

COMPETITION ALERT

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THE CASE FOR REFORM OF THE COMMERCE COMMISSION'S PROCESSES: DISCUSSION DOCUMENT

This Alert considers some of the key proposals in the Ministry of Economic Development's Discussion Document on its review of the clearance and authorisation provisions in Part 5 of the Commerce Act.

The Ministry of Economic Development's ("MED") recent Discussion Document¹ reviewing the clearance and authorisation procedures in the Commerce Act 1986 ("Act") does not propose fundamental changes to the existing clearance and authorisation process for mergers, but it does propose to allow clearances for restrictive trade practices, and explores other modifications to Part 5 of the Act to improve the effectiveness and efficiency of both the mergers and restrictive trade practices assessment process.

Adding a trade practice clearance process

Possibly the most innovative suggestion in the Discussion Document is the proposal to introduce a clearance process for trade practices, whereby a person could apply to the Commerce Commission ("Commission") for clearance of a practice on the grounds that it did not contravene the restrictive trade practices provisions of the Act. This would be similar to the way in which mergers that are not regarded by parties as being in breach of the Act may be cleared by the Commission, with the same resulting benefits of commercial certainty and immunity from prosecution.

Currently, to obtain immunity for an arrangement which may otherwise breach the prohibitions in ss 27-38 of the Act (the restrictive trade practices prohibitions), parties must seek an authorisation. This process is more expensive and lengthy than a merger clearance process, with a \$11,250 filing fee alone, and no specified timeframe for completion. An authorisation application also requires economic evidence providing a justification for the restrictive elements of the conduct on the grounds of public benefits and the parties must cease giving effect to the arrangement or conduct until authorisation is granted.²

The Discussion Document suggests that introducing a clearance process would be beneficial for businesses as it would be less complicated, expensive and time consuming than the authorisation process. Such a process would be particularly useful for trade practices that are at the 'margins' in terms of their effects on competition, or otherwise require the Commission to take a view as to whether parties are or would, but for the arrangements in question, be in competition with each other, for example in determining whether a technical price fixing breach has occurred.³

Often commercial parties undertake legal and economic analysis in order to establish if their arrangements are caught by the restrictive trade practice prohibitions. However, because immunity from examination by the Commission is only available if authorisation is obtained, regardless of how careful or correct the advice is, the Commission may still investigate. That investigation process can cost parties thousands of dollars to respond to and commonly

1. <http://www.med.govt.nz/upload/46918/discussion-document.pdf>.

2. This obligation to cease a trade practice while authorisation is being considered is a substantial disincentive to businesses seeking authorisation, as ceasing a particular practice can have far reaching consequences for a business, particularly in relation to arrangements that have been in place for years and only give rise to the prohibited effects due to changes in market circumstances outside the control of the parties.

3. For a more extensive discussion on the potential pitfalls of technical price fixing, see 'Cartels and Price Fixing - Avoiding Claims in the Current Legal Environment'; Sarah Keene and Andrew Fincham, Lexis Nexis Conference paper, 31 May 2007, available at <http://www.russellmveagh.com/doclibrary/public/Competitionlaw/Cartelsandpricefixing.pdf>.

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represents a significant distraction for senior management through the process. In addition, as investigations are not subject to any statutory timeframes, the Commission staff allocated to it are regularly required to resource other investigations, such as clearances, that are subject to a formal statutory process. This means that investigations can drag on for years creating significant commercial uncertainty in the interim. A voluntary restrictive trade practices clearance process would allow commercial parties to avoid this uncertainty, cost and delay.

An informal pre-merger process?

One of the key differences between the New Zealand and Australian merger control regimes is the fact that the Australian Competition and Consumer Commission ("ACCC") operates an informal pre-merger process whereby parties to a proposed merger can approach the ACCC on an informal and confidential basis and receive a "letter of comfort" that the ACCC proposes to take no action against a proposed merger. The Commission had a process of this nature and deliberately moved away from it.

