

MERGERS

Competition Policy Review (Harper Review) Final Report

Current position

Substantive law

- Mergers (acquisitions) are prohibited by s 50 of the CCA if they would have the effect, or be likely to have the effect, of substantially lessening competition in a market
- Market defined in 50(6) as a market for goods or services in Australia or a State, Territory or region of Australia

Procedure

- No mandatory pre-merger notification
- Voluntary informal notification to ACCC available (most common option)
- Voluntary formal notification to ACCC available with merits appeal to Tribunal (never been used; onerous up front information requirements)
- Authorisation available on public benefit grounds – application directly to Tribunal with no possibility for merits review. ACCC provides support role to Tribunal

Harper Panel recommendation 35

Substantive law

- No change

Procedure

- No introduction of mandatory pre-merger notification
- There should be further consultation between ACCC and business with the ‘objective of delivering more timely decisions in the informal merger review process’
- Retain voluntary informal notification to ACCC; ACCC to consult with stakeholders with object of delivering more timely decisions
- Combine current formal notification and authorisation processes
- Unnecessary restrictions and requirements to be removed from the new formal process - details to be settled in consultation with business, practitioners and ACCC but with following elements:
 - ACCC to be decision maker at first instance
 - ACCC to have power to authorise merger if satisfied that:
 - It does not SLC **or**
 - Merger would result in a benefit to the public that would outweigh any detriment
 - No prescriptive information requirements (ACCC should have power to require production of business and market information)
 - Strict timelines that cannot be extended except with consent of merger parties
 - ACCC decisions subject to Tribunal review with strict timelines
 - Tribunal review should be based on material that was before the ACCC, but Tribunal should have discretion to allow a party to adduce further evidence, or to call and question a witness, if satisfied there is sufficient reason

Review

- A program of post-merger evaluations should be implemented to determine whether the ACCC’s ‘processes were effective and its assessments borne out by events’ (could be performed by Australian Council for Competition Policy)

[summary prepared 11 June 2015]

Current merger clearance and authorisation provisions

Section 88 Power of Commission to grant authorisations

The ACCC currently has power to grant authorisations under section 88, but this does not extend to mergers.

Part VII Division 3 Merger clearances and authorisations

Currently an extensive number of provisions set out the powers and processes of the ACCC and Tribunal in relation to formal merger clearance applications and merger authorisation applications. It is proposed that these be consolidated into a single authorisation process, with the ACCC hearing the claim at first instance and the opportunity for appeal to the Tribunal.

The current provisions can be viewed here:

<http://www.australiancompetitionlaw.org/legislation/2010cca.html#part07>

Proposed merger authorisation provisions

Section 87ZP Definitions

In this Division:

merger authorisation means an authorisation under subsection 88(1) to a person to:

- (a) acquire shares in the capital of a body corporate or to acquire assets of a person to which section 50 would or might apply; or
- (b) acquire a controlling interest in a body corporate within the meaning of section 50A,

but does not include an authorisation where the conduct specified in the application includes conduct to which one or more provisions other than section 50 or 50A would apply.

Section 88 Power of Commission to Grant Authorisations

- (1) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person to engage in conduct specified in the application to which one or more provisions of Part IV would or might apply.

Effect of authorisation

- (2) While an authorisation under subsection (1) remains in force the provisions of Part IV do not apply to the applicant and any person referred to in subsections (8) and (9) engaging in the conduct specified in and in accordance with the authorisation.

Note: The references to conduct and engaging in conduct in subsection 89(1) include the actions set out in subsection 4(2).

Authorisation test

- (3) Subject to subsections (4) and (5), the Commission must not make a determination granting an authorisation under subsection (1) to engage in conduct specified in the application unless the Commission is satisfied in all the circumstances:
- (a) that the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition; or
 - (b) that the conduct would result, or be likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public that would result, or be likely to result, from engaging in the conduct.
- (4) Paragraph 3(a) does not apply to an application for authorisation for conduct to which [*the cartel provisions*], [*the secondary boycott provisions*] and the [*resale price maintenance provisions*] would apply.
- (5) In respect of a merger authorisation, in determining what amounts to a benefit to the public for the purposes of paragraph (3)(b):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Single application may deal with more than one type of conduct

- (6) The Commission may grant a single authorisation in respect of all conduct specified in an application for authorisation or may grant separate authorisations in respect of any of the conduct.

Conditions

- (7) The Commission may grant an authorisation subject to such conditions as are specified in the authorisation.

Other and future parties

- (8) An authorisation granted by the Commission to a person to engage in conduct has effect as an authorisation in the same terms to every other person named or referred to in the application for authorisation as a party or proposed party to the conduct.
- (9) An authorisation may be expressed so as to apply to particular persons or classes of persons who become a party to the conduct as specified in the authorisation.

Past conduct

(10) The Commission does not have power to:

- (a) grant an authorisation to a person in respect of any conduct undertaken before the Commission makes a determination in respect of the application; and
- (b) in respect of a merger authorisation, grant authorisation in respect of an acquisition that has occurred.

Withdrawal of application

(11) An applicant for authorisation may at any time, by writing to the Commission, withdraw the application.