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Via email economics.sen@aph.gov.au

Mr John Hawkins
Committee Secretary
Senate Economics Committee
Department of the Senate
P O Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins.

Inquiry into Aspects of Bank Mergers

I have pleasure in enclosing a submission which has been prepared jointly by the Trade Practices Committee and the Financial Services Committee of the Business Law Section of the Law Council of Australia.

The submission has been approved by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

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Thank you for providing the Committees with an extension of time in which to lodge their submission. If you have any questions in relation to the submission, in the first instance, please contact the Chair of the Trade Practices Committee, Dave Poddar, on [02] 9296 2281.

Yours sincerely,

Bill Grant
Secretary-General

4 March 2009

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Trade Practices Committee and Financial Services Committee

Business Law Section

Law Council of Australia

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Submission to the Senate Economics Committee Inquiry: Aspects of Bank Mergers

1 Introduction

1.1 The Trade Practices Committee and the Financial Services Committee of the Business Law Section of the Law Council of Australia (**the Committees**) provide this submission to the Senate Economics Committee (**Senate Committee**) in response to its Inquiry into Aspects of Bank Mergers (**Inquiry**). The Committees are grateful for the opportunity to participate in the Senate Committee's consultation process.

1.2 A properly functioning banking sector is crucial for the full and effective operation of a nation's economy, a fact which is highlighted by the current global economic crisis. As a result of the reduction in available liquidity, highly leveraged and exposed banks have failed or been forced into public ownership in both the United States and Europe. To date, the Australian banking system has not faced such turmoil due to the tighter regulatory environment. Nonetheless, in Australia, as elsewhere, bank mergers can play an important part in the creation and maintenance of a stable financial environment, in which commerce is pursued to the general benefit of the population.

1.3 In this submission, the Committees have not sought to address fully each of the terms of reference of the Inquiry. Certain aspects of the terms of reference are outside our data and fact base. Instead, the Committees have focused on those issues in which they have extensive experience (in particular relating to merger control). In the current economic circumstances, the Committees note, however, the human impact of the loss of employment resulting from mergers, whether informally cleared by a regulator or approved by Government in response to concerns with stability in the wider financial system. The Committees do not wish their submission to be considered harsh or uncaring in the current economic climate.

1.4 The Committees note the recent speech by Mr John Fingleton, Chief Executive of the United Kingdom Office of Fair Trading[1], in which he referred to the risks of both over and under regulation, and advocated what he described as the "Goldilocks" approach:

> *"I favour a "Goldilocks" approach to flexibility: it needs to be just right; if too inflexible, we may cause wider harm to the economy in the short-term; if too flexible, we may cause greater long term harm by undermining investment, incentives and innovation. This is not about*

[1] *Competition Policy in Troubled Times*, 20 January 2009. Available online at: http://www.oft.gov.uk/news/speeches/2009/0109.

moving away from the core aim of making markets work well for society, or weakening our enforcement stance, but simply recognising that, in crisis and recession, the types and areas of intervention that best achieve this may change" (p.12).

1.5 Similarly, in relation to aspects of the global economic crisis and its very real impact on the United Kingdom, Mr Fingleton stated:

> "*...it is essential that the causes of the credit crunch are properly diagnosed so that the policy response is targeted 'micro-surgery' rather than drastic amputation. If we mistake regulatory failure for market failure, we risk undermining the source of much of the wealth creation that came from the opening of markets to competition*" (pp.1-2).

Importantly, Mr Fingleton went on to state:

> "*...intervention to rescue the financial system from systemic collapse in exceptional circumstances can be crucial, but should not be seen as a reason to suspend the importance of competition in other sectors, either via State aid, anti-competitive mergers or cartels*" (p.2).

1.6 Equally, in the Committees' view, market failure, either caused by external or internal disturbances, should not lead to inappropriate changes in competition regulation where the core issue is not competition. The Committees believe, in the current economic circumstances, that the existing regulatory framework involving the Australian Competition and Consumer Commission (**ACCC**), Australian Prudential Regulation Authority (**APRA**) and the Reserve Bank of Australia (**RBA**) has been prudent and balanced. The Committees see no need to change the existing legislative and regulatory safeguards at this time.

