

# Proposed reforms to the informal merger review process in Australia

In December 2005, the Australian Competition and Consumer Commission (ACCC) issued its *Merger Review Process Guidelines: Draft for Comment* ("Draft Guidelines").

Public submissions from interested parties have closed and the release of finalised guidelines by the ACCC is keenly anticipated in the upcoming month or so.

## Current system

There is currently no mandatory merger notification process in Australia and no formal clearance process. The Federal Government is attempting to introduce a formal system, but the Bill was blocked by the Australian Senate and its status is currently unclear.

Parties under the current system can apply for informal merger clearance from the ACCC. The practical effect of merger clearance is to permit a proposed merger to proceed without any opposition or legal challenge from the ACCC. The clearance of a merger by the ACCC does not amount to immunity or exemption from legal action by the ACCC or a third party. In practice, however, it is rare for a third party to take action in relation to the approval of a merger that was the subject of an ACCC informal review, although recently, in a matter in which this firm was involved, a target applied to the Federal Court to set aside a decision by the ACCC to accept undertakings by a bidder which were the basis of the ACCC clearance (the legal challenge was withdrawn before being heard by the Federal Court).

In October 2004, the ACCC released the first version of the Informal Review Guideline. The principal aim of the Informal Review Guideline was to make the process of informal merger clearance more transparent and the ACCC more accountable. In summary, the introduction of the Informal Review Guideline resulted in the:

- establishment of indicative review timeframes, including the clear articulation of the assessment process used by the ACCC
- establishment of a new public register
- articulation of the ACCC's information requirements from applicants in relation to informal merger assessments
- identification of the circumstances in which the ACCC will publish:
  - a. Statements of Issues inviting comment on its stated concerns regarding a proposed merger.
  - b. Public Competition Assessments providing details of its reasons for a decision in relation to a proposed merger of significant interest.

These measures were all designed to make the ACCC more accountable and the process of informal review more transparent for applicants.

## Reform of the current system

The release of the Draft Guidelines was done to further fine-tune the systems and processes implemented under by the ACCC under its Informal Review Guideline. The principal aim of the Draft Guidelines is to improve the timeliness and efficiency of the ACCC's merger review process and to remove any remaining ambiguities from the current process. Consequently, the majority of the changes proposed in the Draft Guidelines are essentially "administrative" in character, with the core features of the current system being retained.

The Draft Guidelines propose the following key amendments:

- expansion of the types of mergers (including confidential proposals) for which processes are detailed in the Draft Guidelines, and clarification as to what process applies to the different types of mergers that the ACCC will review. In particular, the Draft Guidelines propose confidential and non-confidential review categories, with non-confidential merger reviews further split into "basic" and "comprehensive" review categories;

- new classifications for the various merger reviews undertaken by the ACCC. Whereas the ACCC considers that only limited market inquiries (if any) are necessary for "basic" reviews, the ACCC will conduct more extensive market inquiries before expressing a view in relation to a "comprehensive" review.
- clearer and shorter timelines for informal reviews. As part of a "comprehensive" review, the ACCC will review the proposed merger in two phases. Review under Phase 1, which will involve the making of market inquiries, the assessment of market enquiries and the consideration of the proposal by the Merger Review Committee, is forecast to take six to eight weeks. Review under Phase 2, which will only result if the ACCC believes the proposed merger raises serious competition concerns and will entail the ACCC conducting a further investigation into the proposed merger, should be completed within 12 weeks of the beginning of a Phase 1 investigation; and
- an opportunity for merger parties and interested parties to provide a right of reply to an ACCC Statement of Issues and publication (subject to limitations) on the ACCC website.

Recently, the Chairman of ACCC announced in a speech at an IBA Antitrust Conference in Sydney that the Commission is prepared to accept behavioural undertakings in clearing mergers in some cases, particularly if there are "structural" (divestment) undertakings involved.

## Comment

Though it remains to be seen whether the Draft Guidelines will be adopted in their entirety, it is submitted that increasing the timeliness of the current system is a welcome move. So too is the setting out of the types of information business is required to provide to the ACCC when it conducts an informal merger review.

Significantly, while the Draft Guidelines do retain the confidential and non-confidential merger review categories adopted in the Informal Review Guideline, the further division of non-confidential mergers into "basic" and "comprehensive" review sub-categories provides greater certainty for business.

The proposed introduction of "indicative timelines" also promises to provide business with greater commercial certainty. For the first time not only will merger parties and third parties be required to meet submission deadlines, but the ACCC will be required to meet its own target dates. As such, these "indicative timelines" will serve to increase the timeliness of the merger review process and ultimately the accountability of the ACCC.

The Informal Review Guidelines can be accessed at:

<http://www.accc.gov.au/content/index.phtml/itemId/589109/fromItemId/6204>

The Draft Guidelines can be accessed at:

<http://www.accc.gov.au/content/index.phtml/itemId/719293/fromItemId/6204>

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