

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Australia****27 November 2018**

This document reproduces a written contribution from Australia submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Australia

1. Background: merger control in Australia

1. Section 50 of the *Competition and Consumer Act 2010* (CCA) prohibits mergers that would have, or be likely to have, the effect of substantially lessening competition in any market in Australia.
2. The notification of mergers in Australia is voluntary and non-suspensory. As parties are not legally required to notify the ACCC of a proposed merger, they have the option of completing the merger without seeking any regulatory consideration. However, this approach exposes them to regulatory uncertainty if the ACCC decides to investigate the merger and subsequently takes legal action, including to obtain injunctions restraining completion.
3. If the ACCC considers a completed merger contravenes section 50, the ACCC can apply to the Federal Court of Australia for orders which may include a divestiture, pecuniary penalties and declarations, including a declaration that the merger is void and the monies be refunded to the acquirer.
4. Parties are encouraged to, and typically do, approach the ACCC well before a merger is completed if the merger may raise competition concerns.
5. If parties make a decision to notify the ACCC of a merger, there are two available options for obtaining merger clearance: informal merger clearance or merger authorisation.

1.1. Informal merger clearance

6. The ACCC reviews mergers primarily through its Informal Merger Review Process (informal clearance). There is no legislative basis for this process, and so the informal review process only provides merger parties with the ACCC's considered view on whether a proposed merger is likely to contravene section 50 and therefore whether the ACCC will oppose the merger in the Federal Court.
7. There are no minimum turnover or other thresholds requirements for section 50 to apply (other than the requirement that the merger is likely to substantially lessen competition), and mergers and acquisitions of any size may be captured by the provision.
8. Parties have regard to the ACCC's informal view when determining whether to proceed with the proposed merger.
9. The ACCC may take legal proceedings if parties intend to proceed to complete a merger that following an informal review the ACCC considers would be likely to contravene section 50 of the CCA.

1.2. Merger authorisation

10. In 2017, the CCA was amended to enable merger parties to seek statutory protection from legal action under section 50 of the CCA by lodging an application for merger authorisation with the ACCC.¹
11. Parties seeking merger authorisation must provide the ACCC with an undertaking not to complete the proposed merger while the ACCC is considering the application.
12. The ACCC must not make a determination granting a merger authorisation unless it is satisfied in all the circumstances that either the proposed merger will not substantially lessen competition, or the proposed merger will result in a net public benefit.
13. If parties are dissatisfied with an ACCC determination in relation to an application for merger authorisation, they may seek limited merits review before the Australian Competition Tribunal within a prescribed timeframe.
14. If a merger authorisation is granted and in force, the authorised parties are able to complete the merger without the risk of legal action for a contravention of section 50.

2. The relevance and investigation of gun jumping in Australia

2.1. Gun jumping in Australia

15. While the ACCC has not publicly provided guidance on what may constitute ‘gun jumping’, the ACCC is likely to investigate any conduct relating to a proposed merger where the parties (particularly those that may be regarded as close competitors) are actively coordinating their activities, or are in effect acting as if they are one entity rather than competitors, in the period prior to completion. The ACCC may also consider gun jumping conduct where the merger has been completed.
16. In Australia, examples of gun jumping conduct which may raise concerns include:
 - sharing current and competitively sensitive information before completion beyond what is required for integration planning and to conduct due diligence, for example each party’s commercial areas sharing sensitive information²
 - placing restrictions on the activities of the vendor/target before completion, which limit their ability to compete
 - taking steps to integrate the acquirer’s and vendor/target’s businesses or to coordinate their dealings with customers before completion, such as joint marketing or referring the vendor/target’s customers to the acquirer.
17. In relation to pre-merger integration steps, the ACCC also carefully considers whether there is a heightened risk of early integration through formal agreements between the parties, including joint ventures.

¹ Previously, applications for merger authorisation were made to, and determined by, an independent statutory tribunal (the Australian Competition Tribunal).

² Usually, parties implement information sharing confidentiality restrictions, such as ensuring a select group of employees responsible for viewing competitively sensitive information necessary for merger planning are not also involved in commercial decisions.

2.2. Detection and investigation of gun jumping

18. Gun jumping in Australia may be uncovered through customer/supplier complaints, competitors, whistle blowers or the merger review processes (informal merger review or merger authorisation).

