



Law Council
OF AUSTRALIA

Business Law Section

10 May 2013

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Dear Rod,

Consultation on Proposed Update to ACCC's Merger Process Guidelines

The Business Law Section of the Law Council of Australia is grateful for receipt of your letter of 2 April 2013, inviting consultation regarding the proposed update of the ACCC's Merger Review Process Guidelines (**Guidelines**).

This response has been prepared by the Business Law Section's Competition and Consumer Committee.

If you have any questions regarding this submission, in the first instance please contact the Committee Chair, Michael Corrigan on 02-9353 4187.

Yours sincerely,

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Section Chairman

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Review of the ACCC Merger Process Guidelines
Submission by the Competition and Consumer Committee of the
Business Law Section of the Law Council of Australia

May 2013

1. *Overview of Submission*

- 1.1 The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the invitation to engage in consultation with the ACCC in relation to its review of the Merger Review Process Guidelines (**Guidelines**).
- 1.2 The Committee also appreciates the opportunity to have discussed these matters with senior representatives of the ACCC on 16 April 2013.
- 1.3 The Committee notes that the ACCC is reviewing the Guidelines to ensure that they continue to reflect current practices and to update the Guidelines where appropriate. This response concerns only the two matters raised in the ACCC's letter of 2 April 2013 (**Letter**). The Committee welcomes the opportunity to comment on other amendments to the Guidelines as further developed during the review.

2. *Indicative Timelines and Decision Dates*

- 2.1 The Committee has considered the proposal in the Letter that, in informal clearance matters, an indicative decision date will only be published by the Commission at a later stage than is currently the case. The decision date may be advised at the conclusion of the initial period of market inquiries or, if the merger parties have been provided with a market concerns or "transparency" letter, after receipt of a response from the merger parties to that letter (should they choose to provide one).
- 2.2 The Committee notes the Commission's concerns that setting indicative timelines at the commencement of an informal merger review, in some cases, may not be the best way of communicating to merger parties and other interested parties the likely timing of a review, given the way in which timing can change in circumstances where significant competition issues are identified during the review.
- 2.3 Where it is necessary for good reason to push back a proposed decision date, the Committee is sympathetic to, and supportive of, measures which will allow the Commission to respond to inappropriate or unfair criticism of that step by commentators who may not be aware of the Guidelines.
- 2.4 However, the Committee suggests there may be other and better means to deal with those criticisms.¹ The Committee's experience is that merger parties and their commercial advisers currently derive considerable value from being notified, at the commencement of a review, of the likely target decision date, even if it is provisional.

¹ See [2.7] and [2.14] below

2.5 The Committee therefore encourages the Commission to maintain its current practice of setting an indicative timeline at the commencement of an informal review.

2.6 In this regard the Committee notes that, under the current Guidelines², the Commission advises that its:-

"indicative timelines are just that - indicators of when the ACCC expects to make its decisions on non-confidential merger/merger proposals and the relevant steps in the assessment process. By publishing these timelines, merger parties and third parties are kept informed of the key dates in the process, including the due date for submissions and the ACCC's target decision date. However, the informal process is founded on the need to be sufficiently flexible to accommodate the commercial practicalities that may arise in a merger review and the need for the ACCC to reach a properly informed and correct decision. Indicative timelines may need to be adjusted: sometimes the ACCC will be able to make a decision faster than planned and other times there will be a need to delay decision or submission dates to ensure the ACCC has the information it needs.

Indicative timelines will, if appropriate, include:

- *details of the key assessment milestones;*
- *an outline of the timing for market inquiries;*
- *the expected decision date."*

2.7 The Committee understands that, from time to time, some parties may criticise the Commission for shifting the decision date for a matter from that proposed in the indicative timeline. In the Committee's view, however, the Guidelines make it clear that the indicative timeline is at a risk of being changed due to the requirements of the matter and that this is well understood by those who regularly engage with the Commission. If it is not adequately understood by commentators or the media, that warning could be more prominently highlighted on the Mergers page.

2.8 The benefits of an upfront indicative timeline include promoting procedural transparency to all parties that may have an interest in the matter under consideration and also imposing some necessary disciplines on the merger parties and on third parties in responding to the Commission's market inquiries.

2.9 The Committee's concern is that those disciplines will be weakened or lost if the timeline is not posted until after completion of market inquiries. This may have untoward effects, for example by creating in third parties or even the merger parties an erroneous belief that they have more time than is properly the case in which to submit material or information to the Commission and extending the review period unnecessarily, as a consequence. If the proposal was adopted, it is not clear how effectively the Commission could deal with delayed responses from its market inquiries, or 'close off' or ignore those late responses. If the Commission has not announced any decision timeframe, the apparent prejudice caused to the merger parties by a delay in that decision timing may not be available as a reason to 'close off' late responses.

2.10 In addition, for the merger parties, the Commission's review timeline often forms part of broader transaction planning which may include other steps such as Board or

² [4.42 - 4.43]

shareholder approvals or meetings, third party consents, other regulatory approvals, court applications and other actions required to implement a transaction. All those stakeholders, and those advising on and planning these steps, have a strong interest in understanding, at an early stage, the likely or provisional timing of the ACCC process, even if it is qualified and provisional, so that they can plan these other steps that each have their own complexities.

