



Australian
Competition &
Consumer
Commission

ACCC supplementary submission

Senate Economics Committee

Inquiry into aspects of banking mergers

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Introduction

1. On 29 January 2009 the Australian Competition and Consumer Commission (ACCC) provided a written submission to the Senate Economics Committee *Inquiry into aspects of banking mergers (the inquiry)*. ACCC representatives also gave oral evidence at the inquiry's public hearing of 13 March 2009.
2. The ACCC notes that, at additional public inquiry hearings held on 10 August 2009, a number of witnesses provided views on the ACCC's approach to assessing mergers pursuant to section 50 of the *Trade Practices Act 1974* (Cth) (TPA). Section 50 prohibits mergers that would have the effect or likely effect of substantially lessening competition in a market. A number of parties subsequently made supplementary written submissions to the inquiry in relation to the issues raised during public hearings.
3. This supplementary submission seeks to clarify the ACCC's approach to, and the administrative processes it adopts in assessing mergers and acquisitions pursuant to section 50 of the TPA.
4. The ACCC's merger review process enables parties to a merger to seek the ACCC's views on whether a merger proposal is likely to breach section 50 of the TPA. It is noted that while merger parties have alternative options to have mergers considered formally by the ACCC¹ or by the Australian Competition Tribunal under the authorisation process², these avenues have never been used.³ Additionally, it is noted that recent comments made to the inquiry focused on the ACCC's administration of its merger review process. Accordingly, this supplementary submission focuses on the administration of the merger review process by the ACCC.

Application of merger law in the banking sector

5. The ACCC believes that section 50 of the TPA is the appropriate mechanism for assessing the competitive implications of mergers in the banking sector.
6. Section 50 of the TPA applies universally across all industry sectors in Australia, including the banking sector. The ACCC believes that there are very strong policy reasons for maintaining the same merger test across all sectors of the economy.
7. Previous inquiries into the effectiveness of Australian anti-trust law have noted the effectiveness of the TPA in protecting the competitive process and the distorting effect on economic efficiency of adopting different trade practices obligations for different industries. As noted by the Dawson Committee:

¹ Subsection 95AC(1) of the TPA.

² Subsection 95AT(1) of the TPA.

³ See ACCC (2009) *Submission to the Senate Economic Committee Inquiry into Aspects of Bank Mergers*, pages 4-5.

The competition provisions should apply generally and consistently to business conduct without regard to the nature of the industry in which the conduct occurs. Efficiency, and consequently welfare, may suffer if the regulation of competition is not uniform. Differing regulatory treatment of different sectors of the economy will provide differing incentives for investment and effort by discouraging participation in particular sectors and will detract from the ability of markets to allocate resources in an efficient manner. Productivity, growth and welfare may then all suffer.⁴

8. The ACCC concurs with this assessment.
9. At the same time, the banking sector is also subject to regulatory scrutiny which enables the consideration of further issues of public interest that may arise in relation to bank mergers. In particular, such matters can be taken into consideration by the Treasurer within existing legislation including the *Banking Act 1959* (Cth) and the *Financial Services Shareholding Act 1998* (Cth).

The ACCC's merger review process

10. The ACCC considers that the administrative framework for examining mergers - including those in the finance sector - primarily through the merger review process, is effective and appropriate.
11. The ACCC's merger review process enables parties to seek the ACCC's views on whether a merger proposal is likely to breach section 50 of the TPA. Depending on the outcome of a review, the ACCC will consider available options including whether to bring proceedings in the Federal Court of Australia to restrain the parties from completing a merger.
12. The ACCC considers that its merger review process maintains transparency, reliability, accountability and predictability - largely as a result of the combined effect of its own published guidelines, statements of issues, reasons for decisions in public merger reviews, and ongoing, independent external scrutiny.
13. The ACCC publishes guidelines that establish the procedural and analytical framework the ACCC applies in conducting a merger review.⁵ Together, these guidelines set out the process that the ACCC will engage in, the likely timing of reviews, opportunities for engagement with the ACCC and the approach to analysing both competition concerns and constraining influences on market behaviour that may alleviate competitive concerns.
14. These guidelines have been developed in line with international best practice, contemporary views on anti-trust analysis, and the ACCC's experience in reviewing and assessing mergers.
15. Further, over the last five years the ACCC has significantly increased the transparency of its merger review process with three important elements of its

⁴ Dawson (2003) *Review of the Competition Provisions of the Trade Practices Act*.

