7 December 2017

Law Council
OF AUSTRALIA

Business Law Section

Ms Suzie Copley
General Manager Coordination & Strategy Branch
Merger & Authorisation Review Division
Australian Competition & Consumer Commission
Level 24
400 George Street
BRISBANE QLD 4000

By email: Suzie.Copley@accc.gov.au

Dear Ms Copley

MERGER AUTHORISATION GUIDELINES AND APPLICATION FOR AUTHORISATION OF A PROPOSED MERGER OR ACQUISITION

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission (**ACCC**) on the 'Merger Authorisation Guidelines' (**Draft Guidelines**) and the proposed 'Application for authorisation of a proposed merger or acquisition' (**Draft Application Form**) released by the ACCC for consultation.

2. The Committee is also appreciative of the additional time the Commission has allowed for the Committee to make this submission.

General observations

3. At a broad level:

- the Draft Guidelines provide useful information relating to how the ACCC will approach the new process for merger authorisations. While in many respects the approach reflects that which applies to non-merger authorisation, appropriately, given specific features unique to the merger authorisation process, the ACCC proposes to issue separate merger and non-merger guidelines; and

- the Draft Application Form removes the excessively prescriptive elements of the current Form S while making clear the types of information that the ACCC will seek in order to reach the requisite level of satisfaction on the merger authorisation test. Appropriately, the Draft Application Form gives an applicant the discretion not to include certain information stipulated in the form provided an explanation is given. However, despite the apparent willingness to give this discretion to the applicant, the ACCC links adequacy of information (which it proposes to assess) as a clear criterion for assessing and confirming the validity of the application. This risks retaining an overly prescriptive approach, contrary to the intentions of the Harper reforms. There is also little guidance given as to how the ACCC will assess compliance with the requirements of the Draft Application Form and validity generally.

Telephone +61 2 6246 3788 • ***Fax*** +61 2 6248 0639 • ***Email*** mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

4. The Committee has focussed its comments on specific aspects that in its experience are likely to be of significance to potential applicants, largely relating to the timeliness and transparency of the ACCC's process. These comments are intended to help ensure that the merger authorisation process (being a *formal* merger process) is able to viably operate in parallel to the ACCC's *informal* clearance process for those relatively few mergers and acquisitions for which the features of the formal process are important. This was a clear objective of the Competition Policy Review (**Harper Panel**) in making its recommendations:

> *The Panel considers that an efficient and effective formal merger approval process is important for the economy. Although the informal approval process has been shown to work effectively for the majority of mergers, parties to complex and contested mergers* ***should have an alternative merger review process available to them that delivers transparent and timely decision making****, consistent with international best practice.*[1] (emphasis added)

5. Similarly, the Government's response to the Harper Panel noted that the reforms 'will streamline and simplify the formal merger review processes, reducing burdens on businesses while maintaining the integrity of the system'.[2]

6. The approach taken by the ACCC in administering and applying the merger authorisation process is fundamentally important if these reform objectives are to be achieved. Our focus in this submission is therefore on elements of the Draft Guidelines that impact on transparency, timely decision making and the balance between burdens on business and integrity of the process. Specifically, the Committee comment on the following:

   - pre-lodgement processes and draft applications;
   - validity of an application;
   - timing;
   - information gathering;
   - ACCC feedback during the consideration of the application;
   - securing transparency while respecting legitimate confidentiality concerns;
   - ACCC residual discretion;
   - recent consideration and application of the net public benefit test;
   - conditions and undertakings; and
   - review by the Tribunal.

7. The Committee also offers some miscellaneous comments.

[1] Competition Policy Review, Final Report, March 2015, p.328 and also Recommendation 35.
[2] Australian Government Response to the Competition Policy Review, p.28.

Pre-lodgement processes

8. The Draft Guidelines appropriately encourage prospective applicants to approach the ACCC for 'discussion and guidance' before lodging a merger authorisation application. In principle the Committee supports the Draft Guideline encouraging such contact with the ACCC.