The ACCC informal process is generally seen as beneficial to business as it is a process that is more flexible than a formal process, provides decisions in a more timely fashion, and provides direct access to the Commissioners themselves, who are ultimately responsible for declining the application. In addition, the ability to approach the ACCC in confidence is an advantage in the case of commercially sensitive business acquisitions.

There are, however, some downsides of the informal process for businesses and this has been recognised by the Federal Parliament in recently implementing a formal merger clearance process for Australia. First, the informal process merely provides a letter of comfort and not a guarantee that the ACCC will not prosecute, and it does not provide immunity from challenges by third parties. Secondly, the ACCC does not undertake a detailed review to the same extent as the Commission, and usually no decisions are published, which means that the ACCC's approach to competition issues and markets is less transparent. Thirdly, the lack of formal process precludes appeals and makes judicial review of the ACCC's decisions more difficult.

The Discussion Document does not favour reintroduction of a letter of comfort system in New Zealand, despite the likelihood that it would result in speedier decisions compared to the formal clearance system. The reasons provided are that it "would be at the expense of some due process protections that underpin the Act and the legal system more generally".

Increasing the statutory timeframe for merger clearance determinations

The time taken by the Commission to provide merger clearances has been a hot topic in the media and commercial community. On the one hand, parties like the certainty and clarity provided by the formal regime, but once in the process, if the Commission does not have enough information to take a view on whether clearance should be given, unless parties agree to an extension, the application is deemed declined. This can lead to problems in bidding processes or even the situation that NZ Bus found itself faced with, where it took the view that there were no competition risks, and withdrew the application. When the Commission took action and proved the company wrong, the company was penalised for this approach.

The MED proposes increasing the statutory timeframe for merger clearance determinations by the Commission from 10 to 30 working days. The MED's rationale for this proposal is that 10 working days is "unrealistically short and extensions are agreed as a matter of course" and then goes on to state that "only one of the last 52 clearance decisions made by the Commission has been decided within 10 days". In the last 12 months, Commission merger determinations took on average 42 working days, and some clearance proceedings took much longer than this, most notably the Foodstuffs and Progressive Enterprises applications for the acquisition of The Warehouse which took 99 and 95 working days respectively, and the Carter Holt Harvey application for the acquisition of Lakesawn Lumber Limited which took 75 working days.⁴

In the merger context timeliness of receiving clearance is frequently crucial as there are very real costs associated with delay in clearance applications, or regulatory risk or delay can lead to a bid simply not being considered, especially when there are competing purchasers for a business. Many would say that it is an unsatisfactory situation to have some potential purchasers (those already active in the industry) disadvantaged, whilst other parties that do

4. For a commentary on the Commission's timing of decisions see David Hargreaves' article in the Dominion Post on 31 May 2007: <http://www.stuff.co.nz/4079390a1865.html>.

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not require the comfort of seeking clearance (frequently, Australian-based private equity or industry participants) do not face such uncertainty.

The recommendation in the Discussion Document may lead to an even longer time for determinations to come from the Commission. On the other hand, the real issue may be one of practice rather than law. In that respect we take comfort in our experience which has been that, provided information is carefully presented, focussed and complete, the Commission will work hard to meet the timeframes agreed with counsel.

Other proposals

Other issues canvassed in the Discussion Document include:

- (a) Whether to replace the High Court with a specialist competition tribunal;
- (b) Whether the Commission should be given powers to enforce divestment undertakings in the merger context, or whether enforcement of these undertakings should remain with the courts;
- (c) Whether the Commission should be able to consider behavioural undertakings when assessing merger applications;
- (d) Modifying the process of authorisation for trade practices so that the trade practice in question does not have to be ceased while authorisation is being considered by the Commission; and
- (e) Minor changes to the process of assessing costs and benefits when considering the public benefit test.

Submissions

There are a number of proposals for change in this Discussion Document for the clearance and authorisation processes.

If you are potentially affected, we recommend you contribute to the MED's consultation process. If you are uncertain as to whether or how these proposals may affect your business, please contact one of the contributors below.

Submissions on the Discussion Document close on Friday 10 August 2007.