Pre-Merger Notification

Australia

Is there a regulatory regime applicable to mergers and similar transactions?

Yes. Section 50 of the Trade Practices Act ("TPA") prohibits a person from acquiring, directly or indirectly, shares or assets of a corporation if the acquisition would have the effect, or the likely effect, of substantially lessening competition in a substantial Australian market.

The TPA is enforced by the Australian Competition and Consumer Commission ("ACCC") which has no power itself to block or delay a merger. The ACCC must commence proceedings in the Federal Court. Only the Court can issue an injunction to block mergers or acquisitions that may contravene the TPA, or impose financial penalties or make divestiture and other orders.

There are three alternate paths to getting a merger or acquisition past the ACCC:

1. Informal clearance: The ACCC operates an "informal clearance" procedure under which it consults publicly and states its position on a particular merger or acquisition to the parties. It will grant an "informal clearance" (which is simply a short letter) to a merger or acquisition that it does not seek to oppose. The ACCC has published Merger Guidelines that guide its approach to assessing mergers and acquisitions under section 50 of the TPA.

2. Authorisation: Under sections 88(9) and 90(9) of the TPA, there is scope for a merger to the "authorized" by the ACCC if it is satisfied that the merger - even if anti-competitive - would be likely to result in such a benefit to the public that the merger should be allowed to proceed. (Proposed amendments to the TPA will hand the role of determining applications for authorisation of mergers and acquisitions to the Australian Competition Tribunal). Rarely is this test satisfied.

3. Formal clearance: The Australian Government has introduced draft legislation that from late 2005 will establish a voluntary formal merger clearance procedure, under which parties will be able to lodge an application for a formal clearance to the ACCC.

The Federal Treasurer also has special powers with respect to mergers in the financial services sector. There are also specific industry regulations concerning the acquisitions in the media sector which are presently being reviewed by the Federal Government.

The Treasurer also has powers under the Foreign Acquisitions and Takeovers Act to prohibit a foreign acquisition from proceeding where it is considered that the foreign acquisition is contrary to the national interest.

Additional Comments

Proposed legislative amendments

The Federal Government has introduced legislation to amend various aspects of Australian competition law. This legislation is expected to be passed by the Federal Parliament some time in 2005. While this legislation will not amend the substantive test for mergers and acquisitions under section 50 of the TPA, it will make some procedural changes to...
the merger clearance processes.

We detail the relevant changes throughout this guide.

Offshore acquisitions

Generally speaking, an offshore acquisition by an offshore company will not fall for consideration under section 50 of the TPA. However, under section 50A of the TPA, the ACCC, Federal Treasurer or any other person may apply to the Tribunal within 12 months after the date of the acquisition for a declaration that the acquisition has the likely effect of substantially lessening competition in a market in Australia and the acquisition does not result in a benefit to the public that outweighs this effect. If such a declaration is made, the company has 6 months to remedy the situation or else it is prevented from carrying on business in the market to which the declaration relates.

Section 50A has never been applied.

Identify Applicable National Regulatory Agency/Agencies

The primary regulatory agency is the ACCC. It is a well funded Federal Government agency with offices in each State and Territory of Australia. It is comprised of a Chairman (Mr Graeme Samuel), a Deputy Chair and 5 Commissioners. The ACCC has over 500 employees.

Additional Comments

The Australian Competition Tribunal ("Tribunal") will, under the proposed amendments to the TPA, be empowered to review the ACCC’s decision in respect of formal clearance applications and will also hear applications for authorization of mergers and acquisitions. The Tribunal is comprised of a Federal Court judge and two other members (an economist and a lay-member) and operates with more formal, court-like procedures.

Is there a supranational regulatory agency (e.g., the European Commission) that has, or may have exclusive competence? If so, indicate.

No.

Are there pre-merger filing requirements; if so, where are they published?

There are no mandatory pre-merger filing requirements. If the merger involves an acquisition by a foreign company, compulsory notification to the Foreign Investment Review Board may be required, if the target's gross assets exceed A$50m or in certain other cases.

For an ACCC authorisation application, Form F of the Trade Practices Regulations establish the form that must be used.

