

# Merger Control in Australia Informal and Formal Review

APEC Workshop on Merger Control Regimes —  
Information Sharing Best Practices

1 March 2018

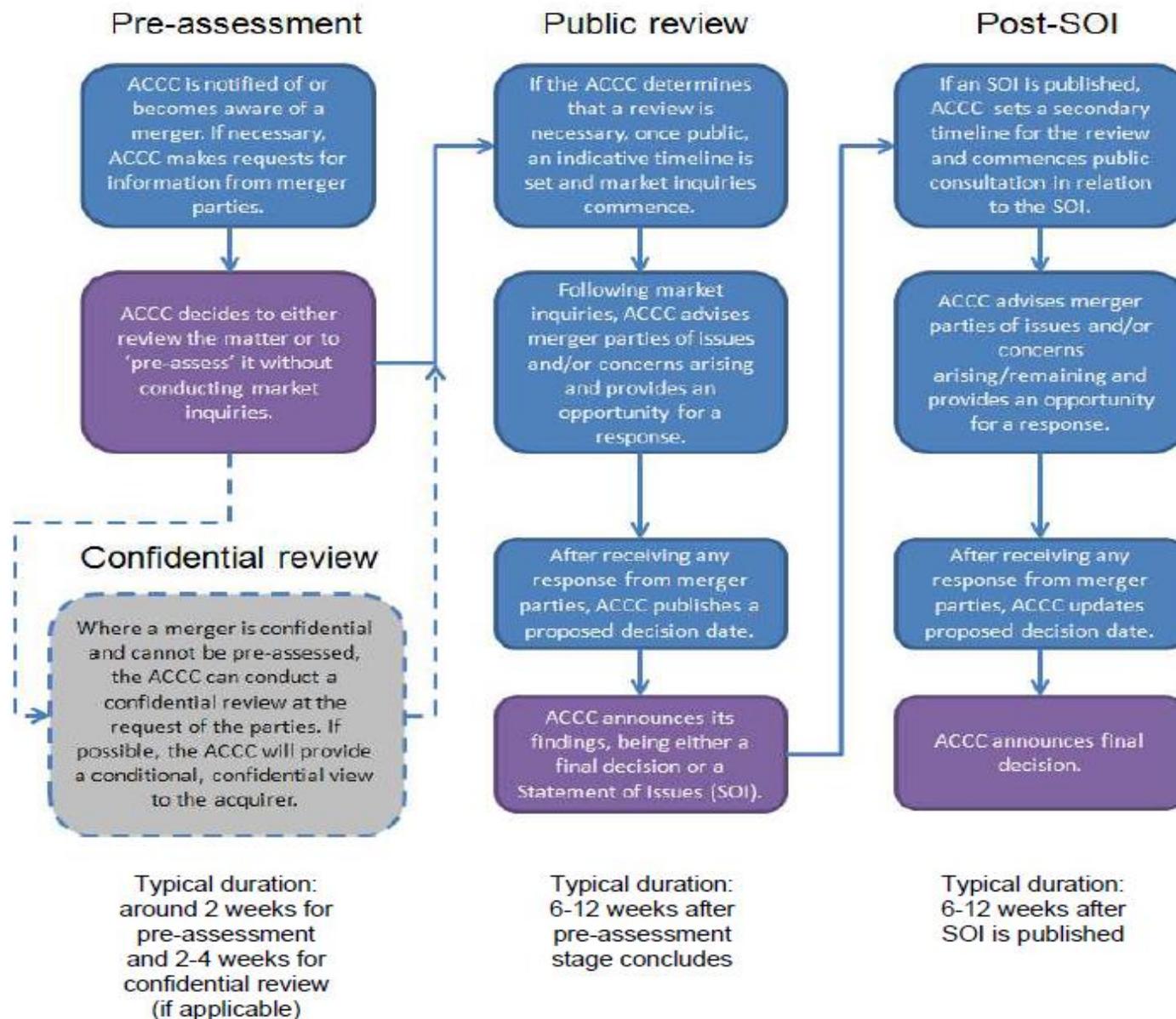
Port Moresby, Papua New Guinea

BRENT FISSE  
 LAWYERS

# Legal framework

- ▶ *Competition and Consumer Act 2010 (Cth), s 50*
  - prohibits mergers/acquisitions that have effect/likely effect of substantially lessening competition in a market
- ▶ No mandatory notification – voluntary notification recommended where:
  - products of merger parties are substitutes or complements and merger firm will have greater than 20% market share (*ACCC Merger Guidelines, 6-7*)
- ▶ Informal review – informal clearance (letter of comfort) by ACCC
  - based on ACCC practice and guidelines, not legislation
  - relied on extensively
- ▶ Formal review – authorisation by ACCC (2017 amendments)
  - replaces former formal clearance process (never used) and former Australian Competition Tribunal authorisation process (used rarely)
- ▶ ACCC enforcement:
  - injunctions
  - penalties
  - divestiture and other orders
- ▶ Third parties:
  - damages
  - divestiture
- ▶ Ongoing debate about formal v informal review:
  - informal review process popular but has drawbacks
  - new ACCC merger authorisation process untested, with some downsides

# Informal Review - Outline



## Stats

- ▶ ACCC and AER Annual Report 2016-7:
  - in 2016-2017 ACCC considered 288 mergers of which 33 were subject to a public review
  - 88% cleared without need for a public review (target of 70%)
  - unconditionally cleared 23 mergers that underwent a public informal review
  - 2 approved subject to undertakings
  - 8 reviews were discontinued either because the transactions did not proceed or because the parties withdrew their request for clearance
- ▶ JWS, *Recent Trends in Complex ACCC Merger Review Cases 2005-2016* (2017):
  - ACCC generally taking longer to make final decision for SOI transactions
