



Trade Practices Law Council Workshop
*The ACCC's Merger review process
guidelines*

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Introduction

This paper outlines on a practical level the Australian Competition and Consumer Commission's approach when considering mergers and acquisitions. The focus of this paper will be on our processes, rather than the analytical framework the ACCC uses. Stephen King's paper discusses in detail the analytical framework applied by the ACCC when considering mergers and acquisitions.

Over the past couple of years the ACCC has revised and streamlined its processes, consistent with international best practice. Our processes revolve around two fundamental aims:

- clearing those mergers that are not anti-competitive as quickly as possible, in accordance with commercial timeframes and imperatives; and
- identifying, investigating and addressing mergers that do raise competition concerns.

The Guidelines issued by the ACCC on its merger review processes continue to evolve as the ACCC, business and its advisors and the community at large learn from experience and international best practice.

Informal merger clearance

The informal clearance process operates through the ACCC's *Merger review process guidelines*. These process guidelines were first introduced in October 2004 and have now been revised. The aim of the Guidelines is to provide clarity, certainty and transparency to all interested parties, including the parties directly involved in the merger, customers, suppliers and shareholders.

In order to gain the necessary information to provide an informal clearance, the ACCC undertakes a public merger review. If the proposed merger appears unlikely to raise competition concerns then the ACCC may decide that only limited, or no, market inquiries are necessary to enable it to assess and decide on a merger, the merger. For example, the ACCC may have relevant information from other recent merger inquiries that allows it to determine that a particular acquisition under consideration will be unlikely to substantially lessen competition. This type of review can be conducted quickly, usually within a few weeks and in 2005 approximately half of all public mergers considered by the ACCC were did not require more than limited market inquiries.

Of all the mergers considered in the first year of the process guidelines, 40 per cent were completed in less than two weeks; 20 per cent were completed in between two and four weeks; 20 per cent between four and six weeks; ten per cent in six to eight weeks and ten per cent in more than eight weeks. That is, more than a third are completed in less than a fortnight.

The ACCC may decide that more extensive market inquiries are required to evaluate a proposed acquisition. In these circumstances, the merger review process follows a number of steps.

Once the ACCC receives a substantive submission on the proposal's competitive effects from the merger parties (or acquirer), the ACCC establishes a time line for a first round of market inquiries. Submissions from interested parties are usually sought in the first two to three weeks of the investigation. They are assessed by the ACCC over a further two to three weeks. During this assessment phase, the ACCC often meets with both the merging parties and with other market participants to discuss specific issues. In particular, if concerns about the merger have been made to the ACCC, the ACCC puts these concerns back to the merging parties to seek their response. Thus, this four to eight week period involves significant interaction with market participants, including the merging parties, in order to focus in on any substantive competition concerns.

After this first round of market inquiries is complete, the merger is considered by the Mergers Review Committee and/or the full Commission. One of two possible outcomes is likely at this stage:

1. No substantial competition concerns are raised by the transaction and informal clearance is granted; or
2. Competition issues are identified arising from the transaction that have not been resolved or which appear incapable of being resolved without further information from the market place.

When, on the basis of information before it, no substantial competition concerns are identified by the ACCC, the merger parties will be advised that, based on the information provided, the ACCC does not propose to intervene in the transaction pursuant to s.50. However, the ACCC reserves the right to reopen the matter if the information provided is incorrect or incomplete or if new information comes to the ACCC's attention.

Statements of Issues

If competition concerns are identified, the ACCC may release a Statement of Issues which will be published on the website.

A Statement of Issues is not a final decision on a proposed acquisition and may perform a spectrum of functions including indicating the ACCC's unresolved concerns, the type of further information it would like, and in some cases may go so far as to provide the ACCC's preliminary view as to whether a merger is likely to substantially lessen competition. This provides merger parties an opportunity to explore avenues (for example by giving s. 87B undertakings) to resolve the ACCC's concerns before the ACCC makes a final decision.

Since October 2004, the ACCC has released 12 Statements of Issues.

