

# CHAPTER 2

## SCHEDULE 1—MERGER CLEARANCES AND AUTHORISATIONS

### Introduction

2.1 Subsection 50(1) of the *Trade Practices Act 1974* (TPA) provides that:

A corporation must not directly or indirectly:

- (a) acquire shares in the capital of a body corporate; or
- (b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.<sup>1</sup>

2.2 In practice, section 50 is aimed at mergers that have potential anti-competitive effects.

2.3 Under current provisions, corporations proposing to acquire shares or assets in another body corporate in circumstances likely to invoke the prohibition against mergers have two options available to them if they want some protection from the section 50 prohibition. They can approach the Australian Competition and Consumer Commission (ACCC) for an informal clearance or otherwise seek a formal authorisation. Either option will provide some protection against the section 50 prohibition.

2.4 Under the informal arrangements, the ACCC approves the proposed merger if it considers it would not have the effect, or likely effect, of substantially lessening competition (the competition test). The ACCC may attach conditions to informal approvals and does so particularly where they are considered necessary to counter any possible anti-competitive effects of the proposed merger.<sup>2</sup> Although an ACCC approval protects the applicant corporation from a section 50 challenge by the ACCC, it offers no protection against court challenges by third parties.

2.5 On 18 October 2004, the ACCC implemented '*Guideline for Informal Merger Review*' which supplements existing merger assessment guidelines. The new guideline applies to non-confidential merger approval applications. It adopts eight guiding principles for best practice merger review as set out in the International Competition

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1 Subsection 50(2) of the TPA prohibits a 'person' from acquiring shares or assets of a corporation subject to the competition test.

2 Under section 87B of the Act, the ACCC may require an undertaking 'in connection with a matter in relation to which the Commission has a power or function' under the Act.

Network<sup>3</sup> guidelines which, among other things, promote greater transparency and accountability in merger reviews. Under the ACCC's new guideline, information on non-confidential merger proposals is published on the ACCC's web site. The guideline also provides an outline of issues which the ACCC considers when assessing informal applications.

2.6 Where a proposed merger is unlikely to pass the competition test used in informal approval applications, a corporation may apply for ACCC authorisation. The test applicable for authorisations is whether, given that the merger may substantially lessen competition in a market, the benefit to the public would be such that the merger should be permitted.

2.7 Once the ACCC issues an authorisation, the applicant corporation is protected against ACCC action under section 50. However, it is not protected against third party challenges. The TPA provides for a review on the merits of the ACCC's determination in the Australian Competition Tribunal (the Tribunal).<sup>4</sup>

2.8 A third party seeking to challenge the legal validity of the ACCC's determinations made under informal approval or authorisation processes may initiate proceedings in the Federal Court.

### **The provisions in Schedule 1**

2.9 The provisions in Schedule 1 of the bill will not change the tests regarding mergers but will give corporations two additional means by which they might qualify for immunity against the prohibition in section 50 of the TPA:

- (a) merger clearances; and
- (b) merger authorisations.

2.10 Schedule 1 will not preclude recourse to the existing informal approval process.

### **Merger clearances**

2.11 The Explanatory Memorandum says of the merger clearance provisions:

The Dawson review found that the Commission's current informal system is relatively speedy and inexpensive—the voluntary nature of the process minimises the possibility of unduly delaying mergers that are unlikely to be in breach of section 50. The Dawson review considered that the weaknesses of the system are evident in the absence of an effective mechanism for review and the absence of reasons for the Commission's decisions.

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3 The ICN was set up to formulate best practice guidelines for competition law enforcement. It has over 80 member countries including Australia.

4 The applicant corporation may also apply to the Tribunal for a review on the merits of the ACCC's decision.

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[Schedule 1] creates a voluntary formal mergers process that will operate in parallel with the existing informal system, retaining the advantages of the informal system, and overcoming some of its disadvantages.<sup>5</sup>

2.12 More specifically, the provisions regarding merger clearances will:

- provide for the ACCC to grant a clearance to a person to acquire shares in the capital of a body corporate and to acquire assets of another person, provided that the ACCC is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition;
- allow the ACCC to grant a clearance subject to conditions;
- protect an acquisition from legal challenge by the ACCC or third parties under section 50 of the TPA but only if all requirements of the clearance are observed;
- require the ACCC to make a determination on a clearance application by the end of 40 business days from the time when application was made to the ACCC (although there is provision for this time limit to be extended with the applicant's consent);
- deem the ACCC to have refused to grant a clearance if it has not made a determination within the statutory time limit;
- allow the ACCC, when considering a merger clearance application, to consult with whatever persons it considers appropriate;
- require the ACCC to advise the applicant in writing of its determination on a merger clearance application and its reasons for the determination;
- give applicants—but not third parties—disputing an ACCC clearance determination the right of review by the Tribunal on the merits of the ACCC's determination.