2 Executive Summary

2.1 Mergers - including bank mergers - are an important aspect of a fully functioning and efficient economy. Mergers enable efficiencies to be achieved, ineffective competitors to exit the market and product and service innovation to occur.

2.2 In the Committees' view, Australia's existing legislation and merger assessment process provides the appropriate level of regulatory scrutiny to prevent anti-competitive concentration in the banking sector from occurring, when coupled with the current prudential and Government controls. Moreover, it is broadly consistent with international best practice and with the merger control regimes of Australia's leading trading partners, including the United States, the European Union, Canada and the United Kingdom. Bank mergers are already subject to a form of 'public benefit' assessment in addition to any clearance which may be sought from the ACCC, as the Treasurer must only approve such mergers under the *Banking Act* 1959 (Cth) (**Banking Act**) and *Financial Sector (Shareholdings) Act* 1998 (Cth) (**FSA**) that are "*in the national interest*". Additionally, the existing provisions for the imposition of, and enforcement of compliance with, conditions associated with

bank mergers are consistent with both equivalent Commonwealth legislation and comparable jurisdictions.

2.3 Consequently, the Committees do not believe that bank mergers should be subject to a bespoke legislative or additional regulatory framework. In particular, the Committees can see no economic or legal justification for the introduction of an alternative approach to analysing or measuring competition in relation to bank mergers at this time. Indeed, as a matter of strict competition principles, the Committees would wish to see the continuation of clear and transparent bank merger decisions by the ACCC. If bank mergers are to be approved on prudential and public interest grounds, that should be the subject of clear and separate consideration. To conflate these separate aspects would likely lead to less than ideal merger analysis[2].

3 Recent Mergers in the Banking Sector

Background

3.1 Bank mergers receive special treatment compared to standard mergers. Not only are bank mergers subject to assessment under section 50 of the *Trade Practices Act* 1974 (Cth) (**TPA**), they must also be assessed by the Treasurer pursuant to section 14 of the FSA and section 63 of the Banking Act[3].

3.2 Procedurally, however, banks have the same options available for seeking merger clearance from the ACCC as other industries. Banks may:

(a) informally notify the ACCC and seek informal (non statutory) clearance;

(b) formally notify the ACCC and seek formal merger clearance pursuant to section 95AC of the TPA; or

(c) apply for authorisation to the Australian Competition Tribunal pursuant to section 95AT of the TPA[4].

3.3 Mergers are an important element in the efficient functioning of an economy. In particular, mergers allow firms to achieve efficiencies, such as economies

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[2] In South Africa, following a traditional competition effects analysis, the Competition Commission is required to consider whether a merger can be justified on public interest grounds, in particular taking into account the effect of the merger on employment (Competition Act 89 of 1998). Examples of this dual-purpose assessment in operation are: (i) Harmony Gold Mining Company Ltd acquisition of Gold Fields Ltd (11 February 2005) in which the Competition Commission cleared the merger subject to conditions, including a moratorium on retrenchments below corporate management and supervisory positions for a period of two years from completion, with a maximum retrenchment figure among this group of 1,500. Press release available online at: http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202005/MR04_2005.doc; and (ii) proposed acquisition by Bonheur 50 General Trading (Pty) Ltd of Komatiland Forests (Pty) Ltd (23 September 2004), which the Competition Commission prohibited on both competition and public interest (employment) grounds. Press release available online at: http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202004/komatiland%20media%20release%2016.doc.

[3] Additionally, where a business transfer from one bank to another takes place, it may be subject to the voluntary or compulsory approval of APRA and the Treasurer pursuant to the *Financial Sector (Business Transfer and Group Restructure) Act* 1999 (Cth).

[4] To date, there have been no applications for a formal merger clearance or merger authorisation, with all notified mergers (including bank mergers) requesting informal clearance. Informal clearance decisions of the ACCC are essentially 'no action' letters by the regulator. Given that the ACCC is the only party able to seek an injunction to restrain a merger, such 'no action' letters are usually the best way to achieve transactional certainty, but do not provide complete comfort: for example, the prospect of third parties seeking a declaration of a contravention remains open. This possibility is fairly remote, however, given the time and cost involved in such an application.

of scale or management rationalisation. On the other side, mergers may result in an unacceptable aggregation of market power, which in turn may lessen competition in a market substantially.

