

Submission to Ministry of Economic Development in relation to discussion document "Review of the Clearance and Authorisation Provisions under the Commerce Act 1986".

Publication of Written Reasons for Commission Clearance Decisions

- 1 I wish to make a short submission in relation to Issue B: The publication of written decisions in relation to mergers.
- 2 This submission is made by me personally as a competition law practitioner and does not necessarily represent the views of Kensington Swan or Kensington Swan's clients.
- 3 The MED paper asks the question whether there is a need to amend the Act in relation to the publication of written merger clearance decisions.
- 4 As the paper notes, the Commission has a practice for releasing its reasons for merger clearance decisions some time after the time of determination. Sometimes there can be a delay of several months between the Commission's determination and the issue of reasons.

Summary of My View

- 5 In my view this practice is wholly unsatisfactory, and raises issues of:
 - a. the robustness of the decision itself, if it is reached before the Commission's reasoning and analysis has been completed;
 - b. fairness to persons affected by the decision who are unable to properly assess whether to exercise rights of appeal or judicial review in relation to the decision when the reasons for the decision are not available. In particular, persons affected by a decision by the Commission to grant clearance for a merger or acquisition may be deprived of their rights to challenge the decision. This is because the merger or acquisition may well be implemented before the persons affected can see the reasons and be in a position to decide whether there are grounds for judicial review of the decision.
- 6 Accordingly in my view, the Commission should be required to issue its reasons for a clearance decision at the same time as giving that decision.

Robustness of Commission Decision Making Process

- 7 As a matter of correct process, the Commission should not release its decision until after its reasoning is complete. Otherwise there must be a concern that the Commission has pre-determined its decision based on a less than full analysis.
- 8 Once the Commission has come to a certain determination then as a matter of necessity the Commission's reasons must support that determination. A process whereby the Commission reaches a decision and then only subsequently prepares reasons which will support that decision is not satisfactory.

Impact on rights of Appeal or Judicial Review

- 9 It is also unsatisfactory from the point of view of the exercise of appeal rights or rights of judicial review that there are no reasons for the decision at the time that it is issued.
- 10 An applicant for clearance or authorisation has 20 working days to appeal a Commission decision in relation to a clearance or authorisation application. If the reasons do not come out until after that 20 day time period has expired how does the applicant make a considered decision whether it has grounds for appeal?
- 11 The applicant could lodge a pro forma appeal and then decide later whether to pursue the appeal, but that is not entirely satisfactory.
- 12 The situation is even more serious in relation to other parties affected by a clearance decision who want to consider whether to seek judicial review of the decision.
- 13 Take the situation where company A seeks, and obtains, clearance to acquire the shares in company B, and company C (who might be a competitor or a customer) wants to consider challenging the Commerce Commission decision to grant clearance.
- 14 Company C does not have rights of appeal against the decision but can seek judicial review. The ability to challenge a Commerce Commission decision by way of judicial review is more limited than a full right of appeal (such as is available to the applicant for clearance). A party affected by a clearance decision could seek judicial review on the grounds that the Commerce Commission had failed to take into account relevant considerations or had taken into account irrelevant considerations.

- 15 However a person cannot decide if it has grounds for judicial review until the reasons are given. Without those reasons it cannot assess whether the Commission has failed to take into account relevant considerations or has taken into account irrelevant considerations.
- 16 Accordingly, a serious problem arises if the reasons for the decision are not issued together with the decision. This is because the applicant for clearance can immediately implement the transaction the day after the Commerce Commission decision granting clearance is given. The failure by the Commission to give reasons does not stop the transaction from going ahead but it does prevent affected parties from knowing whether they would have grounds to seek judicial review challenging the decision.
- 17 Accordingly if the Commission's reasons are not given together with the Commission's decision, third parties who might wish to challenge the Commission's decision are prejudiced. They are unable to make an informed decision whether to seek judicial review until after the parties to the clearance are able to implement the transaction. After implementation of the transaction, a Court will almost certainly not be willing to intervene, so that the right to seek judicial review is lost.
- 18 Therefore the consequence of the Commission's current procedure of not issuing reasons until after the determination is effectively to deprive affected parties of rights of judicial review.

Conclusion

- 19 In conclusion, as a matter of proper decision making process, and to ensure affected parties are not deprived of legal rights of challenge, it is important that the Commission be required to issue its reasons for clearance decisions at the same time as those decisions are made.

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