number of these newly exempt horizontal mergers relative to other deal types.

Thresholds also need to be designed with the understanding that merging parties will try to avoid being above it. Barrios and Wollmann, 2022 find evidence in the US that merging parties near a reporting threshold will reduce the transaction value of a merger, substituting upfront consideration with other deferred types of compensation for the seller, to avoid the legal requirement of notifying investors and regulators.

Lastly, notification costs can also serve as a useful screening tool, i.e deterrent. They may help select merger proposals that are more desirable for consumers and society. Besanko and Spulber, 1993 predict that the highest regulatory burden is for the mergers that were most likely to be deleterious to competition in the first place.

Creeping Acquisitions

The proposed legislation also proposes a review of prior acquisitions made by the merging parties in the assessment of whether a merger results in a substantial lessening of competition. This is in response to the notion that a sequence of smaller acquisitions may result in a lessening of competition, but may not be adequately captured with the current legislation, which focuses on the incremental impact of each transaction.

Acquisitions of this nature are known colloquially as 'stealth acquisitions'. Evidence from the US has documented such acquisitions in the kidney dialysis industry (Wollmann, 2020), which was further linked to a degradation in the quality of service to consumers (in this case, patient outcomes like mortality).

Background on rising concentration and other e61 work on competition in Australia

In separate research on The State of Competition in Australia, the e61 Institute finds that rising concentration does not necessarily imply declining competition but there is some evidence that this is what has occurred. The research finds that industries that become more concentrated see fewer new entrants, and that the largest firms in concentrated industries are less likely to be displaced from their positions over time. In addition, concentrated markets often display more anti-competitive behaviour, as measured by ACCC infringement notices.

Other e61 Institute research also covers relevant competition issues:

- Elias, 2024: From Aisles to Oligopolies: New Insights on Supermarket Competition in Australia. e61 Research note
- Adams et. al., 2022: Better Harnessing Australia's Talent. Five facts for the Jobs Summit. e61 Policy Report

References

Barrios, J. M., & Wollmann, T. G. (2022, January). *A new era of midnight mergers: Antitrust risk and investor disclosures* (Working Paper No. 29655). National Bureau of Economic Research. https://doi.org/10.3386/w29655

Besanko, D., & Spulber, D. (1993). Contested mergers and equilibrium antitrust policy. *The Journal of Law, Economics, and Organization*, *9*(1), 1–29. https://EconPapers.repec.org/RePEc:oup:jleorg:v:9:y:1993:i:1:p:1-29

Wollmann, T. G. (2019). Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act. *American Economic Review: Insights*, *1*(1), 77–94. https://ideas.repec.org/a/aea/aerins/v1y2019i1p77-94.html

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