SUBMISSION TO COMPETITION TASKFORCE ON MERGER REVIEW BY ROGER FEATHERSTON

I have practised in competition law since 1975, including as a partner in the firm then known as Mallesons Stephen Jaques and as a Commissioner with the ACCC. In the latter role, I chaired the ACCC's Merger Review Committee.

I welcome a strengthening of the merger laws. Competition is unpredictable, yet the courts and tribunal have had an unrealistic desire for evidence of how competition will play out in the future instead of focussing on the preservation of conditions which would allow competition to develop.

My primary concerns, therefore, are with the revised factors guiding the application of the substantial lessening of competition test.

Before turning to those, I can't help but observe that the claim of simplification is contradicted by the length of the proposed amendments, the convoluted approach to the key issue of refusing a clearance, the use of special definitions and new terms, and even the complex numbering of sections. (I note that the proposed merger amendments cover over 90 pages when the entire 1974 Trade Practices Act was only 83 pages long.)

I do acknowledge and appreciate, however, some of the proposed innovations such as, for example, the capturing of cumulative acquisitions and related agreements.

The revised merger factors are set out in proposed sub-section 51ABX(3).

Paragraph (a) refers to 'the need' to 'maintain and develop' 'effective competition' in 'markets'. Each of these elements raises concerns.

The term 'need' may be a general objective, yet it appears to permit argument that the ACCC is required to determine (on evidence) in each case that there exists a need in that case for competition to be maintained and developed. Sub-section (4) does not resolve this issue, but lends weight to the view that each market must be assessed (due to its structure, the actual or potential competitors, or otherwise) as to whether a need exists. This would appear to impose a heavy and unnecessary burden on the ACCC.

I note that in sub-section (4), paragraph (b) appears to suggest that relevant competition is limited to identified competitors or potential competitors because it requires them to be persons carrying on business in Australia.

The reference to 'maintain and develop' raises concerns as to why it is 'and' when it should be 'or', and whether 'develop' means 'achieve' or encompasses an opportunity to enhance or improve.

Why is the concept of 'effective competition' required? It seems unfortunate and counter-productive to introduce two levels of competition, when 'competition' provides greater scope. Is it intended that competition is only lessened substantially if competition is reduced below the level of 'effective competition'?

Why is it ‘markets’ in the plural, rather than in any market?

In paragraph (c), the wording appears to be ambiguous as it may limit relevant commercial relationships to those between the parties to the acquisition and exclude those with third parties.

In paragraph (d), does the phrase ‘suppliers, consumers and users’ cover the field?

In paragraph (e), the factor has a definite public benefit tenor, which appears inappropriate in this context as public benefit is dealt with as a subsequent issue. It also uses the term ‘could’, which seems to include matters which might be quite remote possibilities, and then uses the term ‘would’ which seems to be overly definite. Also, if ‘advantage’ is relevant, shouldn’t disadvantage also be relevant?

In sub-section (5), regard should be possible in respect of any provision, not just ‘any restriction’; and in any contract, etc., not just ones which are ‘directly related’ and ‘necessary’.

I submit that additional guidance should be provided in section 51ABX to the courts and tribunal to focus them on what is likely to be lost, in terms of the market characteristics which allow competition to develop, and away from looking for evidence as to how competition will play out and who is likely to enter. The currently proposed factors don’t appear to me to go far enough.

Finally, I again express my concern with the proposed introduction of terms and definitions which are not used, or not used consistently, in other parts of the Act.

Roger Featherston
9 August 2024