  - red lights not fatal – since 2005 50% of all transactions with one or more red lights have been cleared and only 26% blocked
  - red lights do not necessarily mean that remedy is required for clearance – since 2005 41% of all cleared transactions with one or more red lights have not required any remedy
  - 68% of all transactions with one or more orange lights (but no red lights) have been cleared and only 13% blocked
  - 94% of all cleared orange light transactions (30 of 32) did not require any remedy

## Strengths

- ▶ Opinions and experiences vary but generally satisfactory record on key criteria:
  - certainty
  - transparency
  - maintenance of confidentiality
  - speed
  - reliability
  - ease of access and communication
  - quality of outcome
- ▶ Flexibility
- ▶ Feedback at an early stage and throughout the process
- ▶ Can take account of transaction timetable including foreign investment approvals and financing
- ▶ Pre-assessment can permit speedy confidential outcomes in some cases
- ▶ Access to senior staff and sometimes Commissioners
- ▶ Undertakings, if required, can be negotiated as transaction proceeds
- ▶ No lodgement fee
- ▶ Costs of using informal review process may be significant but can be kept under control by merger parties

## Downsides

- ▶ Key submissions not made public and reasons of ACCC for its decision may not be apparent
  - eg Foxtel – Fox Sports merger review – 3 skimpy paragraphs on public register and no SOI – see below
  - Public Competition Assessments vary in quality and not always made (eg none in Foxtel – Fox Sports merger review)
- ▶ Review process has become more formal to some extent:
  - more detailed guidelines
  - more attention to timeframes
  - more transparency
- ▶ More market inquiries and more secondary reviews
- ▶ Closer scrutiny of submissions and data
- ▶ Longer timelines for complex mergers
- ▶ Increased use of s 155 investigative powers by ACCC including s155(1)(c) examinations
- ▶ Can be expensive process given role of lawyers and experts

