MERGER AUTHORISATION ALIVE AND KICKING

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Legal Briefings – By **Chris Jose**

SUMMARY

- Murray Goulburn approached the competition issues for this proposed takeover with a focus on substantial public benefits. Those public benefits can only be considered under the merger authorisation process, not the usual ACCC informal clearance process.
- Since 2007 a merger authorisation application can only be made in the Australian Competition Tribunal. Murray Goulburn's Tribunal application is the first time this new process has been used
- Critically, Murray Goulburn's experience shows that the process can be viable, efficient and effective.

The recent three way takeover battle for Warrnambool Cheese & Butter between Saputo, Murray Goulburn and Bega Cheese has provided Australia's M&A community with a rare insight into an alternative avenue for obtaining competition approval.

For the first time ever, this takeover battle saw a merger authorisation application made direct to the Australian Competition Tribunal (the **Tribunal**).

The ACCC's informal merger clearance process remains the process of choice for the vast majority of mergers and acquisitions. It operates with a sufficient degree of flexibility and rigour to match the needs of most mergers.

But in this instance, instead of taking the usual path of seeking informal merger clearance from the ACCC, Murray Goulburn opted for merger authorisation from the Tribunal.

Merger authorisation in the Tribunal is a public process that allows a merger to be authorised on public benefit grounds, where those public benefits are weighed against any detriments, including anticompetitive detriments – the so-called 'net public benefit test'.

Murray Goulburn's authorisation application was built on its view that its takeover would generate public benefits, especially through substantial efficiency gains, the international competitiveness of Australian industry and likely flow-on benefits to farmers and rural communities.

Authorisation has been available for mergers since the former Trade Practices Act was first introduced nearly 40 years ago, but has not been commonly used, with only about 20 applications during its history. Merger authorisations dried up completely in 2007 when the law was changed to require applicants to apply directly to the Tribunal, instead of the ACCC. Since 2007, no party had used this process. That is, until now.

Under the new process the Tribunal has three months to make its decision, unless complexity or other special circumstances warrant extending the period to no more than six months.

Murray Goulburn filed its application for merger authorisation on 29 November 2013. The application received a swift and efficient response from the Tribunal and its Registry. Within two weeks, the Tribunal had set a tight timetable, dealt with initial confidentiality rulings, listed the matter for a quick hearing in early February 2014, and had indicated that it proposed to make its determination by the end of February 2014, within the statutory three month period.

Key learnings from Murray Goulburn's experience include:

- **Timeliness**: merger authorisation in the Tribunal compares well with the ACCC's informal merger clearance process from a timeliness perspective. Had the application proceeded (it was withdrawn when Murray Goulburn announced it would sell into Saputo's bid in January 2014), Murray Goulburn likely would have had an authorisation determination within three months. That is remarkably efficient especially for a quasi-judicial process, and demonstrates that fears about timing of the merger authorisation process are unfounded. The more common informal clearance processes can also be very quick and efficient. However, while the ACCC completes most of its public merger reviews within 8 weeks, that is not the case for complex or contentious mergers. In these matters the timeframes can take many months and regularly exceed 6 months or more. Unlike the Tribunal authorisation process the ACCC's timeline is not regulated by legislation.

- **Transparency**: within the short timeframe available in Murray Goulburn's application, some 31 submissions from interested parties were published on the Tribunal's register. Although parts of those submissions were restricted to the lawyers acting for the parties on confidentiality grounds, this level of transparency differentiates merger authorisation

from the usual ACCC informal merger clearance process. Similarly, subject to confidentiality rulings to protect commercially sensitive information, Murray Goulburn's application and supporting evidence were placed on the Tribunal's register and were open to scrutiny by interested parties. This level of transparency is in stark contrast to the usual informal merger clearance process where submissions and evidence, both from the merger parties and third parties, are only open for direct review by the ACCC. This lack of transparency can lead to frustration for parties seeking to complete a merger in a complex market or in circumstances where there are contentious competition issues.

- **Heavy procedural burden**: as can be expected from a quasi-judicial, formal process authorisation applications in the Tribunal impose very substantial burdens on the parties. These burdens include having to file at the time of commencing the application a comprehensive submission supported by lay and expert evidence. The process also requires responding to substantial information requests from the ACCC and the Tribunal.

Overall, the Murray Goulburn experience suggests that for mergers that involve complex markets or contentious competition issues, and that also have public benefits (such as significant efficiency gains), merger authorisation should be considered as an option for obtaining competition approval.

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