THE URGE TO MERGE

Changes to Australia's merger laws in 2007 represent the most profound shift in more than 30 years.

IN 2005, a year dominated by advances in technology, broadband speeds and the rise of blogging, the *New Oxford American Dictionary* named 'podcasting' as its word of the year.

In Australia 2006 may come to be known as the year when 'mergers' became one of the country's most popular terms.

In response to global trends, which saw a record $4.83 trillion in international merger deals, merger activity hit new heights in Australia in 2006 thanks in part to a number of landmark deals.

According to a report by international research and business services company Thomson Financial, the value of Australian mergers increased by 56 per cent during 2006, up to a total value of more than $208 billion.

That report, released in January, showed that many of those deals were larger than their historical predecessors, including some greater than $1 billion such as the $11.1 billion bid for Qantas by a consortium of overseas and local investors or the $7.9 billion acquisition of insurer Promina Group by rival Suncorp.

As the regulator responsible for assessing mergers on competition law grounds, the ACCC also carried out record numbers of merger assessments during the year.

There was a 44 per cent increase in assessments in the 2005–06 financial year compared to the previous 12 months, with indications that the trend is likely to continue well into 2007.

But the arrival of the new year also brought with it significant changes to the way mergers can be assessed and permitted to proceed.

On 1 January a new merger assessment regime came into effect that is likely to affect both large and small businesses, as well as the competition regulator and the Australian Competition Tribunal. It provides another option for those businesses looking to merge (along with certain changes to the existing regime).

In October 2006 the Commonwealth Government succeeded in passing through Parliament a suite of changes to the Trade Practices Act responding to earlier criticisms about the process of clearing or rejecting mergers. Those changes contained in the Trade Practices Legislation Amendment Bill, known also as the Dawson Bill, were originally proposed in a review of the competition provisions of the Trade Practices Act chaired by former High Court judge, Sir Daryl Dawson, in 2003.

In 2004 the ACCC took steps to improve its informal clearance process through adopting many measures that increased the transparency of the process, its timeliness and efficiency, and the certainty and predictability of its decision making. These improvements have led to the informal clearance process becoming significantly more attractive for business.

Following the Dawson review the government proposed changes to the existing merger law which incorporated many of the review's recommendations. These included a new voluntary formal merger approvals process administered by the ACCC (reviewable by the tribunal) and the requirement that applications for merger authorisations be made directly to the tribunal rather than the ACCC for adjudication.

The original draft legislation met with significant opposition both in parliament and among several small business groups. The primary concern was that the changes would hand more power to larger companies and make it easier for them to merge as a result of their ability to bypass the ACCC in seeking authorisations for mergers.

While the ACCC is no longer the decision maker for merger authorisation applications, it has been given a central role before the tribunal where anti-competitive mergers may be argued under an authorisation application in the public's interest.

The ACCC will provide a report to the tribunal of its assessment of the application which the tribunal will take into account in its determination. The ACCC will also have the power to appear before the tribunal in hearings and submit evidence as well as cross-examine witnesses.

The informal path for having mergers assessed will remain, and is a route likely to remain popular despite the option of now seeking formal clearance, according to ACCC general manager for mergers and acquisitions, Tim Grimwade. He says:

> It is widely expected both within and outside the Commission that the informal system will remain the dominant clearance process due to improvements that have occurred in the last two years that have made it more responsive and reactive. Generally it is a more flexible system for most applicants.
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> There is a high level of engagement and informal exchange between commission officers and applicants. Formal clearance processes won't have the same level of informal engagement and will not allow the confidential consideration of proposals. The operation of the formal clearance process depends on the receipt of a detailed set of answers to a prescribed set of questions and the application of a certain and consistent process within a prescribed timeframe of 40 business days. The informal process is more flexible and can be more responsive to the particular transaction at hand—for example, by enabling decisions to be made on mergers that aren't likely to raise competition concerns in significantly less time than 40 business days.

Freehills partner Professor Bob Baxt, a former chairman of the Trade Practices Commission and currently chair of the Law Council of Australia's Trade Practices Committee agrees.

Professor Baxt says the informal system has been greatly improved and streamlined in recent years, addressing many of the concerns identified in the 2003 Dawson review. He also sees an increase in civil penalties for contravention of the competition provisions of the Act as one of the other significant changes to be introduced with the start of the new legislation:

> I think we will also see the courts starting to hand down more serious penalties in this area.

With the new systems yet to be tested, many businesses will be very interested to see how effective they are when compared to the existing merger clearance routes.

THE URGE TO MERGE (continued)

Mr Grimwade believes the new formal process may appear attractive for international mergers where parties and their financiers demand the sort of regulatory certainty and more concrete timelines they see in formal clearance regimes that they confront elsewhere in the world where regulatory approval is compulsory.

Dave Poddar, a partner with Mallesons Stephen Jaques and a non-government attorney adviser to the International Competition Network, has been involved in numerous major mergers and acquisitions in the financial services, manufacturing, retail, transport and other industry sectors.

He says the certainty provided under the new formal clearance system will be attractive to some businesses, but the current informal system should remain the preferred approach by Australian companies. He also says that:

> The formal merger process will be likely to be limited to a small number of highly complex transactions. It will be a lengthy and very public process and it will take time for people to find their feet with it. The informal process is working very well and while it is administered by the ACCC in a flexible and facilitative fashion, has many advantages over the formal merger control regimes administered overseas.
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> Nonetheless, the new formal merger process in Australia will provide an alternative for some parties and provides an additional element that the transaction is now 'formally' cleared by the regulator and then immune from challenge by third parties.

With the new systems yet to be tested, he says many businesses will be very interested to see how effective they are when compared to the existing merger clearance routes.

> I think we will see a bedding down period of maybe a year or so. The private sector will see this as having a lot of benefits, but it will take a while for both the private sector and the regulator to get some experience with it.

Both processes need to also be looked at in context. The Australian merger control processes are among the best in the world and highly rated overseas. The ACCC mergers staff are extremely professional and focus on the competition issues, so it's a system that works well and we should be proud of it. ●