The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the Australian Competition and Consumer Commission (“ACCC”). The Sections appreciate the opportunity to present our experience and views with respect to the ACCC’s draft Merger Review Process Guidelines (“draft Guidelines”). The Sections appreciate the substantial thought and effort reflected in the draft Guidelines and offer these comments in the hope that they may assist in completing the final version. The Sections’ comments reflect their expertise and experience with competition law in the United States as well as in numerous other jurisdictions worldwide.

The Sections commend the ACCC’s focus on continuing to improve the transparency of its merger review process, consistent with the guiding principles and recommended practices of the International Competition Network. Such transparency is particularly important in the context of an informal merger clearance process regime to provide parties with a degree of certainty as to process while ensuring that mergers are subject to appropriate antitrust scrutiny.

These comments focus on four aspects of the draft Guidelines: publication of merger review timelines; time periods for public review of mergers; coordination of ACCC merger review with competition agencies of other jurisdictions; and remedies in international mergers.

1. Publication of Review Timelines

The Sections endorse the ACCC’s commitment to transparency, particularly the publication of provisional decision dates as well as the publication of Public Competition Assessments regarding certain merger reviews and additional details regarding the various stages of each merger review. While the Sections commend the ACCC’s efforts to provide transparency, we are concerned that the publication of provisional decision dates and any amended timelines may be problematic in some circumstances, particularly where one or more of the merger parties are public companies. To address such concerns, the Sections recommend that the ACCC commit to consulting with the merger parties prior to publishing provisional decision dates and amended timelines.

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2. Time Periods for Review

The Sections recognize the ACCC’s commitment to the prompt review and clearance of transactions that do not raise material competitive concerns. As noted in paragraph 2.12 of the draft Guidelines, a significant proportion of mergers can be pre-assessed expeditiously and the ACCC indicates that such pre-assessments may often be completed within two weeks. The Sections are concerned, however, that the Guidelines suggest a further extension of the ACCC’s indicative timeline for public review of mergers. For example, the ACCC’s 2006 Process Guidelines indicated that the initial pre-Statement of Issues review would generally last from four to twelve weeks. The draft Guidelines extend this period to eight to fourteen weeks. The Sections recommend that the ACCC strive to complete the first phase of the merger review within six weeks of notification in accordance with the ICN’s Recommended Practices for Merger Notification Procedures, assuming the merging parties have provided the relevant information needed from them on a timely basis.

3. Coordination with Competition Agencies of Other Jurisdictions

The Sections endorse the ACCC’s close consultation with overseas competition enforcers, which contributes to harmonization of competition law enforcement across jurisdictions and achieving consistent outcomes. In a few areas, however, the Sections are concerned that the policies in the draft Guidelines could adversely affect the ACCC’s review process and therefore recommend that the Guidelines provide additional flexibility.

(a) Suspension of review timetable for consultations with overseas agencies

Paragraph 2.60 of the draft Guidelines indicates that consultation with overseas agencies may result in suspension of the ACCC’s review pending those discussions or the outcome of an overseas agency’s review. While the Sections appreciate that suspension may be appropriate in a particular case, the Sections are concerned that it could result in a lengthy extension that may not be necessary to investigate the effects of a transaction in Australia. Accordingly, the Sections recommend that suspension based on international agency consultations be used infrequently and that the ACCC indicate in the Guidelines the circumstances in which such suspension may be appropriate, for example where the proposed remedy for the ACCC is contingent on the remedy being approved in an overseas jurisdiction. The Sections further recommend that the Guidelines provide that, where feasible, the ACCC consult with the parties regarding the benefits and costs of suspension.

(b) Guidance on the acceptable form of a confidentiality waiver

The Sections endorse the ACCC’s approach to exchanges of confidential information with other international competition agencies as outlined in paragraphs 2.62-2.64 of the draft Guidelines. The Sections note the ACCC’s comment in paragraph 2.64 that confidentiality

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waivers should be provided in acceptable form. The Sections have observed some inconsistencies among competition agencies’ practices regarding the form of acceptable waivers. In order to expedite the process of obtaining waivers and avoid the need for waivers to be re-executed, the Sections suggest that the ACCC publish a standard form of acceptable waiver or, alternatively, elaborate in paragraph 2.64 on the key elements of an acceptable form of waiver.

4. Remedies in International Mergers

The Sections endorse the ACCC’s approach of closely consulting and coordinating with overseas enforcers to ensure consistency with respect to remedies in relation to international mergers (draft Guidelines at paragraph 2.86).

Over the past few years, the Sections have observed the ACCC’s flexible approach to remedies in the context of international mergers. The ACCC generally appears to have adopted three different approaches depending on the circumstances of the merger and the competitive effect intended to be remedied:

(1) Where the effect relates to circumstances specific to a market in Australia, the agency has adopted an Australia-specific remedy enforceable under s 87B of the *Competition and Consumer Act 2010* (“CCA”);\(^4\)

(2) Where the effect relates to circumstances in more than one jurisdiction (e.g., an effect in a global market), the ACCC has sometimes relied on a remedy that is negotiated in another jurisdiction but has required the parties to provide a substantially similar remedy enforceable under s 87B of the CCA, in particular, in cases where some element of the proposed remedy (such as the identity of the purchaser of a proposed divesture) is not known at the time of the ACCC’s decision;\(^5\)

(3) Where the effect relates to circumstances in more than one jurisdiction (e.g., an effect in a global market), the ACCC has sometimes relied on a remedy that is negotiated in another jurisdiction to resolve its concerns without requiring a substantially similar remedy enforceable under s 87B of the CCA. This particularly appears to be the case where the elements of the proposed remedy, including the identity of the purchaser, are known.\(^6\)

The Sections note the comment at paragraph 2.86 of the draft Guidelines that even if undertakings are provided to an overseas enforcer, the ACCC will generally require that the undertakings are also provided to the ACCC so that it has the ability to enforce the undertakings as well. This appears to narrow the ACCC’s prior approach. In circumstances where it is not necessary for the ACCC to be able to separately enforce the remedy provided in another

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jurisdiction because it can be adequately enforced elsewhere, the requirement to enter into a separately enforceable undertaking under s 87B of the CCA could be burdensome and unnecessary, and result in delays and additional costs to the parties and the ACCC.

Accordingly, in circumstances where enforceability by an overseas agency is sufficiently certain, the Sections recommend that the ACCC retain the flexibility to adopt the approach articulated in (3) above – to rely on a remedy negotiated elsewhere without also requiring the parties to execute a remedy under s 87B of the CCA.

Conclusion

The Sections very much appreciate the opportunity to comment on the draft Guidelines and hope that the ACCC finds these comments useful. We would be pleased to respond to any questions that the ACCC may have and to provide any further assistance that may be appropriate.

Respectfully submitted,

Section of Antitrust Law
Section of International Law
American Bar Association