

TREASURY CONSULTATION ON MERGER REFORM AND UNFAIR TRADING PRACTICES 2023-2024

PUBLICATION OF SUBMISSIONS INDUCED BY FOI APPLICATIONS MADE ON 1 MAY 2024

Summary

Treasury requested submissions in response to consultation papers on merger reform and unfair trading practices in 2023. 46 non-confidential submissions in response to the Merger Reform Consultation paper (20 November 2023) were made available on the Treasury website on 31 May 2024, approximately 5 months after the deadline for submissions. 71 non-confidential submissions in response to the Unfair Trading Practices Consultation Regulation Impact Statement (23 August 2023) were made available on the Treasury website on 28 June 2024, almost 7 months after the deadline for submissions.

The submissions referred to above were made available by Treasury in response to two FOI applications made by Brent Fisse on 1 May 2024. The eventual outcome is welcome. However, the lack of transparency in the merger reform and unfair trading practices consultations is regrettable.

The relevant background is recorded below. That is because it is unclear what, if any, recognition of the FOI applications made on 1 May 2024 and their effect in inducing publication of the non-confidential submissions will emerge on the Treasury website.

A Merger reform consultation

1. On 20 November 2023, Treasury published the Merger Reform Consultation paper. The Consultation paper requested submissions by 19 January 2024. See at <https://treasury.gov.au/consultation/c2023-463361>.
2. The Consultation paper said that:

‘All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain confidential.’ (p 3)
3. In response to the non-publication of the submissions made on the relevant Treasury website page, the author made an FOI application on 1 May 2024 requesting ‘[a]ll written submissions made to Treasury in response to the Merger reform consultation paper, 20 November 2023’. (FOI 3592)
4. A 21-day extension of time under s 15AA of the Freedom of Information Act 1982 (Cth) was requested by the Treasury Freedom of Information Officer on 8 May 2024. The request was agreed to by the applicant on 13 May 2024.
5. On 31 May 2024, late afternoon, 46 non-confidential submissions were published on the Treasury website. Merger reform was a topic at the Competition Law Conference in Sydney

on 1 June 2024. Mr Marcus Bezzi, Chief Advisor to the Competition Taskforce at the Commonwealth Treasury Competition Task Force within Treasury was a speaker on that topic at the conference.

6. On 3 June 2024 the applicant received an email from the Treasury Freedom of Information Officer providing a link to the submissions that had been published on the Treasury website on 31 May and requesting withdrawal of the FOI request. The applicant acceded to that request on 6 June 2024.
7. No reference is made to the FOI request on the Treasury website.

Unfair trading practices consultation

8. On 23 August 2023, Treasury published the Unfair Trading Practices – Consultation Regulation Impact Statement. The statement requested submissions by 29 November 2023. See at <https://treasury.gov.au/consultation/c2023-430458>.
9. The Statement said that:

‘All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence.’ (p 3)
10. In response to the non-publication of the submissions made on the relevant Treasury website page, the author made an FOI application on 1 May 2024 requesting ‘[a]ll written submissions made to Treasury in response to the Unfair Trading Practices – Consultation Regulation Impact Statement, 23 August 2023’. (FOI 3591)
11. A 21-day extension of time under s 15AA of the Freedom of Information Act 1982 (Cth) was requested by the Treasury Freedom of Information Officer on 8 May 2024. The request was agreed to by the applicant on 13 May 2024.
12. On 17 June 2024, the applicant received an email from the Treasury Freedom of Information Officer stating that: ‘We are currently in the process of preparing these documents for publication. We expect the non-confidential submissions will be publicly available on the Treasury website on/by 28 June 2024.’ On that basis, the email asked the applicant to agree to withdrawing the FOI request.
13. The applicant did not agree to the request to withdraw the FOI application (email of 17 June 2024).
14. On 18 June 2024 the applicant was advised by the Treasury Freedom of Information Officer as follows:

‘Please be advised the statutory deadline for your FOI request 3603 has been extended by 30 days to allow for third party consultation under sections 27 and 27a of the FOI Act.

The revised statutory deadline is 21 July 2024.’
15. On 28 June 2024, 71 non-confidential submissions were published on the Treasury website.

16. On 28 June 2024, the applicant received an email from the Treasury Freedom of Information Officer providing a link to the submissions that had been published on the Treasury website that day, requesting withdrawal of the FOI request and stating that: 'A response by COB 4 July 2024 would be appreciated.'
17. On 2 July 2024, the applicant replied to the request to withdraw the FOI request in these terms.

'I do not agree to withdraw the FOI request. Only in that way does there appear to be any chance that the FOI request will be acknowledged on the Treasury website. The FOI request should be acknowledged because it took that FOI request to induce the publication of the 71 non-confidential submissions on 28 June 2024.

I note that there is no acknowledgement on the Treasury website of the FOI request for submissions that was made in response to the Merger Reform Consultation paper. That is despite the fact that it took that FOI request to induce the publication of the 46 non-confidential submissions on 31 May 2024.'

Brent Fisse

2 July 2024