Additional Comments

Under the Government's proposed amendments to the TPA, it is expected that there will be a specified filing requirement for parties who wish to obtain a formal clearance from the ACCC.

What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions)

Section 50 of the TPA applies to any direct or indirect acquisition of shares in the capital of the body corporate or any assets of a person or corporation.

In practice, this means that all acquisitions (and joint ventures involving an acquisition of shares or assets) are caught by section 50. It is not necessary for the acquiring party to obtain "control" of the relevant company, but in practice, it may be unlikely for an acquisition to have a substantial effect on competition unless the acquiring party is able to control the relevant corporation or assets.

Is there a "size of transaction" threshold?

No.
Is there a "size or turnover of the parties" test; if so, what is it and how are size and turnover to be calculated?

No.

Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.

Yes. The TPA only applies to mergers or acquisitions that affect a "substantial market". In practice, this substantiality threshold is almost always satisfied.

Section 4E of the TPA defines a "market" as a market in Australia. However, this does not require that the relevant market be defined as wholly within Australia. This simply means that some part of the market must be in Australia.

A relevant market may also be wholly within a State or Territory or in a region of Australia.

Is the filing voluntary or mandatory? What are the penalties for non-compliance?

The filing is voluntary for an informal clearance application.

There are no penalties under the TPA for not notifying a merger to the ACCC (but there are penalties for breach of section 50).

Additional Comments

Parties will generally make an assessment about the risk of ACCC action before deciding to not notify the ACCC of an acquisition. The ACCC becomes aware of merger and acquisition proposals via the media, competitors or customers, other Government agencies and the stock exchange and has powers under section 155 of the TPA to require the production of information, or the provision of evidence, if it has reason to believe that an acquisition may contravene section 50. The penalty for failure to comply with a section 155 notice is a maximum sentence of 12 months and a financial penalty of AUD $2000.

Time in which a filing must be made

As filing is voluntary, there are no filing deadlines.

Given that the ACCC takes about 8 weeks to consider an application for informal clearance (and will take 40 business days to determine and application for a formal clearance), it is usually advisable to notify the ACCC as early in the process as possible.

Form and Content of Initial Filing

Informal clearance

If the parties seek an informal clearance from the ACCC, there is no prescribed format for notifying the transaction. However, the ACCC's Merger Guidelines indicate that the parties should make a written submission containing background information on the parties, the structure of the market, other market participants, the rationale for the merger and an analysis of the impact of the acquisition on competition.

In practice, especially for those mergers and acquisitions which do have some impact on competition, the parties will generally prepare a detailed submission with extensive analysis of the potential impact of the proposal on competition.
Under Form F of the Trade Practices Regulations, parties are required to complete certain particulars about themselves and the shares or assets to be acquired. Parties generally submit a detailed submission explaining the public benefits arising from the merger, in addition to the impact of the merger on competition.

Additional Comments

The new formal clearance procedures that the Government proposes to introduce will make provision for specific filing requirements.

Are filing fees required?

There are no filing fees for an informal clearance application.

The fee for filing an authorization application is AUD$15,000.

Additional Comments

It is expected that there will be a filing fee for the new formal clearance procedure.

Is There An Automatic Waiting Period? If so, specify

There is no automatic waiting period and the merger or acquisition can in principle be completed while it is being assessed by the ACCC. However, if a merger or acquisition is completed and the ACCC subsequently forms the view that it contravenes section 50, the ACCC may seek financial penalties, divestiture and other orders. Usually, an acquisition that raises competition law issues is expressed to be subject to ACCC clearance to avoid a contravention of section 50.

Are There Time Limits Within Which The Regulatory Agency Must Act? Can they be shortened by the parties or be extended by the regulatory agency?

Informal Clearance

There is no strict time limit in which the ACCC must act. However, the ACCC, under its Merger Guidelines, will set an initial timetable with the parties once the informal notification is made. This timetable is indicative only and there may be slippage, especially in complex matters.

The ACCC's Merger Guidelines states that, for complex mergers, it will aim to complete its assessment within 8 weeks. However, the ACCC has taken longer in respect of recent complex mergers and acquisitions.

