



ACCC INFORMAL CLEARANCES OF MERGERS: PROCEDURE AND STRATEGY

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Abstract

This paper discusses the procedural aspects of obtaining informal clearance of a merger from the Australian Competition and Consumer Commission. The issues examined include, how an application is made and what material should be provided to the Commission, the time the Commission will take to consider an application, and questions of confidentiality. The paper prefaces that discussion by examining the question, whether an approach to the Commission is necessary at all. The paper examines two important strategic issues – first, how can merger parties manage the Commission’s market inquiry process and, second, the options open to merger parties if the Commission refuses to grant informal clearance.



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You act for a company contemplating a merger with one of its competitors. It will want to know whether some form of clearance or authorisation from the Australian Competition and Consumer Commission (**ACCC**) is needed. That advice largely depends on your view of the risk of the acquisition breaching the *Trade Practices Act 1974 (TPA)* and the extent to which your client is risk averse. If the decision is taken to approach the ACCC for informal clearance, you will need to prepare the case to justify the application and adopt strategies to make success more likely in the shortest timeframe possible.

This paper discusses the nature of ACCC informal clearances. What do you get at the end of the process and what is it worth? Is confidentiality an issue? How long will the ACCC take to provide an informal clearance? Will the ACCC conduct market inquiries and what is involved? One focus of the paper is a discussion of the strategies merger parties can adopt to improve the prospect of obtaining an informal clearance. This is examined in relation to managing the market inquiry process and the options available if the ACCC refuses to grant an informal clearance. The paper begins by examining the preliminary question of whether informal clearance is needed.

On 1 January 2007, the TPA was amended, making provision for a formal clearance procedure. This is set out in Subdivision B of Division 3 of the TPA (sections 95AA to 95AS). An examination of this new procedure is outside the scope of this paper, largely because it is not yet considered a viable option in most transactions.

1. Is an approach to the ACCC necessary at all?

Merging with a competitor will always raise trade practices issues because of the prospect of it affecting competition.² Section 50 of the TPA is the relevant provision. It provides that:

A corporation must not directly or indirectly:

- (a) *acquire shares in the capital of a body corporate; or*
- (b) *acquire any assets of a person,*

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

¹ An earlier draft of this paper was presented to the Law Council of Australia Macquarie Bank Competition Law and Corporations Law Workshop, 25-27 February 2000. The author thanks Mr Bill Reid of Blake Dawson Waldron for his comments on the draft paper. The paper has also benefited from the commentary at the Workshop provided by Professor Philip Williams of the Melbourne Business School and Ms Sharon Henrick of Mallesons Stephen Jaques, Sydney and the contributions by workshop delegates. The views expressed in this paper nevertheless remain those of the author.

² Mergers also raise issues under section 50 if the target trades at another stage of the production and/or distribution process – referred to as a vertical merger. A road transport company's acquisition of port facilities or a cement producer's acquisition of concrete production facilities are examples of vertical mergers.



It is not necessarily the case, however, that some form of clearance from the ACCC will be required just because the target is a competitor. Much depends on whether the merger satisfies the Commission's concentration threshold. The Commission has indicated that a merger will trigger further investigation if it results in:

- (a) the four largest firms in the market having a combined market share of at least 75% and the merged entity having 15% or more; or
- (b) the merged firm having at least 40% of the market, irrespective of the share of the four largest firms in the market.

This author would normally advise a purchaser to seek informal clearance if there is a reasonable argument that the merger will not breach section 50 despite the increase in concentration. If there is no argument at all, the purchaser will need to consider applying for authorisation. However, the feasibility of such an application will depend on the merger producing sufficient public benefits to justify authorisation.³ As authorisation is a public process, however, the confidentiality of the transaction may also influence a purchaser's strategy. This issue is discussed further below.

If the threshold is not satisfied and the transaction is otherwise low risk, this author generally advises purchasers to complete the transaction without approaching the Commission. It should be noted that the ACCC threshold is only a rule of thumb and does not necessarily mean that the merger in question will not substantially lessen competition. A merger will be low risk if all factors point towards competition not being substantially lessened, for instance your client and the target each have 5% of the market, the market is not highly concentrated and there are low barriers to entry.⁴

In order to complete this discussion, it is noteworthy that merging parties in international transactions should consider the timing of their application in Australia. In many of these transactions, other jurisdictions are felt more important, such as the United States and Europe. The ACCC however strongly recommends in its 2006 Merger Guidelines⁵ that any application for informal clearance be lodged with the Commission at the same time applications for clearance are lodged overseas.⁶ There are a number of reasons for this. Failing to do so, could bring the ire of the Commission. More importantly, though, most agencies around the world share information.⁷

³ The authorisation mechanism is set out in section 95AT(1) of the TPA.

⁴ The only exception may be where it is a particularly high profile merger that would attract public attention, in which case notifying the Commission without seeking its approval would be recommended course of action.

⁵ Australian Competition and Consumer Commission 2006, *Merger Review Process Guidelines*, Canberra, July.

⁶ paragraph 4.91 of the 2006 Merger Guidelines

⁷ paragraph 4.90 of the 2006 Merger Guidelines



2. What is an Informal Clearance?

An informal clearance is not authorisation. An authorisation legitimises what would otherwise be an unlawful merger. What you get from an informal clearance is less clear, but nevertheless valuable.

An informal clearance is a statement from the ACCC that it has no intention of intervening in the transaction; although, that statement comes with extensive qualification. A common response is as follows:

Dear Sir

I refer to the above matter and to previous communications in relation to it.

The Commission has considered the information provided by you and other material it has before it and, based on that information, the Commission does not propose to intervene in the above matter pursuant to section 50 of the Trade Practices Act.

Nevertheless, should new information come to the Commission's attention, or should it become aware that some of the information that has been provided by you is incorrect or incomplete, it reserves the right to reopen the matter.

As the qualification indicates, this does not prevent the ACCC resiling from its position, before or after completion. Indeed, that occurred in Santos Limited's acquisition of Sagasco Holdings Limited from the South Australian Government in 1994. Santos obtained informal clearance. Prior to the parties concluding the transaction, however, the Commission contacted Santos and asked for undertakings that it not proceed unless it received the Commission's approval. When Santos refused, the Commission issued proceedings, seeking interlocutory relief.

To the best of this author's knowledge, this has not happened since and is unlikely to occur post-Santos. It is a serious matter for the Commission to put its view in writing. The ACCC noted as much in paragraph 4.8 in its Merger Guidelines⁸:

"The Commission is concerned to ensure that it does not give inappropriate comfort to the parties and then, upon undertaking market inquiries, come to the view that the merger would be likely to substantially lessen competition."

As already noted, informal clearance is not authorisation. And unlike authorisation, informal clearance does not change the legal status of a merger. A merger that is likely to substantially lessen competition will remain unlawful even if the ACCC has given its informal clearance. However, only the ACCC is

⁸ Australian Competition and Consumer Commission 1999, [Merger Guidelines](#), Canberra, June (Merger Guidelines).



able to apply to the Court for an injunction to prevent a merger proceeding.⁹ By abstracting itself from the equation – which the Commission does through an informal clearance – the ACCC gives merger parties a fair measure of protection, at least to complete the transaction.

Other affected parties – such as competitors – are not entirely defenceless against mergers that have informal clearance. It would be a bold move, but a competitor could issue proceedings, seeking divestiture and damages under section 81 of the TPA. This could be a very effective strategic move as issuing proceedings before completion would test the metal of most companies.

Having said that, an informal clearance should minimise the chances of any competitor adopting such a strategy. Generally, competitors are aware that the ACCC has considered the merger. The ACCC publishes all informal clearances on its web site and its press releases on these matters often receive some attention. Any competitor contemplating this strategy would need to bank on the ACCC being wrong. This probably accounts for the fact that no competitor has ever taken this type of action to prevent a merger.¹⁰ However, the Commission does get it wrong, and so it should not be ruled out.

