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Briefing note August 2016

Will the Harper-proposed merger authorisation reforms be the 'authorisation' of a less effective merger control regime?

The Government is expected to shortly release exposure draft legislation implementing the Harper Review reforms which it supports. One of the key areas of reform will be in relation to the Australian antitrust merger control regime. The Government agrees with the Harper Review's recommendation to merge the currently separate merger authorisation and formal merger review processes, and vest the Australian Competition and Consumer Commission (ACCC) with first instance decision making powers.

However, could there be an unintended and concerning consequence of this change – namely, the removal of an effective and, perhaps, the only practical, alternative review mechanism and constraint on the ACCC's decision making powers in the informal merger review process?

Overview

The Government is expected to shortly release, for public consultation, its exposure draft legislation implementing those of the Harper Review reforms it supports.

The proposed reforms will touch on all aspects of the current Australian competition law regime.

One of these areas of reform is in relation to the Australian merger control regime. While the Government acknowledges that the current *informal* merger regime is working effectively overall, it has supported the Harper Review's recommendation to combine the previously separate *formal* merger and merger *authorisation* processes and vest the ACCC with the responsibility for deciding both these types of applications at first instance. This would end the role

Key issues

- Merger authorisations are increasingly being seen as an effective alternative review process and therefore a practical constraint on ACCC decision making. This is especially important where the ACCC's informal merger review decisions are not otherwise subject to formal review procedures.
- Merger review processes need to be commercially timely, transparent and provide merger parties with certainty in relation to process. They should also provide a judicial review mechanism for the usual 5-8% of mergers that are complex and require close assessment.
- The Harper Review-recommended reforms, which have been supported by the Government, would reintroduce the previous 'two-step' process for merger authorisations by reinstating the ACCC as first instance decision maker for authorisations and providing the Tribunal with an appellate role.
- This could have a detrimental impact on the existing efficiency of the Australian informal merger review regime unless the Government's reforms recognise the practical oversight and 'check and balance' provided by the Tribunal in its current processes.

of the Australian Competition Tribunal (**Tribunal**) as the first instance decision maker for merger authorisations and an alternative review mechanism for informal merger clearances which the ACCC has opposed or advised the merger parties it will oppose. The reforms will instead vest the Tribunal with appellate responsibilities only (in addition to its existing appellate role for formal merger review decisions).

While it is generally accepted that the current informal merger process works relatively well, it is arguably the existence of a timely and separate merger authorisation process carried out by the Tribunal which is a key reason for this success. That is, in the 5-8% of Australian merger control matters which are difficult and complex and where merger parties disagree with the ACCC's assessment, there needs to be the availability of a timely and transparent merger review process that provides a constraint on the ACCC's informal review process. While the never-used formal merger review process does not provide such a constraint, timely decisions by the Tribunal have done so.

Without significant care and commercial consideration, the proposed authorisation reforms may add complexity and possibly longer delays between an initial application (whether it be initially via an informal review or authorisation process) and final decision. In many cases it is the review by a body separate to the ACCC which is valued by merger parties, and, post-reforms, access to this separate body will only be available after going through another first instance process with the ACCC. This extra step could thereby have the unintentional consequence of undermining the utility and practicality of the merger authorisation process and thereby, in turn, the ACCC's accountability in its informal merger decision-making process.

Accordingly, the Government's proposed reforms need to be mindful not to eliminate what is operating as a practical constraint on the informal merger review process by providing merger parties with an alternative review pathway. This constraint assists in ensuring the efficacy of the informal merger review process, particularly for difficult matters.

The existing framework

Currently, the Australian merger control regime consists of three main routes to a decision; (i) informal review; (ii) formal review; or (iii) merger authorisation.

Both formal and informal merger clearance applications are determined by the ACCC and are based on the 'substantial lessening of competition' (**SLC**) test, ie is the merger likely to result in an SLC. The formal review process has not to date been used due to the availability of the simpler, more flexible and generally quicker path available in the form of an informal merger review process.

Although informal merger reviews do not provide statutory immunity from prosecution by the ACCC or from third parties, which a formal review decision does, the ACCC will provide a letter of comfort to the acquirer stating that it does not intend to oppose the merger and merger parties generally consider this letter to provide the requisite level of certainty.

Formal merger review decisions can be reviewed on appeal by the Tribunal but informal merger review decisions have no appeal avenue and merger parties have to seek a declaration in the Court or proceed knowing the ACCC will likely seek an injunction which the parties will then have to fight in court.

Merger authorisation applications are currently made to the Tribunal. The test applied to a merger authorisation application is a 'public benefits' test – ie will the benefits to the public of the merger outweigh the likely anti-competitive detriment – and is therefore a broader test than the SLC test that is applied by the ACCC. Merger authorisation decisions can only be the subject of judicial review by the Federal Court (a review on questions of law, not on the merits).

Informal merger clearances are generally made within 6-12 weeks of notification. Formal merger reviews have a statutory timeline of 40 business days (8 weeks) which can be extended by 20 business days (4 weeks). Merger authorisations have a statutory deadline of 3 months, which can be extended in cases of particular complexity or other special circumstances. However, to date the Tribunal has been very commercial and sought to ensure authorisations are heard and decided in very short timeframes.