1. Pacific Brands Ltd's proposed acquisition of Joyce Corp Ltd's foam business assets - 22 March 2005
2. China Light & Power's proposed acquisition of the non-regulated Australian assets of Singapore Power - 14 April 2005
3. Readymix Holdings Ltd's proposed acquisition of Elvin Businesses - 30 April 2005
4. Patrick Corporation Ltd's proposed acquisition of FCL Interstate Transport Services Pty Ltd - 09 June 2005
5. Ramsay Health Care's proposed acquisition of Affinity Health - 1 July 2005
6. Woolworths Ltd's proposed acquisition of 22 Foodland Associated Ltd supermarkets - 31 August 2005
7. Toll Holdings Ltd's proposed acquisition of Patrick Corporation Ltd – 10 November 2005
8. Lion Nathan Australia Pty Ltd's proposed acquisition of Coopers Brewery Ltd - 16 November 2005
9. Barloworld Ltd's proposed acquisition of Watty Ltd – 23 March 2006
10. International Power's proposed acquisition of the South Australian assets of NRG – 17 May 2006
11. Victorian Livestock Exchange Ltd's acquisition of Sale and Korumburra saleyards – 14 June 2006
12. Alinta's proposed acquisition of AGL & Alinta-AGL joint merger proposal – 16 June 2006.

Issuing a Statement of Issues triggers a second round of market inquiries. The issuing of the statement also provides a useful opportunity for merging parties to explore possible remedies with the ACCC to resolve the identified competition concerns before a final decision is made.¹ The range of concerns

¹ This said, parties can provide such undertakings at any stage of the merger evaluation process or even once the ACCC commences Court action.

covered in the Statement of issues can generally be broken up into three broad categories:

- Green-light issues – those issues that, based on the current information, appear unlikely to lead to a substantial lessening of competition.
- Amber-light issues – those areas where the ACCC identifies potential concerns and seeks to explore these further in order to either verify or dismiss the concern.
- Red-light issues – those matters that, based on current information available, could represent a significant threat to competition and as such are likely to breach s.50 of the Trade Practices Act.

The reality can be that once further market information is assessed, the colour of those regulatory lights can change dramatically, or may in fact become reinforced. Once relevant stakeholders have had a chance to comment on a proposed merger or acquisition, it is quite possible for those green or amber lights to turn red, or visa versa. In addition to inviting the merger parties to respond to the Statement of Issues, the ACCC will engage in on-going consultation with the merger parties prior to making a final decision on a merger.

This practice of releasing a Statement of Issues is consistent with the International Competition Network's guiding principles for transparency and procedural fairness.

The length and scope of this stage of the merger investigation will depend on the nature and complexity of the merger, the results of market inquiries in response to the ACCC's Statement of Issues, the completeness of information provided by the merger parties throughout the process, and the potential for the merger parties to address outstanding competition issues through amendments to the proposed acquisition, suitable s.87B undertakings or providing the ACCC with additional information.

If a merger requires the ACCC to release a Statement of Issues then the ACCC expects to complete the full investigation, including reaching a final decision, within a total of twelve weeks from the date the merger proposal was first submitted to the ACCC.

Of the public mergers reviewed by the ACCC in 2005, approximately half required full market inquiries although less than 10 per cent of these (or 2.5 per cent of all mergers reviewed by the ACCC) involved the release of a Statement of Issues or a second round of market inquiries to consider an undertaking.

Misleading the market

The ACCC has encountered problems from businesses which by explicit statements or background briefings, provide an indication that as a result of

their dealings with the ACCC, it is likely that the merger will be given the go ahead, when privately they know the ACCC has some significant unresolved competition concerns.

Making bold predictions to journalists that a merger or acquisition is likely to get the tick of approval from the ACCC can lead to media speculation that misleads investors to buy or sell shares with only limited, or worse still, misleading information.

Where this happens, the ACCC will notify the merger parties of its concerns and provide a short period for them to clarify/correct the information. Where the ACCC's concerns are not resolved by clarifying statements, the ACCC reserves the right to advise the relevant regulatory authorities like the Australian Securities and Investment Commission, the Australian Stock Exchange, and/or the Takeovers Panel of its concerns and/or make its own public statements.

Confidential merger reviews

While the informal merger clearance process is public and transparent, it is possible for merging parties to approach the ACCC seeking a confidential view prior to the matter becoming public. This is particularly useful for parties that might be considering a number of alternative options and are seeking some initial guidance on any competition issues that might arise.