3. How to make an application and what you need to provide to the ACCC

3.1 General Observations

Any application for an informal clearance must begin with the merger parties (generally the purchaser) filing a submission with the ACCC. That submission will accompany an express request for the clearance, generally set out in a cover letter. This is more fully discussed in the 2006 Merger Guidelines between paragraphs 4.92 and 4.99.

The critical point to realise is that submissions must persuasively advocate the purchaser's case. A submission is not merely an information paper, allowing the ACCC to draw what it will. As a lawyer representing a purchase in a proposed acquisition, you will fail in your duty if all you do is provide information to the Commission.

That makes the structure, format and crafting of the piece extremely important. All of these factors will influence the persuasiveness of the submission. As an example of structuring, some submissions are accompanied with very detailed and well thought out executive summaries. They form a valuable resource for the ACCC project officers to return to. With a bit of luck, a well-crafted executive summary will form the basis of the ACCC staff paper (the paper which the Merger Committee or the Commission considers when reaching a determination of the matter). In some cases, therefore, more effort is put into crafting the executive summary than the submission itself.

⁹ Section 80(1A) of the TPA.

¹⁰ That is, after a merger has received informal clearance.



The importance of the submission cannot be underestimated. Some of the aspects of this are explored in the next section. As a general observation though, the ACCC has recently confirmed its importance:

“Merger parties should note that an assessment of a proposed merger by the ACCC and any subsequent decision not to oppose a proposed transaction *is largely based on the information provided by the merger parties* and the terms of the transaction identified by the merger parties.”¹¹ (emphasis added)

3.2 Observations on Content

An examination of the content of submissions is beyond the scope of this paper. It is, however, appropriate to make a few fundamental observations.

The Commission has indicated that all submissions should address at least the following points¹²:

- (a) background information about the parties;
- (b) the commercial rationale for the merger;
- (c) the structure of the market, including any relevant information about other major market participants; and
- (d) an analysis of the proposed acquisition in terms of the factors referred to in section 50(3) of the TPA.

Indeed, the ACCC has indicated that its consideration of a merger will not begin until it has adequate information.¹³

Of these details, the parties should not discount the importance of discussing the commercial rationale of the deal. The Commission must understand what is motivating the parties to merge, particularly if it is to improve the economic efficiency of the merged business. Notwithstanding the technical analysis of markets and competition, the parties will take a large step towards obtaining informal clearance if they can convince the ACCC that the parties are seeking efficiency, rather than making a ‘grab’ for market share.¹⁴

There are some basic facts on which the Commission seems to place inordinate importance. The ACCC uses these facts as if they were points on a road map to orient its analysis of the issues. The following are the most significant:

- (a) the parties’ view of the market or markets in which they trade;

¹¹ paragraph 4.97 of the 2006 Merger Guidelines

¹² Merger Guidelines, paragraph 4.9 and Appendix of the 2006 Merger Guidelines.

¹³ paragraphs 4.28 and 4.29 of the 2006 Merger Guidelines

¹⁴ Reid, W. 2000, Clearances of mergers, paper presented to the Law Council Macquarie Bank Competition Law and Corporations Law Workshop, Novotel North Beach Hotel, 25-27 February.



- (b) the market shares of all substantial competitors in that market or markets, based on existing output and nominal capacity; and
- (c) the cost of establishing an effective competitor.

The ACCC uses the parties' view of the market and market shares to determine whether the merger is likely to exceed the concentration threshold and require closer attention. The cost of establishing a concern that could be described as an effective competitor is used as the basis for the Commission's consideration of barriers to entry. This author questions the importance of the last particularly.¹⁵ Nevertheless, the Commission will generally request these details, so the parties merely cause delays if their submission does not deal with them.

Finally, the submission should deal with both sides of the case and all relevant points, both for and against granting informal clearance. Submissions that fail to do this often lose credibility and, therefore, the power to persuade.

3.3 **Strategic Decisions**

There are a number of strategic decisions to be made about the additional assistance required. In particular, should you be engaging an economist? Should you be commissioning market research? Are there any other experts or consultants you should be using, such as an independent industry expert or management consultants to provide an opinion on such matters as what are the likely constraints on the business?

The fundamental point is persuasion. If any strategy aids that end, it is the opinion of this author that it should be adopted. If you decide to engage an economist, however, she or he should be used judiciously. First, there must be an aspect of the case on which the economist can add value. In Professor Philip Williams' view, this is unlikely to be the case. He has commented that economists are of limited use as the Commission should reach its own conclusions based on the facts, rather than the opinion of an independent economist.¹⁶ In any event, even though based in economics, competition law is fundamentally a legal discipline. A lawyer should, therefore, run the project, using the economist only as a resource.

4. **Confidentiality**

Unlike authorisations, informal clearances are confidential. That includes all information about the proposed transaction, including the parties involved and the nature of the transaction. It may be excessive, but, so there is no doubt about the matter, this author sets out the request for confidentiality in detail.

¹⁵ In the view of present author, this cost alone has only minimal probative value for demonstrating barriers to entry. The real question is whether any of that investment represents a sunk cost. The parties should, therefore, also note if that is the case and, more importantly, where it is not the case. Other evidence of barriers to entry should include examples of entry or expansion over the preceding five years.

¹⁶ Professor Williams made these comments in his commentary of this paper at the Law Council Macquarie Bank Corporation Law and Corporations Law Workshop.



We confirm that all information concerning the Acquisition is currently confidential. This Submission is, therefore, provided to the Commission on the condition that it protect the confidentiality of:

- (a) all information and materials in, or appended to, the Submission; and*
- (b) all other information relating to the Acquisition, including the fact that Bull Limited is considering buying the Business and Bear Limited is considering the sale of the Business.*

This includes not disclosing any of the said information to anyone other than Commission officers, consultants and Commissioners, and only insofar as disclosure is necessary for the Commission to assess the Acquisition.

Without limiting the implications of the preceding paragraphs, Bull and Bear request that the Commission conduct no market inquiries until the Acquisition is announced to the market or as otherwise agreed. Bull and Bear intend making that announcement once a sale agreement is executed. We will inform the Commission of the intended date of the announcement at a later date. We confirm that this agreement will be subject to the Commission indicating that it does not intend intervening in the transaction.

*Some information in this Submission will remain confidential to Bull and/or Bear after the Acquisition is announced. This information is referred to in Schedule 1 (**Confidential Information**). A further condition of the parties providing the Submission to the Commission is that the Commission keep the Confidential Information confidential (in the manner described in the preceding paragraphs). The parties have prepared an executive summary to the Submission for the purposes of the Commission's market inquiries (if the Commission takes the view that market inquiries are necessary).*

The Commission will keep the submission (and its contents) confidential both whilst the transaction remains confidential and after it is made public. There is generally only one exception to this. Where the Commission issues a Statement of Issues in the course of an investigation, it will post any submissions made in response to that Statement on its website.¹⁷

Confidentiality will necessarily be compromised by the Commission's market inquiries. There is some scope for controlling the extent to which the matter becomes public through the ACCC's market inquiries. Some strategies for doing that are discussed in the next section of the paper.

¹⁷ paragraph 4.32 of the 2006 Merger Guidelines



5. Market Inquiries

5.1 *When will the ACCC conduct market inquiries?*

The ACCC will only rarely finalise its view on a merger and provide an informal clearance without conducting market inquiries.¹⁸ It will certainly not do so if the merger satisfies the concentration threshold in the Merger Guidelines. There may also be cases where the Commission will want to conduct market inquiries even where the concentration threshold is not satisfied, such as particularly high-profile mergers where there may be public interest considerations.

5.2 *What are Market Inquiries?*

The ACCC is not interested in simply determining whether the proposal is popular. Market inquiries focus on the material issues relevant in section 50 cases. As already noted, they are:

- (e) market definition;
- (f) the competitive dynamics of the market; and
- (g) whether the proposed acquisition will affect competition and, if so, how and to what extent.¹⁹

The next section of the paper explores the types of market inquiries the commission typically make to determine market definition. As to the competitive dynamics of the market, the ACCC will examine the issues set out in section 50(3) of the TPA. These include the extent and nature of any barriers to entry, the nature of existing contracts and arrangements in the market, the extent of vertical integration, the dynamism of the market, the significance of import competition and the potential for future import competition.

