1 November 2024

Senate Economics Legislation Committee
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Senators

RE: Inquiry into the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

Introduction

The Financial Services Council (**FSC**) welcomes the opportunity to provide feedback on the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024.

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, financial advice licensees and investment platforms. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses. The financial services industry is responsible for investing more than $3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is one of the largest pools of managed funds in the world.

Summary

The FSC supports the objectives of boosting competition and productivity in Australia which underly the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (**Bill**). The FSC also supports in-principle measures which efficiently and effectively target mergers and acquisitions that are anticompetitive.

However, while the Bill does not appear to be intended to capture the day-to-day investment transactions of fund managers and superannuation funds, we note that the Bill's reliance on ministerial determinations to set both thresholds for transaction notifications (section 51ABP) and classes of transactions (section 51ABQ) may inadvertently result in many such transactions being unintentionally captured.

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Analysis

As recognised by the Treasurer in his second reading speech, mergers (as well as acquisitions):

> *[…] have genuine economic benefits and are an important feature of any healthy, open economy.*
>
> *They can attract capital and retool businesses and improve the uptake of new technologies.*
>
> *They can allow businesses to achieve greater economies of scale and scope, to access new resources, technology and expertise.*
>
> *This can flow through to consumers via greater product choice and quality as well as lower prices.*

The FSC notes the Senate referred the Bill to the Committee on 10 October 2024 with the reporting date of 13 November 2024. Consequently, the short timeframe available for consultation has meant there remain some uncertainties associated with how the proposed legislation may operate.

In particular, the FSC notes uncertainties around how the proposed legislation will impact fund managers and superannuation funds, such as those engaged in passive investment strategies. Traditionally, Australia's mergers and acquisitions laws have focused on transactions involving changes in control of (or significant stakes in) large target companies. In contrast, the overwhelming majority of transactions involving fund managers and superannuation funds involve relatively small stakes in a diverse range of corporations (or structures such as trusts and managed investment schemes).

The FSC also notes that the Treasurer's second reading speech placed a significant emphasis on mergers rather than acquisitions conducted by fund managers and superannuation funds.

While the Bill does not appear to be intended to capture the day-to-day investment transactions of fund managers and superannuation funds, we note that the Bill's reliance on ministerial determinations to set both thresholds for transaction notifications (section 51ABP) and classes of transactions (section 51ABQ) may inadvertently result in many such transactions being unintentionally captured.

Any adverse impact on fund managers and superannuation funds would potentially be exacerbated by provisions allowing for the cumulative effect of serial acquisitions to be assessed over a three year period (subsections 51ABZH(6) and 51ABZH(7)).

The Treasurer has foreshadowed in his second reading speech that:

> *Firstly, any merger will be looked at if the Australian turnover of the combined businesses is above $200 million, and either the business or assets being acquired has Australian turnover above $50 million or global transaction value above $250 million.*
>
> *Secondly, the ACCC will look at any merger involving a very large business with Australian turnover more than $500 million buying a smaller business or assets with Australian turnover above $10 million.*
>
> *Finally, to target serial acquisitions, all mergers by businesses with combined Australian turnover of more than $200 million where the cumulative Australian turnover from acquisitions in the same or similar goods or services over a three-year period is at least $50 million will be captured, or $10 million if a very large business is involved.*

On its face, these thresholds create significant potential for many routine investment transactions involving fund managers and superannuation funds to be unintentionally captured by the new regime.

The FSC notes that the Bill allows for:

- the exemption of transactions between related entities, such as interfunding transactions

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between a responsible entity's funds (section 51ABD(1));

- categories of transactions to be carved out from notification requirements (section 51ABQ);
- the exemption of acquisitions that do not result in result in control (section 51ABS), noting this exemption has its own discretionary exemption (subsection 51ABS(5));
- the exemption of acquisitions of Chapter 6 entities (such as publicly listed companies, unlisted companies with more than 50 members and listed registered schemes) provided voting power does not exceed 20% (section 51ABT); and
- waivers to be provided from notification in limited circumstances (sections 51ABU and 51ABV).

It is not presently clear whether all day-to-day investment transactions conducted by fund managers and superannuation funds would be captured by any such carve-outs, exemptions or waivers. It may be the Government's intention to cast a wide net by capturing many such transactions through the legislation and then exempting them via subordinate legislation. If so, the FSC strongly supports a clear, unambiguous and detailed statement to this effect from the Government.

As things stand, it appears that many ordinary course investment transactions involving fund managers and superannuation funds are still liable to be captured by the Bill. Examples include the acquisition of interests in:

- entities that are not Chapter 6 entities, such as unlisted managed investment schemes and large unlisted corporations with fewer than 50 members;
- intangible and tangible assets, such as interests in patents, land and infrastructure (although the FSC notes it is the Government's stated intention to use subordinate legislation to exempt certain residential and leasing-focused commercial land acquisitions).

On its face, if ordinary course investment transactions (or a subset of them) were to be captured by the new notification regime, this would create a significant operational burden, increased compliance risk and higher transaction costs, as well as potentially delays associated with ACCC approval processes – all of which would be damaging to end investors and deter overseas investors from investing their capital in Australia. Indeed, it would be incongruous for reforms aimed at improving competition to make Australia a less competitive destination for global capital.

It is feared the reforms may have a particularly adverse impact on private equity, venture capital, unlisted managed funds and micro as well as small-cap funds. This may have unanticipated effects which deserve more detailed consideration. For example, the Bill might make venture capital funds' fees uncompetitive relative to large-cap funds due to a higher administrative burden, with potentially adverse implications for start-ups and job growth.

In light of the above uncertainties associated with the Bill, the FSC respectfully:

1. recommends the Committee inform itself about the Bill's potential adverse impact on ordinary course investment activities carried out by among others fund managers and superannuation funds; and
2. if the Bill operates to adversely impact the competitiveness of Australia's funds management industry, recommends further consideration be given to how the Bill might be amended (or refined through subordinate legislation) to streamline its application to businesses undertaking ordinary course investment activities on behalf of everyday Australians, and create greater certainty for industry.

Next steps

The FSC appreciates the opportunity to contribute to this Inquiry. We would welcome the opportunity to meet with you to discuss these issues in more detail.

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To arrange this, please contact Jack Morgan, Director of Policy – Investment and Funds Management at [redacted]

Yours sincerely

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