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Commerce Act Review  
Ministry of Economic Development  
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## **Review of the Clearance and Authorisation Provisions under the Commerce Act 1986 (Act) - DLA Phillips Fox submissions on discussion document**

### **Introduction**

- 1 The submission provides comment on the questions posed by the Ministry of Economic Development (**Ministry**) in the discussion document relating to the review of the clearance and authorisation provisions under the Act.
- 2 The submission represents the views of the firm in New Zealand and does not necessary represent the views of its clients. It is not legal advice.

### **Merger issues**

#### **Question 1: What should be the default number of working days for Commerce Commission (Commission) consideration of merger clearance applications?**

- 3 We would favour increasing the default number of working days from 10 to 20. This period represents a sensible balance between the need for realism and the need to maintain a degree of pressure on the Commission to reach a decision in a timely and efficient fashion. We believe a genuine discipline is imposed on the Commission by the need to seek extensions from applicants and announce those extensions in circumstances where a decision cannot be reached. In an acquisition, timing is often everything and this should be reflected in the legislation.

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- 4 Our concern with the 30 working day period suggested by the Ministry is that it would become the norm for all clearance applications (even those which take less than 30 working days under the current regime).

**Question 2: Is there a need to amend the Act in relation to the publication of written merger clearance decisions?**

- 5 The short answer is yes. The Commission is required to give reasons in relation to authorisation applications (see section 67(5) of the Act) and given the formality which now accompanies a merger clearance process there appears to be little reason for any distinction between the clearance and authorisation process.
- 6 Reasons should either have to be released when the decision is announced (the discipline of having to write down the reasons prior to a decision might be viewed as increasing the quality of decision making) or within, say 10 working days, if this is viewed as unacceptable. Parties involved in major transactions should not be forced to rely on the discretion of the Court to obtain leave to file their notice of appeal outside the 20 working day period. For this reason the time period for appealing a clearance that is declined should run from when the Commission's reasons are released.

**Question 3: Should the Act provide for the enforcement of undertakings to dispose of assets or shares?**

- 7 As a matter of principle, a party should not be required to dispose of an asset under the Commerce Act regime unless that disposal is required to alleviate an actual or likely substantial lessening of competition (SLC). Also, a party seeking a clearance (which is, after all, voluntary) should not be in a worse position than a party that has undertaken a transaction without a clearance.
- 8 Bearing these principles in mind, we wonder whether the status quo (where a divestment undertaking forms part of a clearance) is to be preferred. It should be remembered that, up until recently, Australia did not have a formal clearance process so the option of including the divestment as a formal condition of the Commission being satisfied as to the absence of an SLC was not available. We are aware of a number of examples of where there has been a failure to comply with an undertaking and the Commission has investigated and found no SLC. Does the Ministry envisage that under any new law, these cases would have given rise to penalties against the acquirer or even divestment (despite there being no breach of the law)?

**Question 4: Should the original applicant be able to ask the Commission to make minor variations to undertakings to divest assets or shares?**

- 9 We agree with the Ministry that this appears to be a sensible suggestion. The merger regime should be concerned with substantive issues of competition, not minor matters of form or process.

**Question 5: Should the Commission be able to accept behavioural undertakings?**

- 10 We agree with the view taken by the ACCC in Australia that behavioural undertakings which are an adjunct to structural undertakings can provide competition benefits to consumers which would not otherwise occur. Concerns regarding enforceability can be lessened if the undertakings are self enforcing in the sense that third parties who have the benefit of the undertakings can take action against the acquirer.
- 11 Accordingly it would be preferable if the Commission were given the flexibility to accept appropriate behavioural undertakings. Our only concerns relate to Commission resourcing and the effect that allowing consideration of such undertakings would have on the time taken to consider clearance applications.

**Question 6: Should the Commission consider introducing an informal pre-merger letter of comfort?**

- 12 The informal approach is certainly favoured in Australia and we understand that no parties have yet sought to use the formal regime put in place following the Dawson reforms.
- 13 We believe it would be useful for parties to have an ability to informally approach the Commission on a confidential basis for an informal assessment of the merger. If the Commission was satisfied based on the information put before it that no SLC was likely then it could issue a suitably qualified letter of comfort. If required, the Act could be amended to make it clear that the Commission was entitled to subsequently bring proceedings notwithstanding any such letter.
- 14 We believe that such an approach would probably lead to an increase in the number of mergers being considered by the Commission under the formal process. This is because a party would effectively have no choice but to apply for a formal clearance if the Commission expressed concerns regarding its merger (which, without market enquiries, would be a very likely outcome of all but the most obvious merger enquiries).

**Restrictive Trade Practices Issues**

**Question 7: Should a clearance system be introduced for trade practices?**

- 15 We agree that a clearance system should be introduced for trade practices. Literature suggests that it is particularly important in small economies for competition law not to prohibit arrangements that are welfare enhancing. The per se price fixing provisions of the Act and the associated exclusions are difficult to interpret and potentially capture collaborative arrangements that are pro-competitive and promote efficiency.
- 16 It is preferable for the Commission to consider such borderline arrangements in an orderly manner rather than, for example, putting parties to the expense of employing senior counsel to defend an investigation (in addition to the stigma and commercial detriment of being involved in such an investigation).
- 17 We do not believe that the Commission would be flooded with applications because of cost and the fact that collaborative arrangements tend to have ongoing

commercial sensitivity. It is likely to be significant joint ventures and perhaps distribution arrangements which will come before the Commission (the types of arrangements that have the greatest potential to give rise to welfare benefits).