At the confidential stage of a merger proposal, a confidential view can often be provided by the ACCC within three to four weeks of receiving a full submission from the parties. However, the ACCC is rarely able to provide the parties with an unqualified final view about an acquisition on the strength of a confidential review alone and will, in most cases, not provide an unqualified view until the matter becomes public and market inquiries have been conducted. The range of responses to a confidential proposal that merger parties can expect from the ACCC include the following:

- based on the information available to it, the ACCC does not propose to oppose the merger, but reserves the right to conduct market inquiries once the matter becomes public.
- the ACCC has some competition concerns about the proposed acquisition, but is unable to form a definitive view without making market inquiries. The reasons for this view will be provided in writing to the merger parties, usually including an identification of the concerns and the proposed focus of market inquiries.
- the ACCC has formed the preliminary view, which is subject to market inquiries, that the proposed acquisition would appear likely to substantially lessen competition in the relevant market(s), in breach of s. 50. The reasons for this view will be provided in writing to the merger parties.

During 2005-06 the ACCC examined 272 mergers, acquisitions and asset sales for their compliance with section 50 of the Act; 261 were not opposed, two were opposed but were subsequently resolved through undertakings, six were resolved through undertakings during the course of their review and three had concerns expressed on a confidential basis. The 261 not opposed includes 26 that were withdrawn during the course of their consideration by the ACCC.

Public Competition Assessments

Following the completion of a merger evaluation, the ACCC may provide a Public Competition Assessment that outlines its conclusions and reasoning on the decision. In particular, the ACCC issues a Public Competition Assessment for all transaction proposals where the merger is rejected; the merger is subject to enforceable undertakings; or the merger is approved but raises important issues that the ACCC considers should be made public. Thus the Public Competition Assessments fulfil a dual role. They provide transparency and procedural fairness to parties seeking an ACCC informal merger clearance. They also have an educational role, informing lawyers, economists and other relevant parties about the approach taken by the ACCC and the key elements of its decision.

International mergers

When a merger occurs across international boundaries involving two or more jurisdictions, additional issues may arise.

As Australia has no formal pre-merger notification, there is benefit for both the ACCC and merger parties to streamline the process of informal merger reviews. The ACCC expects the same notice of mergers as overseas agencies with simultaneous lodgement of clearance applications, where possible.

In order to make appropriate market inquiries and conduct a competition assessment, the ACCC requires adequate time. Only then will it be able to provide a clear decision with respect to acquisitions or proposed acquisitions considered under s.50 of the Act. This requires all relevant information relating to the international transaction including, for example, full details of international agreements relating to any Australian aspects of the transaction and the proposed timeline for obtaining regulatory approval in other jurisdictions.

The ACCC and other regulators may share information of a non-confidential nature concerning particular mergers. The regulators may also seek a confidentiality waiver from the merger parties to enable the regulators to exchange confidential information on a particular merger where it is considered appropriate. Such a confidentiality waiver will still restrict agencies from disclosing, as far as the law in that jurisdiction permits, confidential information to a third party.

Refusals by merger parties to grant confidentiality waivers may cause delays in the ACCC's and overseas regulators' assessment processes. The sharing of

non-confidential information and, where possible, confidential information between regulators is consistent with the ICN's guiding principles for coordination between regulators in relation to merger reviews.

The ACCC and the New Zealand Commerce Commission are in the final stages of negotiating a cooperation protocol for merger review, which will draw on current practice and identify further opportunities for cooperation between the two agencies.

Such cooperation may include coordination of agency processes to synchronise the timing of merger reviews where possible, share merger party and third party information held by each agency (subject to confidentiality), share agency analysis and assessment of transactions and, from time to time, gather information on behalf of the other agency.

The different merger review processes in each jurisdiction combined with the absence of pre-merger notification thresholds, means that for inter-agency cooperation between the ACCC and the NZCC to be effective, it will depend to a considerable extent on the cooperation and goodwill of the merging parties and, to a lesser extent on third parties.

In particular, cooperation will be most effective when the merging parties (and third parties, as appropriate) allow the agencies to share information where the disclosure of that information would otherwise be subject to confidentiality restrictions.

Similarly the protocol should also benefit businesses by improving the regulatory environment, reducing the burden on merging parties and third parties and increasing the overall transparency of merger review processes.

Gaming

There is, of course, a temptation for merging parties to try and game the informal merger review process, such as through misleading or premature statements, mentioned above.

The ACCC will not tolerate the abuse of its processes to the advantage of merging parties. The informal merger process works extremely well in the sense that it provides a relatively quick and transparent process for merger evaluation by the competition authority.

If parties engage in gaming, the action will inevitably be to their own detriment by slowing the review process and delaying the ultimate decision.

Resolving competition concerns

Section 87B undertakings provide a powerful, court enforceable, remedy to overcome the potential anti-competitive effects of a merger. It is no secret that the ACCC has increasingly sought to utilise them in its enforcement of section 50 the Act.

