QUAY INSIGHTS July 2023

Merger authorisations and public benefits in Australia after the Telstra/TPG Tribunal determination

On 12 July 2023 the Australian Competition and Consumer Commission (**ACCC**) published a letter sent to the merger parties to the proposed Brookfield/Origin takeover outlining the need, in a merger authorisation application, to causally connect claimed public benefits to the acquisition in a medium-term timeframe. This reflected the determination of the Australian Competition Tribunal (**Tribunal**) in Applications by Telstra Corporation Ltd and TPG Telecom Ltd (No. 2) [2023] A CompT 2 (**Telstra/TPG**).[1]

Merger Authorisation in Australia

Merger parties may seek an authorisation of an acquisition under the Competition and Consumer Act 2010 (Cth) (**CCA**) from the ACCC. Under section 4 of the CCA a "merger authorisation" is:

- an authorisation for a person to engage in conduct to which section 50 or 50A of the CCA would apply (being the provisions dealing with mergers in Australia or offshore which affect a market in Australia); and

- not an authorisation for a person to engage in conduct to which any provision of Part IV of the CCA, other than section 50 or 50A, would or might apply.

This makes clear that the authorisation applies *only* to the acquisition of shares or assets that might otherwise potentially breach section 50 or 50A of the CCA and that is the subject of the merger authorisation.

The ACCC may grant a merger authorisation *only when it is satisfied* that either:

- the proposed acquisition is not likely to substantially lessen competition; or

- the likely public benefit from the proposed acquisition outweighs the likely resulting public detriment.

[1] https://www.accc.gov.au/system/files/public-registers/documents/ACCC%20letter%20to%20Applicants%20re%20request%20for%20information%20-%2011.07.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf

The issue of public benefit, including its link to the relevant conduct (that is, the acquisition of shares or assets) and timeliness, is important in authorisation applications as the CCA requires the ACCC (and the Tribunal on review), to assess the likely competitive effects of, and the public benefits and detriments likely to result from, the conduct for which authorisation is sought. Public benefits (and detriments) will only be considered by the ACCC and the Tribunal in authorisation applications where they arise within the short to medium-term and the medium term is usually considered to be between 5 to 10 years.

Merger authorisations are public merger review assessments which the ACCC places on its merger register for transparency and public scrutiny, including by customers, suppliers, and competitors as well as the general public. Public scrutiny is important because, unlike the position under the ACCC's informal clearance regime (which is effectively a "no action'' letter from the ACCC), if a merger authorisation is obtained neither the ACCC nor any other person may take action to prevent or unwind the authorised merger under the CCA.

Background: Merger reform as a result of the Harper Review

In 2015 the Competition Policy Review, frequently called the Harper Review because it was chaired by Professor Ian Harper, made recommendations for significant changes to the CCA.

These were implemented in 2017. One of the changes was to the merger authorisation process in the CCA to shorten the timeframes for merger authorisations. This change was made because of the need for commercial timeliness. In addition, the CCA was amended to provide that the material the Tribunal may consider on review of an ACCC merger authorisation determination is limited to the material that had been before the ACCC.

Mr Michael O'Bryan, then Queens Counsel, was a member of the team that undertook the Harper Review. Mr O'Bryan was subsequently appointed to the Federal Court and, in due course, to the Tribunal. Justice O'Bryan is now the President of the Tribunal.

The Brookfield/Origin Merger Authorisation

In June 2023 a consortium comprising Brookfield LP and MidOcean Energy (**Applicants**) lodged a merger authorisation application with the ACCC seeking to acquire the listed Australian company Origin Energy (**Origin**) at a price that is said to value Origin at $18.7 billion on an enterprise value basis.

In their merger submission the Applicants stated the proposed acquisition will provide substantial public benefits, in particular because the Brookfield Global Transition Fund *"intends to pursue a significant acceleration of Origin Energy Markets' renewable generation build out, which will improve materially Australia's ability to attain its net zero targets, with the direct economic and social benefits that flow from this"*. These benefits are said to clearly outweigh any potential public detriments from the proposed acquisition.