19. During a merger review, the ACCC routinely examines key transaction and associated agreements between parties. In recent years, the ACCC has also placed a greater emphasis on reviewing the contemporaneous internal documents of merger parties, including by issuing compulsory notices to produce documents and information. Where such agreements and other documents raise questions about potential gun jumping behaviour, the ACCC will investigate further.

20. There remains a risk that the ACCC does not detect or otherwise become aware of gun jumping conduct, particularly as merger notification is voluntary in Australia.

3. Legal consequences of gun jumping conduct

21. Where merger parties have ‘jumped the gun’, either by coordinating their activities and/or acting as if they are one entity before completion, the ACCC may investigate the conduct as a possible contravention of the cartel provisions (sections 45AA to 45AU), or section 45 of the CCA.

Box 1. Legislative provisions relevant to gun jumping conduct

Sections 45AA to 45AU of the CCA (‘cartel provisions’) contain civil and criminal provisions that prohibit cartel conduct which is defined as making and/or giving effect to a contract, arrangement or understanding between parties who are in competition with each other with a provision relating to:

- price fixing
- bid rigging
- allocating customers, suppliers or territories, or
- restricting outputs in the production and supply chain.

Section 45 prohibits the making of, and giving effect to, contracts, arrangements or understandings or concerted practices that have the purpose, or would have the effect or likely effect, of substantially lessening competition.

22. Where parties proceed with an anti-competitive merger, the ACCC may also take action for a breach of section 50.

23. Only the Federal Court has the power to determine that there has been a contravention of the CCA and, if so, what penalty and/or other remedies should be imposed. The ACCC must bring proceedings in the Federal Court if it wishes to obtain an injunction, penalties and/or other orders. The ACCC does not have a specific prosecution and fining policy for gun jumping cases, nor the power to issue fines.

24. Cartel conduct and other anti-competitive agreements and practices are enduring enforcement and compliance priorities for the ACCC.³ However, there have been very few cases where the ACCC has taken action in relation to conduct that can be characterised as gun jumping.

25. In July 2018, the ACCC commenced proceedings against Cryosite in respect of gun jumping arising from alleged cartel conduct.

26. The ACCC has not published guidance about gun jumping conduct, and does not typically advise merger parties of gun jumping risks before or during a merger review. However, in light of the Cryosite case, the ACCC is considering updating its guidance for merger parties and expanding its communications to highlight the issue of gun jumping.

27. Prior to Cryosite, the ACCC had not taken court action for cartel conduct which could be characterised as gun jumping, although a 1996 matter (Pioneer), in which the ACCC alleged a contravention of section 50, involved some gun jumping aspects. In addition, recent court action against Pacific National and Aurizon also involves alleged arrangements reached between the parties in addition to the proposed acquisition which the ACCC alleges is likely to have the effect of substantially lessening competition.

Box 2. CASE STUDY - ACCC v Cryosite Ltd (2018)

Cryosite and Cell Care Australia Pty Ltd (Cell Care) both supplied cord blood and tissue banking services in Australia. Stem cells in cord blood and tissue are collected at the birth of a child, and can be used in the treatment of blood disorders.

Cryosite and Cell Care were the only two businesses supplying private cord blood and tissue banking services in Australia. The parties entered into an agreement that Cell Care would acquire Cryosite's cord blood and tissue banking business. The parties did not (and were not required to) notify the ACCC of the proposed merger.

Upon receiving an anonymous complaint about the proposed merger, the ACCC commenced an informal merger review. During that review, the ACCC uncovered potential gun jumping conduct and began a separate cartel investigation into that conduct. The ACCC subsequently announced in December 2017 that it would discontinue the merger review and not make a decision on whether to grant informal merger clearance, but continue its investigation into the circumstances surrounding entry into the agreement and the closing of Cryosite's cord blood and tissue collection operations.

In July 2018 the ACCC instituted legal proceedings in the Federal Court against Cryosite in which the ACCC alleged the following conduct:

- The asset sale agreement included a provision that Cryosite was to refer all cord blood and tissue banking sales inquiries to Cell Care after the agreement was signed and before the merger was completed.
- Cryosite gave effect to that provision by referring such customers and reporting to Cell Care in relation to customers referred. Cryosite also stopped providing cord blood and tissue banking services to new customers.

³ <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

The ACCC alleges this conduct constitutes cartel conduct in contravention of the CCA, because it restricted or limited Cryosite's supply of cord blood and tissue banking services and/or allocated customers from Cryosite to Cell Care. As a result of engaging in the alleged cartel conduct, the ACCC alleges Cryosite 'jumped the gun' by effectively exiting the cord blood and tissue banking market for new customers before completion of the proposed merger.