3.4 Recent banking acquisitions - the acquisition of BankWest and St Andrew's Australia by Commonwealth Bank of Australia (**CBA Merger**), and the acquisition of St George Bank Limited by Westpac Banking Corporation (**Westpac Merger**) - have impacted Australia's retail banking environment. However, each of these mergers was subject to a thorough competition assessment, in addition to prudential and national interest considerations.

ACCC's assessment of the CBA and Westpac Mergers

3.5 The ACCC informally reviewed and unconditionally cleared both the CBA and Westpac Mergers on the basis that these mergers were not likely to lessen competition substantially in any market. The general framework adopted in assessing these mergers was consistent with the competition factors outlined in section 50(3) of the TPA and the ACCC's Merger Guidelines 2008. The ACCC compared the likely competitive condition in the relevant markets post-mergers, against the competitive environment absent the merger (i.e. in the counterfactual scenario).

3.6 Importantly, in its competition assessment of the CBA Merger, the ACCC indicated that BankWest was unlikely to be a strong competitor absent the acquisition because of the impact of the global financial crisis on its parent company, HBOS plc (**HBOS**)[5]. Indeed, the financial condition of HBOS was such that, if the acquisition did not proceed, BankWest would not be supported in its continued growth, nor would its aggressive pricing strategies - targeted at market share growth - continue. The ACCC indicated, therefore, that, absent the merger, there may have been a serious deterioration of BankWest's ability to compete in the banking sector. There may also have been a risk that BankWest would have been compelled to scale back its operations, resulting in a detriment to consumer choice. The ACCC stated that the "*financial situation of BankWest's UK parent, and the associated changes it is likely to make to BankWest's operating model in the absence of the transaction…strongly informed the ACCC's conclusions*"[6]. Arguably, therefore, the CBA Merger was beneficial to wider Australian society as well as to the economy.

3.7 In the Committees' view, the CBA Merger decision was transparent in particular on the competition grounds in relation to the relevant counterfactual, as exemplified by the ACCC's statement that "*the RBA and APRA also indicated that they did not consider that BankWest would be in a position to provide strong and sustainable competition going forward*"[7].

3.8 With regard to the Westpac Merger, there was no indication that St George would have been adversely affected by the global financial crisis to the extent

[5] ACCC Public Competition Assessment, Proposed Acquisition of BankWest and St Andrew's by CBA, 10 December 2008. Public Competition Assessment available online at: http://www.accc.gov.au/content/index.phtml/itemId/852882/fromItemId/751046.
[6] CBA Merger Public Competition Assessment, paragraph 67.
[7] CBA Merger, Public Competition Assessment, paragraph 60.

that BankWest would. Indeed, the ACCC found St George to be an innovative competitor to a degree in the relevant markets. However, the ACCC concluded that St George was not, on closer inspection, competitive with the other major banks in terms of either product pricing, or customer service. Moreover, other evidence - such as the existence of sufficient competitive constraints on the merged entity from existing competitors in the retail banking sector, and the likelihood of potential new entry for the supply of retail platforms - resulted in the ACCC concluding that the Westpac Merger would not be likely to substantially lessen competition in any of the relevant markets.

3.9 The Committees anticipate that both recent bank mergers will likely result in job losses, which will adversely affect individuals. However, an important condition of clearance of both mergers by the Treasurer was the requirement to take steps to minimise retrenchments and, where retrenchments were unavoidable, to work with those affected and the Financial Sector Union to provide support. It is not clear to the Committees that a competition assessment which expressly considers the impact of a merger on employment leads to a proper assessment, and in fact may undermine the proper operation of markets, particularly during strong economic times[8]. In the Committees' view, the existing legislative framework which enables the Treasurer to impose conditions on a merger approval is an optimal solution.