⁵ See ACCC (2006) *Merger review process guidelines* and ACCC (2008) *Merger guidelines*.

procedure. The first of these is the “Statement of Issues” which the ACCC publishes where competition concerns arise in the course of its merger review. Its purpose is to alert the market to the ACCC's need for further information. Secondly, the ACCC publishes the reason for its decision in all public matters. And finally, the ACCC releases a “Public Competition Assessment”, which comprehensively details the ACCC's reasons for decision in matters of significant public interest. The ACCC's development and use of the Statement of Issues and Public Competition Assessment will be discussed in more detail below.

16. The ACCC notes that the merger review process does not place the ACCC in the position of adjudicating on the legality of a proposed merger - the question of whether a merger or proposed merger amounts to a contravention of section 50 of the TPA is one for the courts to determine. The ACCC's role, in contrast, is an investigative one: it must reach a view regarding the likelihood that a proposed merger will substantially lessen competition and, if so, explore options for legal enforcement.
17. It should also be noted that the TPA makes private action available to third parties who may, independent of the ACCC's views on a merger or acquisition, seek declarations, divestiture and/or damages (if adversely affected by a merger in breach of section 50).
18. The ACCC's processes and decisions are subjected to ongoing scrutiny from a range of sources including the courts, third parties who publicly comment on the ACCC's decisions or take their own private actions, inquiries such as the current inquiry, and Freedom of Information legislation.
19. Accordingly, the ACCC is not free to interpret and apply section 50 however it may choose. Importantly, it must have regard to legal precedent, and adhere to a list of specific non-exhaustive factors contained in section 50(3) of the TPA in determining whether a merger is likely to substantially lessen competition in a market.⁶

Conduct of a merger review

20. The following outlines the ACCC's merger review process in more detail, particularly as it relates to interaction with interested parties and confidentiality of information.

Administrative processes

21. The *Merger review process guidelines*, first published by the ACCC in 2004, establish the procedure for review of non-confidential mergers.⁷ The procedures are necessarily flexible to accommodate the different circumstances that can arise in merger review, taking into account that pre-merger notification is not mandated.

⁶ See paragraph 16 of the ACCC's previous submission to this inquiry.

⁷ These guidelines were initially entitled *Guideline for informal merger review* before they revised in 2006. The guidelines also establish a procedure for reviews on a confidential basis either at the request of the merger parties or at the ACCC's own initiation; however, the ACCC is unlikely to provide an unqualified view about a merger or acquisition on the strength of a confidential review alone.

For instance, the ACCC in some cases may not need to make any market inquiries at all to reach a view that an uncontentious merger will not breach s50 of the Act. In other cases, merger parties may not cooperate with a review, so that certain elements of the merger review process may not apply. However, for major non-confidential merger reviews that necessitate significant market inquiries, key features of the merger review procedure include:

- The ACCC lists details of the transaction in the Mergers Register on its website as soon as a proposed acquisition becomes public. This entry contains the names of the parties, a description of the acquisition and the relevant industry and staff contact details.
- The ACCC places details of the market inquiries it is undertaking on the Mergers Register, including often an open market inquiries letter which outlines the particular issues to be explored in the ACCC's investigation. The purpose is to identify to potentially interested parties the areas of investigation necessary to assess the potential competition issues which arise, and to encourage them to provide their views on these issues to ACCC staff. The open market inquiry letter is supplemented with targeted inquiries, letters and often meetings with interested parties.
- The Mergers Register contains an indicative timeline of the ACCC's review of proposed mergers which is continually updated during the course of the investigation. This informs interested parties of the progress of a matter, provides deadlines for submissions and indicative dates for ACCC decisions. The ACCC aims to provide considered views on mergers it investigates within timeframes that are reasonable, having regard to commercial imperatives and the need for the ACCC to be sufficiently informed as to the likely competitive effects.
- Where the ACCC comes to a preliminary view that a proposed merger raises competition concerns or may raise competition concerns that require further investigation, it will publish a Statement of Issues. The purpose of such a statement is to raise awareness of competition issues posed by a merger, and to elicit further comment from interested parties.⁸
- In certain circumstances, the ACCC will release a Public Competition Assessment usually within a few weeks of its assessment of a proposed merger in order to provide a detailed explanation of the ACCC's analysis of the competition issues raised by a merger and the reasons for the ACCC's decision.⁹ It is the ACCC's practice to issue a Public Competition Assessment in all matters where a merger is rejected, or is subject to enforceable undertakings. In circumstances where a merger is cleared but raises important issues that the ACCC considers should be made public, a Public Competition Assessment will also be issued.

