

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

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The Role of the Australian Competition & Consumer Commission in Privatizations and Related Matters

The Australian Competition and Consumer Commission (the "ACCC") has been given a wide range of responsibility in the last three years. This increase in responsibility has made it probably the most important economic regulator in Australia (with the exception of the Reserve Bank, which still has a significant influence on interest rates and related matters). Apart from being given the specific role of regulator in the area of telecommunications (which by itself would have been enough), it will have an enhanced role in looking at the small business area (which was briefly referred to in previous newsletters), and is becoming increasingly more involved in media matters. But, one of its most important tasks which has gone largely unheralded has been in relation to the upcoming privatization and deregulation of Australian industries - electricity, gas, the ports and water and transport. In this context, it has been given what many see as a quite powerful role.

The ACCC is the only body that can seek to enjoin a merger, takeover or sale of significant assets of a corporation on the basis of anti-competitiveness. Other regulators may only seek divestiture after the fact. However, the ACCC cannot stop the proposed merger without seeking a court order. Unlike its powers in relation to telecommunications (where it has an important new power to issue what are in fact cease and desist orders in relation to anti-competitive telecommunications practices), the ACCC can only signal its concern about a particular transaction by seeking assurances and undertakings from the parties. Failing that, it will need to obtain a court injunction. Although it does not always get its way in seeking permanent injunctions, it is often successful in obtaining temporary injunctions pending final evaluations of the transactions by the courts.

In the privatization and deregulation of the Australian electricity and gas industries, State Governments have often made it an essential part of the privatization and sale of major assets that the successful purchase will not raise any trade practices problems. There are different ways in which State Governments have approached this particular matter, but by and large they require the relevant bidders to obtain a clearance from the ACCC before a bid can be successfully pursued. In some cases, the bids are made conditional on ACCC clearance. A penalty may be imposed (by way of forfeiture of deposit) where a party successfully bids for a property but later cannot complete due

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to ACCC concerns. In these circumstances the ACCC virtually becomes a player in the transaction. As a player, the ACCC visits data rooms to obtain relevant information, writes to relevant parties expressing its concerns and, in many cases, it obtains undertakings from prospective bidders to ensure that the concerns under the merger provisions of the Act can be eliminated.

Unlike the US Federal Trade Commission (and the Department of Justice) and other regulatory agencies elsewhere, the ACCC has no formal role in clearing mergers. Following detailed debate concerning the introduction of a pre-clearance notification regime, the Australian Government has not proceeded with this proposal.

Decisions by the ACCC as to whether a particular purchaser can be allowed to acquire a major public asset (such as an electricity station or a gas pipeline) are often made in a limited period of time and with only limited information provided on a confidential basis. The ACCC is not privy to much of the discussions that are taking place and must undertake its enquiries in the context of a number of different companies bidding for the same asset. Indeed, it is not unusual for competitive bidders to raise with the ACCC concerns that other bids may raise. Sometimes this is done as a tactical device to create uncertainty in competing bids and thus undermine the likely success of those bids. Governments are unlikely to want to endorse a particular bid, even if it is at a very high price, if there is an impression that the transaction could later be enjoined by the ACCC or, in the most extreme case, made the subject of a divestiture order by an interested party.

Formal pre-notification and filing of the information required by Parliament is a feasible option, as it does not foreclose the party from obtaining a court declaration in the event that the ACCC reaches a decision with

which the parties are unhappy. While this may delay transactions in a way that perhaps has not yet occurred in Australia, it would have the benefit of giving the ACCC's role a formality which at present is difficult to ascertain. At the same time, this should provide interested persons with a more certain (legal) regime if they wished to seek a review of a decision of the ACCC on the basis that it impacts on their rights.

At the moment, the ACCC says that if it has a competition concern about a merger, it is left with the task of threatening court proceedings or seeking undertakings from the relevant party. In most cases, parties are prepared to provide undertakings in order to allow their merger or other activities to proceed. However, this is often very difficult and can create significant burdens for both the relevant acquirer and the ACCC.

The ACCC's decisions are based on its own Merger Guidelines. Courts have not expressed a view one way or another on the correctness of the ACCC's evaluation of mergers.

The creation of a more formal regime in which the ACCC's guidelines are given statutory or regulatory recognition, and the ability of the courts to actually become involved in a transaction in an administrative rather than in a necessarily litigious framework, could also further a more efficient and effective administration of our Act. Certainly, many bidders for Government assets and facilities would welcome greater certainty and clarity in the way in which the law operates.

Note

* The above views are by way of discussion and not necessarily the views of the Australian Competition and Consumer Commission.