Authorization

If the parties apply for authorization, section 90 of the TPA provides that the ACCC must make a determination within 30 days, with the possibility of extension by the ACCC if complex issues are involved. In practice, therefore, authorisations will generally take between 6-12 months.

Amendments to the TPA would propose that merger authorizations be lodged directly with the Tribunal, with a 3 month time limit (which could be extended to 6 months for complex matters).

Additional Comments

Under the proposed formal clearance procedure, the ACCC would have 40 business days after receiving an application for formal clearance to provide a formal clearance, or else the ACCC would be deemed to have refused to grant a formal clearance.

This period will be able to be extended with the consent of the applicant. The 40 day time period would "stop" running if:
What is the substantive test for clearance?

Section 50 of the TPA prohibits a merger or acquisition if it will have the effect, or be likely to have the effect of substantially lessened competition in a market.

Section 50(3) of the TPA sets out a list of factors which may be taken into account when determining whether a transaction will result in a substantial lessening of competition. These factors are as follows:

- the actual and potential level of import competition;
- the height of barriers to entry in the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market;

The ACCC has published Merger Guidelines which indicate its approach to determining whether a particular merger or acquisition will contravene section 50. The Merger Guidelines set out indicative "safe harbour" market share thresholds that inform the ACCC's analysis. The ACCC has indicated that it is only likely to consider the merger or acquisition in detail where it will either:

- result in the merged firm having a market share of at least 15% where the four largest firms will have a market share of 75%; or
- result in the merged firm having a market share of 40% or more.

The ACCC has also indicated that it is unlikely to oppose a merger where imports have consistently accounted for 10% or more of sales in the relevant market over the past 3 years or more.

Recent case law suggests that a "substantial" lessening of competition refers to a lessening of competition that is "meaningful or relevant to the competitive process" as opposed to "large or weighty".

If a merger or acquisition is likely to substantially lessen competition in a market, it is possible to apply for authorisation. Authorisation is granted if the merger or acquisition gives rise to such a benefit to the public that it should be allowed to take place.

"Public benefits" have been defined to include anything of benefit to the community generally, including the achievement of economic goals of efficiency, promotion of exports and export competitiveness, import replacement, expansion of employment, economic development and industrial harmony.
The ACCC will only authorise a merger or acquisition if these public benefits outweigh the anti-competitive detriment from the merger or acquisition.

What are the common Post-Filing Procedures: Requests for further information, etc?

Informal clearance

The ACCC provides an individual assessment timeline for its consideration of the matter. The timelines will be determined based on the complexity and significance of the proposed transaction.

In some matters, the ACCC publishes details of its preliminary competition concerns arising from a proposed transaction in the form of a Statement of Issues. This document will be placed on the public register. The intention is to ensure that the market is informed of the ACCC's views throughout the process.

A Statement of Issues is not a definitive decision and the parties to the transaction, and market participants, will be able to consider and respond to the ACCC's concerns.

The ACCC consults widely with competitors, customers and suppliers to seek their views on the proposal. It calls for written submissions from all interested parties.

The ACCC will often request further information from the parties to the proposal, although there is no formal procedure for such requests. The ACCC prefers to request that parties voluntarily provide information sought by the ACCC. However, in more complex merger matters, the ACCC is increasingly looking to its statutory powers under section 155 of the TPA to demand that information be provided. Recent experience demonstrates that the ACCC may call for all or any of the following:

- marketing, business and strategic plans for the transaction
- board minutes and board reports
- customer and supply details; and
- financial information.

Meetings may be held between the parties and ACCC staff. The Commissioners will generally only be available for meetings in relation to major matters or where the issues to be discussed are of significance.

The decision on the merger or acquisition is ultimately made by the ACCC's Mergers Panel, which comprises senior staff and Commissioners and, for more contentious or high profile matters, by a vote of the full Commission. Meetings of the Panel and the Commission are in camera and are not open to the public.

