Law Council
OF AUSTRALIA

Business Law Section

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Dear Ms Copley

Guidelines for Authorisation of Conduct (non merger)

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission (**ACCC**) on the proposed 'Guidelines for Authorisation of Conduct (non merger)' (**Draft Guidelines**).

The Draft Guidelines are also intended to be complemented by the document that was issued in draft by the ACCC, 'Application for authorisation for proposed conduct (other than mergers or acquisitions), Guidance in completing your application to the ACCC' (**Draft Guidance Document**).

Having reviewed the Draft Guidelines and Draft Guidance Document, the Committee makes the following observations and suggestions for the ACCC's consideration:

1. The Committee believes that both documents are useful and is appreciative of the ACCC undertaking this form of work for the assistance of the business and legal community.

2. As the underlying authorisation processes in the *Competition and Consumer Act 2010* (Cth) (**CCA**) are largely unchanged, the Committee's commentary on the two documents is limited and reasonably high level.

3. The Committee notes at paragraph 1.8 of the Draft Guidelines the ACCC proposes that if authorisation is sought:

> *... for proposed conduct that may breach both the per se provisions and other competition provisions of the Act, the ACCC will apply the test for authorisation applicable to per se conduct to its assessment of the entire application for authorisation. That is, the ACCC may grant authorisation only if it is satisfied that the likely public benefit from the conduct outweighs the likely public detriment.*

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The Committee has reservations as to this approach, depending on the particular authorisation application and the relevant proposed conduct. This is because, as the ACCC correctly notes in paragraph 1.7 of the Draft Guidelines, the relevant conduct if it is not in relation to *per se* conduct, may be subject to a test which has two limbs, namely that the ACCC may grant authorisation if it is satisfied that either:

> *(i) the conduct would not be likely to substantially lessen competition;* ***or***
>
> *(ii) the likely public benefit from the conduct outweighs the likely public detriment.* (emphasis added)

Given the slightly different tests for the relevant conduct depending on the nature of the authorisation being sought, it is arguable that the ACCC may be led into error in applying the different, presumably higher test applicable to *per se* conduct to proposed conduct that is not actually subject to that test.

4. Having regard to the merger authorisation process returning under the amendments to the CCA, to originate with the ACCC at first instance, the previous split with the authorisation process routes for possible joint venture conduct (to the ACCC) and merger conduct (to the Tribunal), now no longer arises. In these circumstances, some commentary as to the ACCC's approach on this interaction in the Draft Guidelines would be helpful. This situation appears to have arisen in several matters in recent times with merger clearances (whether formal or informal) and conduct authorisations. See for example *BP Australia Pty Ltd & Ors – Authorisation A91580 – A91582* and *NBN Co Authorisations – A91479 – A91481,* as well as previously in the Qantas/Air New Zealand joint venture and merger authorisation. Accordingly, there is, in the Committee's view, some value in briefly outlining the process the ACCC will follow.

5. Given the new ability for the ACCC to authorise section 46 conduct and the ability of the ACCC to authorise the new concept of concerted practices (section 45) conduct, it would also be helpful for the ACCC to highlight particular types of issues with such applications that it would like to see information on included in any application. For example, in relation to concerted practices, because it will often involve information sharing (and because it may be considered in conjunction with collective bargaining authorisation applications), it would presumably be appropriate to provide with some specificity, the nature of proposed information flows.

6. Further guidance in relation to the authorisation of section 46 conduct would be appreciated. In particular, guidance as to what the ACCC may be expecting for the assessment of such conduct. This is particularly the case having regard to the high level nature of the ACCC's interim section 46 guidance. The Committee has separately commented on the latter document.

7. The Committee refers to paragraphs 4.21 to 4.31 (and paragraph 4.31 in particular), of the Draft Guidelines dealing with the situation where a pre-decision conference is called. Where a conference is called, but the applicant invokes its right not to answer questions at the conference and to respond in writing post the conference, then it would be preferable to make it clear (given the time and cost involved in arranging the conference for all parties and for reasons of procedural fairness), that the applicant is expected to then make its written submission within a reasonable period and that other parties will be given a reasonable time thereafter in which to respond. Naturally,

if the applicant adopts this approach, then the time period for the authorisation application may need to be extended by the ACCC.

