Joint Comments of the American Bar Association's
Section of Antitrust Law and Section of International Law
on
Australian Consumer and Competition Commission *Draft Merger Guidelines 2008*

The Section of Antitrust Law and the Section of International Law (together, "the Sections")* of the American Bar Association submit these comments regarding the Australian Consumer and Competition Commission's ("ACCC") *Draft Merger Guidelines 2008* (the "Draft Guidelines" or "Guidelines"). The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the policy of the American Bar Association.

The Sections have substantial experience in the antitrust and merger control laws in the United States and other jurisdictions, and in the practical implications of those laws. These comments draw upon that experience, and the Sections hope and intend that they will assist the ACCC in its development of revised guidelines for use in merger review.

The Sections applaud the ACCC's efforts in preparing the Draft Guidelines and inviting comment on them, particularly because doing so contributes to increased efficiency, consistency, and transparency of the merger review process. The Draft Guidelines succinctly outline the ACCC's substantive standards for reviewing mergers, and generally achieve their stated purpose, to "provide comprehensive and detailed information that merger parties, the business community, their advisers, and the public can draw on to . . . assess the likely level of scrutiny a proposed merger will receive from the ACCC." The ACCC is to be commended for updating its Guidelines to reflect the ACCC's increased experience in merger reviews over the last decade, as well as for considering the merger guidelines of other jurisdictions and the work of the International Competition Network. The Sections welcome the Draft Guidelines as an important contribution to harmonizing international standards, particularly as merging parties increasingly find themselves subject to merger control regimes in numerous jurisdictions simultaneously.

Although the Sections generally concur with the provisions of the Draft Guidelines, these comments identify a few issues that the ACCC may wish to consider further.

1. The Competition Test

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The competition test elaborated in the Draft Guidelines of course reflects the specific language of Section 50 of the Trade Practices Act of 1974, which prohibits transactions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. This substantive legal standard is remarkably similar to that of the United States, where Section 7 of the Clayton Act prohibits transactions that "may substantially lessen competition" or "tend to create a monopoly in any line of commerce." Although the competition test and the Draft Guidelines discussion of what constitutes a substantial lessening of competition are similar to those in the Horizontal Merger Guidelines promulgated by the U.S. Department of Justice ("U.S. DOJ") and the Federal Trade Commission ("FTC")[1], the Sections observe the following:

First, although the Draft Guidelines clearly note that the touchstone for finding likely anticompetitive effects is the ultimate impact of the transaction on Australian consumers, the Draft Guidelines' initial discussion of the "Competition Test" appears to equate preservation of competition with the preservation of rivalry, rather than equating preservation of competition with the preservation of consumer welfare. The ACCC may wish to consider revising Paragraphs 2.1 through 2.5 of the Draft to make clear that, in applying Section 50 of the Trade Practices Act, the ACCC does not seek to preserve rivalry for the sake of rivalry; rather, the ACCC will seek to intervene with respect only to those transactions that, by creating market power or facilitating its exercise, will result in a substantial lessening of consumer welfare.

Second, although the Draft Guidelines correctly define an aspect of market power as "the ability to achieve a significant and sustainable increase in price," they appear to establish a "safe harbor" in which price increases of five to ten percent following a merger will be considered below the threshold of "substantiality" that would trigger ACCC intervention. While a postulated five to ten percent small but significant nontransitory increase in price may be appropriate in applying the hypothetical monopolist test for market definition purposes, there is little basis in policy or practice for espousing a five to ten percent range as a safe harbor for "acceptable" price increases. The Sections note, for instance, that the U.S. Horizontal Merger Guidelines state specifically that "The 'small but significant and nontransitory' increase in price [*i.e.*, a price increase of five to ten percent] is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases."[2] Applying the same five to ten percent standard to both establish a substantial lessening of competition and define a relevant market using a hypothetical monopolist test seems somewhat inconsistent. The relevant market is one in which a hypothetical monopolist profitably could impose a price increase of at least five percent. If a price increase of at least five percent is established as the threshold for a substantial lessening of competition, that might be interpreted to mean that only a merger to monopoly would involve the requisite lessening of competition.

