

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Australia --

25 February 2014

This note is submitted by Australia to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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– Australia –

1. Introduction – key features of Australian merger control

1.1 ACCC not an administrative decision making body

1. The ACCC is not an administrative decision making body but instead operates under an enforcement/prosecutorial model. Therefore, if the ACCC decides to challenge a merger and the merger parties do not abandon or modify the transaction, then the ACCC needs to commence legal proceedings in the Federal Court and the Federal Court will make a final determination on whether a merger breaches section 50 of the *Competition and Consumer Act 2010*. Under section 50, acquisitions are prohibited if they would have the effect, or are likely to have the effect, of substantially lessening competition in a market in Australia (SLC).

1.2 Notification is voluntary and non-suspensory

2. As merger parties are not legally required to notify the ACCC of a merger, they have the option of proceeding with the merger without seeking any regulatory consideration but this exposes them to regulatory uncertainty if the ACCC decides to investigate the merger and subsequently takes legal action.

3. The ACCC reviews those mergers it becomes aware of that have the potential to raise concerns under s 50. Such mergers are generally brought to the ACCC's attention by merger parties who request informal clearance. Alternatively the ACCC may become aware of a proposal through media reports, from complaints or through referral from other government bodies (such as the *Foreign Investment Review Board*).

1.3 Options for merger clearance in Australia

- **Informal clearance** - Merger parties can seek *informal clearance* which enables them to obtain the ACCC's informal view on whether the merger is likely to contravene s.50.
- **Formal clearance (since 2007)** - Parties can also seek *formal clearance* from the ACCC which provides immunity from action under s.50. Key features include statutory review timeframes and an avenue for appeal to the Australian Competition Tribunal. To date, no applications to the ACCC have been made.
- **Authorisation (public benefits taken into account)** - Since 2007, any applications for authorisation must be made to the Australian Competition Tribunal to seek exemption from the merger provisions on public benefit grounds. **Declaration** - Merger parties can also apply to the Federal Court for a declaration that the acquisition does not breach s.50. This is not usually an attractive option for merger parties because the onus is on them to show that the acquisition is not an SLC – in contrast to where the ACCC takes legal action to block a merger and therefore has the onus to prove that it is an SLC.

1.4 ACCC 'informal' merger clearance – the predominant clearance option used by merger parties

4. By seeking 'informal' clearance merger parties receive the ACCC's view on whether the proposed acquisition is likely to have the effect of substantially lessening competition and therefore whether the ACCC is likely to challenge the merger in the Federal Court. There is no legislation underpinning the informal process; rather, it has developed over time to provide an avenue for merger parties to seek the ACCC's view prior to completion of a merger.

Informal clearance has become practically the sole method by which merger parties seek clearance. Changes to the informal system over time have introduced a level of formality to the system and in large part addressed a number of the concerns about the informal system that led to the introduction of the formal clearance option.

2. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

5. The merger regime in Australia does not have a mandatory notification requirement and it is not suspensory. As a result, there is no threshold at which merger parties must notify the ACCC of a merger prior to consummation and no legal restriction preventing merger parties from completing a transaction without ACCC approval.

6. While pre-merger notification is voluntary in Australia, the vast majority of informal merger reviews are initiated at the request of the merging parties and merger parties are encouraged to consult with the ACCC well before completing a merger. The ACCC's Merger Guidelines provide indicative market share thresholds to assist merger parties to decide whether notification is warranted. There are a number of reasons why merger parties are motivated to voluntarily notify the ACCC in advance of completing a transaction—these include:

- Enables merger parties to manage any risk and uncertainty of later legal challenge including injunction and divestiture. The fact that the ACCC has demonstrated its preparedness to pursue non-notified mergers when these are likely to substantially lessen competition via ex parte injunction and penalties provides merger parties with a strong incentive to notify in advance.
- Increased ACCC surveillance of acquisition activity and a proactive approach of engaging with merger parties early regarding reported transactions which raise potential competition concerns reduce the likelihood of merger parties trying to slip under the radar
- Merger parties are able to seek a qualified provisional view on a confidential basis and therefore get an early indication of possible competition concerns.