Often, the ACCC will focus its market inquiries on the propositions put to it by the parties in their submission or submissions. In this way, the ACCC tests these propositions. They use market inquiries as an opportunity for determining whether there is any evidence to support them, in addition to the evidence provided by the parties. To close the loop, the ACCC will go back to the merger parties if any issues are raised in the course of market inquiries, seeking further information from them concerning those issues.²⁰

It is important to note that the ACCC will not conduct market inquiries unless the merger parties consent. The parties go to the ACCC in confidence and the Commission will respect that. The Commission often, however, notifies the parties that market inquiries are necessary and suggests that clearance will be delayed unless consent is forthcoming. It is nevertheless within the purchaser's power to refuse consent altogether or grant conditional consent. Conditional consent is examined below.

¹⁸ See paragraph 4.11 of the Merger Guidelines.

¹⁹ paragraph 4.116 of the 2006 Merger Guidelines

²⁰ paragraph 4.117 of the 2006 Merger Guidelines



5.3 Market Inquiries into market definition

The TPA largely defines “market” in terms of substitutability – the substitutability of one product for another, from the perspective of both buyers and sellers.

For the purposes of this Act, unless the contrary intention appears, “market” means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.²¹

Following largely US jurisprudence, the Commission has translated this definition into a test referred to as the ‘SSNIP test’. SSNIP is an acronym for the ‘small but significant and non-transitory increase in price’ on which the test is predicated. The test is described in its Merger Guidelines as follows:

The process of market definition can be viewed as establishing that are of product, functional and geographic space within which a hypothetical current and future [that is, not subject to the threat of entry] profit maximising monopolist would impose a small but significant and non-transitory increase in (SSNIP) above the level that would prevail absent the merger.²²

The Commission starts with the product supplied by the merged firm, in the geographic and functional space covered by that company. That is gradually expanded to incorporate those firms that supply, or would supply, the same or similar products, making it non profit-maximising for the hypothetical monopolist to impose a ‘SSNIP’ or otherwise exercise a significant degree of market power.²³ This is assessed over the foreseeable future.²⁴

There is, however, often little direct evidence of SSNIPs and their effects.²⁵ The only evidence often comes from the ACCC’s own market inquiries. The ACCC

²¹ Section 4E of the TPA.

²² Paragraph 5.44 of the Merger Guidelines.

²³ Set out in paragraphs 5.45 and 5.61 of the Merger Guidelines.

²⁴ This is set out in paragraph 5.71 of the Merger Guidelines. Focussing on the longer term is intended to exclude the effects of any short-term power supplier get from time to time from various advantages over competitors. An example may be an innovative product. The power a supplier obtains from introducing that product evaporates when its competitors launch similar products.

²⁵ Hodgekiss has suggested that evidence can come from an analysis of historical pricing (Hodgekiss, C.C. 1999, ‘The conduct of trade practices litigation’, *Trade Practices Law Journal*, vol.7, p.196). This view is supported by Professor Peter Swan of Sydney University (Swan, P.L. 1997, Why do courts ignore empirical evidence?: Market definition relevant to Australian Rugby League and Superleague, paper presented to the 1997 Australian Law and Economics Association Conference, Melbourne, 4 July). In the view of this author, however, analysing historical pricing often produces ambiguous results, compromising its use as evidence (Algie, M.I. 1998, The evidentiary aspects of market definition, paper presented to the Law Institute of Victoria Advanced Civil Litigation Seminar *Litigation and the Trade Practices Act*, Melbourne, 16 March). The difficulty is that numerous other factors affect the analysis. Swan’s methodology attempts to



obtains this evidence by posing a series of hypothetical questions to customers of the merger parties, asking them to speculate about their buying decisions if the price of Product A were to change.

The following are the sorts of questions the ACCC use²⁶:

- (a) *Do you consider that there is a separate market for particular types of biscuits? For example, [sic] a separate market for chocolate biscuits? What do you consider that the price differential would need to be to compete with the leading brand of chocolate biscuits in the chocolate biscuit market?*
- (b) *Do you consider there to be a separate market for all biscuits? Do you consider there is substitutability between various types of biscuits and what price differential is required to compete with the established major brands?*
- (c) *What is the degree of substitutability between chocolate biscuits and other biscuits, such as savoury biscuits and health food biscuits? What price differential is necessary to induce substitution if at all?*
- (d) *Comment whether there are any geographic constraints on your organisation's ability to service customers or to obtain supplies of the product(s), and if so, details of these limitations (eg. the cost of transporting the products).*

The underlined portions of these questions are relevant to the SSNIP test. If respondents were to say that substitution between different types of biscuits required a price differential of 10%, the Commission is likely to conclude that a single market for biscuits exists. A response of greater than 10% would make that conclusion less certain.

It is beyond the scope of this paper to comment on whether the ACCC's approach is sound. Suffice to say that Australian Courts rarely use the SSNIP test to define markets. Interestingly, a United States Court in 1997 rejected as speculative the testimony of consumers as to their probable responses to a hypothetical price increase.²⁷ Despite this, merger parties must acknowledge and accept that the ACCC uses the SSNIP test. As it is the ACCC that the merger parties need to convince to obtain informal clearance, they should define

deal with this difficulty statistically; this is perfectly acceptable to econometricians, but is not prohibitive evidence. This evidence was presented to the court in *Superleague*, but was ignored by Burchett J (Swan, P.L. 1997, *ibid*). His Honour relied on evidence of the competitive constraints on the ARL and the perceptions of various parties of the market in which they traded (*News Limited v Australian Rugby Football Limited & Ors* (1996) ATPR 41-466).

²⁶ The following questions are taken from a market inquiry questionnaire used by the Commission in a 1999 investigation of a breach of section 46. The products were changed to biscuits to protect confidentiality.

²⁷ *United States v Engelhard Corporation*, 126 F.3d 1302 (11th Cir.1997). See also *Australia Meat Holdings Pty Ltd v Trade Practices Commission* (1989) A.T.P.R. 40-932, 50,104, per Pincus J and Algie, M.I. 1996, Substitution and market definition, paper presented to the IBC *Contemporary Issues and Trade Practices* Conference, Melbourne, 16 & 17 September 1996, of Hodgekiss, *op cit*, p.196.



markets according to the SSNIP test, bringing to bear whatever evidence they can find. As a matter of strategy, however, this author often also presents an alternate market definition. This alternative market is generally based on identifying the competitive constraints on the merged entity.²⁸

5.4 The Importance of market inquiries

As already stated, the ACCC will not grant informal clearance without having conducted market inquiries if the merger exceeds the concentration threshold.²⁹ In the experience of the author, the ACCC places considerable weight on the results of its market inquiries. Market inquiries seem to give the Commission the comfort that its conclusions are safe. It is not simply the evidence-gathering aspect of the inquiries, but the fact that all stakeholders have been consulted and involved. This attitude may be a function of the ACCC being a regulatory agency with a mandate to protect the public interest.

The Commission is often sceptical of the information provided by the merging parties, and is therefore difficult to convince. It has, nevertheless, proven to be discriminating in its market inquiries. It realises that some people have an interest in the merger, colouring the answers they give to the market inquiries. A competitor, for instance, may not want to see the merger completed. It may have preferred to buy the target company itself. It may have realised that the acquisition will take out a fairly slothful operator, possibly producing a considerably more efficient competitor. The ACCC therefore often discounts these protestations.³⁰ Professor Philip Williams has also suggested³¹ that the ACCC should equally have concerns about competitor support for mergers. Williams maintains that competitors, especially small competitors, may have an incentive to support a merger where they believe it will result in the merged entity obtaining market power. In those circumstances, market price will increase, benefiting all players in the market, including the small players.³²

Parenthetically, the reader should note that companies are increasingly taking the initiative of making unsolicited submissions to the ACCC on mergers that are before the Commission. This has increasingly happened in this country, but is a practice more common in the United States. Unlike similar submissions lodged by competitors in authorisation applications, your client is only able to obtain a

²⁸ These principles are discussed in Algie, M.I. & Kewley, B.D. 1998, *Market Definition: Competition Law and Practice*, LBC Information Services, Sydney and Algie, M.I. 1996, Substitution and market definition, paper presented to the I.B.C. Conference *Contemporary Issues in Trade Practices*, Melbourne 16 & 17 September.

