



Law Council
OF AUSTRALIA

Business Law Section

Mr Rod Sims
Chairman
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601
Via email: rod.sims@accc.gov.au

3 July 2013

Dear Rod,

Informal merger clearance – public competition assessments

We refer to the last liaison meeting between the ACCC and the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) on 16 April 2013. The Committee welcomes these opportunities to meet with you, other Commissioners and ACCC staff to freely discuss topical issues arising under our competition and consumer laws.

You may recall that during recent liaison meetings, Committee members raised concerns about delays associated with the issuing of Public Competition Assessments (**PCAs**) following decisions by the ACCC on informal merger clearance applications. The purpose of this letter is to provide some additional detail underpinning those concerns and to invite your response to the issues raised. The matters raised below may also be relevant to the Commission's current review of the Merger Process Guidelines.

1. Background

The ACCC's introduction of PCA's into its informal merger clearance process (in late 2003¹) was a welcomed response to earlier concerns about the ACCC's informal merger clearance processes.²

As set out in the ACCC's Merger Review Process Guidelines,³ there are three key objectives supporting a process by which the ACCC provides reasons for its clearance decisions, namely:

- affording additional procedural fairness for the merger parties;
- improving transparency and enhancing the ACCC's handling of merger clearances; and
- establishing, over time, a body of detailed reasons for ACCC decisions thus providing improved understanding of the ACCC's approach to clearance applications.

¹ The first PCA was issued in October 2003 in connection with the opposed acquisition by *Coca Cola Amatil of Berri Ltd*.

² A number of these concerns were raised in the context of the review by the Dawson Committee and were considered in the Committee's report and recommendations and subsequently by the response of the Government of the day in April 2003.

³ At [4.84]-[4.87]. We note that the draft amendments to the ACCC Merger Review Process Guidelines propose a number of changes to the discussion on PCAs. The Committee intends to address these proposals in a separate submission on the draft amendments.

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Concerning the timing for the release of a PCA, and significantly in the current context, the May 2011 Addendum to the Merger Review Process Guidelines replaced the words '*within two weeks of a decision by the ACCC*' with '*as soon as possible after making the decision...*'

2. The current concerns

An examination of the ACCC's public register reveals the following numbers of PCAs issued from 2003 to 2013 and the average and maximum periods of time from the date of the clearance decision to when the PCA was issued.⁴

Year	PCAs issued	Average period (bus. days)	Maximum period (bus. days)	Year	PCAs issued	Average period (bus. days)	Maximum period (bus. days)
2003	3	n/a	n/a	2009	11	21 days	36 days
2004	10	3 days	15 days	2010	13	40 days	104 days
2005	19	15 days	52 days	2011	12	47 days	101 days
2006	29	28 days	67 days	2012	5 (4)	116 days*	>249 days*
2007	29	19 days	54 days	2013	(1)	36 days*	
2008	12	15 days	39 days				

*2012 figures include the 4 matters for which the ACCC has indicated that a PCA will be issued 'in due course' (delay as at 11 June 2013).
In 2013 no PCAs have yet been issued, the ACCC has stated that for 1 matter a PCA will be issued in 'due course' (delay as at 11 June 2013)

We acknowledge that a 'headcount' analysis of this nature is unable to reveal the variables that may legitimately impact on the issuing of PCAs.⁵ That said, however, the evidence presents a very stark contrast between the experiences in recent years when compared to the period immediately following the introduction of the PCA.

We respectfully make the following observations that appear to emerge from the data.

- 1 **Timeliness appears to have been largely lost:** whatever the reasons may be, the period taken to issue a PCA is now longer than it was initially and far in excess of what might be expected under other administrative processes where reasons for a decision are required. In this regard we note:
 - PCAs are no longer issued at about the same time or shortly after the merger clearance decision (as was the case for a number of earlier PCAs);
 - the '14 day' period as originally contemplated in the ACCC's Merger Review Process Guidelines is far exceeded;
 - it is difficult to reconcile the long delays experienced, particularly during the last 2-3 years with the '*as soon as possible*' period contemplated by the amended Guidelines. In 2012, the five PCAs

⁴ For some of the earlier clearance decisions, the PCA contained on the ACCC's public register is either undated or it is not clear whether the PCA was issued on the same date as the clearance decision (a practice that appears to have been common in 2003-2004). In those instances where the register is not clear we have assumed that the PCA was issued on the same date as the clearance decision.