7. In some matters, parties may notify a transaction to the ACCC, or possibly seek a review prior to completion, but then seek to complete prior to the anticipated decision date. Where it is considered that the matter is likely to raise concerns, the ACCC will seek an undertaking from the merger parties not to complete the transaction until the ACCC has completed its review. Alternatively, where there are issues to consider, but concerns are less significant and the assets can be readily separated post-merger, the ACCC will put the merger parties on notice that if they do complete prior to the completion of the ACCC's review, they do so at their own risk of later legal action by the ACCC.

3. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

8. As noted above, under the enforcement model that characterises the Australian merger regime, the ACCC does not have any legislative power to require notification and nor is its decision to oppose a merger binding on the parties. When the ACCC considers that a merger has or is likely to substantially lessen competition in a market and the merger parties decide not to abandon or modify the transaction, it must make an application to the Federal Court seeking remedies.

9. Notwithstanding the voluntary notification system operating in Australia, the ACCC publishes indicative notification thresholds to assist merger parties to decide whether notification is warranted.

10. Non-notification by the merger parties, regardless of whether the merger exceeds the indicative threshold, will not prevent the ACCC from investigating a merger for compliance with the merger law, including making public inquiries to assist its investigation and, if necessary, taking legal action. Proceeding without regulatory approval puts merger parties at risk of the ACCC taking legal action on the basis that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in one or more markets in contravention of the merger provision (section 50 of the *Competition & Consumer Act*).

11. The remedies for breaching section 50 are the same whether a merger is notified or not. If the ACCC reaches a view that an acquisition is likely to have the effect of substantially lessening competition and the parties do not agree to modify or abandon the acquisition, the ACCC can apply to the Federal Court for orders which may include an injunction, divestiture or penalties. Only the ACCC can apply for an injunction to restrain an acquisition prior to completion and/or penalties for a contravention of s. 50. Third parties and the ACCC can apply for declarations and/or divestiture (including setting aside the acquisition in certain cases). Any person suffering loss or damage as a result of a merger that breaches s. 50 can seek damages.

12. The ACCC has the potential to review mergers under some other provisions of the competition law, notably s.46 which prohibits a firm with substantial market power from taking advantage of that market power for an anti-competitive purpose. This provision could potentially apply to acquisition(s) undertaken to foreclose entry and competition in a market. While the ACCC has investigated some instances of alleged exclusionary conduct involving entry foreclosing acquisitions of land, these investigations have not resulted in any enforcement action. Such matters are relatively rare, with section 50 being the primary provision under which mergers are assessed by the ACCC.

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

13. Mandatory notification is not required under Australian merger law. As outlined above, in cases where the ACCC decides to challenge a consummated merger it can apply to the Federal Court for orders which may include declaration, divestiture or penalties.

14. While a number of matters of significant interest have been considered post-acquisition, none of the reviews of completed mergers in recent years have resulted in a transaction being opposed by the ACCC. In 1996, the ACCC's predecessor, the Trade Practices Commission (TPC) successfully challenged the completed acquisition of A Class Blocks by Pioneer Concrete, with the Court awarding penalties of \$5m. This and other decisive action in the early years of the current merger test provide a strong incentive for parties to notify the ACCC of proposed mergers that are likely to raise competition concerns prior to completion.

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

15. Reviews of completed mergers will generally undergo a different process to reviews of proposed acquisitions. Completed mergers are not reviewed by the ACCC in accordance with its merger process guidelines but rather are treated as investigations of potential breaches of the Act that have already occurred. Completed mergers under review are posted on the merger register but no indicative timeline is published. One important reason for this is because information gathering can become significantly harder for the ACCC where the merger parties have no incentive to co-operate. In some cases it may require greater use of the ACCC's compulsory information gathering powers.

16. The analysis of completed mergers may give rise to a number of analytical and evidentiary challenges. Mergers investigated very close to the time of the merger completing will generally follow the same analytical process as mergers considered pre-consummation. However, different types of analytical issues are more likely to arise the greater the time difference between completion of a transaction and the time of review.

17. Further, different lines of inquiry and analysis are often required to deal with post-merger information and particularly to determine what weight to put on post-merger information. In some cases the ACCC has had concerns that the outcomes of investigations of completed mergers may have been manipulated by the parties—for example by refraining from potential anti-competitive conduct while an investigation is ongoing to prevent the ACCC from obtaining sufficient evidence to commence proceedings in relation to the transaction.