8. Section 5 of the Draft Guidelines deals with confidentiality. The Committee considers it would be useful if the Guidelines specifically identified and explained the new power the ACCC will have pursuant to section 89(7) of the CCA, which provides that:

> *[t]he Commission may disclose information excluded under this section from the register … to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application concerned.*

The Committee notes that this provision has the potential to be read quite broadly and could therefore be noted in the Guidelines. This is particularly the case having regard to the discussion at paragraph 12 of this submission.

9. The Committee notes that Section 7 of the Draft Guidelines could be updated in relation to the discussion of specific benefits and detriments having regard to the decision of the Full Federal Court in *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 and in particular where the Court provided some guidance on the 'balancing exercise' required. The Full Court stated (at [7]):

> *Having examined the benefits and detriments resulting from, or likely to result from, the proposed acquisition, the Tribunal is then to determine whether the overall benefit is 'such' that the acquisition should be permitted. This requires a balancing exercise to determine the public benefit. The Tribunal has referred to this as a balance-sheet approach (Re Queensland Co-operative Milling Association Ltd (1976) 8 ALR 481 ('QCMA') at 512) and this is an informative metaphor. It may suggest, however, that the detriments are to be deducted from the benefits leaving only a net benefit. This is informative but may be likely to be a little unrealistic. Many of the benefits and detriments will be incommensurable and possibly unmeasurable as well. To take an example from this case: how does one weigh the improved efficiency of the wagering market against the perils of problem gambling? It seems to us that the benefits and detriments may more usefully be assayed by means of a process of 'instinctive synthesis' sometimes referred to in the law surrounding the formulation of criminal sentences where a similar problem is encountered: see Wong v The Queen [2001] HCA 64; (2001) 207 CLR 584 at 611 [74]-[75] per Gaudron, Gummow and Hayne JJ. This may be referred to as weighing, but to refer to balancing, or a balance-sheet approach, may suggest that the essential qualitative assessment has a greater degree of precision than the statutory subject-matter permits.*

The Tribunal Decision in *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 may also be relevant.

10. Section 7 of the Draft Guidelines is titled 'Substantial lessening of competition', however, at paragraph 7.17 the analysis switches to the 'net public benefit' test. Given paragraph 1.7 of the Guidelines outlines the two limbs (or different tests) available for certain conduct – a competition test and a net public benefit test – it may be clearer if the two tests were addressed in separate chapters (for example, Section 8 might become 'public benefits and detriments').

11. In relation to paragraph 11.33 of the Draft Guidelines, the Full Federal Court's analysis in the *Tabcorp* (2017) matter referred to in paragraph 9 above is relevant, as is the Full Federal Court decision in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124 and should perhaps be footnoted.

12. Finally, it is noted that the Draft Guidance Document is helpful in that it now, by virtue of the amendments to section 89(1)(a) of the CCA, establishes the form to be used in authorisation applications, rather than a form prescribed by regulation under the CCA. In addition to it possibly being the appropriate document to include some of the requested guidance referred to above in terms of what material to include in a particular application for authorisation, the document provides flexibility and there is scope for it to be used very usefully in a practical manner by the ACCC.

13. However, the Committee also notes that giving the regulatory agency wide discretion as to documents and material that are required by it in filings before they are accepted as valid, can lead to onerous obligations on applicants and increase the cost of filings significantly. For example, while understandable, and while subject to a footnote that document provision should be discussed with ACCC staff, the Committee notes in particular, paragraph 4 that deals with documents that should be provided to the ACCC along with the application. These documents are those 'submitted to the applicant's board or prepared by or for the applicant's senior management for the purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made'. Given that these documents are likely to be highly confidential, the Committee believes that the ACCC should indicate that confidentiality restrictions will be given to the provision of these documents in most circumstances and that in this situation and generally in relation to the categories of additional information that may be required (and the breadth of such requests), these will be carefully assessed by the ACCC before requesting them.

The Committee thanks the ACCC for the opportunity to provide comments on the Draft Guidelines. If the ACCC would like any further views, or clarification, on any of the issues raised above, please contact the Chair of the Committee, Fiona Crosbie on (02) 9230 4383 or at Fiona.Crosbie@allens.com.au.

Yours sincerely

Teresa Dyson
Chair, Business Law Section