²⁹ paragraph 4.17 of the 2006 Merger Guidelines

³⁰ The Commission acknowledges this in the Guidelines on Section 87B Undertakings, Australian Competition and Consumer Commission 1999, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings*, ACCC, Canberra, August, p.11.

³¹ These comments were delivered in Professor Williams' commentary on an earlier draft of this paper at the Law Council Macquarie Bank Competition Law and Corporations Law Workshop.

³² However, that presumes that the sale of smaller players will not decline in the post-acquisition market. That is questionable and may be the course of their concern.



copy of these submissions through a freedom of information application. In most cases, that will not be practical. FOI applications take at least 45 days. In addition, a decision of the Administrative Appeals Tribunal in 2000 made the efficacy of FOI applications in the trade practices context questionable.³³

6. Strategies for managing the market inquiry process

6.1 Introduction

There is often good reason for keeping a prospective merger secret. For instance, the parties may not have reached agreement. Making a proposed merger public before agreement is reached often increases pressure on the parties unnecessarily, threatening the prospect of agreement. Making proposed mergers public before formal agreement is finalised also often gives other interested parties scope to adopt strategies to intervene, again, threatening the prospect of concluding the deal.

As already noted, however, the ACCC will often not grant an informal clearance unless it has completed market inquiries. Preserving confidentiality is therefore often in issue. Having said that, there may be cases where the Commission will express a preliminary view without having conducted any market inquiries. The most the Commission will say in these circumstances will either be³⁴:

'The Commission has some concerns in relation to the proposed acquisition [which would be set out in the letter], but does not propose to oppose the acquisition prior to making market inquiries.'

or

'In the absence of market inquiries the Commission does not propose to express an opinion, but does not intend to oppose the acquisition at this point in time.'

The merger is able to proceed with either response, however at some risk (particularly if the parties receive the first of the two responses). The risk is that the ACCC will intervene after the merger has been announced. Few clients welcome that scenario, nor the risk of it occurring. Most clients would need fairly bullish advice before proceeding. In most cases, you will almost always be obliged to advance the matter and obtain some view from the Commission. We are, therefore, forced to deal with the Commission's market inquiries.

The parties have a number of options to protect the confidentiality of a merger whilst advancing matters with the ACCC. As already noted, the ACCC may conduct market inquiries only with the consent of the merger parties. The purchaser could agree to market inquiries on either of the following bases:

- (h) limited market inquiries; or

³³ *Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000).

³⁴ Paragraph 4.7 of the Merger Guidelines.



- (i) market inquiries predicated on press speculation.

In addition, it could consider:

- (a) providing further submissions to the Commission; and
- (b) enlisting expert support.

6.2 Limited market inquiries

One option may be to agree for the ACCC to engage in limited market inquiries. This could involve the Commission questioning only those customers and/or suppliers that are 'friendly' to the parties. For instance, customers and suppliers with which the purchaser has had dealings over many years, people it can trust and is willing to trust. The degree of trust may be enough for the parties to confide in these people and seek their assistance.

Unfortunately, limited market inquiries only gives the Commission limited comfort. That may, however, be enough for the Commission to provide the parties with a clearance subject to it completing its inquiries after the transaction becomes public. At the very least, it gives the parties additional time to complete the deal and make the merger public. When that occurs, the Commission will have advanced its thinking, benefiting from the limited inquiries. It should be able to conclude its additional inquiries in less time than would have been the case if no market inquiries were conducted.

6.3 Market inquiries predicated on press speculation

Another option arises if there is press speculation about industry restructuring.³⁵ This occurred in the case of Berri Limited's acquisition of National Food Limited's juice business. Around the time the two parties approached the ACCC, there was a fair degree of press speculation about the need for rationalisation, based on declining profitability and excess capacity. National Foods was the subject of most speculation. The reports noted that the business had been under-performing for years. The sale would allow National Foods to concentrate on its other businesses, particularly the milk business. Berri and a number of other companies were mentioned as possible purchasers.

The ACCC launched its market inquiries in that context. It approached competitors and suppliers, acknowledging the press speculation and asking them about their reactions assuming the speculation proved to be true. Inquiries were not limited in the sense that the Commission was able to approach everyone it would otherwise have approached and confidentiality had been preserved.

Both limited inquiries and, where it is available, inquiries based on press speculation will advance the case to some extent. Often, however, the ACCC will not be in a position to finalise its views without making more wide-ranging market inquiries, inquiries relating specifically to the merger in question. That proved to be the case in the Berri matter. The initial market inquiries were,

³⁵ paragraph 4.41 of the 2006 Merger Guidelines



however, sufficient for the ACCC to reach a preliminary view that the acquisition was unlikely to substantially lessen competition. On that basis, the ACCC was able to provide the parties with a comfort letter, which was enough for the parties to announce the acquisition. The letter was subject to the ACCC conducting further inquiries after the announcement, which, thanks to receiving the letter, followed soon after.

7. What if the Commission has remaining concerns?

7.1 Introduction

It is not uncommon for the Commission still to have concerns about an acquisition after examining the submission and the information received through market inquiries. In these circumstances, the ACCC will revert to the merger parties for comment. The matter is very much in the applicants' "court" as they say at this point. It is now common practice for the Commission also to issue a Statement of Issues in these cases.³⁶ This statement sets out:

- Issues unlikely to pose competitive concerns;
- Issues that may raise concerns, but on which the Commission has not formed a preliminary view, issues that nevertheless require further analysis; and
- So-called "red light" issues, issues which (if the current issues remain uncontradicted) will support a decision to oppose the acquisition.³⁷

is aimed at eliciting further information from stakeholders, including the merger parties. It is published in the Public Register section of the ACCC's website.

Since 2004, where concerns remain, the Commission will require written undertakings from the merger parties that they will not proceed with the transaction whilst the Commission's considerations continue. These are not section 87B undertakings, but must be given in good faith. Having said that, there may be cases in which the Commission will require those undertakings to be provided under section 87B. Indeed, this was done recently in Alinta's proposed acquisition of the Dampier to Bunbury National Gas Pipeline in Western Australia. Incidentally, the ACCC prosecuted Alinta in September 2006, when Alinta breached those undertakings.

The merger parties have a number of strategic options open to them where the Commission has remaining concerns after completing market inquiries. Those include:

- (a) making further submissions on the issues of concern; and
- (b) obtaining expert assistance directed to those issues.

³⁶ paragraphs 4.60 to 4.76 of the 2006 Merger Guidelines

³⁷ paragraph 4.64 of the 2006 Merger Guidelines



7.2 Further Submissions

A further strategy may be to meet with ACCC officers to understand precisely the outstanding issues. It may be that the parties can further assist the Commission by providing additional submissions directed specifically to these issues. This approach was used in the case of Adelaide Brighton, to obtain informal clearance of its acquisition of Cockburn Cement.³⁸ The Commission had conducted limited market inquiries, but remained concerned about the Western Australian market. Western Australian prices were low relative to the rest of the country. The question for the Commission was whether that was a result of the prospect of importing cheap clinker from South East Asia or competition between the incumbents – the merger parties. Adelaide Brighton made a further submission to the Commission focussing exclusively on this issue.³⁹

Meeting with the ACCC at this stage is also useful from another perspective, managing clients. And the ACCC is generally amenable to meeting with the merger parties.⁴⁰ You need to understand that the process may have taken some weeks to this point. Clients are often getting concerned and their expectations need to be managed. Meeting with the Commission at this stage enfranchises the client. To the extent possible, it also reassures the parties of the likelihood that more fulsome market inquiries will result in a resolution of the matter.

7.3 Expert assistance

Finally, engaging independent experts at this stage can aid your case. These experts could include:

- (a) industry experts (if there are any);
- (b) management and business consultants; and
- (c) industrial economists.