4. Review of mergers that should have been notified but were not

18. Although there is a high rate of voluntary notification in Australia, there are a small number of mergers that are not notified to the ACCC or notified late allowing insufficient time for the ACCC to conduct a comprehensive review. Accordingly reviews of these mergers may be conducted post-merger.

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

19. Mandatory notification is not required under Australian merger law. As noted above, the ACCC has the same powers to investigate and prosecute anti-competitive mergers that have been completed and/or not notified as those that have been notified. The same time limits also apply (see below).

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

20. As outlined above, in cases where the ACCC decides to challenge a consummated merger it can apply to the Federal Court for orders which may include declaration, divestiture or penalties. Applications to the Court for the divestment of shares acquired in contravention of section 50 must be made within 3 years of the alleged contravention while applications for penalties arising from a breach of section 50 must be made within 6 years.

21. Where a merger has taken place less than six, but more than three years previously, the decision whether to litigate will turn on the sufficiency of penalties as a remedy versus the likely costs involved in obtaining them, as well as the significance of the matter for maintaining incentives to notify the ACCC and the integrity of the merger review process.

22. While a number of matters of significant interest were considered post-acquisition, none of the reviews of completed mergers in recent years have resulted in a transaction being opposed by the ACCC, the incentives for notification incorporated into the informal system and the deterrence effect of the ACCC's merger law enforcement have reduced the risk of mergers that raise significant competition concerns proceeding without the parties first having sought clearance.

5. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

23. When the ACCC decides not to oppose a merger, it routinely advises merger parties of this decision in writing. The decision not to oppose a merger is qualified, however, and the ACCC always reserves its right to re-open a matter in circumstances where its decision has been based on incorrect or incomplete information, or where new information comes to light.

24. The ACCC may later be requested to re-open a matter on a confidential basis by a third party. Alternately, it may be called upon publicly by a third party to re-open a matter, or it may, of its own volition, wish to consider whether to re-open a matter (for example, if information received from another area of the ACCC indicates there may be a case for re-opening a matter).

25. The ACCC is of the view that there is no legal impediment to it re-opening a merger investigation to consider whether a merger had breached section 50, even where it has previously given the merger an informal clearance. This is because an informal clearance is not a decision authorised by the *Competition & Consumer Act 2010* but merely a statement to merger parties that, based on the information before it, the ACCC does not propose taking court action to seek an injunction to stop the transaction proceeding.

26. However a decision to publicly re-open a merger investigation is very significant and therefore not taken lightly by the ACCC. While showing that it is willing to re-open merger investigations where necessary may encourage prospective merger parties to be thorough and accurate with submissions they make to the ACCC, re-visiting transactions that have been previously cleared could also potentially have the unwanted effect of reducing business certainty and undermining confidence in the informal merger system.

27. The informal system works largely because business trusts that the ACCC will not alter its decision except in a limited number of situations. This is evidenced by many sale agreements having ACCC approval written into their terms. Re-opening a merger investigation after having previously granted clearance would therefore be likely to undermine confidence in the system.

28. The ACCC very rarely re-opens merger investigations and therefore the risks of proceeding with a transaction on the basis of an informal clearance are very low. Thus, the informal system provides a high level of certainty to merger parties.

29. When deciding whether a merger investigation should be re-opened, the ACCC will initially perform an internal review of the merger in light of the new information, which may also involve requesting information from the merged entity and complainant. A public re-examination of the merger would generally only be considered appropriate where the ACCC is satisfied that, after the internal review, the following pre-conditions have been met:

- (a) the ACCC forms the view, based on information available, including the new information, that the merger has or may have breached section 50;
- (b) the new or corrected information would have had a material effect on the ACCC's decision to clear the merger;
- (c) the ACCC, acting reasonably in the circumstances, could not have discovered the alleged misrepresentation / new information before it made its decision not to oppose; and
- (d) the benefits of re-opening the merger investigation outweigh the potential detriments.

30. If the ACCC decides to challenge a previously cleared merger it can apply to the Federal Court for orders which may include a declaration, divestiture or penalties. Only the ACCC can apply for penalties for a contravention of s. 50. Third parties and the ACCC can apply for declarations and/or divestiture (including setting aside the acquisition in certain cases). Any person suffering loss or damage as a result of a merger that breaches s. 50 can seek damages. Applications to the Court for the divestment of shares acquired in contravention of section 50 must be made within 3 years of the alleged contravention while applications for penalties arising from a breach of section 50 must be made within 6 years.