Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

10 – 11 February 2010

Question: aet 77

Topic: Global Financial Crisis - ACCC

Hansard Page: Written

Senator EGGLESTON asked:

1. What changes, if any, have been made to the ACCC's policy or the manner of enforcement of that policy to take account of the GFC including in respect to industry consolidation through mergers and acquisitions to take account of the GFC.
2. As a result of the economic impact due to the global financial crisis, consideration is likely to be given by many businesses to industry consolidation through mergers or acquisitions to better ensure economic survival. How does the ACCC balance the issue of such industry consolidation through mergers and acquisitions during times of economic and financial crisis with the need to maintain competition? (Issue of competition v survival.)

Answer:

1. The ACCC's approach and the analysis it applies to merger reviews has not changed as a result of the GFC. The merger test under section 50 remains unchanged. Section 50(3) of the *Trade Practices Act 1974* requires the ACCC to take into account a number of factors in assessing whether a merger or acquisition is likely to substantially lessen competition, including the degree of concentration in the market, actual and potential import competition, the height of barriers to entry to the market and the degree of countervailing power. In making its assessment, the ACCC takes into account the level of concentration in a market irrespective of whether concentration has occurred as a result of consolidation arising during, or as a consequence of, the GFC. Given that merger analysis is conducted on a forward looking basis, the impact of relevant factors that are external to the merger, such as the GFC, are taken into account in the counterfactual analysis.
2. As outlined above, the ACCC's approach and the analysis it applies to merger reviews has not changed as a result of the GFC. The ACCC's assessment is based on whether an acquisition is likely to substantially lessen competition. It does however take into account the issue of firm survival under section 50 when the target firm is a failing firm. Failing firms are firms that, absent a merger or acquisition, are in imminent danger of exiting the market, such that they will no longer pose a competitive constraint. It is important to note that the fact that a firm is failing is not a defence against an acquisition that would otherwise result in a substantial lessening of competition. Failing firm claims

are assessed within the competition analysis as part of the relevant counterfactual.

Merger analysis is conducted on a forward looking basis. The ACCC will assess each merger by comparing the likely future state of competition with the merger with the likely future state of competition without the merger. This comparison isolates the merger's impact on competition from other factors unrelated to the merger. Often the future state of competition without the merger (the counterfactual) will be similar to the state of competition at the time of the merger.

However, in some circumstances the pre-merger conditions will not appropriately reflect the future state of competition in a market. For example, in the case of a merger involving a firm that is in imminent danger of exiting the market such that it will no longer pose a competitive constraint (failing firm), the current state of competition may overstate the level of competition in the future.

Merger parties seeking clearance on failing firm grounds need to show that the current state of competition is not the appropriate benchmark to assess the competitive effects of the merger because the target and its assets would exit the market regardless of whether the merger proceeds. In a genuine failing firm scenario, the competitive harm resulting from the target's exit from the market should not be attributed to the merger. In this circumstance, the counterfactual needs to reflect the expected failure of the target and the resulting loss of rivalry.