Third, in Paragraphs 2.13 and 2.14, the Draft Guidelines state that a merger will violate Section 50 of the Trade Practices Act if there is a "real chance" of a substantial lessening of competition. The

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[1] 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Horizontal Merger Guidelines"), *available at* http://www.usdoj.gov.atr/public/guidelines/horiz_book/toc.html.

[2] *See* Horizontal Merger Guidelines § 1.0.

Sections submit that this ambiguous phraseology will not be helpful guidance for merging parties. The ACCC may wish to clarify that a "mere possibility" of a substantial lessening of competition is not sufficient to establish a violation.

Fourth, although the Draft Guidelines are abundantly clear that merger review must focus on prospective effects and that market analysis must compare conditions with the merger to conditions without the merger, in Paragraph 2.18, the Draft Guidelines note that, in some cases, "the relevant counterfactual may involve a more competitive outcome due to the target being acquired by another firm." The Draft Guidelines, however, do not provide any additional guidance as to the circumstances in which the ACCC might make such an assumption, or the types of evidence that would support such an assumption. Accordingly, Paragraph 2.18 raises the concern that the ACCC may seek to challenge a transaction on the basis that there may be a hypothetical, more competitive purchaser that the ACCC may consider to be a more attractive acquirer of the target firm. Such reasoning also may raise the potential for competitors to present self-serving counterfactuals to the ACCC, which might incorrectly shift the analytical focus from the proper question – whether the proposed merger in question substantially lessens competition in a market – to a focus on whether there is a preferable merger option.

Finally, although Paragraph 2.18 of the Draft Guidelines discusses the importance of "future competitors" in applying the "with and without the merger" test, the Draft Guidelines provide only a cursory treatment of theories of anticompetitive harm based on potential competition. The Sections suggest that the Draft Guidelines expand on the treatment of potential competition, perhaps with reference to actual potential competition and perceived potential competition.[3]

2. Market Definition

The approach of the Draft Guidelines to market definition is straightforward and largely noncontroversial, based as it is on the so-called "hypothetical monopolist" test that is well accepted as a useful analytical device in merger review. Again, however, a few observations may be useful.

First, although the Draft Guidelines deal with price discrimination and the concept of "captive customers" in Paragraphs 3.32 through 3.35, the significance of "captive customers" for market definition purposes is not made clear. In this respect, the Draft Guidelines perhaps should adopt the concepts of "marginal" and "inframarginal" customers that are more familiar to antitrust economists and lawyers.[4]

Second, the discussion in Paragraphs 3.12 through 3.21 of supply-side substitutes being in the relevant product market may be confusing. The Sections note that the ACCC's approach to market definition, as reflected in its previous practice and in the Draft Guidelines, diverges from that adopted in U.S. antitrust law. The U.S. antitrust agencies account for supply-side substitution in identifying and assessing the significance of competitors within the relevant market. Under the U.S. Horizontal Merger Guidelines, the scope of the product market is defined by reference to cross-elasticity of demand only, while cross-elasticity of supply is relevant for identifying producers that are considered part of the

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[3] *See, e.g.,* U.S. Department of Justice Non-Horizontal Merger Guidelines §§ 4.111, 4.112, *available at* http://www.usdoj.gov/atr/public/guidelines/2614.htm.

[4] *See, e.g.,* Joseph Farrell, "Thoughts on Antitrust and Innovation," Jan. 25, 2001, *available at* http://www.usdoj.gov/atr/public/speeches/7402.htm.

market, either as current or future participants.[5] To define the market to include potential supply-side substitute products could result in an overbroad market definition that would include as market participants all producers of a potential substitute product, whether or not their capacity would be used to produce the relevant product. If only a small portion of those producers' capacity would be shifted to producing the relevant product, defining the relevant market in this manner could well understate the adverse competitive effect and result in no challenge to the merger. In contrast, the U.S. approach would take into account only the amount of capacity used to produce the substitute product that would be likely to come into the market to affect price, which might result in a challenge to the proposed merger. Thus, while generally the two approaches may not differ significantly, there is a potential for divergent results for some mergers.

