

Harper Review recommendations - Mergers

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In brief

- The Final Report of the Federal Government's independent review of competition policy in Australia – the so called “Harper Review” – was released on 31 March 2015.
- The Final Report's recommendations on mergers will be of interest to clients. In brief, the recommendations:
 - clarify the definition of ‘competition’ in the Competition and Consumer Act 2010 (“**the Act**”) to explicitly include ‘potential imports’ in addition to ‘imports’; and
 - seek to combine the formal merger clearance and merger authorisation processes and provide for the Australian Competition and Consumer Commission (ACCC) to be the decision maker at first instance. Specific features of the formal process are to be settled in consultation with business, competition law practitioners and the ACCC.

In detail – the proposed changes

Definition of ‘competition’

In response to concerns that the Act does not adequately provide for global competition, the Harper Panel has recommended that the definition of ‘competition’ in the Act be amended from:

- “competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia”, to
- “competition from goods imported or **capable** of being imported into Australia, or from services rendered or **capable** of being rendered in Australia, by person not resident or not carrying on business in Australia”¹.

¹ Competition Policy Review, Final Report, March 2015, page 321.

Although this recommendation has been made in the context of mergers law, if implemented it will apply to all relevant provisions under the Act as the term ‘competition’ is a central term.

It is arguable that the change is unnecessary and that the existing language is sufficient. However, complaints have been raised that the ACCC administers the Act too narrowly and therefore some practical effect may result. Note that the ACCC have opposed the recommendation².

Merger Approval Process

Currently, there are three separate processes available to parties seeking merger approval – informal, formal and authorisation. The informal process is the most commonly used process. Since their introduction in 2007, the formal process has never been used and the authorisation process has only been used twice.

Informal merger review

The Harper Panel did not make any recommendations with respect to the informal process noting its flexibility and low cost, despite many submissions requesting that it be subject to more transparency and rigour. Instead, the Panel recommended that there should be further consultation between the ACCC and business representatives with the objective to deliver more timely decisions.

Since there is no statutory basis for the informal process, there is no right of appeal for the parties if the ACCC does not give its approval. In such a case, the parties may seek a declaration from the Federal Court if they wish to proceed with the merger which is likely to be time and cost intensive for the merger parties.

Proposed formal merger clearance – combination of the current formal and authorisation process

The Harper Panel has recommended combining the formal and authorisation processes into a new formal approval mechanism intended to be used for complex and contested mergers. The current formal process imposes strict and prescriptive document and information requirements which are onerous and inflexible. The proposed process is intended to do away with prescriptive requirements to make it workable, while imposing strict timelines to provide merger parties with timing certainty for their transactions.

Further, under the current process, the ACCC can only review the merger on the basis of the substantial lessening of competition (SLC) test, and the public benefit test is applied separately by the Tribunal in an authorisation application. In the proposed formal process, merger parties will be able to make a single application to the ACCC that addresses both the SLC and public benefit test at the first instance allowing a review by the Tribunal³. This will enable approval for any public benefit arising from a merger at an earlier stage from the ACCC. However, the merger parties will lose the right to apply directly to the Tribunal for an authorisation, noting that in both approaches to the Tribunal to date, the informal merger clearance process was initially pursued⁴. Further, the review by the Tribunal is not proposed to be a full rehearing which will affect the right of the merger parties to put forward new evidence or test ACCC’s evidence through cross-examination unless the Tribunal allows it⁵.

² Ibid, page 317

³ The Harper Panel is proposing that the ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially competition **or** that the merger results in public benefits that outweigh any detriments, see page 329 of the Final Report.

⁴ The first application to the Tribunal, by Murray Goulburn in its proposed acquisition of Warrnambool Cheese and Butter was in 2013, following an informal merger clearance application before the ACCC in 2010. The second application to the Tribunal, by AGL, was lodged 20 days after the ACCC notified AGL of its indicative informal view opposing the merger.

⁵ Ibid, page 331

The detail and specific features of the proposed formal regime, including the following, are all unclear at this stage:

- the extent of document and information requirements imposed by the ACCC;
- the onus of proof;
- opportunities for third parties – including competitors, suppliers, consumers and their representatives – to be heard;
- the extent of transparency around disclosure of concerns and evidence on which those concerns are based; and
- the scope of merits review by the Tribunal.

The Harper Panel has recommended that these details are to be settled in a future consultation. The features that are eventually adopted will determine whether the proposed new formal regime will be more accessible and effective.

The following table sets out details of the current and recommended processes available to parties seeking merger approval.

	Current Process - recommended to stay as is	Current Processes - recommended to be replaced		Recommended Replacement
Merger clearance process	Informal	Formal	Authorisation	Formal + Authorisation
Decision maker	ACCC	ACCC	Tribunal	ACCC
Test	SLC	SLC	Public benefit	SLC or Public benefit
Clearance	Confidential or Public	Public	Public	Public
Information requirements	No set information requirements. Evidence does not have to be legally admissible. Submissions not published.	Set information requirements.	Set information requirements.	No prescriptive forms or information requirements, but likely that ACCC will be empowered to seek additional information and documents ⁶ .

⁶ Ibid, page 331

Timing	Indicative only ⁷ , flexible timing can be extended at the option of the parties or the ACCC and therefore can become protracted.	Statutory timeline of 40 business days with possible 20 business day extension.	Statutory timeline of 3 months with possible 3 month extension.	Statutory timeline of 3 months for initial ACCC decision (can only be extended with consent of parties).
Nature of decision	Indicative view. If approval is not given, the merger parties or the ACCC need to get an order from the Federal Court to proceed with or block the merger respectively.	Formal decision by ACCC.	Formal decision by Tribunal.	Assume statutory basis, and formal decision by ACCC.
Appeal body	Injunction or declaration may be appealed to the Full Federal Court.	Tribunal	Federal Court	Tribunal - Statutory timeline of 3 months for merits review. Based upon material before the ACCC but Tribunal to have discretion to allow further evidence or witnesses if sufficient reason.
Other features	No immunity from third party action.	Immunity from third party action.	Immunity from third party action.	Likely immunity from third party action.
Fees	No fees	\$25,000	\$25,000	Fee likely, amount to be determined.

*Based on the table on pg. 313 of the Harper Report

⁷ The current ACCC Merger Review Process Guidelines, 26 September 2013, advise that most informal merger clearances will be completed within 8 weeks but where the merger involves a Statement of Issues then the guideline timeframe can extend to 24 weeks (see page 13). In practice, informal merger clearance can take longer with the issue of information requests by the ACCC, both formal (section 155 notices) and informal, and/or if a section 87B undertaking is proposed to alleviate particular competition concerns raised by the ACCC.

The Takeaway

The merger recommendations largely go to the procedural aspects of merger review, and are likely to be of interest to all clients with prospective merger activity in concentrated industries.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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