Enforcement of merger clearance conditions

3.10 The ACCC unconditionally cleared both the CBA and Westpac Mergers. However, pursuant to the Banking Act and FSA, the Treasurer cleared both the CBA and Westpac Mergers on a conditional basis only. The Treasurer was required to determine whether the acquisitions were in the national interest. In reaching his conclusion, the Treasurer examined whether the acquisitions would support a strong and competitive Australian banking system, taking into account issues such as prudential requirements, economic efficiency and community banking needs[9]. The differences in the conditions imposed on both transactions indicates that the process for negotiating and agreeing conditions or undertakings in respect of bank mergers can be tailored to individual contexts. However, the strength of the acquirer, wider financial context and specific factors driving the transaction may result in divergence in the conditions imposed or undertakings accepted by the ACCC or Treasurer[10].

3.11 Compliance with the conditions set out in the clearance decisions is initially a matter for the relevant corporation or person and the Treasurer. Both the CBA and Westpac Mergers were approved subject to time limited conditions. In the case of the Westpac Merger, six conditions were imposed for a period of three

[8] See South African cases of Harmony/Gold Fields and Bonheur/Komatiland.
[9] See media releases issued by the Treasurer in relation to the Westpac and CBA Mergers, 23 October 2008 and 18 December 2008 respectively. Full press releases available online at: http://www.treasurer.gov.au/listdocs.aspx?pageid=003&doctype=0&year=2008&min=wms.
[10] For example, in the acquisition of Bank of Melbourne by Westpac in 1997, the ACCC identified a number of competition concerns at a local level. In order to alleviate these concerns, the ACCC accepted section 87B undertakings from Westpac which required Bank of Melbourne's extended opening hours to be maintained and for the entitlement of existing transaction account customers to fee exemptions to be preserved. Additionally, Westpac agreed to grant access to its electronic network for new and small Victorian competitors and their Victorian customers for a reasonable period.

years from the date of the acquisition, and two conditions were imposed for a three year period in the CBA Merger.

3.12 In the event that either CBA or Westpac fails to comply with any of the clearance conditions, the Treasurer could:

(a) revoke the approval clearance, pursuant to section 18 of the FSA; or

(b) apply to the Federal Court for an injunction to prevent a party from breaching or proposing to breach one of the conditions under section 65A of the Banking Act and section 32 of the FSA.

3.13 The means by which the conditional approvals granted by the Treasurer to the CBA and Westpac Mergers may be enforced are consistent with the way in which the ACCC may enforce section 50 of the TPA, or a breach of section 87B of the TPA undertakings. On that basis, the measures available to enforce the conditions of the Westpac and CBA Mergers appear to be balanced and consistent with equivalent Commonwealth legislation.

4 ACCC and Banking Mergers

Background

4.1 The ACCC is responsible for consumer protection and fair trading laws contained in the TPA. In particular, the ACCC reviews mergers and enforces section 50 of the TPA, which prohibits mergers which would have, or would be likely to have, the effect of substantially lessening competition in any market. Merging parties may voluntarily notify the ACCC of a proposed or completed merger, or the ACCC may request information about a merger where it has not been notified.

4.2 Irrespective of how a merger is notified or otherwise picked up, the core element of the ACCC's merger assessment is to determine both the 'factual' (i.e. what the impact on competition will be if the merger proceeds) and 'counterfactual' (i.e. what will happen to competition in the market if the merger does not proceed) scenarios associated with the merger. In examining both the 'factual' and 'counterfactual' scenarios, the ACCC will examine the impact on competition of a proposed or completed transaction pursuant to its Merger Guidelines 2008 (**Guidelines**)[11].

4.3 The first step the ACCC takes in considering a merger is to define the relevant product and geographic markets in which the parties compete. Once market definition has been determined, the ACCC examines a number of factors, as set out in section 50(3) of the TPA and further expanded in the Guidelines. These factors include:

(a) market concentration;

(b) barriers to entry and expansion;

[11] ACCC Merger Guidelines 2008, 21 November 2008, available online at: http://www.accc.gov.au/content/index.phtml/itemId/809866.

(c) actual and potential import competition;

(d) degree of countervailing buyer power;

(e) dynamic characteristics of the market; and

(f) the likelihood that the acquisition will enable the merged entity to increase prices or decrease levels of service significantly and sustainably.

4.4 The approach adopted for merger reviews by the ACCC is analytical and thorough. It relies on the provision of (often) extensive information and documentation from the notifying party and independent supporting evidence. Both the substantive merger legislation and the ACCC's approach to assessing mergers is consistent with international best practice and comparable to the merger regimes in Australia's major trading partners.