The independence and expertise these people bring to the task may persuade the Commission on outstanding, problematic issues.

An industry expert can provide additional evidence, not simply an opinion based on the existing evidence. They, however, rarely tout themselves as such, taking positions at universities. Industry experts can come from unexpected places. They could be retired senior employees of a competitor. They could be with Government agencies involved in the industry. It may, therefore, take some investigation on your part to find an appropriate expert.

³⁸ Discussed further in the context of applying for authorisation as a strategy if informal clearance is refused.

³⁹ Unfortunately, on that occasion, the further submission did not persuade the Commission, requiring the parties to explore other options (which are discussed below).

⁴⁰ paragraphs 4.107 and 4.114 to 4.120 of the 2006 Merger Guidelines



Returning to the Adelaide Brighton matter, an industry expert (if one had existed) may have been able to say to the ACCC that, based on his or her experience in the industry, cement prices in Western Australia were low because of the prospect of cheap imports coming in. An understanding of precisely how incumbents set prices, the sorts of matters they considered and their perceptions of imported product could have backed that up.

Management and business consultants are often useful for identifying the competitive constraints on the merged business. They generally provide this information for the prospectus. The same input can be developed for the Commission.

Industrial economists are expert in applied microeconomics – analysing how markets operate. Their assistance is generally based on the evidence already assembled. Unless they have had previous experience in the industry, they will only opine of matters such as the expected behaviour of rational, profit maximising suppliers in such a market.

8. Timing

The ACCC notes in its Merger Guidelines that the time required to provide an informal clearance largely depends on two factors:

- (a) the nature and complexity of the proposed merger; and
- (b) the extent of co-operation provided by the parties.

There is no question the ACCC will do what it can to satisfy the commercial imperatives of the parties⁴¹; so it is always helpful if the parties are able to share that information with the ACCC.

The ACCC's formal position is set out in paragraph 4.14 of the Mergers Guidelines and is further developed in the 2006 Merger Guidelines.

'At the confidential stage of the proposal, that is where the Commission is unable to make market inquiries, an informal response should be available within [four weeks].⁴² In those cases where it is appropriate to undertake market inquiries, a general guide to the time frame for a Commission decision is:

- *in matters that the Commission is satisfied do not breach the merger [concentration] thresholds, the Commission may inform the parties within [2 to 3 weeks]⁴³ that it does not propose to take any action at that time;*

⁴¹ paragraph 4.56 of the 2006 Merger Guidelines

⁴² paragraph 4.16 of the 2006 Merger Guidelines

⁴³ paragraph 4.47 of the 2006 Merger Guidelines



- *in matters which do appear to breach the merger thresholds, the Commission will usually require [between 6 and 8 weeks]⁴⁴ to make market inquiries and consider the matter; and*
- *in those few major cases which raise very substantial issues and with which the Commission is likely to have a problem, the Commission may take [up to 12 weeks from the start of its inquiries]⁴⁵ to fully consider the matter.'*

If initial market inquiries fail to resolve the ACCC's concerns and it issues a Statement of Issues, this will lead to a subsequent round of public consultation. That consultation will be based primarily on the Statement of Issues.⁴⁶ The timeframe referred to in the third dot point (above) will apply in these circumstances.

In 1996, the ACCC introduced the Mergers Review Committee to consider all but the most complex and contentious mergers. The Committee meets weekly, generally mid-week. This expedited the ACCC's consideration of matters.⁴⁷ Only the more complex mergers now require the consideration and imprimatur of the entire Commission.⁴⁸

As already noted, the extent of cooperation provided by the parties is important. However, delay may be inevitable because the confidentiality of the proposed merger must be protected. The paper discusses above strategies to manage this process. In the experience of the author, this is a point the Commission rarely appreciates, which is evident from the following comment by the Commission in its Merger Guidelines: '...some parties fail to provide timely information, in which case these time frames may be extended'.

Finally, an informal clearance will be delayed if the parties need to provide undertakings (a strategy discussed below). As we note below, the ACCC's practice is to put the proffered undertakings to relevant people in the market before accepting them. Quite apart from that delay (which would be in the order of two to three weeks), there will be the protracted process of negotiating the terms of the undertakings with the ACCC.

⁴⁴ paragraph 4.51 of the 2006 Merger Guidelines

⁴⁵ paragraph 4.53 of the 2006 Merger Guidelines

⁴⁶ paragraph 4.53 of the 2006 Merger Guidelines

⁴⁷ The Committee determines strategies for handling matters. It also focuses on broader merger and sector issues relevant to the Commission's administration of the TPA merger provisions (eg. globalisation issues, undertakings, privatisation processes etc.).

⁴⁸ The Commission includes the Chairperson, Deputy Chairperson and a number of relevant Commissioners.



9. Strategies for overcoming refusal

9.1 Options

Refusal of an informal clearance often means the end of the merger. This emphasises the point that the realising mergers is often an exercise in working with the Commission.⁴⁹

Merger parties nevertheless potentially have a number of options open to them if the ACCC refuses to grant an informal approval of their merger. These options are as follows:

- (j) accepting the Commission's assessment of competition, and:
 - (i) offering section 87B enforceable undertakings; or
 - (ii) lodging an application for authorisation; or
- (k) challenging the Commission's assessment of competition by:
 - (i) applying to the Court for a declaration that the proposed merger would not breach section 50 of the TPA; or
 - (ii) completing the transaction and meeting any challenge by way of an interlocutory application.

Most clients will at least explore the possibility of offering undertakings to the ACCC. The other strategies are also real options; they have been used and used successfully. They are, however, reserved for the more important mergers. This is particularly the case if merger parties were to challenge the Commission's assessment of competition and the merger. This is a strategy not only reserved for the most important of mergers, but also the strongest of clients.

9.2 *There is no judicial review*⁵⁰

As a preliminary point, it must be noted that the ACCC's decision to refuse informal clearance is not reviewable judicially. First, the *Administrative Decisions (Judicial Review) Act 1977* does not apply. Under that Act, the Federal Court can review only decisions of an administrative nature made under an enactment.⁵¹ The difficulty for informal clearances is the lack of any statutory legitimacy. It is, therefore, not a 'decision' – even if it could be characterised as administrative in character – made under an enactment.

⁴⁹ This was a point made by Tim Bednall of Allen Allen & Hemsley, Sydney at the Law Council Macquarie Bank Corporation Law and Corporations Law Workshop.

⁵⁰ These were points made by Ms Sharon Henrick of Mallesons Stephen Jaques, Sydney in her commentary on this paper at the Law Council Macquarie Bank Competition Law and Corporations Law Workshop.

⁵¹ Section 5 of that Act only allows the Court to review decisions

...of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment...



More importantly, the Commission is not bound by the common law principles of procedural fairness when considering an informal clearance application. Procedural fairness requires the decision-maker to give the person affected a right to be heard. There must be no bias. Finally, the decision must be based on logically prohibitive evidence.⁵²

The High Court set out the test for the application for procedural fairness principles in *Kioa v West* (1985) 159 CLR 550.⁵³ Mason J stated it as follows:

*'The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'*⁵⁴

An informal clearance is an indulgence granted by the ACCC. As noted earlier in this paper, by providing an informal clearance, the Commission is merely saying that it does not intend to intervene in the proposed transaction because it has formed a view that it will not breach the law. By its very nature, the application could not be said to have any reasonable expectations. Moreover, there are no rights or interests affected.

9.3 Enforceable Undertakings

(a) Introductory points

Since 1993⁵⁵, the ACCC has been able to accept written undertakings and, where those undertakings are not satisfied, have them enforced by court order. These undertakings can be used to overcome the Commission's concerns about a merger by addressing the impediments to competition continuing. This author would normally advise a purchaser experiencing difficulties obtaining an informal clearance to consider this as an option. The Commission is happy to receive and consider proposed undertakings at any stage in its consideration of the acquisition.⁵⁶

⁵² Section 3 of the AD(JR) Act, defining 'decision to which this Act applies' – the phrase used in section 5.