9. As currently framed, however, the language used in the Draft Guidelines (Section 3) is expressed in more mandatory terms (for example, 'the ACCC expects' and the inclusion of pre-lodgement consultation as a step (apparently a necessary step) in a merger authorisation process in the chart at [1.10].

10. Moreover, the Draft Guidelines stipulate details that contemplate an extensive (and potentially lengthy) pre-lodgement consultation process. This includes providing (before any pre-lodgement meeting) a draft application with 'relevant information and documents', the holding of a pre-lodgement meeting and, presumably, a further iterative (and potentially lengthy) process as ACCC feedback is considered by the potential Applicant and a final application prepared and lodged.

11. In principle, the Committee supports the Draft Guideline inviting parties to consult with the ACCC prior to lodging an application for merger authorisation. However, the need for (and extent of) such consultation should ultimately be a matter for the Applicant (having regard to the burden it bears to secure authorisation) and should be neither mandatory nor 'expected'. The Committee's reservation about pre-lodgement consultation processes is that it can add an administrative layer that is not prescribed or contemplated in the legislation and has a strong potential to add a substantial time to the statutory timeframes in circumstances where timely decision making (and certainty of timing) is a key feature (and indeed a potential advantage) of the statutory scheme. This could in turn have the effect of undermining the statutory timetable.

12. In this regard, the Committee is aware, for example, of requirements for pre-notification that operate in the EU that typically add considerable time to the process. While applicants and their advisers can benefit from interacting with the ACCC prior to lodging an application for merger authorisation the Committee submits that the ACCC should not adopt semi-formal pre-notification requirements that resemble the pre-notification processes that operate under these substantially different regimes. In particular, the Committee notes that unlike the process in the EU[3]:

    - the ACCC's statutory 90-day review period can effectively be extended by agreement between the ACCC and the applicant for authorisation[4];
    - a failure by the ACCC to decide within the 90-day review period is a deemed refusal of authorisation;[5] and
    - the applicant may agree to multiple subsequent extensions of the period for the ACCC to make a determination.[6]

[3] European Council Regulation (EC) No. 139/2004 (EUMR).
[4] Section 90(12) of the Competition and Consumer Act 2010 (Cth).
[5] Section 90(10B) of the Competition and Consumer Act 2010 (Cth).
[6] Section 90(13) of the Competition and Consumer Act 2010 (Cth).

13. The above factors suggest that the statutory timetable is already highly flexible, necessitating against the adoption of an opaque and potentially lengthy 'pre-notification' process similar to that used in other jurisdictions.

14. The Committee therefore submits that it would be helpful if the Draft Guidelines noted that any pre-lodgement discussions and interactions between the parties and the ACCC:

- remain voluntary (although encouraged by the ACCC) – and thus the first shaded box in [1.10] be amended to read: '*Proposed acquirer may consult ~~consults~~ with ACCC before lodgement*';
- will be held by the ACCC in strict confidence;
- are encouraged to be an open, cooperative and timely dialogue with a view to assisting the formal process once it is underway;
- may benefit from a draft copy of the Application being provided to the ACCC; and
- are held without prejudice to the handling and investigation of the application.

Validity of application

15. Consistent with the recommendations of the Harper Panel, the Draft Application Form appears to adopt the less prescriptive approach to the previous Form S which contained mandatory detailed information requirements, with little room for appropriate tailoring to the subject matter of the application. Thus, the guidance given in completing the application allows an applicant to assess whether any specific question in the Draft Application Form is relevant.

16. Despite this apparent (and the Committee submits appropriate) shift to the Applicant the task of assessing the relevance of information provided (having regard to the burden it bears to satisfy the ACCC, and the Tribunal in any review), the Draft Guidelines nevertheless suggest that the ACCC intends to make the adequacy of information in the application a key element in assessing the validity of an application. Thus, the Draft Application Form expressly states that '*Failure to provide sufficient information may render the application invalid…*'

17. Moreover, the Draft Guidelines suggest that validity will be a subjective assessment by the ACCC by reference to the '*level of detail and the type of information required…depending on the nature and complexity of the issues raised by the proposed acquisition*'.[7]

18. This suggests that the ACCC places little weight on the burden on the applicant to satisfy the authorisation test but intends to import a prescriptive approach to the information required as a measure of validity (and thereby as a condition to commencement of the process and statutory timeframe).