Unlike some other overseas jurisdictions, very few Australian merger matters have their competitive effects determined through court proceedings. In the past five years, there have been three occasions where the ACCC's decision on a merger has been challenged through the institution of court proceedings. Of these:

- one matter was settled through provision of revised undertakings that were acceptable to the ACCC (the recent Toll-Patrick matter)
- in another matter the merging party withdrew its defence during the court proceedings (the attempt by Boral to acquire Adelaide Brighton) and in the third,
- the matter was decided against the ACCC and in favour of the merging parties (the acquisition by AGL of a share of the Loy Yang A electricity generation facility).

The relative scarcity of court decisions reflects a number of factors. First, only 4-5 percent of mergers considered by the ACCC in any given year raise competition issues, and about half of these are resolved with undertakings with the other half being opposed. Of those mergers opposed, some parties will decide not to continue with the merger after being informed of the ACCC decision. This may reflect both the strength of the case that they are likely to face in any Court proceedings as well as the cost and uncertainty of such proceedings. However, a significant number of the mergers that the ACCC would oppose in any year do not result in Court action because the competition concerns are satisfactorily resolved by the ACCC accepting court-enforceable undertakings made by the merging parties.

The ACCC can accept undertakings in relation to mergers and other specified conduct pursuant to section 87B of the Act. Some mergers involve the parties providing the ACCC with an undertaking that they will not complete the acquisition until the ACCC has had the opportunity to conduct the appropriate market inquiries. However, of relevance to merger resolution is the situation where merging parties put forward undertakings to resolve competition concerns relating to mergers that would otherwise be anticompetitive.

There are three specific issues regarding undertakings that should be discussed. The first concerns the practice by some merger parties of submitting iterative versions of undertakings to the ACCC; the second relates to the acceptability of behavioural undertakings and finally attempts to vary undertakings following their acceptance by the ACCC.

Iterative undertakings

Merger parties are free to propose s. 87B undertakings to the ACCC for consideration at any time throughout the review process. In the case of an undertaking proposed by the merger parties under s. 87B, the ACCC will, unless it is clearly incapable of resolving its concerns, seek comment from

market participants.

In cases where parties seek to address what they perceive as obvious competition concerns from the outset by giving undertakings at the commencement of an informal review, these will be publicly consulted upon in the first round of market inquiries. Alternatively, where undertakings are given sometime after completion of the first round of market inquiries, whether as a result of a Statement of Issues being published or not, a new timeline will need to be established to allow the ACCC to conduct additional market inquiries on the undertakings and assess their effectiveness in dealing with its concerns.

While merger parties are encouraged to begin discussions regarding possible undertakings with the ACCC as early in the process as is possible, it is important that any undertakings submitted are comprehensive and clearly address all competition issues raised. The ACCC will not tolerate progressive piecemeal changes which are unlikely to resolve concerns. Each time parties submit a new version of their undertakings a new round of public consultation must be undertaken. Clearly this has the potential to drag the process out far longer than necessary.

If an undertaking is offered but the ACCC concludes at the end of its inquiries and assessment that it is in fact unnecessary to accept an undertaking or part of it, it may accept a lesser commitment than the undertaking offers, or clear the merger without needing to accept the undertaking at all. Indeed, in a major merger last year where the acquirer offered a significant undertaking to the ACCC, the ACCC found, after a considered assessment, that there were unlikely to be competition concerns and cleared the merger free of the undertaking.

If merger parties consider there are competition concerns that they can resolve with an undertaking, they should offer their best resolution the first time they make a submission. The ACCC will clear the merger without it or accepting only part of the undertaking, if it finds ultimately there are no or few competition concerns to resolve.

Behavioural undertakings

The ACCC's primary focus, in accepting undertakings to address competition concerns flowing from a proposed merger, is to seek to have those concerns resolved through structural undertakings that have a long lasting effect on market structures to preserve or reinstate competition.

Traditionally, the ACCC's position has been that it does not favour behavioural undertakings primarily because of the need for monitoring by the ACCC and their potential to interfere with the ongoing competitive process through their inflexibility and unresponsiveness to market changes – thereby proving them to be unsatisfactory as a primary means of satisfying our competition concerns.

Recent experiences with undertakings has demonstrated it may be that well formulated behavioural undertakings can provide additional and potentially valuable safe guards to deal with competition concerns that have been primarily dealt with by means of structural undertakings.

