

RECENT CHANGES TO THE AUSTRALIAN MERGER CONTROL REGIME – HOW THE CHANGES HAVE OPERATED IN PRACTICE

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I INTRODUCTION

On 1 January 2007, significant changes to the Australian merger control regime were introduced. The substantive merger test under section 50 of the *Trade Practices Act 1974* (Cth) ('*TPA*') and the voluntary nature of the regime remained unchanged. However, the procedural options for notifying and assessing mergers were increased, with parties now having three routes for seeking merger approval:

- (a) informal (non-statutory) clearance from the Australian Competition and Consumer Commission ('ACCC');
- (b) formal clearance from the ACCC under section 95AC of the *TPA*; or
- (c) authorisation from the Australian Competition Tribunal ('Tribunal') under section 95AT of the *TPA*.

As the new merger control regime has been operating for over two years, sufficient time has now passed to be able to provide a degree of meaningful commentary on it. Accordingly, this paper will:

- (a) outline the key features of the new merger notification regime;
- (b) examine how it has operated in practice; and
- (c) explore how proposed changes to merger legislation relating to 'creeping acquisitions' may impact the merger control regime.

The issues in this paper are primarily approached from a practitioner's perspective, with a focus on the practical manner in which the new merger review regime has worked.

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II BACKGROUND TO THE NEW MERGER REGIME

The introduction of new merger clearance options was intended to address weaknesses in the administration of the informal clearance process and the authorisation procedure, as identified by the Dawson Committee.¹ The existing informal process was criticised for lacking clear, transparent timeframes, and an effective mechanism to review the ACCC's decisions. The Dawson Committee also highlighted the ACCC's considerable discretion under this avenue, for example, if it rejected an informal application, no express review mechanisms existed and no reasons needed to be given.

The Dawson Review recommended the following key changes to the merger review procedure:

- (a) ACCC should provide reasons to the parties where it makes a decision to accept or reject a merger, or where it clears a merger, subject to section 87B undertakings;
- (b) the introduction of a voluntary formal merger clearance process to be administered by the ACCC; and
- (c) authorisation applications should be made directly to the Tribunal to make the timeframe more commercially viable.

III CURRENT MERGER CLEARANCE OPTIONS

Australian merger control is voluntary: merging parties are not obliged to seek clearance of any anticipated or completed merger, but are encouraged to do so in relation to possibly contentious transactions. However, in practice, parties often seek informal clearance to ensure that mergers are not subject to an unexpected review by the ACCC, thereby providing greater transaction certainty. Merger notifications may be made via one of three routes, each of which is discussed further below.

A Informal Clearance Procedure

If a merger is likely to contravene the ACCC's indicative notification thresholds or may give rise to competition issues, merger parties may seek informal clearance from the ACCC. Despite the *TPA* not stipulating timeframes or a process for informal clearance, the ACCC's *Merger Review Process Guidelines 2006* ('Guidelines') state that the ACCC will typically reach a decision on a public merger within six to eight weeks.² The Guidelines draw largely on the International Competition Network's *Guiding Principles and*

1 On 16 April 2003, the Federal Government released the Dawson Committee's report on the competition provisions of the *TPA*: Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) ('Dawson Review').

2 Australian Competition and Consumer Commission, *Merger Review Process Guidelines 2006* (2006) [4.51].

Recommended Practices for Merger Notification and Review Procedures, and set out in detail the processes that the ACCC will follow.

The informal clearance process is supplemented by the practice of parties providing the ACCC with a low-key ‘courtesy letter’, in cases where mergers should not raise any substantive competition issues but may be public.

The ACCC’s administration of the informal clearance process has been improved – perhaps practically – as a result of the existence of the formal review option. In particular, the ability for parties to seek a formal review is a balancing factor to ensure the ACCC manages the informal review process to keep it streamlined and predictable, so that it remains the most popular notification route (discussed further below).