19. The Committee submits that this approach is a substantial shift away from the rationale of the Harper Panel when it stated:[8]

[7] At [3.10].
[8] Competition Policy Review, Final Report, p.331.

> *The Panel maintains the view that it should not be necessary to burden merger approval processes with prescriptive information requirements. In a formal merger approval process, the burden will be upon the merging parties to satisfy the ACCC (and the Tribunal on review) that the merger would not substantially lessen competition in any market or would give rise to public benefits that outweigh any detriment. Provided the law contains penalties for providing false information to the ACCC, and the ACCC is empowered to seek additional information and documents from the merging parties, the process ought to ensure that relevant and accurate information is made available.*

20. The Harper Panel therefore recommended against prescriptive information requirements and placed emphasis on ACCC information gathering powers and penalties for false information.[9]

21. In contrast, the ACCC's intended approach in the Draft Guidelines potentially incorporates high levels of prescription and where what is required to be provided is not determined by the applicant but by the ACCC either in pre-lodgement discussions or when assessing validity. The ACCC also appears to place this emphasis on prescriptive requirements at the application stage rather than relying (as did the Harper Panel) on the ACCC being able to utilise its information gathering powers throughout the process, if and when additional information may be of relevance or assistance.

22. The Committee agrees that the Draft Guidelines should emphasise that the applicant must tailor the applications to the matter at hand and ensure that the application provides sufficient detail and corroborating evidence. However, the Committee submits that it would be preferable for the ACCC to make clear that this is a requirement that links to the applicant's burden to satisfy the authorisation test rather than linking this to the validity of the application. This is particularly so in circumstances where the ACCC has the ability to effectively extend the statutory 90-day review period and if a decision is not made within the review period it is deemed to be a refusal of authorisation.[10]

23. Thus, the Committee submits that the statement in [3.10] of the Draft Guidelines would more accurately read:

> *The level of detail and the type of information required ~~for an application to be valid~~ to satisfy the ACCC (and the Tribunal in any review) will differ depending on the nature and complexity of the issues raised by the proposed acquisition.*

Timing

24. The Draft Guidelines refer, appropriately, to the statutory timeframes and the ability for this period to be extended (section 4). The Draft Guidelines also provide a high-level diagram of the steps that the ACCC considers are involved in the merger authorisation process, at [1.10].

[9] Where such information gathering powers are present in s 90(6)(b), s 155(1) and s 155(2)(b)(iii) and penalties may be sought in s 92 as well as s 137(1) of the Criminal Code.
[10] Section 90(10B) of the Competition and Consumer Act 2010 (Cth).

25. The Committee considers that the Draft Guidelines should provide additional detail around the timing of each step, as well as or by way of an indicative, example timeline for the overall process. The Committee notes that such guidance is provided by the ACCC in the informal clearance process and was also provided by the Tribunal (as a practice note) in the context of the (former) Tribunal authorisation process.

26. While the Committee appreciates the need for some flexibility given the circumstances of each application will differ, the Committee considers that indicative timing for the steps involved in the process is important if the reform objectives of timeliness and transparency are to be achieved.

27. The Committee also submits that the Draft Guidelines should clarify the circumstances in which the ACCC will or may request the applicant to agree to an extension of the 90-day period, the circumstances in which multiple extensions would be necessary and the potential length of any extension.

ACCC information gathering

28. The Committee notes that s 155 has been expanded to allow the ACCC to issue a notice under s 155 for documents and information from the applicant or third parties relevant to a merger authorisation application.[11] These amendments would also permit a notice requiring an individual to appear before the ACCC where the matter is relevant to a merger authorisation application.

29. The Draft Guidelines, however, do not provide guidance on the process and approach of the ACCC to issuing a notice under section 155 when considering a merger authorisation application. The Committee considers that the Draft Guidelines should address this power and the ACCC's general policy with regards to the use of such a power in the merger authorisation context.