4.5 The Committees have limited reason to criticise the ACCC's decisions in recent bank mergers. However, the Committees believe that, over a period of time - perhaps due to the requirements of section 50(6) of the TPA[12] - the ACCC has too readily delineated markets as those in Australia only. This approach does not recognise the globalisation of financial services markets, though the ACCC has generally accepted that competition dynamics in these markets are influenced by international constraints. In this respect, the ACCC has been diligent in analysing the actual competition effects of bank mergers without political interference, which is to be commended.

4.6 The ACCC's current assessment of bank mergers is generally consistent with its assessment of all mergers. The primary question the ACCC must address is whether or not a bank merger (or any other type of merger) would lead, or would be likely to lead, to a substantial lessening of competition in any market. The Committees support maintaining the same legislative framework and competitive assessment for bank mergers as for other forms of merger.

Enforcement of divestiture in the banking sector

4.7 There is no general divestiture power in the TPA which would allow the ACCC to seek divestment of assets or business lines by merging parties. Consequently, the ACCC does not have the power to seek divestiture other than in the context of a merger review.

4.8 When conducting a merger review, if the ACCC considers that divestiture of assets or a business line would remedy any substantial competition issues, it may seek divestiture either:

(a) by accepting binding undertakings from the notifying party to divest the relevant asset or business line within a specified period; or

[12] Section 50(6) TPA defines "market" as "*a substantial market for goods or services in Australia, a State, a Territory, or a region*", thereby focusing analysis on Australian markets.

(b) by applying to the Federal Court pursuant to section 81 of the TPA, to obtain a divestiture order.

4.9 The absence of a general power of divestiture is not inconsistent with other leading competition regimes globally. The Committees note, however, that the United Kingdom Competition Commission has the power to order divestment in the context of market investigations which determine that competition in a market is not working[13]. However, complex issues, such as a negative impact on business certainty as to future investment, are raised as a result of this type of power. Additionally, existing prohibitions against misuse of market power, for example, should, in the Committees' view, provide sufficient safeguard against unlawful behaviour without requiring a general power of divestiture.

Adequacy of section 50 of the TPA in preventing further concentration

4.10 The Committees consider that Australia's existing merger control legislation and regulatory framework is effective in ensuring that mergers which would, or would be likely to, substantially lessen competition may be prohibited. As discussed above, Australia's merger control legislation and practice is broadly consistent with international best practice and comparable with that of our major trading partners.

4.11 In respect of bank mergers specifically, if a bank merger created a level of further concentration in any market in Australia which would, or would be likely to, result in a substantial lessening of competition, the ACCC has sufficient legal routes under the TPA to prohibit that merger. Alternatively, if it were appropriate, the ACCC may clear the merger subject to remedies, such as divestiture.

4.12 With regard to the question of whether a 'public benefit' test should be met in bank merger cases, the Committees do not consider that a further requirement as part of the ACCC's assessment of a merger's compatibility with section 50 of the TPA is required. As discussed in section 3 above, bank mergers are subject to additional regulatory hurdles as compared with mergers in other sectors. In particular, bank mergers must seek approval from the Treasurer pursuant to the Banking Act and FSA. When reaching a decision, the Treasurer must be satisfied that the merger "*is in the national interest*"[14]. Accordingly, bank mergers are already subject to a form of 'public benefit' test.

4.13 Additionally, the Committees note that, in the event that a bank merger was likely to lessen competition substantially in any market such that it may be incompatible with section 50 of the TPA, the merging parties could apply

[13] Pursuant to the Enterprise Act 2002. See, for example, the Competition Commission's investigation into airports controlled by BAA Limited, which concluded that divestiture of certain airports would remedy the competition issues identified. Final report available online at: http://www.competition-commission.org.uk/inquiries/ref2007/airports/index.htm.

