MERGERS – A NEW SYSTEM FOR AUSTRALIA

SUBMISSION TO THE

COMMITTEE OF INQUIRY INTO THE TRADE PRACTICES ACT 1974

ROBIN SPEED LLM
Speed and Stracey
131 Macquarie Street
Sydney NSW 2000
Tel: (02) 9251 8000
Fax: (02) 9251 5788
E.mail: speedstr@bigpond.com

EXECUTIVE SUMMARY

There are a number of ingredients to a successful merger control system for Australia.

- A system suitable for Australia
- A focused merger test
- An independent panel consistently applying the test and constructively making orders
- A threshold below which mergers are not reviewed
- An organisation policing the system

It is suggested that the following is the most suitable system for Australia.

New merger test

The merger test should be – is the merger anti-competitive?

Independent Mergers Panel

An independent Mergers Panel should be established. The Panel should have its own staff with a full time Chairman and a small number of business and Government members.

The Panel should act informally. Its decisions should be final except on limited grounds.

The Panel should have power to constructively shape orders most suitable to the particular merger - with the emphasis on how best to strengthen competition and Australian business.

Threshold

A turnover and market share threshold should be stated below which mergers are not reviewed.

In addition a merger should not be reviewed by the Merger Panel if the ACCC determined that the merger would not substantially lessen competition in a market.

Policing anti-competitive mergers

The ACCC should have the role of merger watchdog.

1. AUSTRALIA

1.1 Introduction

The continuing strength and vigour of Australian business is necessary for the future of Australia. Competition provides the environment to increase business strength and vigour.

Investors and consumers are better off by having a competitive healthy business environment.

Australia needs to not impede the growth of local Australian businesses with competitive edge qualities.

Today Australian businesses are generally result oriented, innovative, outward looking and used to succeeding without government handouts.

Australian business wants to compete globally.

What is needed is a merger control system which does not get in the way of the local competitive struggle between Australian businesses and against foreign competitors.

1.2 Competing overseas

For any Australian business to succeed overseas is difficult. The existing players in the foreign market are usually well adapted to seeing off new foreign competitors.

Australian businesses do not in general have a good record of successfully and consistently competing in overseas markets. This is different from the record of successfully supplying to foreign markets.

What is needed is a merger control system which does not get in the way of Australian businesses growing to compete in foreign markets and globally.

1.3 Mergers and the Australian investment community

Today mergers in Australia are often self regulating. Australia has a sophisticated and transparent system of reporting on the current activities of most Australian businesses.

Managers are not entrenched. Managers who do not perform do not survive – even if they performed in the past. Management is seen very much like Australian sporting teams. Unless the team keeps winning the team is changed.

A proposed merger is not instantly welcomed by the investment community. Quickly and often perceptively the investment community, through the media and a range of public documents, form a judgment on the merits of the merger.

What is needed is a merger control system which leaves the market to judge the investment merits of the merger and only then regulates the surviving mergers where the likely effects are independently determined as anti-competitive.

2. THE MERGER TEST

2.1 The present merger test

The present merger test in Australia provides for the prohibition of all mergers – regardless of size – unless either:

- The merger is in the public interest; or
- The merger is not likely to substantially lessen competition in a market.

It is suggested that the public interest test is too defused and in practice is not satisfactory.

If the parties rely on the substantially lessening competition test - and are wrong - they are subject to maximum penalties of $10 million (corporations) and $500,000 (individuals), and other orders such as injunctions and divestiture.

It is suggested that it is not satisfactory to impose as a consequence of a vague and uncertain test what are in effect severe criminal penalties. There is a clear distinction between for example price fixing and entering into a merger which is subsequently judged to be likely to substantially lessen competition.

The necessary result of having these penalties with this test is to place an unhealthy reliance on obtaining an informal clearance from the ACCC before proceeding with a merger.

2.2 Merger tests elsewhere in the world

Many countries in the world have merger control systems. The tests most commonly used are the substantially lessening competition test, the public interest test and the domination test, (either alone or in some form of combination).

Australia abandoned the domination test and now has a combination of the other two tests.

It is recognised that regardless of the test – the same result for a particular merger may occur depending on who is applying the test.