30. The Committee notes that, in the former Tribunal authorisation process, the applicant (and other parties, including the ACCC) could and did request the Tribunal to issue information requests and summons to third parties who may have possessed information relevant to the application. The Committee submits that it is an important part of the formal merger review process that parties can request the decision maker to exercise mandatory powers to obtain information and documents. The Draft Guidelines should address whether and in what circumstances a party can make a request to the ACCC to use its information gathering powers under s155 to seek information from third parties in conjunction with the application. It should also address access by the applicant to such information. (In this regard, the Committee refers generally to our other comments on transparency).

ACCC Feedback

31. [4.28] of the Draft Guidelines explains, in brief terms, that while the ACCC is not required to publish a draft determination in the merger authorisation process, it expects to 'engage' with the applicant prior to the final determination to provide feedback and this ‘may’ include outstanding concerns, identifying areas of less concern and a summary of concerns received.

32. The Committee submits that the Commission should provide feedback in all cases and that the language should be updated to reflect this. The Committee also submits

[11] Section 155(2).

that the Draft Guidelines would benefit from greater detail around the process, timing and extent to which the ACCC will provide feedback to the applicant. This extends to both providing the views of interested parties and the views of the ACCC on the application. For example:

- At what point will this feedback be provided?
- What form will it take? How detailed will this be?
- Will this include the ACCC's draft view (even if not in the form of a draft determination)?
- Will this be published on the register?
- Will the applicant have an opportunity to respond?

33. Consistent with the approach followed under the former Tribunal authorisation process, where the applicant was provided with a detailed ACCC report and evidence upon which the report relied, the Committee considers it would be appropriate and beneficial for the ACCC to provide the applicant with a copy of its case file (or summary) and evidence:

- during the review process;
- at the conclusion of the review process in order to facilitate a decision as to appeal.

34. Section 4.28 flags that the feedback will not identify any confidential information. For the reasons outlined below, the Committee considers it critical that a suitable confidentiality regime be put in place to ensure that (at a minimum) the applicant's legal counsel and independent experts have unrestricted access to all information before the ACCC.

35. This is necessary to correct any information asymmetry between the ACCC and the applicant, particularly given that a review of the ACCC's decision by the Tribunal will be confined to the information before the ACCC. It will be difficult for an applicant to assess whether it should apply for a review without access to all the information before the ACCC. Moreover, the merger parties are often in the best position to consider the relevance of information put to the ACCC by third parties and ensuring that those comments are sought (not only for contentions but also critical underlying facts) will, in the Committee's submission encourage better decision-making.

Public register and confidentiality

36. The Committee has already made some general comments above regarding provision of feedback to the applicant. This section deals more specifically with the need to ensure that there is an appropriate balance between the ACCC providing transparent and detailed feedback and the confidentiality concerns of interested parties.

37. The Committee considers that Section 5 of the Draft Guidelines provides a useful summary of the approach to confidentiality in the context of the statutory provisions relating to the public register.

38. The Committee submits that an important principle underpinning the public register process, and more generally when dealing with legitimate confidentiality concerns, is that merger authorisations are intended to be considered in an open and public way. A public authorisation process should permit the applicant and interested parties adequate opportunity to understand the information and contentions presented (by all) so that they can be properly tested.

39. In this regard, merger authorisation stands in contrast to the ACCC's informal clearance process. The Committee submits that the greater transparency inherent within the formal merger authorisation process is a fundamental feature (a necessary consequence of which is to provide processes for providing the necessary transparency). As noted earlier, the Harper Panel expressly noted this feature of the alternative formal merger review process:

> *The Panel considers that an efficient and effective formal merger approval process is important for the economy. Although the informal approval process has been shown to work effectively for the majority of mergers, parties to complex and contested mergers* ***should have an alternative merger review process available to them that delivers transparent and timely decision making****, consistent with international best practice.*[12] (emphasis added)

40. The Draft Guidelines at [5.23] note the limited circumstances in which the ACCC may provide the applicant with documents excluded from the public register, largely with reference to the right in s 157 for the applicant to obtain documents that tend to establish its case.