If the ACCC has concerns about an acquisition, it may require the parties to provide enforceable undertakings to address the competition concerns. These undertakings can include the divestiture of particular assets; behavioural undertakings are usually not accepted. The ACCC will generally consult publicly about the content and adequacy of any undertakings offered by the parties.

Since late 2003, the ACCC commenced the process of providing a Public Competition Assessment outlining its reasons for decision where:

- a merger is rejected
- a merger is subject to enforceable undertakings
- the merger parties seek such disclosure; and
- a merger is approved but raises important issues that the ACCC considers should be made public.

The ACCC's public register (on the ACCC website at www.accc.gov.au) will include various information in relation to the proposed transaction, including indicative timelines, Statement of Issues, Competition Assessment and draft enforceable undertakings, subject to appropriate protection of confidentiality requirements.

There is no formal right of appeal from a decision by the ACCC to not grant an informal clearance. If parties apply for an informal clearance decision and the ACCC indicates that it will oppose the merger, the only conceivable right of review available to the parties is to seek a declaration in the Federal Court that the merger or acquisition does not contravene section 50. However, in practice, there are significant costs and time constraints associated with such legal proceedings and this is unlikely to be a viable commercial option in most cases.
Authorisation on public benefit grounds

Once an application for authorisation is made, the ACCC will call for submissions from all interested parties.

Unless a claim for confidentiality is accepted by the ACCC, all submissions and other relevant documents are made available to the public by being placed on the ACCC's public register and website. Generally, the ACCC will exclude from the public register details of:

- secret formulae or processes;
- the cash consideration offered for the acquisition of shares or assets; and
- the current manufacturing, production or marketing costs of goods or services.

The authorisation process is generally time consuming and costly. It generally takes 6 to 12 months. There may be more than one round of public submissions and consultation if new issues arise or if the parties offer enforceable undertakings to mitigate the anti-competitive effect.

At the end of the consideration, the ACCC will publish a written determination setting out its reasons for granting or denying authorisation. This is a publicly available document. An authorisation decision is subject to appeal to the Tribunal. Any person who has a "sufficient interest" in the proposal letter or acquisition may apply for review. A review by the Tribunal is a merits review in a formal Court-like environment and is also a lengthy and costly process.

Additional Comments

The ACCC's precise procedures for the proposed formal clearance system are yet to be developed but it is expected that many of the features of the current informal system will be replicated in the formal clearance system, such as a statement of issues.

The proposed formal clearance process that the Federal Government proposes to introduce would run in parallel to the existing informal clearance process:

- all applications and submissions would be placed on the ACCC website (subject to confidentiality claims for sensitive material);
- the ACCC would have 40 business days to make a decision from the receipt of the application. If it does not make a decision within that time, it would be deemed to not grant a clearance. The ACCC will be able to "stop the clock" if it requires further information from the parties. The initial 40 business day period is extendable with the consent of the applicant.
- The applicant would be able to seek a review of the ACCC's decision in the Tribunal within 30 business days in which to reach its decision. In complex matters the Tribunal would have an additional 60 business days.

The proposed amendments to the TPA also provide that authorisation applications must be made to the Tribunal (rather than the ACCC) which would have three months (extendable to a total of 6 months for complex matters) in order to reach a determination. Tribunal proceedings are court-like. They are more formal and adversarial and generally require the preparation of witness and expert statements, the giving of formal evidence, and the making of formal submissions.

Describe the sanctions for not filing or filing and incorrect/incomplete notification.

There are no sanctions. However, there are consequences of providing inaccurate information:

1. in providing an informal clearance, the ACCC will expressly reserve the right to reconsider the matter if incorrect information was provided to it.

2. Under section 91B, an authorisation can be revoked if it was granted on the basis of evidence or information that was false or misleading.
3. The proposed amendments to the TPA will provide that a merger can be injuncted and divestiture orders made by the Federal Court, if a formal clearance was granted on the basis of false or misleading information provided by the parties to the ACCC.