[14] When reaching a decision in the CBA Merger, the Treasurer stated that the application was approved "*after a comprehensive assessment of its impact on the national interest, with conditions that support a strong and competitive Australian banking system...in addition...this decision takes into account a range of other important considerations including prudential requirements, economic efficiency and community banking needs*". Full press release available online at: http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/144.htm&pageID=003&min=wms&Year=2008&DocType=0.

directly to the Australian Competition Tribunal for authorisation of the merger under section 95AT of the TPA. Authorisation should be sought only where the proposed acquisition would result, or be likely to result, in such a benefit to the public that it should be allowed to occur (section 95AZH of the TPA). Therefore, the existing legislation allows bank mergers to seek clearance based on the public benefit over and above the impact on competition in any market.

4.14 In the alternative, were a 'public benefit' assessment to be introduced in respect of certain (or, potentially, all) mergers, the Committees consider that it should be separate from, and distinct to, the competition assessment administered by the ACCC under section 50 of the TPA. This would be consistent with the current legislative framework of comparable jurisdictions, including the United Kingdom (see below).

Global example of 'public benefit' assessment of bank merger

4.15 As a result of the unprecedented global financial crisis which began in the third quarter of 2007, a number of financial institutions have either collapsed or been forced into public ownership. For example, in the United States, the mortgage providers Freddie Mac and Fannie Mae were saved from bankruptcy by Government intervention following their exposure to the United States sub-prime mortgage market. In mainland Europe, Dexia, Fortis and ING have all received substantial state aid, and in Ireland, Anglo Irish Bank has been effectively nationalised.

4.16 Of particular relevance to this Inquiry is the treatment by the United Kingdom Government and competition authorities of the acquisition of HBOS by Lloyds TSB plc (**Lloyds**). HBOS faced imminent collapse in September 2008 as a result of its exposure to bad debts and inability to obtain short term funding on the global markets. In order to preserve order in the United Kingdom banking sector, the Government facilitated the acquisition of HBOS by Lloyds, with the Crown acquiring an interest of approximately 40% in the merged entity.

4.17 Under the Enterprise Act 2002, the relevant Secretary of State may issue a 'public interest intervention notice' to the Office of Fair Trading (**OFT**), the competition regulator responsible for merger reviews. Pursuant to such a notice, the OFT must conduct a normal merger assessment, which examines the effect the merger will have on competition in the relevant sector and whether the threshold is met for referral to the Competition Commission. However, rather than clearing the merger or referring it to the Competition Commission in the normal way, the OFT must report to the Secretary of State, who will then determine whether or not to allow the merger to proceed.

4.18 In its report to the Secretary of State for Business, the OFT concluded that there was a realistic prospect that the anticipated merger would result in a substantial lessening of competition in relation to several markets in which the parties' operations overlapped[15]. Under normal circumstances, the merger would either have been cleared subject to conditions (such as divestment of

[15] Anticipated Acquisition by Lloyds TSB plc of HBOS plc, 24 October 2008. Full report is available online at: http://www.berr.gov.uk/files/file48743.pdf.

overlapping businesses) or referred to the Competition Commission for a detailed assessment. The OFT report noted that, in light of the extraordinary circumstances in which the merger was agreed, it was intended to provide stability to the banking sector in the United Kingdom. However, third parties submitted that the impact of the merger on competition in the banking sector in the medium to long term would be adverse and may operate against the public interest.

4.19 In spite of the OFT's conclusion that the merger may, or may be expected to, lead to a substantial lessening of competition, on 31 October 2008, the Secretary of State for Business cleared the transaction on the basis that "*on balance the public interest is best served by allowing this merger to proceed without a reference to the Competition Commission*"[16].

Conclusion on adequacy of existing regulatory framework for banking mergers

4.20 The existing legislation and merger assessment process in Australia is adequate to prevent anti-competitive concentration in the banking sector from occurring. Moreover, bank mergers are already subject to a form of 'public benefit' criteria, as the Treasurer must only approve such mergers under the Banking Act and FSA that are "*in the national interest*". In the event that a bank merger raised substantial competition issues but would result in tangible and significant public benefit, it could be assessed by the Australian Competition Tribunal, pursuant to an authorisation application. Consequently, the Committees do not consider that further or specific legislation in relation to bank mergers is necessary or desirable. However, were a 'public benefit' assessment to be introduced, the Committees consider that it should not be by way of addition to the existing merger legislation in the TPA.