2.3 What matters

What matters is not simply the test but:

- The particular economic situation in the country concerned
- The body responsible for applying the test
- Constructive orders for anti-competitive mergers

Success of the test is measured by how it works in Australia - not what test exists in another country.

2.4 The need for a focused merger test

What is needed is a focused merger test.

The public interest test is defused and is not suitable for Australia. Businesses need certainty – the public interest test is not only uncertain but undesirable. It serves generally as a sop to a lower competition test.

Focus is important to the body responsible for applying the test and also, so that the business community can know in advance what is likely to be acceptable.

The substantially lessening test is also not satisfactory as it tends to concentrate on the reduction in the number of competitors - rather than on the competitive system.

Competition is at the heart of our business system. If a merger is determined to be anti-competitive it should be prohibited unless orders can be made to remedy the position.

2.5 The suggested test

It is suggested that there should only be one test – namely is the proposed merger anti-competitive?

This test would be part of a new merger control system, which includes an independent Mergers Panel to determine the application of the test to a particular merger and to constructively determine appropriate orders.

The suitability of any test needs to be judged within its particular system.

What is at issue is the most suitable system for Australia – not simply a debate on a particular test or an aspect of the system in isolation.

It is suggested that the test of being anti-competitive is readily understood and removes the baggage carried by the existing tests. It focuses on the competitive system as a whole.

2.6 Orders

The present system of imposing black and white penalties of $10 million (corporations) and $500,000 (individuals) is today not the most constructive way of handling complex issues.

Under the proposed system the independent Mergers Panel would determine whether or not a particular merger was anti-competitive.

If it determined that the merger was anti-competitive there would be no automatic imposition of penalties or divestiture. Rather the Panel would have a wide discretion to tailor its orders to the particular merger. For example, if it was satisfied that the anti-competition effects would be short lived, appropriate orders might be made and undertakings given.

3. THE MERGERS PANEL

3.1 Constitution of the Panel

It is suggested that the anti-competitive test should be applied by an independent statutory Mergers Panel.

The Panel would have a full time Chairman and a small number of business and Government members. It would have its own staff, including adequate research staff.

3.2 Role of the Panel

The role of the Panel would be to determine whether the particular merger referred to it by the ACCC or a party to the merger was anti-competitive, and if so, to mould the most suitable orders to strengthen Australian business and competition. The Panel would have an array of orders that it might make or undertakings it could accept.

The Panel would be located, and operate, independently of the ACCC. It would also operate independently of political pressure.

3.3 Procedure before the Panel

The Panel would act informally with power to make confidential orders, where necessary, and to summon witnesses and documents.

A timetable would be formulated to ensure that the Panel operated within prescribed time limits.

Decisions of the Panel would be published.

3.4 Panel decisions final

Panel decisions would be final except a limited right of review would be available similar to reviews of administrative decisions.

4. MERGER THRESHOLDS

4.1 Suitable thresholds

Under the present law all mergers are potentially the subject of merger control.

It is suggested that fixed levels of turnover and market share should be specified in the legislation. Below the levels the merger would not be subject to control.

4.2 Additional flexibility

Further flexibility could exist by giving the ACCC power to decide to not refer a merger to the Panel if it considered the merger was not likely to substantially lessen competition in a market.

5. POLICING MERGERS

5.1 The ACCC watchdog

Under the proposed system the ACCC would have the role of merger watchdog both at the pre and post merger stage.

If the Panel decided to impose conditions or accept undertakings the ACCC would act as the watchdog of observance. Any breach would be referred by it back to the Panel.

5.2 References to the Panel

The ACCC could instead of referring a merger to the Panel determine that the merger was not likely to substantially lessen competition in a market. If it made this determination the Panel would have no jurisdiction to deal with the merger.

It is suggested that the test of substantially lessening competition is a useful threshold test to sort out those mergers above the fixed thresholds which should proceed without being reviewed by the Panel.

5.3 The ACCC and the Panel

The ACCC and the Panel would be independent and separate bodies.

Once a matter had been referred to the Panel by the ACCC or a party to the merger the ACCC would submit its views to the Panel on the merger. Likewise, when the Panel was considering orders the ACCC would make submissions.

Robin Speed LLM