

30 November 2010

Mr John Hawkins
Committee Secretary
Senate Economics Committee
P O Box 6100
Parliament House
CANBERRA ACT 2600

By Email: economics.sen@aph.gov.au

Dear Mr Hawkins

**Inquiry into the Australian Competition and Consumer Commission (ACCC)
Franklins decision**

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (formerly known as the Trade Practices Committee) wishes to offer a brief comment in relation to the current Inquiry by the Senate Economics Reference Committee into the ACCC decision in relation to the proposed acquisition by Metcash of the Franklins supermarket chain.

The Committee does not wish to make any submissions regarding the merits of the ACCC's decision.

However the Committee raises for consideration the question of whether a review should be undertaken, at this stage, of the merits of a specific ACCC decision that is likely to be the subject of imminent Federal Court proceedings.

The Committee submits that the Senate Inquiry should be deferred until after the conclusion of any ACCC initiated proceedings, and therefore after the ACCC has been able to complete its role in relation to the proposal.

The ACCC decision in relation to Metcash/Franklins is part of the ACCC informal merger review process. That process is not mandated by the Trade Practices Act (**TPA**) but is a process that the ACCC has developed over the years to assist business. Business generally supports and utilises that process frequently. There are in addition statutory merger review processes under the Act, namely:

- the procedure to seek formal clearance for a merger on competition grounds, with a possible appeal to the Australian Competition Tribunal (**ACT**); and
- the procedure to bring an application to the ACT for authorisation on public benefit grounds.

Most parties to a merger prefer the informal process rather than the above, because of its flexibility and, in most cases, timeliness.

Whilst the ACCC informal merger review process is not a statutory process, parties have some legal avenues available to challenge an ACCC decision made by that process, namely:

- by prompting the ACCC to move for an injunction in the Federal Court to restrain the proposed merger, where parties inform the ACCC that they will proceed despite an adverse ACCC view. That is reportedly the situation in the Metcash/Franklins matter, where media reports indicate the ACCC is about to file an application with the Federal Court;
- a party itself may seek a declaration from the Federal Court in relation to whether the proposed merger is in contravention of section 50, notwithstanding the ACCC decision. This was successfully done by AGL in relation to its acquisition of an interest in the Loy Yang power station in 2003; and
- in cases where the ACCC makes a decision under the TPA, there may also be scope for a party to challenge an ACCC decision in some matters on administrative law grounds pursuant to the Administrative Decisions (Judicial Review) Act.

The ACCC informal review process is largely confidential. The ACCC often uses its section 155 (statutory demand for information) powers to obtain information from the merger parties and other players in the relevant markets. Information so obtained is protected by the statute. Furthermore third parties may provide information voluntarily on the expectation that the information will be kept confidential, and that confidence is also recognised by s.155AAA of the TPA.

In order for the Senate Committee to review the ACCC's decision in respect of the merger, it will presumably need to obtain and review the information that the ACCC obtained prior to its decision. Parties who gave the ACCC information in confidence either by way of statutory powers or voluntarily will likely be most concerned that the information might go outside the ACCC. Further they might be called before the Senate Committee.

In the experience of the Committee, parties who object to a merger being reviewed by the ACCC are concerned that the fact that they oppose a merger remains confidential and that the information that they provide to the ACCC also remains confidential. The ACCC practice is to respect that concern within the limits of the TPA.

If the Senate Committee Inquiry will proceed at this time to canvass the merits of the ACCC decision, it will do so at a time when the merger is also likely to be the subject of proceedings before the Federal Court. The review may raise questions for third parties who provided confidential information to the ACCC.

The Committee therefore submits that the Senate Inquiry should be deferred until any Federal Court proceedings or other action in respect of the ACCC's decision concerning this proposed merger have been completed.

The Committee also submits that the Senate Inquiry should put in place appropriate measures for the protection of evidence provided to the ACCC on a confidential basis.

Yours sincerely

Bill Grant
Secretary-General