⁸ The ACCC issued a Statement of Issues in relation to the acquisition by Westpac of St George on 23 July 2008.

⁹ The ACCC issued a Public Competition Assessment in relation to each of the acquisitions of BankWest and St George (see Attachments B and C of the ACCC's previous submission to the inquiry).

- In matters where a Public Competition Assessment is not issued, the ACCC nevertheless provides reasons for its decision on the Mergers Public Register for all completed public investigations.
22. The level of transparency associated with the merger review process facilitates a high level of scrutiny of any decisions the ACCC reaches regarding the likelihood of a substantial lessening of competition, commensurate with international best practice for the regulatory investigation of public mergers. This level of transparency also enables effective engagement with third parties to explore competition issues.
23. Additionally, over time, the ACCC's publication of Statements of Issues and Public Competition Assessments form a body of precedent of the ACCC's approach to merger proposals. This acts to reinforce the transparency, reliability, accountability and predictability of the ACCC's investigations. The ACCC's merger processes have been consistently ranked by the Global Competition Review as one of the top performing merger review regimes in the world.

Engagement with interested parties

24. A critical part of the ACCC's investigation of a merger or acquisition proposal is engagement with interested parties. Engagement with potentially affected parties - including customers, suppliers, competitors, participants in related markets and peak body or advocacy groups - ensures that the ACCC has a full appreciation of the competitive dynamics of the market/s in question and potential competition issues or constraining influences on market behaviour that may alleviate competitive concerns. Additionally, interested parties play an important role in ensuring that the ACCC is in a position to test submissions made to it by other parties and has access to relevant information to inform its decision.
25. It is for these reasons that the ACCC has set out certain "trigger" points at which submissions from market participants are sought during the course of a merger review, for example in response to a market inquiries letter or a Statement of Issues. Additionally, the ACCC regularly engages with interested parties throughout an investigation.
26. The ACCC has developed a range of opportunities for, and methods by which, submissions can be made by interested parties on merger or acquisition proposals. Written submissions are welcome, and may easily be lodged through the ACCC website in response to the ACCC's market inquiry letters. In many cases - and often in the case of contentious mergers - parties may be more comfortable to discuss their views in person or by telephone. ACCC staff are proactive in contacting third parties to inform them that a merger is occurring, and to discuss the potential outcomes for competition. To this end, it is a standard practice for the ACCC to obtain lists of customers and competitors of the merger parties, and contact them by telephone at the outset of a merger review and subsequently throughout the review process. This approach also ensures that interested parties

gain knowledge of, and confidence in, the ACCC's procedures and are in a position to make valuable submissions on competition issues.

27. The object of the ACCC in merger review is to fully consider likely competition effects. Much useful information can come from different interested parties. At some point in an investigation, the ACCC will have sufficient information to form a considered view of what those competition effects are likely to be, and will not need to hear from every party that might have an interest in one of its investigations. Indeed, many interested parties will have contradictory or irrelevant information. As an experienced investigatory and law enforcement body, the ACCC will determine the likely competitive effects having regard to the credibility, corroborative value, relevance and importance of the information it receives.

Confidentiality of information

28. The ACCC does not publish submissions provided by merger parties, market participants or other interested parties during the course of a merger review. However, as outlined above, the ACCC will, where relevant, publish details of any preliminary competition issues in the form of a Statement of Issues and the reasons for the ACCC's decision in the form of a Public Competition Assessment. The identity of third parties that raised those issues would not ordinarily be revealed, although the arguments of the merger parties themselves may be referred to.
29. ACCC is strongly of the view that its current approach to merger investigation is effective primarily because third parties are able to make submissions on competition issues in confidence. It is not simply an issue that some of the information being provided is of its nature commercially sensitive. It is the experience of the ACCC that, without the convention of confidentiality, market participants will not speak freely with the ACCC about their competition concerns, because, for instance, of a fear of retaliation for speaking out against a supplier or purchaser. Furthermore, were the ACCC to publish submissions even without the objection of the parties providing them, there is a real risk of interference by the merger parties or other key interested parties with the evidence of potential witnesses in future legal proceedings.
30. This does not mean the ACCC is unable or unwilling to test submissions and information put to it by the merger parties (or indeed any other interested party). The extensive consultation which the ACCC engages in, combined with the discussion and/or publication of potential issues of concern, ensures that the ACCC is in a position to adequately assess claims made by parties (without necessarily identifying them) as to competition concerns and constraining influences prior to making a final decision.