⁵³ Allars, M. 1990, *Introduction to Australian Administrative Law*, Butterworths, Sydney, para 6.1 recently applied in *T v Medical Board of South Australia* [1999] SASC 402, unreported decision of the South Australian Supreme Court, delivered on 5 November 1999 by Justice Martin.

⁵⁴ In the same case, Deane J formulated the rule as follows:

In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural justice or procedural fairness. Per Deane J (para 9)

⁵⁵ Section 87B was introduced by the *Trade Practices Amendment Act 1992* (Act 222 of 1992).

⁵⁶ paragraph 4.79 of the 2006 Merger Guidelines



Section 87B undertakings fall into two broad categories:

- (i) structural undertakings – undertakings that affect the structure of the market; and
- (ii) behavioural undertakings – undertakings that modify the behaviour of the parties post-merger.

The ACCC has indicated that it will not accept behavioural undertakings, given the difficulties of enforcement and the resources required to monitor behaviour.⁵⁷ The Commission’s Guidelines on Section 87B Undertakings put it as follows:

The Commission is likely to look most favourably on proposed undertakings that address structural issues in the relevant market(s). Structural solutions provide a basis for the continuing operation of competitive markets. The regulatory costs are one-off, rather than a permanent burden. For example, divestiture of particular divisions of the merged company may remove competitive concerns from the merger, while leaving it an attractive proposition for the parties.⁵⁸

There have been examples of the ACCC accepting a combination of behavioural and structural undertakings⁵⁹, suggesting that, in the right case, behavioural undertakings could be considered.

Any undertakings proffered to the Commission – whether they are structural or behavioural – must be directed towards the nature of

⁵⁷ Paragraph 7.9 of the Merger Guidelines.

⁵⁸ ACCC 1999, op cit, p.9.

⁵⁹ The following is an example of where the Commission accepted the most complex of behavioural undertakings. In 1999, Service Corporation International Australia (SCIA) wanted to acquire control of the only crematoria in Newcastle and the surrounding areas. The ACCC’s concern was that SCIA may take advantage of its monopoly position in the provision of cremation services. In order to address the ACCC’s concerns, SCIA gave the ACCC an undertaking that:

- (i) for three years or until a competitor enters the market, SCIA will operate the Beresfield Crematorium and Memorial Park crematorium separately to SCIA’s funeral directing business;
- (ii) ensure that no advantage be given to SCIA funeral directing businesses which is not given to non-SCIA funeral directing businesses in terms of price offered, discount rebates, access to crematoria, booking times and facilities;
- (iii) no details of next of kin will be used in any way by SCIA for the purposes of selling pre-paid funerals;
- (iv) there will be separate management and staff of the crematoria and SCIA funeral directing; and
- (v) SCIA must notify the Newcastle community through a ½ page advertisement of its ownership of those funeral directing businesses.

Finally, SCIA must engage an accounting firm to conduct an independent audit to attest to SCIA’s compliance with the undertakings. SCIA also agreed to provide the Commission with copies of the audit reports within two weeks of their receipt.



concerns expressed by the ACCC. Assume the ACCC's concern is the access of independent operators to supply. Generally, the following are the types of undertakings the ACCC will accept to cure that difficulty:

- (i) selling production/distribution facilities;
- (ii) granting access to facilities; or
- (iii) guaranteeing supply at agreed prices.

Each of these options is discussed below.

(b) Undertakings to sell assets

There are a number of examples of where undertakings to sell assets have sufficiently remedied the anti-competitive aspects of a merger for the ACCC to provide an informal clearance. Ampol's merger with Caltex was probably the most public. After examining the proposed merger, the ACCC reached the conclusion that it would have the effect of substantially lessening competition in various petroleum markets. Of particular concern to the ACCC was the likely impact of the merger on independent distributors and retailers. It was concerned that these independents were likely to be squeezed out of the industry, reducing competition and increasing prices and profits for the large oil companies.

The Undertakings Caltex and Ampol offered specifically addressed the issue the ACCC raised. They offered undertakings that provided for the sale of import, storage and retail sites, with guaranteed supply of petrol at a competitive price during a transition phase. These undertakings provided a structural underpinning for independent operators to continue to play a competitive role in petrol markets. The ACCC accordingly accepted the undertakings (after considerable negotiation) and cleared the merger.⁶⁰

Often, the Commission expresses concerns that an applicant could purchase further assets and facilities in the market. There have been numerous cases where 87B undertakings have formed a guarantee that the acquirer will not do so unless it first informs the Commission. Where further acquisitions – rather than the current acquisition – is of concern to

⁶⁰ As another example, in 1998, Goodman Fielder Limited wanted to acquire Bunge. The Commission's market inquiries determined that the proposed acquisition was likely to substantially lessen competition in the supply of flour in the south east Australian flour market, the Western Australian flour market and the Queensland flour market. In order to address the Commission's competition concerns, Goodman Fielder undertook to divest itself of the Albion flour mill located in Queensland, the Newport flour mill located in Victoria and the Byford flour mill located in Western Australia. The Commission accepted the undertakings; however, Goodman Fielder was required to sell the flour milling assets during an initial sale period of 6 months from the date the flour mills were advertised for sale. If no purchasers were found during the Initial Sale Period, Goodman Fielder was required to appoint an approved person within three weeks of the expiration of the Initial Sale Period to sell the flour milling assets.



the Commission, this type of undertaking often secures an informal clearance.⁶¹

(c) Undertakings guaranteeing supply

Sale undertakings could alternatively have been structured behaviourally. For instance, the purchaser could have undertaken to ensure:

- (i) supply of petroleum ex refinery to independents on a non-discriminatory basis; and
- (ii) pricing is fixed by a formula based on prices charged to major oil companies (increasing it by a factor of the differential between the pre-merger prices to independents and major oil companies).

Consistent with the Commission’s policy favouring structural undertakings, similar undertakings were unsuccessfully proffered in a 1999 merger, the details of which remain confidential. Unfortunately, in that case, it was not possible to recast them in a structural form.

There is, however, potential for a strategy based on behavioural undertakings. The Commission accepted undertakings from Smorgon Steel Group Limited in February 2000 that were not dissimilar from those set out above, clearing the way for Smorgon to acquire Metalcorp Limited.⁶² Smorgon was a steel maker. Metalcorp processed and supplied scrap steel used for steel making. The ACCC conducted market inquiries and, on the basis of which, formed the view that the vertical integration implicit in the acquisition would have the power to increase prices of steel scrap to small, independent foundries. This would compromise the ability of these foundries effectively against Smorgon.

Smorgon offered undertakings to supply scrap steel to foundries in Queensland and New South Wales at prices calculated on the following formula:

Prices were to reflect no greater premium over prices for standard grades of ferrous scrap than the premium paid by Metalcorp’s customers in Queensland and New South Wales in 1998 and 1999.

The Commission accepted the undertakings, granting Smorgon informal clearance.⁶³

⁶¹ Toll Transport’s acquisition of the Port of Geelong is an example of these undertakings. This case is discussed below, in the context of access undertakings.

⁶² Matter no. D00/6076.

⁶³ Similarly, on 30 June 1998 Sigma announced its intention to make a takeover offer for Allied Master Chemists of Australia Limited (AMCAL). The Commission undertook market inquiries and formed the view that the proposed acquisition would be likely to substantially lessen competition in the market for the supply of pharmaceutical products and services in Victoria if



In December 1998, the ACCC refused informal clearance to Waratah Towage Limited to acquire Hunter Towage Services and tug *Ballina* from BHP Transport. It formed the view that the acquisition would adversely affect the market for towage services in the Port of Newcastle. Within six months⁶⁴, the Commission and Waratah had agreed on acceptable undertakings to resolve the Commission concerns. The undertakings were that Waratah would not increase tariff rates for harbour services beyond a specified amount, it would maintain existing discounts and rebates, it would not introduce new charges for towage services, and it would not increase existing charges for towage services. Waratah also agreed to provide the ACCC with an annual audit report by an auditor nominated by the ACCC.