B Formal Clearance Procedure

The formal merger clearance procedure is only available to anticipated mergers; formal clearance cannot be sought post-completion. Consistent with this, applicants for formal merger clearance are required to enter into a binding undertaking pursuant to section 87B of the *TPA*, which prevents them from completing the acquisition while the ACCC is considering the clearance application.

The introduction of the new formal merger clearance procedure was aimed at addressing many of the previous criticisms of the informal merger clearance process. For example, the formal process sets out a firm timetable for review. The ACCC has 40 business days from filing in which to make a decision. This period may be extended by an agreed period with the applicant’s consent. Additionally, a further 20 business days may be taken by the ACCC in certain ‘complex’ cases.

If the ACCC does not formally clear the merger within the allocated period, it is deemed to have refused clearance. Should the ACCC not clear the merger, the applicant has a right of review by the Tribunal, essentially based ‘on the papers’ relied on by the ACCC to reach its decision. The Tribunal must take its decision within 30 business days or, if it considers the matter to be ‘complex’, within 60 business days. The Tribunal may seek the ACCC’s assistance, and its decision is subject to administrative review.

Importantly, if the ACCC formally clears a merger, the applicant obtains immunity from action by any person for breach of section 50 of the *TPA*. This contrasts with the informal clearance decisions of the ACCC, which are essentially ‘no action’ letters by the regulator. Given that the ACCC is the only party able to seek an injunction to restrain a merger, such ‘no action’ letters are potentially the best way to achieve transactional certainty, but do not provide complete comfort: for example, the prospect of third parties seeking a declaration of a contravention remains open. This possibility is fairly remote, however, given the time and cost involved in such an application.

Consequently, the formal merger clearance process is aimed at providing merger parties with greater certainty in the form of:

- (a) a binding clearance decision, which will immunise the acquirer from exposure to actions by a person for divestiture or damages; and

- (b) an ability for the acquirer to apply to the Tribunal for a review of any negative decision within a commercially realistic timeframe.

C Authorisations

Prior to the merger review procedure amendments, the ACCC's assessment of merger authorisations took between six and 12 months. This rendered the option of seeking authorisation for a merger commercially unrealistic for the majority of transactions. In response, the Dawson Committee recommended that authorisation applications should be made directly to the Tribunal, with the aim of making the process more attractive and commercially viable. Applicants may now apply to the Tribunal under section 95AT of the *TPA* for authorisation.

Following an application for authorisation of a merger, the Tribunal is required to reach a decision within three months of receiving it. If the Tribunal decides that the matter cannot be dealt with properly within that period due to its complexity or other special circumstances, the period will be extended by an extra three months.

In reaching its decision, the Tribunal must seek a report from the ACCC. Additionally, the ACCC may make submissions to the Tribunal and examine (and/or cross-examine) witnesses. The substantive test for granting an authorisation – that is, that the merger would result, or be likely to result, in such a public benefit that it should be allowed to occur – remains unchanged.

IV HOW HAS THE NEW REGIME OPERATED IN PRACTICE?

The existence of three alternative routes to obtain merger clearance has had less impact than may have been expected by some when legislative changes were being discussed and finalised. Between 1 January 2007 and the end of January 2009, there have been approximately 542 mergers reviewed by the ACCC. During this time, there have been no applications to the ACCC for formal clearance of a merger, nor have there been any applications to the Tribunal for authorisation. Merging parties have continued to rely on the ACCC's informal merger clearance process.

While the continued dominance of the informal review process may appear surprising given the changes introduced on 1 January 2007, closer examination of the practical implications of each merger clearance option, combined with the experience that parties had with the informal process, provides an explanation.

The continued popularity of the informal notification process is driven by the benefits of, and familiarity with, the process; improved transparency post-Dawson; combined with a relative lack of familiarity with the formal merger review and authorisation procedures. Additionally, the final form that the formal merger review procedure has taken appears to discourage formal clearance applications.