The ACCC's recent consideration of banking mergers

31. The ACCC applied the principles and processes discussed above in its reviews of recent banking mergers.
32. In investigating the proposed acquisition of St George Bank by Westpac Banking Corporation, the ACCC maintained details of the investigation on the ACCC website so interested parties could be made aware of the ACCC's processes and timetable for reviewing the matter, and given opportunities to comment in a timely manner. Notably, after an initial consultation process, the ACCC issued a Statement of Issues to inform interested parties of the various competition issues raised, and to enable interested parties to provide further comments on issues of potential concern. (In that matter, the competitive implications of wealth management platforms was the key area in which the ACCC sought further information through its Statement of issues.) At the finalisation of its investigation, the ACCC issued a Public Competition Assessment and a media release to explain the reasons for its decision.
33. Particular care was taken to provide opportunities for any interested party to engage with the ACCC in this matter. Specifically, the ACCC was aware that the proposed acquisition was of interest to a very wide range of customers, including both large corporate customers and individual consumers, and a number of techniques were used by the ACCC to engage with these different groups. The ACCC sent out a market enquiry letter providing an overview of the market, areas of overlap between the parties' activities and questions about competition to ensure that interested parties had an opportunity to provide comments, and also had relevant information about the parties and the merger proposal. This market enquiry letter was sent to over 120 organisations and posted on the ACCC's website. In addition, the ACCC issued a media release to raise awareness of the process, and the opportunities available to any person wishing to comment. ACCC staff met or engaged in telephone conversations with more than 30 third parties, to discuss and explore the issues raised in their submissions, and to test the reliability and completeness of other information before the ACCC (having regard to the confidentiality of submissions).
34. Furthermore, the ACCC undertook a process to inform and elicit consumer views in this matter, by developing what it referred to as a "survey". The survey was never intended to be more than a more user-friendly form of a market inquiry questionnaire, and had been designed as a convenient vehicle for consumers to give their opinions on the merger and a forum for the ACCC to gain information about consumer habits which would help highlight areas where additional investigation should be undertaken. It was not intended, nor designed, to be a statistically reliable representation of the views of all customers potentially affected by the proposed merger, due to the self-selection of respondents. The confidentiality of responses was assured from the outset, in line with standard ACCC practice. Consumers were specifically advised that if they responded to the questionnaire, their answers would be kept confidential. The ACCC sought the assistance of consumer advocacy groups such as CHOICE to assist with dissemination. This was a significant effort by the ACCC to broaden the scope of

its inquiries into the competitive effects of the merger, and demonstrates the ACCC's flexible approach to conducting market inquiries

35. The ACCC engaged with CHOICE on a number of occasions in the course of its investigation regarding the purpose and dissemination of the surveys to relevant consumers. The ACCC also held discussions with CHOICE to assist CHOICE in its understanding and interpretation of the ACCC's *Merger guidelines*.
36. Accordingly, the ACCC considers that it took all reasonable steps to engage with interested parties in this matter, subject to the requirements of confidentiality.
37. A similar procedure was undertaken in relation to the ACCC's examination of the proposed acquisition of BankWest by the Commonwealth Bank. In that matter, interested parties, including CHOICE, were invited to submit their comments in relation to the proposed acquisition. Details of the progress of the investigation were maintained on the ACCC website throughout and, at the conclusion of its investigation, the ACCC published a Public Competition Assessment to explain the reasons for its conclusions on competition. Relevant market information provided to the ACCC in earlier reviews was considered insofar as it was helpful and relevant. This can truncate the market inquiry process. For instance, in the BankWest matter, the ACCC used similar market definitions to those it had determined after considerable inquiry in the St George/Westpac matter.

Should third party submissions be published?