⁵ For instance, we note that in respect of the decision in the *Fairfax/Southern Independent Publishers (Illawarra)* clearance application (14 December 2010), the ACCC's public register notes that the PCA was delayed while confidentiality issues were resolved with the parties. The PCA in that matter was issued 101 business days after the clearance decision. We also note that some of the very early PCAs were very short and contained little detail.

issued were released 32, 48, 74, 92, and 151 business days after each clearance decision; and

- the situation is further compounded by the delays in four matters decided in 2012 where the ACCC, having opposed clearance, has indicated that a PCA will be issued 'in due course'. In those cases no PCA has issued for 124, 174, 179 and 249 business days.⁶

2 **Increasingly PCA's are not operating as reasons for decision for merger parties:** As outlined above, one of the objectives that support the ACCC providing reasons for its clearance decisions (even in the form of a PCA), is procedural fairness for the parties. That objective is not served by the long delays commonly associated with the release of a PCA. Where a merger is opposed, for example, in the current situation the PCA does not give the affected merger parties the opportunity to have the ACCC's decision explained in writing and neither does it provide an informed basis on which they may consider their options in light of the ACCC's reasons. A PCA issued with protracted delay cannot add to procedural fairness.

3 **PCAs issued for clearances 'not opposed' now a rarity:** In earlier years (as shown in the table below) a significant proportion (and in some years a majority) of PCAs were issued where the ACCC did not oppose the clearance application. This practice is both consistent with the ACCC's Merger Review Process Guidelines and an underlying purpose of the PCA, to promote a better understanding of the ACCC's decisions.

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Not opposed		1	15	4	18	7	6	2	7	1	
With s.87B/SAU	2	7	2	7	7	2	1	6	3	3	
Opposed	2	2	2	1	4	3	3	5	0	1(+4)	(1)
Not decided				1*							
Totals	4	10	19	13	29	12	10	13	10	5(+4)⁺	(1)⁺

*Origin Energy's proposed acquisition of Sun Gas did not proceed but the ACCC issued a PCA setting out its consideration of the matter.
⁺The figures in brackets refer to the matters where the ACCC has indicated PCAs will issue but they have not been issued

While the ACCC still issues PCAs where a clearance is not opposed (with the last one being issued in July 2012 in the AGL/GEAC matter), the numbers suggest they are increasingly less common. Moreover, an examination of the ACCC's public register suggests that a number of other matters raising 'important issues' could have come within the ACCC's own criteria for issuing a PCA where a merger is cleared. For example:

- Universal Music/EMI Group: a matter involving 2 major record companies with a clearance reviewed by the ACCC over a 6 month period and raising important issues relating to the supply of recorded music;
- Bunnings Group/Costa's Mitre 10 Werribee: a matter in an industry of ongoing public interest that raised complexities sufficient to warrant a Statement of Issues and a 95 business days review period; and

⁶ As at 11 June 2013. These are the delays experienced in the clearance applications for *Carsales/Tradingpost*, *Sonic/Healthscope (Qld & WA)*, *Woolworths/G Gay Hardware* and *ALH Group/Hotels & Takeaway stores NSW*. In each of these opposed clearances applications the ACCC's public register notes that a PCA will issue 'in due course'.

- Pact Group/Viscount Plastics and Visy/HP entities: two separate acquisitions in markets for the supply of products including PET that raised complex issues warranting detailed Statements of Issues and lengthy review periods.

The Committee invites the ACCC's response to the above matters. If you have any questions, in the first instance, please contact the Committee Chair, Michael Corrigan, on 02-9353 4000 or via email: mcorrigan@claytonutz.com

Yours sincerely,

A handwritten signature in blue ink that reads "John S/K" with a long horizontal flourish extending to the right.

John Keeves
Acting Section Chairman