Third, Paragraph 3.31 of the Draft Guidelines refers to "market segments" as a potentially useful concept, but does not provide concrete guidance as to how market segments assist in market definition or competitive effects analysis. The Sections submit that the "market segment" concept is not particularly helpful in merger analysis. To the extent that the reference to "market segments" could be interpreted to mean "submarkets," the Sections suggest that, based on the experience of U.S. practice, the concept of "submarkets" does not add to the analytical framework, as "submarkets" are themselves likely to be relevant markets for purposes of market definition.

Finally, although the Draft Guidelines note that market definition is purposive, and that market definition needs to be adapted to the facts and circumstances of any particular merger, the Draft Guidelines nevertheless convey the impression that market definition is a fundamental and indispensable aspect of the merger review process. In this respect, the Draft Guidelines perhaps should note that the merger review process – and market definition in particular – is an iterative process and that the ACCC ultimately is interested in determining the competitive effect of a transaction. As noted in Paragraph 3.4 of the Draft Guidelines, in some cases it may not be necessary to determine the precise contours of the market because it will be obvious that, on any market definition, the transaction will not substantially lessen competition. The Sections note the ACCC previously has adopted this approach, and that it also is a common approach taken in the published decisions of the European Commission.[6] Similarly, in cases in which there is sufficient data to conduct merger simulations, such simulations also may provide useful additional evidence of a likely so that anticompetitive effects, it may be unnecessary for the ACCC to define the precise contours of the relevant market.

3. Unilateral Effects

In contrast to merger guidelines in both the United States and Europe, Chapter 4 of the Draft Guidelines, addressing unilateral effects, combines sections on horizontal, vertical, and conglomerate mergers. This combined discussion reflects the ACCC's view that all three types of mergers are equally capable of posing a threat to competition. The Sections note this view has informed the ACCC's traditional approach to assessing the competitive effects of a vertical merger. However, the ACCC's approach – both in practice and as reflected in the Draft Guidelines – contrasts markedly with the U.S. and European approaches. For example, the European Commission's guidelines on non-horizontal mergers include an explicit statement that non-horizontal mergers generally are less likely to significantly

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[5] Horizontal Merger Guidelines §§ 1.11, 1.3.

[6] *See, e.g.*, Case M.4751 STM/Intel/JV [2007], ¶ 20, *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4751_20070810_20310_en.pdf.

impede competition than horizontal mergers.[7]

It may be that the nature of Australia's smaller economy, or perhaps other economic or infrastructural considerations, justifies the ACCC's divergence from international practice. The Sections submit, however, that it would be useful for the ACCC to provide a more complete explanation for its conclusion that non-horizontal mergers pose more of a threat to competition than that found by other antitrust authorities.

As an example, one might infer from Paragraph 4.4 that non-horizontal mergers pose a threat to competition equal to that posed by horizontal mergers. That paragraph reads, "While competition issues associated with horizontal, vertical, and conglomerate mergers are addressed separately, mergers frequently involve two or more types, requiring an integrated analysis. Vertical or conglomerate competition issues may in some cases be exacerbated by horizontal aspects of a merger and vice versa." In the Sections' view, although vertical links in some cases might exacerbate horizontal effects, it is at least as plausible that they might ease them. Accordingly, the ACCC may wish to consider deleting "or vice versa" from the second sentence of Paragraph 4.4.

4. Concentration and Market Shares

The ACCC has indicated that it will take a broad approach to measuring market concentration, including the use of market shares, an x-firm concentration ratio (CRx), and the Herfindahl-Hirschman Index (HHI). All three metrics, especially with regard to the delta in the HHI, can be useful in assessing the competitive effect of a merger. In this respect, we note that a number of other jurisdictions rely on at least two of these metrics as barometers for triggering concentration concerns.