## Foxtel – Fox Sports: ACCC decision 7 Dec 2017

<b>Market definition</b>	<p>The ACCC considered the proposed acquisition in the context of:</p> <ul style="list-style-type: none"><li>- A market for the acquisition of sports content</li><li>- A market for the acquisition of non-sports content</li><li>- A market for the acquisition of channels of packaged linear audio visual content</li><li>- A market for the supply of STV audio visual content to consumers</li><li>- A market for the wholesale supply of fixed line and mobile broadband and voice services</li><li>- A market for the retail supply of fixed line broadband and voice services</li><li>- A market for the retail supply of mobile broadband and voice services</li></ul> <p>For the purposes of this assessment it was not necessary to reach a concluded position on the precise definition or geographic dimension of these markets. In particular, the ACCC did not form a final view on whether there are separate markets for digital rights for sports content.</p>
<b>Competition analysis</b>	<p>The ACCC considered that the merger was unlikely to substantially lessen competition in any of these markets.</p> <p>News Corporation owns 100 per cent of Fox Sports and owns Foxtel jointly with Telstra, each owning 50 per cent. After the merger, News Corporation would have a 65 per cent share of a merged Fox Sports and Foxtel, with Telstra holding the remaining 35 per cent. The ACCC considered that apart from the markets for the acquisition of content and the retail supply of voice and broadband services, the parties' commercial incentives, and constraints would be similar with or without the merger.</p> <p>In relation to the markets for the acquisition of content the ACCC considered that Telstra and Fox Sports are not close competitors. The ACCC considered that the merged entity would continue to be constrained by new entrants, options for rights holders to supply content directly to consumers and the bargaining power of premium sports rights holders.</p> <p>With respect to the retail telecommunications markets, while the merger involves agreements between the merged entity and Telstra that restrict other telecommunications suppliers from including Foxtel's digital products as part of their triple play bundles, the ACCC did not consider that this was likely to substantially lessen competition. The ACCC took account of the circumstances that consumers who choose alternative suppliers of broadband services will still be able to access Foxtel's digital products and that there are alternative sources of content for telecommunications suppliers wanting to offer triple play bundles. Similarly, the ACCC considered it important that where triple play bundles include subscription television services, often additional payment is required to access the service or the premium components of the service.</p>

## Vodafone – Sky (2016-7): transparency

- ▶ Contrast the detailed public determination of the NZ Commerce Commission in:
  - *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1, *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2
- ▶ Contrast the public submissions made in that review and published by the Commerce Commission in accordance with the NZ formal merger review process:

Documents		EXPAND ALL ▼	COLLAPSE ALL ▲
Final determination	13/04/2017 (1 documents)	EXPAND ▼	
Cross-submissions on Letter of Unresolved Issues	24/11/2016 (16 documents)	EXPAND ▼	
Submissions on Letter of Unresolved Issues	14/11/2016 (18 documents)	EXPAND ▼	
Letter of Unresolved Issues	31/10/2016 (1 documents)	EXPAND ▼	
Additional third-party submissions	13/10/2016 (7 documents)	EXPAND ▼	
Response to submissions on the Statement of Preliminary Issues	14/09/2016 (5 documents)	EXPAND ▼	
Submissions on the Statement of Preliminary issues	16/08/2016 (16 documents)	EXPAND ▼	
Statement of Preliminary Issues	14/07/2016 (1 documents)	EXPAND ▼	
Applications	30/06/2016 (2 documents)	EXPAND ▼	

## Key elements

- ▶ ACCC can authorise merger (ss 88, 90) if satisfied that:
  - the merger will not be likely to substantially lessening competition in a market; *or*
  - the likely public benefit from the proposed acquisition outweighs the likely public detriment, including any lessening of competition
- ▶ Timeframes:
  - 90 days to determine applications
  - 90 days can be extended with parties' agreement prior to the expiry of 90 day period
- ▶ Review of ACCC decision:
  - limited merits review by Australian Competition Tribunal (within 90 days, extendable in some circumstances)
  - judicial review of legality of decision by Federal Court
- ▶ Lodgement fee \$A25,000