**Describe the procedures if the agency wants to challenge the transaction?**

If the ACCC wishes to oppose the transaction, it can file an application in the Federal Court challenging the transaction under the section 50 of the TPA and seeking a preliminary injunction and a permanent injunction barring completion of the transaction (or if completion has occurred, requiring the parties to unwind the transaction and make divestitures). The decision of the Federal Court can be appealed to the Full Court of the Federal Court and then, by leave, to the High Court of Australia.

The ACCC can challenge a merger within six years after completion although, as a practical matter, if the ACCC has had an opportunity to review a transaction based on complete and accurate information, it is very unlikely to revisit it post-completion unless significant new facts were to come to light.

**Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger?**

The maximum penalty that can be imposed by the Federal Court upon application by the ACCC is presently $10m for a corporation, and $500,000 for any individual involved in the merger or acquisition.

Parties that contravene section 50 can also be required by the Federal Court to pay compensation to third parties, undertake compliance and training programs, or perform community service.

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**Additional Comments**

*Under proposed amendments to the TPA, the penalties for a contravention of section 50 will be increased to the greater of:*

- (a) $10,000,000;
- (b) (if the value of the benefit can be calculated) 3 times the value of the benefit derived from the breach; and
- (c) (if the value of the benefit cannot be calculated) 10% of the annual turnover of the body corporate, and its related bodies corporate, during the past 12 months.

**Describe, briefly, your assessment of the regulatory agency's current attitudes/activities**

**Summary of current informal clearance procedure (both confidential and public approaches) and new formal clearance procedure**

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<tr>
<th>Current Informal Clearance</th>
<th>New Formal Clearance</th>
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<tbody>
<tr>
<td><strong>Confidential Approach</strong></td>
<td><strong>The parties make a public application to</strong></td>
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<tr>
<td>• The parties provide a submission to the ACCC that the proposed acquisition does not substantially lessen competition.</td>
<td><strong>the ACCC that the proposed acquisition does not substantially lessen competition.</strong></td>
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<tr>
<td>• The parties can approach the ACCC and provide a submission to the ACCC on a confidential basis.</td>
<td><strong>The parties' application and all other documents relating to the application will be published on the ACCC's website (except any information over which the parties claim confidentiality).</strong></td>
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<tr>
<td>• The ACCC will provide an informal response usually within 3 to 4 weeks.</td>
<td>• The ACCC will make a decision within 40 business days with a provision for 20 business days' extension.</td>
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<td>• The ACCC will rarely be able to provide parties with an unqualified final review based upon a confidential review only.</td>
<td>• The applicant bears the onus to prove no substantial lessening of competition.</td>
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<td>• Even if interim clearance has been granted by the ACCC in its confidential review, formal inquiries may be</td>
<td>• The parties can apply to the Australian Competition Tribunal for review of the</td>
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### Public approach

- The parties provide a submission to the ACCC that the proposed acquisition does not substantially lessen competition.
- The fact of the proposal is posted on the ACCC website, but not the submission.
- The ACCC will announce a timetable in which the decision will be made.
- This timetable cannot be controlled or limited by the parties.
- The ACCC can require a wide variety of undertakings with little room for review of their demands.
- The ACCC will proceed to market inquiries.
- A final decision will be announced by the ACCC in accordance with its timetable.
- The final decision is informal and not binding on the ACCC in law or on third parties (although it is treated as final in fact).
- A summary of the ACCC’s competition analysis or public competition assessment will be posted on the ACCC website.
- No appeal is available. De novo application to Federal Court possible.

**Any ACCC concerns can be addressed by the parties by giving undertakings or by challenging the ACCC’s decision in the Federal Court.**

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The Lex Mundi member in this jurisdiction is Clayton Utz

The Australian Competition Tribunal’s review is limited to the information the parties put forward in their initial application to the ACCC.

The parties’ initial application to the ACCC should therefore be thorough and put all relevant information forward including addressing any unexpected concerns from third parties, giving any undertakings and presenting any evidence or witnesses.

The Australian Competition Tribunal will make a decision in accordance with its timetable.

The final decision means the merger is “immune” from further challenge.

*The formal clearance procedure will not be available until at least January 2007 (a date is yet to be formally advised).*

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The Lex Mundi member in this jurisdiction is Clayton Utz