Although the Draft Guidelines provide that an HHI of 2000 is a notification trigger, and they indicate that considerations of HHI levels and the HHI delta of a merger are relevant to the ACCC's assessment of concentration and market shares as a merger factor, the Draft Guidelines do not provide guidance as to what numerical values of market share, CRx ratio, or delta in the HHI will be considered problematic, nor how the ACCC intends to weight these structural indicators against other merger factors, including dynamic indicators. We note in this respect the Draft Guidelines abolish the previous market share "safe harbor" concentration thresholds (below which a market was presumed to be competitive) contained in the 1999 Merger Guidelines. We suggest that the Draft Guidelines might further clarify how the ACCC will apply the HHI. We note that the Australian context presents particular challenges for the application of the HHI, as Australia's is a smaller economy than those of the United States and Europe, where the HHI has been adopted. As such, Australian markets are more likely to be concentrated, and an HHI of 2000 frequently will be reached even before a merger.

The Sections suggest that the Draft Guidelines could contain a more generous presumption as to

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[7] Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, ¶¶ 11-14, *available at* http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf.

the competitive significance of a pre-merger or post-merger HHI level above 2000. Moreover, given the frequency with which this level will be reached (and hence notification will occur), we consider it desirable that the Guidelines provide further guidance as to what change in concentration (or delta) isis likely to be problematic, rather than just the HHI 2000 trigger level for notification purposes. This would be in keeping with the approach of many jurisdictions, and it also would be consistent with the stated purpose of the Draft Guidelines.

5. Actual and Potential Import Competition

It is important that the Guidelines provide a comprehensive analysis of the role of imports. Although the size of Australia's economy means that industries often are concentrated, Australia has a relatively open economy in terms of the level of tariffs or other barriers to imports. The significant exposure of most Australian manufacturing industries to import competition must be borne in mind when adopting an HHI standard that previously has been employed in other countries that have different tariff and non-tariff import barriers. For this reason, the Sections support the Draft Guidelines' retention of the 10 percent benchmark from the 1999 Merger Guidelines for import competition. We also believe the general approach taken by the Draft Guidelines is appropriate and practical.

The Sections make two suggestions, however. First, we suggest that the Draft Guidelines acknowledge, as did the 1999 Merger Guidelines, that, in some cases, import competition may impose a constraint on the merged firm via a downstream or upstream market. Second, we suggest that the Draft Guidelines be amended to include an indication of the ACCC's starting point for timely expansion for imports, with the corollary that the appropriate time frame will depend on the particular market under consideration. The Draft Guidelines suggest that where "there are no barriers to the quantity of independent imports rapidly increasing in the future . . ." then (so long as other factors are present) imports are likely to provide a direct competitive constraint. Currently, the Draft Guidelines make no specific reference to time frames within which the prospect of imports increasing will be considered a competitive constraint. It is not clear whether the one- to two-year benchmark suggested elsewhere (for example, in Paragraphs 6.26 and 6.45) applies to imports.

6. Notification Thresholds

The Sections support the use of notification thresholds in the Draft Guidelines. Such guidance can be of great potential benefit for merging parties in determining whether a voluntary notification to the ACCC is advisable. The Sections have strong concerns, however, about the adequacy and practicality of the current notification thresholds in Appendix 1 of the Draft Guidelines. Specifically, the Sections do not believe the Draft Guidelines provide sufficient guidance as to when notification is advisable. Accordingly, at least when the decision whether notification is appropriate is not obvious, the Draft Guidelines risk turning Australia's merger control regime into a mandatory consultation or filing system simply because merging parties cannot assess on their own whether they should notify the ACCC.

For example, where market shares are not objectively quantifiable, or where market definitions are contested, criteria (b) through (d) will provide little practical guidance to merging parties. Additionally, insofar as these criteria can be applied in practice, they are not in themselves indicative of potential harm, thus raising a preliminary question whether these factors are suitable as notification "triggers" in the first place.

The Sections suggest that the ACCC clarify that the notification thresholds apply only when the parties to the merger have a horizontal, vertical, or conglomerate relationship. If the parties have no such relationship, a voluntary notification rarely, if ever, should be appropriate based only on the status of one of the parties. For instance, if only one of the parties to a merger participates in a "concentrated" market, it is not clear why a transaction could raise competitive concerns, if the parties have no horizontal, vertical, or conglomerate relationship to each other.