**Question 8: Assuming a clearance system is introduced, should it apply to price fixing and resale price maintenance?**

- 18 The answer appears to be yes because these are per se offences and have the greatest potential to create a "chilling" effect among parties considering joint ventures and other arrangements.

**Question 9: Assuming a clearance system is introduced, what features would it have?**

- 19 We would envisage a system that mirrored the merger regime, perhaps with a simplified prescribed application form. If an informal regime was established for mergers this would also apply to trade practices.

**Questions 10, 11 and 12: Collective bargaining issues**

- 20 We do not see any economic evidence that collective bargaining schemes for SMEs create efficiencies.
- 21 Our view is that section 36 of the Act provides parties with an appropriate degree of protection against misuse of any monopsony power. Defining a "small business" seems arbitrary and not based on any particular economic reasoning.
- 22 Our answer does not change if a clearance regime for trade practices is introduced. We envisage that such a regime would only consider whether or not any collective bargaining arrangement fell within section 30 of the Act (not whether it would result in a substantial lessening of competition).

**Questions 13 to 20: Authorisation process issues**

- 23 We would favour the removal of the jurisdiction test for authorisations whether or not a formal regime for trade practices regime is introduced. We question the extent to which the jurisdictional test would withstand judicial scrutiny as there appears to be no particular reason why the lessening of competition found by the Commission under section 61(6) of the Act might not be nil (thereby virtually guaranteeing that the benefit to the public would outweigh the loss of competition). This is consistent with section 58(1) of the Act which contemplates that a person who considers that section 27 of the Act *might* apply, is able to apply for an authorisation.
- 24 In any event, there appears to be no logical reason for the Commission failing to authorise conduct that will presumably have some efficiency benefits with no or minimal corresponding competitive detriment.
- 25 We do not have a view on the circumstances where an authorisation should be varied, replaced or revoked.
- 26 The requirement to cease conduct while applying for an application for authorisation is probably superfluous as most parties would not wish to expose themselves to

additional penalties in the event that their authorisation was declined. If this is not the case and the Commission wishes to stop the conduct then it is open to it to seek an injunction in the usual way.

- 27 If the decision whether or not to hold a conference is left to the Commission then there is a danger that, as is the case with clearance applications, no conferences will ever be held. Assuming it is regarded by submitters as a good thing to hold conferences for authorisations then the status quo should remain. If it was decided to leave the decision to the Commission then presumably the Act should specify the parties who can request a conferences and the basis on which the Commission must make its decision.
- 28 We have no view on whether the statutory time limits in section 62 of the Act relating to restrictive trade practices should remain.

#### **Questions 21 to 25: Joint legal process issues**

- 29 We do not have a particular view on whether appeal rights for persons who participate in Commission conferences should be retained or replaced. We note that the definition of those who may participate is very broad (extending to any other person who in the opinion of the Commission may assist the Commission in the determination of the application). Accordingly we wonder if appeal rights should be limited to persons having an appropriate interest in the application (as determined by the Court).
- 30 We would support the establishment of a specialist competition tribunal to hear both competition appeals and merits review appeals. We believe that the volume of competition and regulatory cases and the importance of such decisions for the economy and consumers justify this approach.
- 31 We believe lay members provide a useful and helpful resource for judges sitting on competition and regulatory matters. Accordingly we would support the introduction of a discretion to appoint lay members where a Court is considering the merits of a report by the Commission.

#### **Questions 26 to 30: The legal framework for assessing costs and benefits**

- 32 The Commission's analytical framework as set out in its merger guidelines appears to:
- 32.1 adequately address what would happen if the proposed merger or arrangement did not go ahead.
  - 32.2 be generally consistent with practices adopted in other jurisdictions.
- 33 It may be useful for the Commission to provide greater guidance as to how it chooses an appropriate counterfactual in situations where there are multiple possibilities (each with differing likelihoods of occurring).
- 34 We believe that there is no particular need for express reference to international competitiveness to be included in the public benefit test as it would appear to fall

within the concept of public benefit. The weight to be given to any such benefit would need to be assessed on a case by case basis having regard to the particular merger or trade practice and appropriate expert economic evidence. Equally, however we would not oppose an express reference if others felt it was appropriate and required to put the matter beyond doubt.

- 35 We agree with the approach taken by the Court of Appeal that it is useful to quantify costs and benefits where *it is feasible to do so*. We understand that parties have expressed concerns that the Commission has interpreted the Court of Appeal's views so as to effectively require quantification on every occasion. Whether or not this is the Commission's practice, the correct interpretation of current law appears sufficiently flexible to allow consideration of dynamic or other difficult to measure economic effects in a quantitative way (where feasible) and/or using qualitative analysis if this is more appropriate. In practice the Commission would presumably tend to favour a quantitative analysis of benefits and costs because it makes its task of weighing up costs and benefits easier and more transparent. However, such a bias would seem unavoidable (and not necessarily undesirable) where public benefit is assessed by a regulator rather than in the policy or political environment.
- 36 We believe timeframes need to be assessed on a case by case basis having regard to the nature of the industry and appropriate economic expert evidence. As with all the Commission's tests (for example, the SSNIP test, the LETs test), rules of thumb or "approaches" are not substitutes for an analysis of the particular facts applied to the legislation.
- 37 Finally we believe that the approach taken by the Commission to define markets is generally appropriate. The High Court decision in the *Brambles* case provided a useful reminder to the Commission to apply the common sense test to market definition.

#### Further information

- 38 Thank you for providing this opportunity for us to comment on the discussion paper. Please do not hesitate to contact us if you have any questions regarding our submission.

Regards



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