For example, as an adjunct to the substantial structural undertakings obtained in the recent merger assessment involving Toll Holdings Ltd proposed acquisition of Patrick Corporation Limited², which included the divestiture of 50 percent of the Pacific National, the ACCC also obtained the following behavioural undertakings:

- commitments from Toll regarding its ongoing involvement in Pacific National³, including that:
 - all dealings between Toll and Pacific National are to be on an 'arms' length' basis
 - Toll will not have access to confidential customer information provided to Pacific National
 - Toll will not involve itself in the commercial operations of Pacific National
 - the shareholders of Pacific National will ensure that Pacific National does not discriminate in favour of Toll's own downstream freight forwarding interests. Auditing provisions are included to measure compliance.

These measures were adopted to ensure that the continued operation of Pacific National is not unfairly influenced by Toll's ownership of Patrick and the services of Pacific National are competitively available to other industry players.

To further deal with the potential anti-competitive conduct flowing from the merged entities ownership of one of the two major stevedores in Australia (Patrick's stevedoring operation), Toll committed that it would not discriminate in favour of Toll or Patrick's freight forwarding or logistics operations in terms of price or service quality in relation to Patrick's port operations.

While behavioural undertakings have their difficulties, and won't be viable in many circumstances, their potential value lies in the way in which they provide

² Toll is one of Australia's largest providers of transport and logistics services, operating a network of over 400 sites throughout Australia and the Asian region. Its activities include freight forwarding and line-haul services by road, rail, sea and air as well as integrated logistics and distribution services including specialised warehousing and refrigerated freight services. Patrick Corporation Limited is also a large Australian transport and logistics provider. Its activities include freight forwarding and line-haul services by road, rail, sea and air as well as integrated logistics and distribution services including specialised warehousing and significant port stevedoring operations.

³ Pacific National, a 50:50 joint venture between Toll and Patrick, is one of Australia's largest rail companies and is the largest provider of interstate rail container line-haul services. It has a very strong position on all major inter-capital routes, with the exception of freight moving between South Australia and Darwin.

certain obligations that provide further protection against anti-competitive outcomes arising from a merger.

The role of behavioural undertakings is overwhelmingly as an adjunct or a supplement to structural undertakings. In essence they are designed to restore and maintain the pre-merger level of competition. Of course, the merger parties are also still required to abide by the statutory obligations under Part IV of the Act.

Non compliance with undertakings

While behavioural undertakings require monitoring, the burden of such monitoring need not fall fully on the ACCC. For example, undertakings can require the appointment of independent auditors to confirm that the relevant parties are complying with certain aspects of the undertakings. Further, where behavioural undertakings relate to interaction between the merged entities and either customers or suppliers, these customers and suppliers provide an important focus for monitoring. If the undertakings are not being complied with, these parties have a strong incentive to lodge a complaint with the ACCC. The ACCC can then follow up the complaint and, if necessary, take action against the merged parties for non-compliance with the undertaking.

In the case of non compliance with an undertaking the ACCC can either take action specifically in relation to a breach of the s87B undertaking or more broadly if the ACCC forms the view that there has been an alleged breach of Part IV of the Act.

It is interesting to note that the remedies available under section 87B and in particular sub section (4) are separate and in fact seem wider than those otherwise available for breaches of Part IV of the Act . If an undertaking is not being complied with, the ACCC can apply to the Federal Court for an order under s.87B (4). The Court, if it is satisfied that the party to the undertaking has breached a term of the undertaking, may make all or any of the following orders:

- an order directing the person to comply with that term of the undertaking
- an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach
- any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach, and
- any other order that the Court considers appropriate.

Currently the ACCC is considering whether undertakings recently proffered in two separate merger matters are in fact being honoured.

Attempts to undermine undertakings

The ACCC views compliance with all aspects of a section 87B undertaking as a serious matter and it expects a party to comply not just with the literal terms of the undertaking but also with its spirit and intent. If necessary the ACCC will not hesitate to respond to a breach of an undertaking with enforcement action in the Federal Court.

A further concern in enforcing undertakings is where a party seeks to alter the terms or intent of the undertaking accepted by the ACCC or seeks to misrepresent its effect.

The ACCC will not allow a party, having given unequivocal court enforceable section 87B undertakings, to alter or vary those undertakings in a manner that reduces or undermines the effectiveness of the undertaking. For example successive requests to extend the timeframe for the sale of a divestiture asset or unexplained delays in complying with auditing or reporting requirements are just two examples of conduct that will not be tolerated.