A Limitations of the Formal Merger Review Procedure

The ACCC's *Formal Merger Review Process Guidelines 2008* ('Formal Guidelines') provide additional guidance as to how the formal merger clearance procedure will operate in practice. In particular, the Formal Guidelines provide additional direction as to how to prepare a valid formal clearance application, using statutory Form O, 'Application for Merger Clearance'.

It is stated in the Formal Guidelines that Form O

asks a series of questions of the acquirer and is designed to elicit important information from the applicant at an early stage. The questions largely relate to the merger factors in subs 50(3) of the Act and require detailed responses.³

It is a complicated notification form and requires extensive preparatory work. Consequently, the time and costs involved in preparing a formal merger notification will almost certainly be substantially greater than for a comparable informal notification.

Indeed, in many respects, Form O is the Australian equivalent of the European Commission's Form CO, which demands extensive and detailed information upfront. Perhaps the clearest divergence between the jurisdictions, however, is that the European Commission requires pre-filing contact and discussions with the notifying party (which extends in practice to obtaining the case team's input into the merger notification), whereas the ACCC merely encourages such pre-notification contact in its Formal Guidelines.⁴ Given the similarities, it is unsurprising that businesses operating under commercial pressures, and given a choice of merger review procedures, are reluctant to choose the path of greatest resistance.

An additional consideration is that Form O does not leave any room for error. If there is even a small mistake on the form, that notification may be deemed invalid, and the applicant may be required to resubmit or withdraw the notification. The circumstances under which Form O may be declared invalid by the ACCC appear to be widely drawn, as the ACCC may declare an application invalid where:

- (a) it does not include the requisite information in response to questions;
- (b) the required attachments (such as board papers, annual reports etc) are not attached;
- (c) it is not accompanied by the appropriate fee or section 87B undertaking; or
- (d) requests to exclude certain information from the public register due to confidentiality concerns affect the validity of an application.⁵

In addition to the complexity inherent in Form O and the apparently unforgiving nature of the ACCC in the event of mistakes (which can have

3 Australian Competition and Consumer Commission, *Formal Merger Review Process Guidelines 2008* (2008) [3.16].

4 *Ibid* [3.10]: 'To assist prospective applicants, the ACCC encourages parties to participate in informal discussion with, and seek procedural guidance from, the ACCC before lodging an application'.

5 *Ibid* [3.32]–[3.36].

significant consequences for acquisition timetables), there are four key reasons why the formal merger clearance procedure has proven, and will continue, to be an unattractive option for merging parties:

- (a) *publicity requirements* – formal merger notification submissions and accompanying information and documents must be published in full on the ACCC’s website, subject only to commercial confidentiality concerns. This public disclosure regime – while understandable from a regulator’s perspective, given it is providing transactional immunity – reduces the attractiveness of the formal review process for merging parties, which typically wish to maintain high levels of confidentiality. However, the ACCC’s requirement to publish the application and supporting information differs from the publication requirements of comparable jurisdictions. For example, the European Commission publishes only a short description of the transaction from a Form CO application, thereby maintaining the confidentiality of the vast majority of the document;
- (b) *upfront filing requirements* – extensive pre-filing work is required to produce a valid application, resulting in significant costs and time pressures. For example, the ACCC’s Formal Guidelines state that ‘parties wishing to rely on expert reports to support or supplement the information or contentions provided in the application *must do so at the time of making the application*’.⁶ The requirement for expert reports (most frequently, economists’ reports) to be submitted upfront with the formal merger filing is both unrealistically demanding and inconsistent with comparable merger regimes. For example, both the United Kingdom and European Union allow economists’ reports to be submitted in support of a merger notification after the original filing. Such flexibility is necessary in what can potentially be a two-stage review process. The ACCC’s approach is based on an upfront loading of information requirements because of the comparatively short period of time it has to review formal merger applications.