These cases appear irreconcilable. All three involved behavioural undertakings. The Smorgon case involved the access of a group of customers to supply at a reasonable price. In a not dissimilar way, the case in which the Commission refused to accept undertakings concerned access of independent competitors. The apparent lack of consistency highlights the fact that the Commission examines each merger on its merits and accepts undertakings where, on the facts of the particular merger, the Commission believes its concerns will be overcome. That creates both difficulties and opportunities for parties approaching the Commission.

(d) Access undertakings

The nature of access undertakings under Part IIIA of the TPA is now well known. These are not the access undertakings anticipated in the Commission's Guidelines.⁶⁵ The access undertakings offered to obtain informal clearance are generally somewhat less formal and less prescriptive.

In 1999, Toll Transport Limited was to acquire the Port of Geelong. The Toll Group at that time already owned the Port of Hastings. The Commission therefore formed the view that the acquisition would substantially lessen competition. The Commission's concern was the access of other port users to the port facilities.

The ACCC granted an informal clearance of the acquisition after Toll Transport offered these undertakings:

AMCAL members were not permitted to continue acquiring pharmaceutical goods and services from their preferred wholesaler. The Commission informed Sigma that it would not intervene in the proposed acquisition if Sigma agreed to provide an undertaking that it would not, for a period of 3 years, impose any restriction on the ability of AMCAL members to obtain the relevant products and services from their preferred wholesaler.

⁶⁴ Undertakings were accepted on 17 June 1999.

⁶⁵ ACCC 1999, op cit, p.9 and Section 7 of the Merger Guidelines.



- (a) an undertaking to not hinder or prevent the operator of any business using or intending to use the Port of Geelong for the purposes of which the port is normally used; and
- (b) Toll Transport will not oppose installation on reasonable conditions of one or more dry bulk unloaders at the Port of Geelong.⁶⁶

An important point for the Commission was to ensure that the company did not buy any further port assets. Toll Transport, therefore, undertook not to acquire ownership of any interests in South Australia, Victoria, New South Wales ports or port facilities⁶⁷ without first giving the ACCC reasonable notice in writing.

Westpac's takeover of the Bank of Melbourne was another example of access undertakings used to overcome the Commission's competitive concerns and obtain an informal clearance. These undertakings are discussed further below as a case of the Commission demanding undertakings that go beyond merely overcoming competition concerns.

(e) Section 87B risks

There are two principal risks inherent in offering section 87B undertakings in order to secure an informal clearance:

- the first is timing; and
- the second is the scope of the undertakings the Commission will demand before granting informal clearance.

(i) Timing

The ACCC will test the efficacy of all proffered undertakings by conducting further market inquiries. In its Merger Guidelines, the Commission states as follows:

*The Commission will need to assess the competitive significance of the undertakings, and at the same time inform itself as to the requirements necessary to make the undertakings practical and workable. The Commission will also want to assess the impact of the proposal on third parties...*⁶⁸

If the difficulty is the position of independents in the market, amongst others, the ACCC will seek the views of the existing

⁶⁶ Toll Transport also undertook to notify the ACCC of any proposals of others acquiring any interest in the port and any proposals to change the proportion of equity interest by member of the consortium. Finally, there was an undertaking to notify the ACCC where Geelong Port ceases to be the operator or other acquires shareholding in Geelong Port.

⁶⁷ Where turnover is over \$500,000 pa, or likely to be over \$500,000 in the first year.

⁶⁸ Paragraph 7.22 of the Merger Guidelines and ACCC 1999, op cit, p.11.



independents. Vociferous opposition by independents at this stage is likely to mean an ACCC refusal.

Clients should be aware that attempting to resolve difficulties in the informal clearance process by offering undertakings will involve delay. Seeking views on undertakings will take at least a further month. That is in addition to the time it takes to settle the undertakings with the Commission. As discussed in the next section, considerable negotiation may be involved in getting undertakings to an acceptable state, all of which takes time.

(ii) Scope

The other risk inherent in attempting to secure an informal clearance by offering section 87B undertakings is the scope of those undertakings. Negotiating undertakings with the Commission is an exercise in 'horse trading'. Unfortunately, the Commission is the only one in town buying horses. Despite the Commission stating that:

[t]he test [of the scope of undertakings the Commission will normally accept] will be whether the arrangements envisaged by the proposed undertakings will address the reduction in competition,⁶⁹

there have been many instances where the undertakings the Commission extract, instead of merely addressing its competitive concerns, engage in social engineering.⁷⁰ The problem is that the Commission often confuses its various roles – particularly the role of industry regulator and that of an enforcement agency.

Westpac's 1997 takeover of the Bank of Melbourne is a case in point. Many of the undertakings dealt with matters that had nothing to do with the competitive impact of the takeover. The Commission's assessment of the competition effects of the takeover was based on state markets for certain financial services. The Commission nevertheless required Westpac to afford access to national and international EFTPOS and ATM systems. The Commission also mandated opening hours for certain Bank of Melbourne branches, a matter that was wholly irrelevant to competition – indeed, it compromised the autonomy at the heart of open competition.

Probably the best illustration of the Commission's attempt to socially engineer this market according to Bednell was the undertaking granting third parties access to Westpac's automatic

⁶⁹ ACCC 1999, op cit, p.10.

⁷⁰ The examples discussed in this section were provided by Mr Tim Bednell of Allen Allen & Hemsley.



teller machines (**ATM**) and electronic funds transfer (**EFTPOS**) systems.⁷¹ These undertakings applied to entities that did not necessarily satisfy the Reserve Bank's prudential requirements. Indeed, a number had already failed to gain access by normal commercial means. This demonstrated that.

Caltex's acquisition of Ampol was another example on point. In that case, the ACCC insisted that the parties release vendors of businesses they had previously acquired from restraint of trade obligations, to the extent that they exceeded five years. This affected only one vendor, well known to the ACCC. It had been well compensated for an enforceable 10 year restraint over five years previously. The parties were not entitled to recoup any of the consideration paid to that vendor.

This undertaking had no impact on the competition effects of the merger.

The tendency of the ACCC to seek these undertakings must, however, be seen in context. The parties generally recognise that the ACCC seeks to utilise its position in these situations, but the cost of giving these undertakings is invariably less than the benefits of the merger proceeding. The parties are, therefore, happy to give these undertakings to ensure that the merger proceeds. Bednell, nevertheless, concludes that the parties' willingness does not justify the ACCC seeking these undertakings.

9.4 Authorisation application

Where section 87B undertakings fail to secure informal clearance, lodging an application for authorisation is a viable alternate strategy. It should be noted that most clients are unlikely to embrace this option enthusiastically. Generally, the public nature of authorisations⁷² and is a disincentive to most clients pursuing authorisation. Much depends on the importance of the acquisition to the business.

Since 1 January 2007, the Australian Competition Tribunal has jurisdiction in this area. It will authorise a merger under section 95AT(1) of the TPA where it:

- (a) is likely to substantially lessen competition; but
- (b) will nevertheless result in benefits to the public that outweigh the competitive detriment.

If the ACCC refused to grant informal clearance, it is because it is at least concerned that the proposed merger will substantially lessen competition. Indeed, it may have concluded that the proposed merger will substantially lessen

⁷¹ Subject to certain conditions.

⁷² Under section 95AY, the application for authorisations must be published on the ACCC's website (Public Register), subject only to confidentiality orders under section 95AZA.



competition. The outstanding question is, therefore, whether the proposed merger is at all beneficial to the public and, if so, to what extent. That will be a question for the Tribunal.

In *Re: ACI Operations Pty Ltd*⁷³, the ACCC listed the following matters, which, in its opinion, could constitute public benefits:

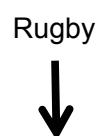
- (a) economic development, such as encouragement of research and capital investment;
- (b) fostering business efficiency, particularly where it results in improved international competitiveness;
- (c) industrial rationalisation, resulting in more efficient allocation of resources and in lower or contained unit production costs;
- (d) expansion of employment or prevention of unemployment in inefficient industries;
- (e) employment growth in regional Australia;
- (f) promotion of industry cost savings, resulting in contained or lower prices at all levels in the supply chain;
- (g) development of import replacements; and
- (h) growth in export markets.