41. The Draft Guidelines make no reference to the express power in s 89(7) which is introduced as part of the recent reforms:

> *The Commission may disclose information excluded under this section from the register kept under subsection (3) to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application concerned.*

42. This is an important provision which the Committee submits warrants a reference in the Draft Guidelines. It should also be reflected in the standard provisos upon which the ACCC accepts confidential information, in particular the circumstances in which confidential information may be disclosed by the ACCC (as set out in section 5.8 of the Draft Guidelines),

43. While the ACCC arguably has a similar right of disclosure under s 155AAA, the Committee submits that the new permissive power in s 89(7) is significant in the context of a merger authorisation process that is intended to deliver transparent and timely decision making. Specifically, it would permit the ACCC to make limited and regulated disclosure of confidential and commercial sensitive information on terms similar to those regularly adopted by the Tribunal, including where appropriate for such information to be disclosed to legal counsel (and experts) subject to specific non-disclosure undertakings or conditions. Of course, it also permits other terms of disclosure.

[12] Competition Policy Review, Final Report, March 2015, p.328 and also Recommendation 35.

44. The Committee has, on past occasions, recommended greater transparency in the ACCC's informal clearance process. The principles underpinning those submissions apply *a priori* to a formal process where transparency and the open scrutiny of information and contentions is an integral feature that underpinning both procedural fairness and stronger decision-making.

45. Greater transparency is, of course, a key feature of the Tribunal process as clearly shown in the four merger authorisation applications that were made under the previous direct to the Tribunal process. While that process has been replaced, the Committee submits that there is no support to a view that those reforms are intended to lead to more limited transparency. This is clear not only from the statements by the Harper Panel and the inclusion of s 89(7) but also emerges from the limitations placed on the information that can be considered by the Tribunal. The combined ACCC/Tribunal process (if there is a review application) is likely to be more efficient and effective if greater access to confidential information is made available in the process before the ACCC, than is the case in the informal clearance process.

46. The Committee recommends that:

- the Draft Guidelines make specific reference to s 89(7) and give guidance on the circumstances in which the ACCC would exercise that power and how it might protect legitimate confidentiality concerns; and

- include, as a possible application of this right to disclose, express reference to limited disclosures to persons (such as the applicant's legal counsel and experts) under regimes governed by strict obligations of confidence such as those regularly adopted by the Australian Competition Tribunal and the Federal Court.

ACCC residual discretion

47. With reference to the Tribunal's decision in *Re Medicines Australia Inc*[13] at [106], the Draft Guidelines state that the ACCC is not required to grant authorisation even where the relevant authorisation test is satisfied.

48. The Committee submits that a reference to any such residual discretion (which may or may not represent the law) is unhelpful without some guidance on the circumstances in which the ACCC considers it is entitled to (and would) exercise that discretion. The Committee's preference would be that there be no reference to any such residual discretion in these guidelines given its limited judicial consideration in a non-merger context. However, if the ACCC is minded to include such a reference, the Committee submits that it would be preferable for the ACCC to guide applicants by identifying the circumstances that, in its view, may be relevant to the exercise of any such discretion.

Public benefits and lessening of competition

49. The Committee suggests that it would be helpful if the Draft Guidelines were updated to include references to recent decisions made in a merger authorisation context in the Tabcorp proposed acquisition of Tatts. This includes:

[13] [2007] ACompT 4 at [106].

- the original decision of the Tribunal in *Application by Tabcorp Holdings Limited* [2017] ACompT 1 – where notwithstanding the successful judicial review application, the statements of legal principle were largely affirmed;

- the decision of the Full Federal Court in *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150; and

- the remitted decision of the Tribunal in *Applications by Tabcorp Holdings Limited* [2017] ACompT 5.

50. In particular, the Committee submits that it would be helpful if the Draft Guidelines incorporate recent clarification of the public interest test in the Full Federal Court decision, outlined below.

51. First, that public detriment need not be a substantial lessening of competition but may be any public detriment (including a competitive detriment) arising out of the merger.