Merger authorisation track record

Since the introduction of the existing merger authorisation process in 2007, it has been used three times; ie Murray Goulburn (which was ultimately withdrawn as the target was likely to be acquired by a third party), AGL and Sea Swift.[1] Both the AGL and Sea Swift applications were decided in favour of the merger parties and were both decided within the three month statutory time period. The applications followed opposition decisions made by the ACCC via the informal review path.

Prior to 2007, the merger authorisation process was similar to what has been proposed by the Harper Review; ie merger

authorisations were determined at first instance by the ACCC with a right of appeal to the Tribunal. In contrast to the current system, the merger authorisation process resulted in only one authorisation subject to undertakings at first instance (ie by the ACCC) [2] and one authorisation on appeal to the Tribunal, out of a total of five applications made in the period 1995 to 2007.[3]

The previous system was generally considered a lengthy and unattractive process due to the 'two-step' process and the perception of ACCC confirmation bias (after having usually already opposed the merger under the informal review path). In 2003, after noting the general "*dissatisfaction with the authorisation process*", the Dawson Review[4] recommended the process be replaced by the one we have now, to "*greatly reduce the time taken in considering an application for authorisation ... [and] meet the perception of some parties that the ACCC is not able to look afresh at authorisation applications based upon public benefit because of its previous consideration of the effect, or likely effect, ... on competition*."[5]

Caution is needed to avoid undermining the benefits of the current merger authorisation process

The informal merger review process is considered to be generally efficient and effective, compared to reviews conducted in other jurisdictions. The informal nature of the review including the lack of prescribed merger forms, prescribed time periods or obligations on the ACCC to produce detailed reasons for each decision, are key factors in its relative timeliness.

However, for the more complex mergers it is important that there be other avenues for merger parties to pursue when faced with a controversial and unfavourable informal merger decision by the ACCC.

Due to their relative timeliness, merger authorisations are being increasingly viewed as the most practical route to take when faced with an unfavourable informal merger decision, where the merger arguably gives rise to efficiencies or other public benefits.[6] The other options, ie obtaining a declaration in the Federal Court or commencing a formal merger review, are comparatively unattractive due to the time involved and evidence required.

The practicality and timeliness of the process before the Tribunal saw AGL 'shoehorn' a SLC argument into its merger authorisation, where public benefits included such things as the benefits to the State of receiving a price for the generation assets which reflected their retention value, the investment by AGL in the assets and the more efficient operation by AGL of the assets which in turn was claimed would enable AGL to better compete in the retail market.

The recent successful application of the merger authorisation process since its introduction in its current form only serves to strengthen the informal merger process and provide comfort in the overall system where there might otherwise be discomfort due to the difficulty of litigating mergers before the Federal Court (and the appeal process) and thereby the otherwise lack of a degree of practical oversight or accountability.

However, by (re-)introducing another layer of decision making into the authorisation process and making the ACCC responsible for that additional layer (ie the same body that would usually have already considered the merger under the SLC test), there is a concern that the benefits of the authorisation process, including the balance it provides to the overall system, will be undermined. The ability to have a 'fresh pair of eyes' review the merger would be available only after the ACCC has looked at it (usually after already reviewing it under the SLC test). It is possible that merger authorisations will be relegated to the 'too impractical' basket along with formal merger reviews.

Conclusion

It is important that, through the upcoming public consultation process on the draft exposure legislation implementing these reforms, the Government is invited to, and does, review and consider the concerns of Australian businesses in relation to the former process, as noted in the Dawson Review. The final legislation for the merger process should address these concerns to ensure that the merger authorisation process and the Tribunal continue to provide a timely 'check and balance' on the ACCC's informal merger review process.

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[1] *Application by Murray Goulburn Co-Operative Co Limited*, ACT 4 of 2013; *Application by AGL Energy Limited* [2014] ACompT 1; *Application by Sea Swift Pty Limited* [2016] ACompT 9.

[2] Another authorisation application was approved by the ACCC in 2005 however this was in relation to both s47 and s50, and the joint venture was ultimately dropped by the parties, see *Applications by GrainCorp Operations, AWB and Export Grain Logistics*, 2004-2005.

[3] *Little Company of Mary Health Care proposed acquisition of St Vincent's Hospital; Re Qantas Airways Limited* [2004] ACompT 9 (12 October 2004); Department of Treasury, (2003), *Review of the Competition Provisions of the Trade*

Practices Act, retrieved from http://tpareview.treasury.gov.au/content/report.asp, page 64.

[4] A review of the competition provisions in the *Trade Practices Act 1974* in 2002-2003, by a committee formed by Treasury and chaired by Sir Daryl Dawson.

[5] Department of Treasury, (2003), *Review of the Competition Provisions of the Trade Practices Act*, retrieved from http://tpareview.treasury.gov.au/content/report.asp, page 65.

[6] The Tribunal has noted the importance of a prompt decision over an exhaustive inquiry, see, e.g., *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1, paragraph 129.

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