The Tribunal has suggested that anything of value to the community generally is a public benefit. This includes any contribution to the aims pursued by society, particularly the achievement of the economic goals of efficiency and progress.⁷⁴

In 1999, to pursue its acquisition of Cockburn Cement, Adelaide Brighton Limited adopted an authorisation strategy after initially failing to obtain an informal clearance from the ACCC. The proposed transaction comprised two, inter-dependent aspects:

- (a) Adelaide Brighton was to acquire Cockburn Cement, the leading supplier of cement in Western Australia; and
- (b) Cockburn's ultimate holding company, Rugby plc, would acquire Adelaide Brighton,

resulting in the following vertical structure:



⁷³ (1991) ATPR (Com) 50-108.

⁷⁴ *Re: Queensland Co-Operative milling Association* (1976) ATPR 40-012 at 17,242.



After conducting limited market inquiries, the Commission concluded that the transaction would have an anti-competitive effect in the Western Australian market for cement. Its concern was that independent concrete producers were less likely to obtain supplies of cement at competitive prices.

During the informal clearance process, it was argued that the merger would not substantially lessen competition because import competition would remain an important competitive constraint. There was evidence that local prices were low compared with the rest of the country. Even after conducting market inquiries, however, the Commission was not convinced that the evidently low prices were the result of the prospect of imported product coming from south east Asia.⁷⁶ The transaction involved the largest and second largest cement producers merging. The Commission was concerned that the low local prices were a function of rivalry between these companies. It was on that basis that the ACCC refused informal clearance.

Adelaide Brighton lodged an application for authorisation, identifying public benefits that included:

- (a) the increased independence of Adelaide Brighton, having a positive effect on competition in all Australian states;
- (b) access to Rugby's⁷⁷ international experience and financial strength, improving Adelaide Brighton's competitiveness in the Australian cement industry; and
- (c) greater efficiency through the rationalisation of Cockburn Cement and Adelaide Brighton in both Western Australia and Geelong, lowering the unit production costs and, thereby, improving Adelaide Brighton's competitiveness.

The Commission – which adjudicated authorisations at the time – accepted that these were benefits and that they outweighed the competitive detriment it had

⁷⁵ Adelaide Brighton Cement Limited operated Adelaide Brighton's cement business.

⁷⁶ The amount of product historically imported was relatively small. ABL argued that the threat of imports increasing was real and it was this threat that forced incumbents to price low. That price was at import parity.

⁷⁷ The transaction also involved Cockburn's holding company, Rugby International plc, acquiring Adelaide Brighton.



identified in its market inquiries. The ACCC granted Adelaide Brighton authorisation on 30 April 1999.⁷⁸

9.5 ***Appeal from the Australian Competition Tribunal***

If the Tribunal refuses authorisation, the parties have the option of seeking a review of that decision in the Federal Court. This would be a judicial review on administrative law grounds. Its benefits are therefore questionable.

9.6 ***Seeking a declaration***

If the ACCC refuses informal clearance, the purchaser also has the option of making an application to the Federal Court for a declaration. Unlike the strategies of negotiating undertakings with the Commission and seeking authorisation from the ACCC, applying for a declaration and the last strategy to be discussed, completing the transaction without informing the Commission, involves the parties (and the purchaser in particular) challenging the Commission's view of the market and competition. The parties are effectively backing their own judgment that the merger will not substantially lessen competition. That is something few clients are willing to do.

There are, however, a number of problems with this approach.

- (a) First, seeking a declaration is a fairly confronting strategy. Clients need to assess whether antagonising the Commission by adopting this approach is worth the anticipated result.
- (b) As is the case with applications to the Tribunal, seeking a declaration will take time. There is virtually no prospect of obtaining an interlocutory declaration. The Court will want to examine the substantive issues before granting a declaration. Even if the parties agreed to an expedited hearing, such an application would take between six to nine months. That would kill most acquisitions commercially.

In one of the few cases where this strategy has been adopted, AGC effectively challenged the ACCC to acquire an interest in the Loy Yang Power Station.⁷⁹

9.7 ***Proceeding to completion***

The final option is for only the strongest of clients. Proceeding to completion after the Commission has refused informal clearance invites it to issue proceedings, seeking urgent relief. In a hearing for interlocutory relief, the ACCC merely needs to show that there is a serious question to be tried.⁸⁰ That should not present the ACCC with insurmountable problems. It must also show that the

⁷⁸ *Adelaide Brighton Limited* (1999) ATPR (Com) 50-272.

⁷⁹ *ACCC v AGL* [2003] FCA 525.

⁸⁰ *American Cyanamid Co v Ethicon Ltd* (1975) AC 396, per Lord Diplock.



balance of convenience is in favour of granting such an order. That may be problematic.⁸¹

The Commission's difficulty in showing the balance of convenience is in its favour is the only attraction of this approach. Moreover, there are strategies the merger parties can adopt to make the balance of convenience to be more likely in favour of not granting relief. The Santos case illustrates the point. As noted above, that case involved the South Australian Government's privatisation of its gas company, Sagasco Limited. The Commission⁸² issued proceedings, seeking interlocutory orders to prevent Santos Limited acquiring the company.

Justice Heerey refused the Commission's application on the balance of convenience.⁸³ His Honour considered that a number of points supported not granting relief. They included the existence of rights that would have been affected by an interlocutory injunction:

- (a) the right of the Government to obtain the best price possible when privatising its assets;
- (b) the legitimate rights and expectations of shareholders of Santos that its Board would seek to develop and expand the company's business; and
- (c) the general right to invest and trade freely in the securities of public listed companies – including the right to make and accept takeover bids that comply with the Corporations Law.

Heerey J recognised that there was an interest of the public in protecting competition. His Honour nevertheless, on balance, found for the respondents.

The critical factor in this case was the undertakings Santos offered to the Court to quarantine the Sagasco business if its takeover offer was successful. The undertakings Santos offered were as follows:

Santos undertakes to the Court that, if it becomes entitled to 20% or more of the issued share capital in Sagasco, until the final determination of the proceedings, unless it has the leave of the Court, it will not take any steps:

- (a) *subject to paragraph 2, to change the composition of the board of directors of any company in the Sagasco Group;*
- (b) *to terminate, relocate or otherwise affect the employment of persons employed within the Sagasco Group;*

⁸¹ cf *Trade Practices Commission v Rank Commercial Limited & Ors* (1994) ATPR 41-324.

⁸² The Trade Practices Commission, as the ACCC was prior to 1995.

⁸³ Re: Trade Practices Commission and: Santos Limited and Sagasco Holdings Limited No. VG377 of 1992 FED no. 791.



- (c) *to affect the separate existence of each member of the Sagasco Group;*
- (d) *to change the memorandum or articles of association of any member of the Sagasco Group; or*
- (e) *to intermingle the assets of the Sagasco Group with assets of the Santos Group.*

Quarantining the business in this way made divestiture orders an effective redress if the Court ultimately held the merger substantially lessened competition. Interlocutory relief was, therefore, unnecessary, shifting the balance of convenience away from granting such relief.

10. Conclusions

The ACCC's offer of informal clearance gives most companies sufficient comfort to proceed with mergers and acquisitions. The process raises two important issues for companies wanting to proceed with a transaction through:

- (l) the time it takes for the Commission to reach a decision; and
- (m) what can be done if the Commission refuses to grant informal clearance.

This paper discusses strategies merger parties can adopt to ensure the process through the Commission (particularly its market inquiries) is as efficient as possible. It also discusses the options merger parties have in the event the Commission refuses to grant informal clearance. An initial refusal may be cured by the purchaser offering appropriate undertakings. It may be that informal clearance is no longer an option. The merger parties will need to consider whether the deal is dead. If the merger is important enough, the purchaser can apply for authorisation. Theoretically, the purchaser could challenge the Commission in the Federal Court. Much depends on the steel of the purchaser, the importance of the deal and its time constraints.