The proposed merger was ultimately abandoned.

This matter is still before the Federal Court.

Box 3. CASE STUDY - ACCC v Pioneer International Ltd (1996)

Pioneer International Limited (Pioneer) and a subsidiary company, Pioneer Building Products (Qld) Pty Ltd (Besser), acquired the assets of A Class Blocks Pty Ltd (A Class) and Q Blox Concrete Masonry Pty Ltd (Q Blox). The parties were competitors in the south-east Queensland market for the production and supply of concrete masonry.

The ACCC alleged that from 1992 onwards, Pioneer considered acquiring the A Class business in order to remove A Class as a competitor and increase masonry prices. During this time, Pioneer received legal advice that if it acquired the A Class business, there was a significant risk the acquisition would be anti-competitive.

Subsequently, in June 1994, Pioneer and A Class considered a different proposal where A Class would close its business and sell its masonry production assets (which Pioneer had previously valued at AUD\$2.75 million) to Pioneer for AUD\$6.5 million. The closure of A Class would restrict competition between the parties, in anticipation of the transaction. After Pioneer obtained further legal advice, A Class closed its business and the acquisition proceeded. Pioneer then reduced the discounts it offered customers, and as a result Pioneer and Besser improved their profits.

The Court held that Pioneer's acquisition of the A Class assets contravened section 50 (of the CCA's predecessor legislation), in that it had the effect of substantially lessening competition in the south Queensland concrete masonry market. The Court ordered Pioneer and Besser to pay \$4.8 million in pecuniary penalties. Pioneer and Besser did not file a defence. In doing so they admitted the allegations made in the statement of claim and avoided potentially lengthy and expensive litigation.

3.1. Penalties

28. For corporations, the maximum civil pecuniary penalty for each act or omission which contravenes Part IV of the CCA (which contains the cartel provisions and sections 45 and 50, which prohibit anti-competitive agreements and mergers respectively) is the greater of AUD10 million; three times the value of the benefits obtained from the contravention; or if the benefit cannot be calculated 10% of the annual Australian sales turnover of the corporate group in the preceding 12 months. For individuals the maximum penalty for each act or omission is AUD500,000.

29. Contraventions of the cartel provisions in the CCA can also be prosecuted criminally:

- Individuals found guilty of a cartel offence could face up to 10 years in jail and/or fines of up to AUD420,000 per criminal cartel offence.
- Corporations found guilty of a cartel offence can face fines of up to AUD10 million; three times the total value of the benefits obtained from the contravention; or if the benefit cannot be calculated, 10% of the annual Australian sales turnover of the corporate group in the preceding 12 months.

3.2. Other consequences of gun jumping

30. If gun jumping is identified by the ACCC, either as part of the informal merger review process or another avenue, this may delay the ACCC's consideration of the proposed merger. The ACCC may choose to suspend its assessment of a merger while an enforcement investigation continues.

31. For example, in the Cryosite matter, the ACCC decided not to make a decision on whether to grant clearance for the proposed merger under section 50 of the CCA and discontinued its public informal review of the proposed merger. The ACCC then continued to investigate the circumstances surrounding entry into the agreement and the closure of Cryosite's cord blood and tissue collection operations, and ultimately commenced enforcement proceedings.

32. If the merger parties have completed the merger, in addition to potential penalties for contraventions of the competition laws, where a contravention of section 50 is established, the Court may order divestiture of the shares or assets acquired or may declare the transaction void.

33. Individuals who are knowingly concerned in, or a party to, the conduct may also be banned from managing corporations.

4. Conclusion

34. Australia has a voluntary and non-suspensory merger notification regime. While parties are not required to notify the ACCC of a proposed merger or obtain ACCC clearance prior to completion, parties have a strong incentive to do so where the proposed merger is likely to raise competition concerns in Australia. Prior to completion, parties remain competitors and must comply with the competition laws. If the parties engage in pre-completion coordinated conduct and/or are acting as if they are one entity, they run the risk of contravening the cartel provisions or other provisions that prohibit anti-competitive contracts, arrangements or understandings.

35. The conduct which is the subject of the Cryosite proceeding, currently before the Federal Court, provides a recent example of alleged cartel conduct involving gun jumping. The Pioneer case and current proceedings against Pacific National and Aurizon also shows how the ACCC may take action for anti-competitive agreements entered into in anticipation of, or to give a similar effect to, a merger.