### ***Matters of interest***

2.13 The provisions of the bill are based on the Trade Practices Legislation Amendment Bill 2004 which lapsed as a result of the 2004 election. According to the Parliamentary Library's review of the 2004 bill, several submissions to the Dawson Review proposed that a wider public benefits/efficiency test should apply not only to authorisations but also to the ACCC's assessment of informal approvals.<sup>6</sup>

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5 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 22, paras. 5.48-5.49.

6 Parliamentary Library Bills Digest No. 23, 2004-05, *Trade Practices Legislation Amendment Bill 2004*.

2.14 The Dawson Review considered a broader test would only add complexity to informal reviews and thus impede their swiftness. The clearance procedure recommended by the Dawson Review and adopted in the bill consequently does not change the test in section 50.

### **Merger authorisations**

2.15 The Explanatory Memorandum says of the bill's merger authorisation provisions:

The Dawson Review identified that dissatisfaction with the merger authorisation process is largely attributed to concerns about the time taken by the Commission to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. These factors were considered, by the Dawson Review, to make the merger authorisation process commercially unrealistic for many merger proposals. The merger authorisation process will be made more attractive to business through these amendments by making it more timely and reducing the uncertainty involved.

...[Schedule 1] removes the power of the Commission to assess merger authorisation applications and creates a new process whereby the Tribunal will have the power to directly assess merger authorisation applications. [Schedule 1] provides that applications should be considered by the Tribunal within a statutory time limit and that there be no merits review of decisions made by the Tribunal. Third party interests will be considered as part of the Tribunal's assessment rather than through an appeal process.<sup>7</sup>

2.16 The merger authorisation test has not changed except that it is the Tribunal—not the ACCC—which makes the determination in the first instance regarding whether the acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

2.17 Other features of the provisions are that:

- a merger authorisation will only give an acquisition immunity from section 50 if all conditions of the authorisation are met;
- the Tribunal must notify the ACCC within three business days of receiving an authorisation application and provide it with a copy of the application;
- the Tribunal must publish the authorisation application and invite submissions regarding the application;
- the Tribunal may consult with whatever persons it considers appropriate when considering an authorisation application;

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7 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 2, paras. 1.6-1.7.

- the ACCC must provide information and other assistance to the Tribunal as the Tribunal requires;
- the Tribunal must make a determination on an application within three months of an application being given to the Tribunal, but this time limit can be extended by another three months if the Tribunal considers that the complexity or other special circumstances warrant this;
- if the Tribunal does not make a determination within the statutory time period, it will be deemed to have refused to grant the authorisation;
- the Tribunal may grant an authorisation subject to conditions which may include requirements that certain undertakings are given to the ACCC under section 87B; and
- there is no right of review on the merits from the Tribunal's determination.

### ***Matters of interest***

2.18 At the Committee's hearing, representatives from the ACCC discussed the changes to be introduced by the bill. They indicated that there is no guarantee that the informal process will remain in place once a formal process is adopted. They emphasised, however, that they would use every effort to maintain the informal process. The ACCC advised that it was working with the Tribunal to determine their respective roles in relation to merger authorisations.<sup>8</sup>

2.19 The Committee invited the President of the Australian Competition Tribunal, Justice Goldberg, to respond to comments made in evidence by Mr Graeme Samuel of the ACCC concerning the roles of the ACCC and the Australian Competition Tribunal. Justice Goldberg's response is included in this report at Appendix 1.

2.20 With regard to the new division of responsibility between the Tribunal and the ACCC for merger and non-merger authorisations respectively, the ACCC suggested there could be practical difficulties, particularly when an applicant was seeking authorisations under sections 45 and 50. The ACCC said that in instances such as these and where the parties agreed, the ACCC had been able to adopt a streamlined non-merger authorisation approach to consider the issues. The ACCC questioned whether it was appropriate to split processes dealing with public benefit issues.

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8 The Department of the Treasury tabled a memorandum, dated 10 March 2005, from the President of the Tribunal regarding this matter. A copy of this memorandum is tabled with this report.