Informal notification allows greater flexibility; though much of the same competition analysis and filing preparation may take place as for a formal application, there are no absolute requirements that must be met, and the ACCC will simply request further information should it be considered necessary. Expert reports in support of the merger can also be prepared and submitted after the initial informal notification;

- (c) *section 87B undertakings* – Form O requires that the applicant enter into a binding section 87B of the *TPA* undertaking, prohibiting it from completing the merger during the ACCC’s review. This limits the degree of flexibility normally available to merging parties in Australia; and

6 Ibid [3.39] (emphasis added).

- (d) *only available to non-completed mergers* – connected to (b), a formal merger review procedure is only available to non-completed mergers. This reduces the options that parties ordinarily have when merging in Australia, with the result that pre-clearance closing is prohibited. In a deal driven from, or only involving, Australia, such relative inflexibility may be unimportant. However, in reality, many transactions are globally driven, and Australia is a secondary consideration. Consequently, an advantage that parties currently have in Australia – the ability to complete a merger prior to review – is lost in a formal review process. In worldwide mergers, parties are frequently under pressure to complete transactions as soon as possible, and it is often commercially advantageous (particularly in auction bids) to be able to quickly complete in as many jurisdictions as possible, thereby enabling the purchaser to take the competition risk. By making a formal application, a purchaser would be limiting its ability to complete prior to receiving clearance.

Given the formal procedure's limitations, it is unsurprising that there have been no applications to date. Indeed, there is considerable apprehension that the formal procedure has ended up being particularly unattractive, such that it will almost never be used. Whatever the merits of this view, it is clear that the informal process has remained – and will continue to remain – the most popular route for notifying mergers.

B Have the Changes Affected the Informal Merger Review Procedure?

In many respects, the informal merger review procedure has remained unchanged following the amendments of 1 January 2007. The method of merger notification – a short 'courtesy letter' in matters that do not raise competition issues, or a more detailed informal submission for those matters that do raise competition issues – essentially remains the same. Moreover, the ACCC's review process is generally conducted in a similar manner.

The most useful recent development in the way parties decide whether or not to notify mergers, and the ACCC's conduct of the merger review process, is the new *Merger Guidelines 2008* ('2008 Guidelines'), which were introduced in their final form on 21 November 2008. The introduction of an indicative merger notification threshold (based on a relatively small combined market share of 20 per cent in the relevant markets post-merger), is intended to provide some practical guidance – based on the ACCC's past merger experience – of a threshold below which there is unlikely to be a competition issue. However, the new threshold may have the effect of encouraging more merger notifications than in the past, particularly from overseas parties used to turnover-based mandatory notification regimes. Moreover, the importance that the 2008 Guidelines place on market concentration calculations as part of a multi-faceted competition assessment,⁷ may increase the significance of formulaic economics-based analysis as part of a merger review process.

7 Australian Competition and Consumer Commission, *Merger Guidelines 2008* (2008) [7.6]–[7.16].

The ACCC's approach to informal merger reviews is generally well understood by advisers and businesses in Australia, and is conducted with a good degree of transparency. Indeed, decision transparency has increased following the Dawson Review. In many ways, the mere existence of a formal notification process has encouraged the ACCC to improve its approach to informal reviews.

In particular, the ACCC has moved in recent years to post at least a brief summary of the key issues raised in relation to each informal merger review.⁸ Combined with the practice of publishing public competition assessments in cases which raise significant competition issues, the level of information available to businesses and advisers (who make use of such precedents in drafting informal merger notifications) is very good. It provides a high degree of clarity of the ACCC's review, which in turn enables businesses and their advisers to better assess their own proposed merger activity.

Accordingly, despite the practical problems of the formal process, its existence provides a good 'check and balance' on the informal clearance process. While that is working well, the flexibility of the informal process should make it a superior option.

Nevertheless, the informal process does have limitations. The ACCC appears to have adopted a significantly more prescribed and structured approach in its informal merger reviews in the last two years. For example, applicants no longer receive early feedback from the ACCC as to its concerns in relation to a merger. Now, parties tend not to be aware of the details of the ACCC's views regarding a transaction until well into the course of a review, for example, when information requests (which highlight specific areas of interest) or statements of issues are received.