- 2.11 The Committee endorses the current approach of the Commission that the particular timeline that is posted for each matter is not a standard "6-8 weeks" but will reflect an assessment undertaken by Commission staff at the outset, when the submissions are first received from the merger parties.
- 2.12 The Committee believes that, given the Commission's extensive experience in this area, the Commission and its staff will often, at the outset, be able to form a reasonably reliable judgment of the likely work program raised by the matter and therefore post an indicative timeline which is broadly capable of being relied upon (even if subject to change due to matters beyond the Commission's control). For example, the industry sector may be one well known to the Commission. In some matters, the Commission may post a longer date expecting there will be significant controversy.
- 2.13 However, under this proposal, a further risk that may arise is that posting a decision date after the completion of market inquiries (or a response has been given to a transparency letter) may, at that time, create a perception that the decision date is then firmly fixed and unlikely to be altered (except in exceptional circumstances). However, this may not be the case if, in a Stage Two review, the Commission experiences delays outside its control in obtaining necessary information or other issues intrude. The same risks of media criticism could therefore still arise even under this proposal.
- 2.14 Where the merger parties themselves are a cause of delays in the Commission completing its analysis by the indicative date, the Committee sees no objections in the Commission taking reasonable steps to address those concerns. This may, for example, include suspending the timetable altogether or other actions, such as public statements, if the Commission is concerned that the merger parties themselves are, without reasonable cause, not participating in a cooperative and good faith way to assist the Commission to complete its review.
- 2.15 The Committee notes that the Commission's experience of providing transparency letters to the merger parties has, to some extent, increased the time for the Commission to complete its review. The Committee continues to strongly support the Commission's practice of issuing transparency letters and therefore suggests that the overall timeframes for the Commission's review should be appropriately adjusted to take account of the provision of market transparency letters and the response thereto.
- 2.16 In conclusion, the Committee therefore does not support the first proposal in the Letter and encourages the Commission to continue its current practice of posting an indicative timeline at the outset. The Committee supports the Commission continuing to post a timetable for each matter based on the estimated likely timeframe for that matter and in prominently stating that timetable is subject to change, for the reasons in the Guidelines.
3. ***Additional Publication of Details on the ACCC Mergers Register***

- 3.1 The second proposal in the Letter is that the ACCC may wish to provide a greater level of detail on its public register regarding the stage at which informal review is at, including, for example, when the ACCC provides a market concerns letter to the parties. The intention is that the Guidelines would provide more detail about the possible stages, how long each stage takes and that publication of the stage of providing a transparency letter would be useful to assist merger parties and the public in understanding the progress of the Commission's review.
- 3.2 The Committee does have a number of concerns about this proposal. It would involve making public what is currently not a public step, namely, that a transparency letter has been provided to the merger applicant. The primary question, therefore, is whether the benefits to the public of doing so outweigh the costs and risks of doing so.
- 3.3 The Committee's concerns arise mainly in those merger transactions involving publicly traded entities where, depending on how this new step is described on the ACCC's website, the media and third parties might seek to read into this step a great deal more than is intended or appropriate.
- 3.4 Clearly, and as discussed with the Commission, the purpose of a transparency letter is to afford natural justice to the merger applicant and give it an appropriate opportunity to respond to issues raised from market inquiries so that, before the Commission undertakes its decision or publishes its Statement of Issues, it has the benefit of receiving feedback from the merger applicant on concerns and issues raised by third parties. These concerns and issues may or may not have been fully addressed in the primary submissions or may raise something new. In either circumstance, the transparency letter does not represent any views of the Commission itself, but is no more than reporting what has been received from third parties. Moreover, the validity of the issues and concerns raised in the transparency letter will not have been tested as the parties seeking clearance of the transaction will not, at that stage, have had the opportunity to specifically challenge any of the claims in the letter.
- 3.5 As noted above, the Committee believes that step is a very important and positive development in the ACCC's procedures since this practice was adopted about 2 years ago.
- 3.6 However, an issue is whether, depending on how this step is described, third parties might seize upon the fact that such a letter has been sent, either to draw inferences or make public statements to the effect that the merger applicant is now encountering greater hurdles than expected with its clearance application, or that the Commission is leaning one way or the other towards opposition to the proposed transaction.
- 3.7 In the Committee's experience, it would not be surprising if the media or third parties would seek to apply some pressure to the merger applicant to release the Commission's letter or say something in response to the fact of the letter having been issued. For example, there are cases where the Commission's decision on a merger proposal may be market sensitive information under the continuous disclosure obligations in the Corporations Act and the ASX Listing Rules. It may be that some parties might seek to apply pressure to the merger applicant to respond publicly to or comment publicly on the market concerns letter, on the basis that to fail to do so would breach the continuous disclosure requirements.

- 3.8 In the Committee's view, this would be a retrograde step and would be a misapplication of the purpose and function of the transparency letters. The market will be properly and fully informed at the next stage, after the parties seeking clearance have had the opportunity to respond to any issues and concerns in the transparency letter and the Commission has formulated its views on the matter, when either a Statement of Issues is published or the final decision is published. If the Commission, however, chooses to make this intermediate step in its processes public, it will tend to add significance to the step involving the transparency letters and may add support to the view that the significance of this step does warrant some public disclosure by the merger applicant.
- 3.9 The Committee sees no general concerns with situations where the Commission amends its website to advise publicly that the merger timeline has been suspended, because it is waiting on information from the merger applicant. Of course it may be that publication of very general and neutral statement of that kind would not serve any particular useful purpose over and above the current practice of the Commission in any event.
- 3.10 In this context we note that the current Guidelines³ indicate that:
- "If competition issues are identified after consideration of the market inquiry findings and other material, and these competition issues have not already been raised with the merger parties, the parties will be advised of these issues and will generally be invited to provide a response within a limited time (usually one week) on those issues to which they have not previously responded."*
- 3.11 In the Committee's view, that summary is an appropriate description of the function of the market transparency letter and does not raise a need for the step involved to be the subject of a general public statement. We understand that the one week response time is not strictly insisted on, although some members have had experiences of very short times for a response.
- 3.12 If the Commission wishes to consult over these proposals further or any variation of these proposals then the Committee would be very interested in further participating in a dialogue with the Commission and staff on these important issues.

³ [4.61]