On 12 July the ACCC wrote to the merger parties to ask that they respond to questions in relation to the link between the claimed public benefits and the proposed acquisition of Origin. The ACCC's letter attached Section C of the determination of the Tribunal in Telstra/TPG. That Section C contained the Tribunal's analysis of the statutory framework for its review of merger authorisations under the CCA.

The full Telstra/TPG determination of the Tribunal is still subject to confidentiality restrictions, as the Tribunal allows merger parties to make confidentiality claims in respect of commercially sensitive information, and those claims are now being assessed. As at mid July 2023, the Tribunal has only published a summary of its reasons. The ACCC sought from the Tribunal consent to release Section C of the Tribunal's determination to be able to provide to parties in other matters, given the importance of the legal guidance provided by the Tribunal. The Tribunal agreed to that on 27 June 2023.

The ACCC is to be commended for publishing its letter on the ACCC website, as Section C of the Telstra/TPG determination provides important guidance as to the Tribunal's approach and reflects a number of Tribunal determinations that have been made since the Harper Review reforms of the CCA were implemented.

The importance of the legal analysis set out in Section C of the Tribunal's Telstra/TPG Determination

The legal implications of the Tribunal's merger authorisation determinations since 2017 may not have been fully appreciated but are brought together in Section C of the Telstra/TPG determination.

The Telstra/TPG determination makes clear that the CCA merger authorisation test does not relate to the merger transaction *as a whole*, but to the conduct the subject of the authorisation, that is, the acquisition of shares or assets. The Tribunal emphasised that the test is directed to the effects of the conduct for which authorisation is sought, not the effects of other conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought.

For example, in the Brookfield/Origin takeover, future public benefits from investment in other areas such as clean energy could well be said to arise from the transaction as a whole, but the merger parties will need to show they are causally connected to the specified conduct sought to be authorised, namely the purchase of the Origin shares. The Tribunal in Telstra/TPG also reiterated that it is focused over the medium-term, which it considered to be 5 to 10 years – it may be that that some or all of the public benefits put forward by the Applicants would not occur in that time frame.

Because the merger parties in the Brookfield/Origin takeover are, at the current time, holding the ACCC to its 90-day statutory timeframe for assessing merger authorisations, the ACCC has required a response to its letter within a tight timeframe (by 18 July 2023). It will be interesting to see how the merger parties address the ACCC questions and how this is managed by the merger parties and the ACCC in relation to overall timing. Under the CCA, if the ACCC does not determine an application for a merger authorisation within a 90-day period (which may be extended under section 90(12)), the ACCC is taken to have refused the application.

Implications for other merger authorisations

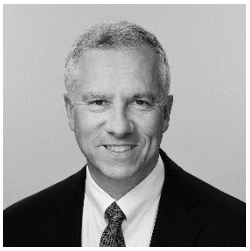
In addition to the Brookfield/Origin merger authorisation, the released Section C is relevant to the delicately poised ANZ/Suncorp merger authorisation application,[2] where the ANZ is facing the situation of the ACCC having raised potential competition issues in its statement of preliminary concerns and a potential difficulty in demonstrating the public benefits that are said to flow from the acquisition.

This latest Quay Insight is a reminder that the ACCC has taken a harder line in recent times, as has the Tribunal, in the interpretation of the merger authorisation test. Applicants must consider the statutory language in the CCA as amended in 2017 in drafting their submissions; namely the ACCC may grant a merger authorisation *only when it is satisfied* that either:

- the proposed acquisition is not likely to substantially lessen competition; or
- the likely public benefit from the proposed acquisition outweighs the likely resulting public detriment.

[2] https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/anz-proposed-acquisition-of-suncorp-bank

Contacts



Dave Poddar
Partner

Quay Law Partners
Level 32, 180 George Street,
Sydney NSW 2000
T +61 422 800 415
E dave@quaylaw.com
www.quaylaw.com

Angela Flannery
Partner

Quay Law Partners
Level 32, 180 George Street,
Sydney NSW 2000
T +61 419 489 093
E dave@quaylaw.com
www.quaylaw.com