The ACCC publishes statements of issues in complex cases. A statement of issues outlines the ACCC's preliminary views on the merger in question, but is not a final decision. In particular, the ACCC is at liberty to change its views outlined in the document after further consideration.

The publication of a statement of issues gives notifying parties and interested third parties the opportunity to make further representations in response. A significant difference between the Australian approach to statements of issues and that adopted by other leading competition regulators is that the ACCC's statements are publicly available. In contrast, certain other regulators, including the European Commission and the United Kingdom's Office of Fair Trading, release statements of issues only to the notifying parties. The ACCC's approach provides a greater degree of transparency to all interested parties, including stakeholders of the merging firms.

8 See, eg, the ACCC's public merger register assessment of the acquisition by News Ltd of three newspaper titles from Times Publication: Australian Competition and Consumer Commission, *News Ltd – acquisition of three newspaper titles from Times Publications*, Informal Merger Clearances Register (30 January 2007); and the joint venture between PBL Media, Elders Ltd and Bell Potter Securities Pty Ltd: Australian Competition and Consumer Commission, *PBL – proposed joint venture*, Informal Merger Clearances Register (8 March 2007).

C Case Study: BHP Billiton's Proposed Acquisition of Rio Tinto

One of the most well known merger reviews conducted by the ACCC in recent years was its informal review of the proposed acquisition of Rio Tinto by BHP Billiton ('BHP').⁹ The ACCC was notified of the transaction on 6 June 2008, just over 18 months after the changes to the merger review procedure were introduced. In spite of having the option to file a formal merger notification, BHP chose to notify the ACCC informally.

The merger review took the ACCC 35 working days from notification, in line with the ACCC's merger guidelines, even for such a significant matter. During the course of the review, the ACCC requested further information from BHP twice prior to publication of the statement of issues. Multiple information requests are common for complex transactions, in particular where the ACCC's competition assessment covers multiple markets.

The ACCC's statement of issues (published on 22 August 2008)¹⁰ identified the global and domestic supply of iron ore lumps and fines as the key issue. In particular, the ACCC requested responses from interested parties in relation to existing and future competition and infrastructure capacity constraints. The ACCC noted, *inter alia*, that the transaction would not be likely to raise competition concerns in respect of coal supply or port terminal services.¹¹

Following responses to the statement of issues (due by 5 September 2008), the ACCC announced on 1 October 2008 its decision to approve the acquisition unconditionally.¹²

The ACCC's public competition assessment addressed the specific points raised in the statement of issues, with particular regard to the impact of the acquisition in Australia. Two important elements in the ACCC's decision were that steel manufacturers could exercise countervailing buyer power in acquiring iron ore, and the existence of 'a number of capacity expansion projects that are likely to be undertaken by alternative suppliers ... including by independent suppliers operating in Australia'.¹³ The possibility of capacity expansion is important in concentrated manufacturing and resources sectors in a small economy such as Australia's. The ACCC will, therefore, tend to examine this topic as necessary in the course of informal merger reviews.

D Summary: Little Practical Change in Merger Review Procedure and Updated Guidelines Indicates a Process Working Well

After more than two years since the new merger review procedures were introduced, the reality is that little has changed in the way in which mergers are notified to, or reviewed by, the ACCC. There have been no applications for a

9 Australian Competition and Consumer Commission, *PBL – proposed joint venture*, Informal Merger Clearances Register (1 October 2008).

10 Australian Competition and Consumer Commission, *Statement of Issues – BHP Billiton Ltd's proposed acquisition of Rio Tinto Ltd and Rio Tinto plc* (22 August 2008).

11 *Ibid* [39].

12 Australian Competition and Consumer Commission, *BHP Billiton Ltd – proposed acquisition of Rio Tinto Ltd and Rio Tinto plc*, Public Competition Assessment (1 October 2008).