Of course from time to time and for reasons beyond the control of the merger parties, it may be necessary to vary certain aspects of an undertaking. I emphasise that such requests for variations will only be accepted if they are bona fide and do not undermine the pro-competitive effect of the undertaking.

Also the ACCC will not tolerate attempts by parties to publicly “talk down” or misrepresent the effect of their undertakings. In this regard the ACCC was dismayed over recent press reports which suggested that Toll did not believe that its undertakings to sell half of Pacific National and divest other rail assets would be of any consequence and that Toll would still retain full management control over Pacific National.

When the ACCC comes across misleading public statements of this nature the ACCC will insist that the party issue a corrective public statement setting the record straight, as was recently issued by Toll clarifying the press reports I just referred to. Failing this the ACCC will issue its own press release about the matter and also consider any other action that might be warranted in the circumstances.

To the greatest extent possible, the ACCC tries to be flexible and timely in negotiating merger undertakings, taking into account the needs of the parties and attempting to understand the commercial pressures they face. This can mean that occasionally undertakings are negotiated very quickly after in-principle agreement is reached between parties and the ACCC on the broader aims of an undertaking.

The ACCC plays an open hand in these negotiations and it expects parties to do the same.

However, if the ACCC is expected to continue to negotiate undertakings in a flexible and timely matter, it must be recognised that sometimes not all

circumstances can be foreseen by the Commission or its advisers. Once an undertaking has been signed and the parties begin to deliver on the commitments, circumstances may arise that were unforeseen at the time when the undertaking was drafted. Something may occur that is not covered by the undertaking, or the parties may realise that it is impossible for them to comply with a specific aspect of the undertaking. In these circumstances the ACCC encourages parties to come forward and work with the ACCC to find a solution that overcomes these difficulties, but which maintains the spirit and intent behind the undertaking. This will usually take the form of a request for a formal variation to the undertakings. The ACCC will participate in further negotiation and discussion, recognising that it is the broader spirit of an undertaking that is important and needs to be strictly enforced. The ACCC will not back away from accepting variations that continue to ensure that a substantial lessening of competition does not arise.

However, in some circumstances parties may attempt to find ways of exploiting an undertaking, circumventing its broader spirit and intent, whilst not necessarily strictly breaching the text. Parties may believe they act with impunity by engaging in conduct which, though detrimental to competition, they believe does not breach the exact words of the undertaking.

If parties do not abide by the spirit of an undertaking and bring about an anti-competitive result, the parties are, in my view, avoiding their obligations. The Commission will do everything in its power to avoid being gamed in this way.

In such circumstances, the ACCC will consider taking substantive action under section 50, including seeking orders for divestiture under section 81. Accepting a section 87B undertaking in relation to a merger does not preclude the Commission from still taking action if it believes a substantial lessening of competition arises.

Looking at the longer term, beyond the specific undertaking under consideration, gaming by parties will force the ACCC to become much less flexible in relation to undertakings, particularly in relation to the timeliness of its consideration. Also, the ACCC will be more likely to demand clauses in undertakings that reserve its rights to deal with contingencies not capable of being known at the time of undertaking negotiations, for example, requirements that assets be divested at the ACCC's discretion. Such clauses, by their very nature, will heighten the level of risk for the parties. It will be up to the parties to trust that the ACCC will abide by the spirit of the process – in much the same way that the ACCC has to date expected that the merger parties will themselves abide by the spirit of the process. Some such clauses have arisen in recent merger undertakings in order to protect the Commission's position (and by that I mean the public's position) in those circumstances where parties have requested an extremely urgent response from the Commission. At no stage has the ACCC abused the discretionary power that such clauses provide.

The ACCC does not wish that such clauses become standard in all undertakings and it does not wish to lose its flexible approach in relation to negotiating undertakings. However, if the ACCC perceives possible risks due to

gaming by parties, risks that will have substantive results for the level of competition in the relevant markets, then the ACCC will be left with little choice.

Conclusion

The ACCC's *Merger review process guidelines* goes a long way to achieving greater certainty, timeliness, efficiency, predictability, flexibility and transparency in the ACCC's assessment of merger matters.

They form part of the ACCC's ongoing commitment to matching and hopefully influencing world best practice in merger evaluation.

If merger parties cooperate with the ACCC by giving it the time and information requires, the ACCC will work with them to meet their commercial timeframes and give them a meaningful and expedient outcome.