> *The inquiry thrown up by s 95AZH is concerned with all benefits and detriments resulting from the acquisition including, no doubt, competitive ones. But so far as the competitive factors are concerned, the focus is much broader than it is under s 50; it is not limited only to detriment in a market nor, even where markets are concerned, with competitive lessenings to which s 50 might otherwise apply.*[14]

52. Second, that internal efficiencies such as cost savings and revenue increases are relevant to the assessment of public benefit,[15] and that there is no requirement to expressly weigh each public benefit.

> *Many of the benefits and detriments will be incommensurable and possibly unmeasurable as well. … It seems to us that the benefits and detriments may more usefully be assayed by means of a process of 'instinctive synthesis' sometimes referred to in the law surrounding the formulation of criminal sentences where a similar problem is encountered: see Wong v The Queen [2001] HCA 64; (2001) 207 CLR 584 at 611 [74]-[75] per Gaudron, Gummow and Hayne JJ. This may be referred to as weighing, but to refer to balancing, or a balance-sheet approach, may suggest that the essential qualitative assessment has a greater degree of precision than the statutory subject-matter permits.*[16]
>
> *It would be unworkable to require the Tribunal explicitly to give a weight to each benefit and we would strain to avoid such a construction were it necessary. It is not, however, necessary so to strain. Section 95AZH(1) does not require what the ACCC suggests. The assessment of benefits and detriments must be complete and the Tribunal must, no doubt, weigh them. This is not necessarily, however, an arithmetical or accounting process. As we have said above, it may involve an instinctive synthesis of otherwise incommensurable factors.*[17]

[14] [2017] FCAFC 150, [11].
[15] [2017] FCAFC 150, [62] – [68].
[16] 2017] FCAFC 150, [7].
[17] [2017] FCAFC 150, [68].

Conditions and undertakings

53. Section 9 of the Draft Guidelines (Imposing conditions and section 87B undertakings) explains that, where possible, the ACCC will provide the applicant and interested parties with the ability to comment on proposed conditions and undertakings.

54. The Committee suggests that, as a matter of procedural fairness, any conditions or undertakings that the ACCC proposes to impose in granting authorisation should be the subject of consultation with the applicant. The Committee also suggests that the Draft Guidelines explain the circumstances in which and when a s87B undertaking may be offered by the applicant or suggested by the ACCC, particularly where it might be without consultation, and discuss any associated impact on timeframes.

Tribunal review

55. The Draft Guidelines set out the parameters of a review by the Tribunal of an ACCC determination.

56. The Committee submits that the Draft Guidelines should set out how the ACCC will deal with a scenario in which a third party (with a sufficient interest) intends to or applies for review of the ACCC's determination in the Tribunal. Specifically, it is not clear whether such a third party could request or be provided with the ACCC's case file in conjunction with such an application.

57. The Committee also considers that the former Tribunal authorisation process benefitted significantly from the transparency associated with the Tribunal conducting oral hearings and permitting cross examination of witnesses and experts. All parties to the proceeding (including the ACCC, the applicant and interveners) were permitted to cross examine witnesses, with appropriate coordination to minimise duplication and protections to preserve confidentiality. Recognising that the Tribunal review is not a re-hearing of the matter, the Committee is also strongly of the view that a review process by the Tribunal should involve (and the ACCC should not oppose) an oral hearing and permit appropriate cross examination.

58. While it will be a matter for the Tribunal as to how it conducts its review of an ACCC determination, the Committee considers that it would be helpful if the Draft Guidelines set out the ACCC's position in relation to the Tribunal conducting such hearings and permitting such cross examination.

Miscellaneous Comments

Finally, the Committee:

- Submits the following revised wording at [1.6] is more accurate:

  The merger authorisation process provides an alternative ~~clearance~~ formal merger review option to the informal merger review process.

- Notes that the Draft Application Form requires the applicant to provide contact details for its competitors and submits that such information is unlikely to be available to the applicant.

Contact

59. If the ACCC would like any further views, or clarification, on any of the issues raised above, please contact the Chair of the Committee, Fiona Crosbie on (02) 9230 4383 or at Fiona.Crosbie@allens.com.au.

Yours sincerely

Rebecca Maslen-Stannage
Chair, Business Law Section