Mergers

Balancing the competitive pressures

Based on a speech given by Graeme Samuel, ACCC chairman, at the National Press Club on 12 November 2003.

The chairman of the ACCC, Graeme Samuel, accepts the recommendation of the Dawson committee that the ACCC provides adequate reasons for its decisions on mergers applications.

Addressing the National Press Club on 12 November he said that, in line with the committee's recommendation, it will from now on publish its reasons for merger decisions when: the merger is rejected; the merger is approved with enforceable undertakings or when the parties to a merger request publication of the ACCC's reasons for approval.

In deciding to publish the ACCC is conscious that this should provide the market with a better idea of its analysis of various markets and associated merger and competition issues. It will also alert the market to the circumstances where the ACCC's assessment of competitive conditions in particular markets is changing, perhaps because of technological change or as a result of previous mergers within those markets.

The ACCC's reasons will normally be published on its website at the same time, or shortly after the merger decision is announced. The ACCC will continue to protect confidential information gained either from the merger parties or through its market inquiries. It will protect the identities of those providing sensitive market information.

The ACCC is, however, concerned about the Dawson recommendation for a voluntary formal clearance process for mergers to operate in tandem with the current informal one. This means an end to the informal system as happened in New Zealand thereby losing one of the great benefits of the Australian system whereby parties come to the ACCC to engage both commissioners and staff during the assessment process. It is a process that has drawn favourable comment in international comparisons of merger assessment systems. In its 2003 ratings, the Global Competition Review said Australia's merger regime 'is deemed to reach the correct result in merger reviews consistently and to do so efficiently'.

At the very least, a formal clearance system will mean more formalisation of the informal system. For example, there will need to be certain up-front information requirements instituted for the informal clearance system so that it is clear on what basis parties are approaching the ACCC. Limited time periods for considering formal merger clearance applications would also mean reduced scope for an interactive process with the ACCC.

The Dawson committee recommended that parties seeking merger authorisation go directly to the Australian Competition Tribunal rather than approach the ACCC. The parties would not have time to discuss merger issues with the ACCC and this would be entirely inappropriate given the ACCC's envisaged role in assisting the tribunal. The tribunal has made it clear that that it would not countenance merger parties seeking to negotiate the terms of a proposed merger with tribunal members.

The ACCC is concerned that a more formal merger assessment will lead to more mergers being rejected. In recent years the ACCC has, on average, only had problems with 4 or 5 per cent of mergers it considered with about half of these able to proceed after discussion and, in some cases, the offering of undertakings. The rejection rate is likely to increase under formalised procedures.