The Sections further observe that some of the criteria – particularly (b) and (c) – will be difficult to apply in practice. Further, with respect to criterion (d), the ACCC might consider providing guidance as to what is the baseline numerical value above which a merged party's market share will constitute a "significantly higher market share than any of its rivals in one or more markets." Clarification would assist parties at the preliminary stage of notification and would assist parties who are subsequently attempting to gauge how the ACCC will view certain market share levels when next assessing the existence and adequacy of competitive restraints.

The Sections commend the ACCC for providing a mechanism for informal consultation about "possible competition issues and the option for having the matter considered." The Sections make two observations regarding this mechanism. First, its usefulness will depend on the notification thresholds having practical certainty for parties and the ACCC seeking to rely on them. Otherwise, informal consultation inevitably will result in notification because of the likelihood the transaction potentially could meet at least one of the criteria listed in Appendix 1. Second, the ACCC may wish to consider whether it would be useful to make clear that, in some instances, the ACCC may be able to determine based on relatively limited information that a notification should not be necessary. Particularly in the context of international transactions, parties may be more likely to take advantage of informal consultation – and informal consultation will prove most useful – when such consultations do not invariably result in a burdensome request for detailed information and a lengthy inquiry.

7. Undertakings

The Sections commend the ACCC's efforts to include a discussion of undertakings in the Draft Guidelines. Guidance on undertakings is extremely helpful to increase efficiency, consistency, transparency, and predictability in the merger review process. Most of the concepts and principles articulated in Appendix 4 are broadly consistent with the Sections' experience in merger review undertaken by the U.S. DOJ and FTC, as well as with the European Commission's approach to remedial action in merger cases. As a broad template for approaching divestitures, the Sections believe Appendix 4 reflects a good balance of interests and a flexible and pragmatic approach to merger remedies policy in Australia, which the Sections welcome.

The ACCC may find it helpful, however, to make clear that, for international mergers and acquisitions, the ACCC will work to ensure that remedies fashioned in Australia will mirror remedies in other jurisdictions, especially when the competition issues in Australia are similar to, or at least not in conflict with, those in other jurisdictions. The increasing number of international transactions enhances the need for communication and cooperation on remedies among competition authorities. The Sections believe that greater cooperation among competition authorities would be beneficial for many transactions that have cross-border implications, with each competition authority considering the other authorities' jurisdiction and remedy framework to the extent possible while still discharging its domestic obligations.

Paragraph 3 of Appendix 4 includes the observation that "[i]n the merger context, undertakings can address the competition concerns while at the same time permitting the realisation of merger benefits, such as efficiencies or improvements in management." The Sections commend the ACCC for taking into account efficiencies and other transaction benefits in fashioning its guidance on remedies, and suggest that the ACCC should take efficiencies and other transaction benefits into account when determining the types of remedies that may be appropriate in particular cases. The Sections suggest that the ACCC may want to clarify that, to be sufficient, a remedy must sufficiently address "substantial competitive concerns," not any conceivable concern of any type.

In Paragraph 4, the ACCC appropriately "encourages merger parties to carefully consider ACCC feedback on the form and content of proposed undertakings." The U.S. experience is that the remedies negotiation process leads to the best outcomes for consumers and competition, and the least disruption to transaction timing, when the parties and the antitrust agency cooperate closely to discuss concerns about proposed remedies and find solutions to address those concerns.

Paragraph 6 states "[t]here will be instances when only an outright rejection of the proposed merger can address the ACCC's competition concerns." The Draft Guidelines, however, say nothing more about the circumstances in which an outright prohibition will be required. Given the substantial risks that an outright prohibition presents for businesses contemplating a transaction (and that prohibition is often the possibility about which the merging parties are most concerned), the Sections suggest that the ACCC elaborate as to the circumstances when outright prohibition may be deemed necessary. At a minimum, the Sections encourage the ACCC to acknowledge explicitly that it will seek outright prohibition only in exceptional circumstances, particularly in the context of international transactions.