38. The ACCC notes submissions have been made to this inquiry that suggest that the transparency and accountability of the ACCC's processes could be improved through a requirement that all third party submissions be published in the course of a merger review - in much the same way that submissions were published in the course of the ACCC's Grocery Inquiry.¹⁰
39. The role of the ACCC in assessing mergers is not in any way analogous to the procedure of a public inquiry, such as the Grocery Inquiry. As previously indicated, in relation to mergers, the ACCC's role is to undertake an investigation as to whether a transaction is likely to raise issues pursuant to section 50; it is not to make a final decision - that is the role of the courts. A merger review is an investigative inquiry where evidence from the market may end up being used in Court, and, accordingly, evidence needs to be carefully tested and not exposed to potential interference prior to any legal action.
40. The ACCC considers that the current balance between facilitating third parties to provide their views on the competitive impact of a merger by disclosing issues raised in the course of an investigation and maintaining confidentiality is appropriate in this context. In particular, it is the ACCC's strong view, based on experience and consideration of international best practice, that the maintenance of confidentiality of information provided by third parties during an investigation is vital to the efficiency and flexibility of its merger investigation process.

¹⁰ ACCC (2008) *Inquiry into the competitiveness of retail prices for standard groceries*.

41. The operation of the ACCC's merger review process would be substantially jeopardised if it were required to publish submissions made to it in the course of an investigation - even if there were provision made to keep some elements of a submission confidential.
42. If all submissions made by market participants were to be published as a matter of course, third parties would be unlikely to speak frankly with the ACCC, and some parties would simply not speak to the ACCC at all. If such a regime were introduced, parties would be uncertain as to the level of confidentiality that would be afforded to them, and be reluctant to come forward because of concerns that, if aspects of the information provided were made public, they could face reprisals from the merger parties or from other parties.
43. Further, if the ACCC were to publish submissions as a matter of course, there is a substantial risk of interference with the evidence of potential witnesses in subsequent legal proceedings.
44. Finally, such a regime would have a significant adverse effect on the investigative process by reducing the current flexible approach that enables the ACCC to seek views from, and raise possible issues for consideration with, third parties on an informal, interactive basis, to a series of formal written submissions and written responses. While the ACCC believes that there are good reasons for using a formal approach where a matter is at a stage of a determination - such as matters before a court or a formal inquiry such as the recent grocery inquiry - a less formal approach is more effective and efficient in eliciting information in an investigative process. Further, a regime that favours the use of public submissions in the context of an investigative process runs the real risk of excluding small business and consumers, who do not have the time or resources to provide detailed written submissions, and can be better engaged through informal contact.

Should the ACCC be required to consider a checklist of issues in assessing a merger?

45. The ACCC notes the suggestion of some submissions to this Inquiry that the ACCC should adopt a "checklist" of competition issues which it must take into account in assessing whether a merger would substantially lessen competition, in order to aid third party engagement with the process. In fact, such competition issues are already listed at section 50(3) of the TPA. These "merger factors" are largely consistent with the factors considered in merger analysis by developed merger review regimes around the world. This, in effect, provides a legislative "checklist" of competition issues. The ACCC's *Merger guidelines*, as published and updated, inform the public how these elements are assessed. As described above, the ACCC takes great care to inform the public of the relevant factors in each merger which require the analysis of these issues in its market inquiries letters.
46. The ACCC's *Merger guidelines*, as published and updated, provide general guidelines for the application of these competition assessments. In the past, and

particularly in the first edition of the *Merger guidelines* (published in 1999), the ACCC sought to minimise the burden of compliance by indicating situations where a merger was not likely to substantially lessen competition. One of these situations described a market where the market shares of the four major participants amounted to no more than 75%. Contrary to CHOICE's submission to the inquiry, this did not amount to a rule that a merger resulting in the four major participants in a market holding 75% share or more would substantially lessen competition *per se*. The ACCC has never had or applied such a rule (and nor, consequently, has it resiled from it). The revised Merger Guidelines published in 2008 no longer refer to the previous 75% threshold as an indication of whether a matter is likely to raise concerns or not. Rather, the current Merger Guidelines encourage parties to approach the ACCC in relation to a matter where the merged firm will have a post-merger market share of greater than 20% in the relevant market.

47. The ACCC would not advocate the adoption of any such rules or a checklist for the analysis of mergers, beyond what is contained in the legislation, in the interests of maintaining the flexibility, relevance and innovation of its investigative procedures to the facts raised by particular mergers on a case-by-case basis, and compliance with international practice.

Conclusion

48. The ACCC believes that its procedure for investigating public mergers is of sufficient transparency and flexibility to encourage and accommodate the views of third parties. Furthermore, the ACCC strongly contends that the efficacy of its procedures would be compromised by requiring publication of the submissions it receives.