## Strengths

- ▶ Authorisation creates an exemption from liability
  - contrast informal review (letter of comfort only)
- ▶ SLC or public benefit test
  - contrast informal review or declaration process where SLC is only relevant test
- ▶ Specific time frame
  - 90 day standard period is almost 1/2 time often taken for complex informal merger reviews
  - if ACCC does not make decision within specified time, authorisation deemed to have been granted
  - if parties try to game system by not providing information, ACCC unlikely to be satisfied that authorisation test is met, and can decide not to grant authorisation before specified period expires
- ▶ Review by Australian Competition Tribunal
  - contrast informal review
- ▶ Apart from lodgement fee, may not be more costly than informal review

## Downsides

- ▶ No guarantee of access to key information
  - submissions must go on public register, but:
    - ACCC has broad discretion to exclude confidential information
    - where ACCC gets information via s 155 investigative process, that information is secret
- ▶ ACCC now substantially controls formal as well as informal review
  - contrast constraint and discipline of former ability of parties to seek authorisation by Australian Competition Tribunal
- ▶ 90 days may be unduly long time in some cases
- ▶ Public process with more limited confidentiality than informal review
- ▶ Merits review by Australian Competition Tribunal is limited to information that was before the ACCC or new material in some circumstances
- ▶ Australian Competition Tribunal review is not limited to the merger parties
- ▶ \$25,000 lodgement fee

# Conclusions

- ▶ Informal review likely to remain the predominant merger review route in Australia
- ▶ Recent Foxtel – Fox Sports merger review indicates that informal review process can lack transparency
  - stakeholders left in the dark about key facts, submissions and ACCC reasoning
  - risk of eroding credibility of ACCC
- ▶ Query whether the Australian informal review process is a commendable model:
  - seems inconsistent with transparency principle VIII in ICN Recommended Practices for Merger Notification and Review
- ▶ Comments or questions?

[brentfisse@gmail.com](mailto:brentfisse@gmail.com)

+61 411 528 122

1. ACCC, *Informal Merger Review Process Guidelines* @ <https://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013>
2. ACCC *Merger Authorisation Guidelines* @ <https://www.accc.gov.au/publications/merger-authorisation-guidelines>
3. ACCC *Merger Guidelines* @ <https://www.accc.gov.au/publications/merger-guidelines>
4. Competition Policy Review, *Final Report*, March 2015 @ [http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf)
5. ACCC and AER *Annual Report 2016-7* @ <https://www.accc.gov.au/publications/accc-aer-annual-report/accc-aer-annual-report-2016-17>
6. ICN, *Recommended Practices for Merger Notification and Review Procedures* @ <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>
7. Foxtel – Fox Sports merger review (2017) @ <http://registers.accc.gov.au/content/index.phtml/itemId/1204706/fromItemId/751046>
8. *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1, *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2 @ <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/vodafone-europe-b.v.-and-sky-network-television-limited/>
9. A Christopher, *Merger clearance-options and insights for practitioners*, RBB Conference, The ACCC's New Era in Competition Law, Sydney 30 Nov 2017
10. JWS, *Recent Trends in Complex ACCC Merger Review Cases* (2017) @ [https://www.jws.com.au/images/publications/Unique-PDFs/JWS\\_Recent%20trends%20in%20complex%20ACCC%20merger%20review%20cases%20-%202017.pdf](https://www.jws.com.au/images/publications/Unique-PDFs/JWS_Recent%20trends%20in%20complex%20ACCC%20merger%20review%20cases%20-%202017.pdf)
11. B Fisse, 'The Australian Competition Policy Review Final Report 2015' (NZ Competition Law & Policy Institute, 26th Annual Workshop, Auckland, 16 Oct 2015), 29-32 @ [https://www.brentfisse.com/images/Fisse\\_Harper\\_Report\\_Critique\\_\(Oct\\_2015\).pdf](https://www.brentfisse.com/images/Fisse_Harper_Report_Critique_(Oct_2015).pdf)