In Paragraphs 10 and 11, the ACCC expresses a "strong preference for structural undertakings" and states that, although behavioral undertakings occasionally may "be appropriate as an adjunct to a structural remedy," they "are rarely appropriate on their own to address competitive concerns." The U.S. experience is mixed: The U.S. antitrust agencies generally use behavioral remedies only to address a vertical issue, or a concern that arises from a minority interest (*e.g.*, information firewalls within a vertically integrated firm that also is supplying a competitor with an important input), or as an adjunct to a structural remedy. As we understand it, the U.S. agencies' general concerns are that behavioral remedies (1) may not create the full competitive incentives that structural remedies ensure; (2) may require costly review and monitoring by the agencies; and (3) may artificially constrain the merged firm from reacting to changing market dynamics.[8] The U.S. state attorneys general have been more willing to consider and implement behavioral remedies to address horizontal issues.

Paragraphs 19 through 21 suggest that the ACCC may, in limited circumstances, be open to carefully crafted non-structural solutions. The Sections are on record as supporting a broader application of non-structural remedies to address competitive concerns raised by mergers and acquisitions.[9] Non-structural remedies, in some instances, serve the interests both of the competition authority in preserving post-merger competition and of the parties in forming more efficient organizations. We commend the ACCC for leaving open the possibility of non-structural remedies, especially when an alternative structural remedy may result in the loss of the very efficiencies that motivated the parties to merge. We

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[8] *See* U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies, Oct. 2004, § III.A, *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm#3a.

[9] *See, e.g.*, Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on the Competition Bureau (Canada) Draft Information Bulletin on Merger Remedies in Canada, (Feb. 24, 2006) ("Canada Joint Comments"), at 4, *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/ABA.pdf/$file/ABA.pdf.

suggest, however, that the ACCC may wish to make more explicit that it will not demand structural remedies when, on the facts of the particular case, less onerous undertakings are capable of remedying the competitive problem. We note that the European Commission has given helpful guidance on the circumstances in which non-structural remedies may be appropriate.[10]

The Draft Guidelines state in Paragraph 17 that "the ACCC generally prefers divestiture to occur on or before the completion date of the merger," and "there will be circumstances where, if the remedy cannot be implemented on or before completion of the main transaction, no remedy will be acceptable to the ACCC." The Sections are on record as supporting "fix-it-first" solutions in the United States and elsewhere.[11] Such policies allow the parties to resolve competitive concerns within normal market strictures, without needing to formalize such contracts in a consent order, thereby avoiding unnecessarily protracted and expensive regulatory process. The Sections believe that it would be helpful for the ACCC to clarify in its Guidelines whether "fix-it-first" remedies are acceptable and whether all divestitures require formal undertakings. In addition, the ACCC may wish to consider that, in some instances, the burden of requiring parties to locate and enter into contracts with up-front purchasers before closing may impose substantial demands on the parties, and may cause a fire sale of the divested assets or delay the transaction from closing.

The Sections also suggest that it would be helpful for the Guidelines to provide more specific guidance on when the ACCC will require that a divestiture occur "on or before the completion date of the merger." In structuring and planning the timing for a transaction, it is important that the merging parties have guidance on whether the ACCC is likely to insist that they implement a remedy prior to closing.

Appendix 4 states at Paragraph 17 that the ACCC "may require the appointment of an ACCC-approved independent auditor or other independent expert to monitor certain aspects of the undertakings." The Sections believe that the ACCC is correct to take a flexible approach to the use of monitors. Although monitors may serve a useful purpose to secure compliance with undertakings in some circumstances, the Sections believe that monitors are not always useful or necessary. The Sections believe that it would be helpful for the ACCC to describe the circumstances in which a monitor is likely

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[10] Draft Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, ¶¶ 61-68, *available at* http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf.

[11] *See, e.g.*, Canada Joint Comments, *supra* note 9, at 8.

to be required. For example, the FTC has stated that the FTC staff will "recommend that the Commission appoint an independent third party to monitor compliance with the terms of the Commission's order" in relatively narrow circumstances, namely where "the Commission'=s order imposes obligations requiring a continuing relationship between the parties and the buyer."[12]

8. Conclusion

The Sections appreciate the opportunity to submit these comments and hope that they are helpful to the ACCC as it finalizes its Guidelines.

[12] Statement of the FTC Bureau of Competition, Negotiating Merger Remedies, Apr. 2, 2003, at 17, *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.pdf**.**