13 *Ibid* [35].

formal merger review and no authorisations have been sought. Instead, the tried and trusted informal merger review process is still the procedure of choice for businesses and advisers because of its predictability, relative transparency and flexibility. In contrast, the formal merger review procedure has been perceived by businesses as unattractive at best, and unworkable at worst. It is difficult to anticipate circumstances in which a formal merger review application would be chosen over the informal route. Nevertheless, the advantage of the new merger review procedures is that the very possibility of seeking formal approval has perhaps encouraged the ACCC to continue to increase transparency as to timing, process and decisions for the informal process. Though the changes have been unsuccessful in the sense that no formal review or authorisation applications have been made, in supporting the effective operation of the informal merger review process, the reforms have been worthwhile.

V HOW WILL 'CREEPING ACQUISITIONS' REFORM AFFECT THE NEW MERGER REVIEW PROCEDURES?

On 6 May 2009, the Commonwealth Government published a second discussion paper highlighting the possibility of reforming merger legislation to take account of 'creeping acquisitions' ('Discussion Paper').¹⁴

The Discussion Paper noted two options for reforming existing merger legislation in order to deal specifically with creeping acquisitions:

- (a) a prohibition on corporations with a 'substantial degree of market power' from acquiring shares or assets if the acquisition 'would have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market'; or
- (b) providing the Minister with a unilateral power (potentially on application by the ACCC) to 'declare' a corporation or a product/service sector for a period of time, in a situation where the Minister has concerns about actual or potential harm from creeping acquisitions or acquisitions by corporations with substantial market power in the relevant market. The competition test applicable to any acquisition by a declared corporation, or acquisition by a corporation in declared product/service sectors, would be the same as for (a) (that is, an 'enhancement of substantial market power' test).

In the event that the Government adopts one of these models and seeks to introduce additional legislation covering creeping acquisitions, the impact on the new merger review procedure is likely to be significant. In particular, there are three changes that would likely occur:

14 Treasury, *Creeping Acquisitions*, Discussion Paper (2009). 'Creeping acquisitions' are defined as a series of small acquisitions, which individually may not give rise to competition concerns but which, when aggregated, may substantially lessen competition in the relevant market.

- (a) the key impact will be on the merging parties' decision as to whether or not to notify a merger to the ACCC. Irrespective of which option is adopted, any business that may enjoy a position of 'substantial market power' in a market would, in practice, face something close to a mandatory merger filing requirement in Australia. Moreover, they may face a de facto market share cap beyond which growth through acquisition may be prohibited;
- (b) the existence of a creeping acquisitions test would impact global transactions by making filing in Australia more likely, but arguably less predictable. This in turn would impact the allocation by the parties of competition risks associated with the merger; and
- (c) the ACCC would be required to apply an additional test to creeping acquisitions, irrespective of whether the acquisition was notified formally or informally. The conceptual analysis and competitive assessment carried out (based on the current proposals) would necessarily be different to the current system, increasing the regulatory cost and burden on businesses.

A Summary

Any reform of the merger legislation based on current proposals to take account of creeping acquisitions will be likely to increase complexity in relation to:

- (a) the merging parties' decision on whether to file;
- (b) the level of supporting work that will be necessary to prepare a filing and ensure clearance; and
- (c) the ACCC's assessment process, irrespective of whether a formal or informal merger review notification is lodged.

VI CONCLUSION

The new merger review procedures have been operating for over two years. In that time, the two new application options have not been used, with all notified mergers using the informal review process. The informal process is generally considered to work effectively, with the ACCC conducting reviews to an appropriate level and providing good levels of transparency for both the merging parties and other interested persons. The predictability of the process, compounded with the cumbersome and inflexible nature of the formal review and authorisation processes, and the requirement to publish the formal application on the ACCC's website, have encouraged businesses and advisers to approach the ACCC on an informal basis. Changes in the informal review process that have made it less flexible than before the introduction of the formal review option have affected the approach adopted by notifying parties. However, the ACCC's

more regimented process has not discouraged the use of the informal merger review option. In the event that creeping acquisitions reforms are introduced, the informal merger review process is likely to continue to be the most popular method of notifying the ACCC, even though the actual review process will necessarily become more complex.