5 Consumer Choice and 'Off-shoring' of Services

Impact of mergers on consumer choice

5.1 It is important to understand that the primary goal of competition policy in Australia, as elsewhere in the world, is to protect competition. By protecting competition, the competitive process will deliver outcomes that maximise consumer welfare in terms of prices charged for, and the choice of, available products. Put simply, provided competition is effective, appropriate product choices will be made available to consumers at competitive prices. Therefore, in assessing the impact of a bank merger, the same competition principles apply as in the consideration of the impact of a merger in any other sector of the economy. To deviate from such a policy by introducing special rules for the banking industry raises a real risk that non-competition issues are introduced to the assessment of the likely competitive consequences of the merger.

5.2 The Committees note that bank mergers differ in their assessment by the ACCC as compared to other mergers to a degree as a result of the 'four pillars

[16] Department for Business, Enterprise and Regulatory Reform press release, 31 October 2008. Full press release available online at: http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=382908&NewsAreaID=2&NavigatedFromDepartment=True.

policy'. Both the current Government and the previous administration have publicly ruled out any mergers between any of the 'big four' banks, citing competition concerns - the so called 'four pillars policy'. While the Committees understand the concerns of the Government, they strongly favour consistent application of merger control legislation to *all* sectors of the economy. On that basis, if a proposed merger between any of the big four banks would lead, or would be likely to lead, to a substantial lessening of competition in any market contrary to section 50 TPA, it could be prohibited under existing legislation. Consequently, the Committees see no economic or legal justification for applying a discrete policy in respect of bank mergers over any other sector of the economy, thereby undermining the effective operation of competition law and analysis within the banking sector.

5.3 In the current economic environment, it is important to consider cases where a merging party (typically the target) has been an effective competitor at the time of the merger but, due to economic circumstances or financial limitations, will likely be unable to continue to provide innovative and competitive products and services to consumers in the future, a merger should enhance consumer choice. This is because, absent the merger, the target could be expected to reduce its competitive offering, lower service standards, or contract in size in response to financial pressures. This in turn would adversely impact consumer choice in the relevant sector. As part of a larger merged entity, however, product offering and innovation is likely to be preserved and even enhanced, provided that sufficient competitive constraints continue to exist in the relevant sector.

5.4 The CBA Merger is an example of a merger which maintained and even promoted product offering and innovation.

5.5 Additionally, even in situations where the target company is not expected to reduce its product or service offering absent a merger, consumer welfare should remain broadly unaffected by a merger, provided that the merger does not give rise to a substantial lessening of competition. In fully functional and competitive markets, product and service innovation, customer service levels, and competition for market share should ensure that consumer choice is at least preserved after any merger in those markets, or more likely enhanced in the future. In order to ensure that consumer choice is not adversely affected by mergers in any sector (including the banking sector), it is essential that sufficient and effective competitive constraints remain within the relevant markets after a merger.

5.6 Moreover, with regard to the recent bank mergers in particular, the imposition of conditions on the CBA and Westpac Mergers by the Treasurer may be expected to increase consumer choice, even in the short term. The conditions mean that more branches will be available to customers of the merging parties, ATM fees will be removed and product offering will be upheld.

'Off-shoring' of services

5.7 The Committees note that the Australian Law Reform Commission (**ALRC**) has considered the issue of 'off-shoring' in some detail. The ALRC has

consulted on the adequacy of Australia's existing privacy legislation and has concluded that the existing legislation should be amended. In particular, the ALRC has recommended that the entity responsible for sending data overseas as part of an 'off-shoring' of services exercise remains accountable for that data, other than in limited circumstances, with appropriate penalties for the misuse of that data[17].

5.8 In the Committees' view, the issue of banks 'off-shoring' services should, from a legal perspective, be dealt with in the context of privacy law, rather than laws applicable to mergers and acquisitions, including the competition aspects of such transactions. Further, financial information which has been sent off-shore should be treated no differently to any other form of personal data sent overseas (for example, within the telecommunications sector), as governed by the *Privacy Act* 1988 (Cth).

Alternative approaches to applying section 50 of the TPA to banking mergers

5.9 The Committees have commented in this submission that Australia's existing merger legislative and regulatory framework is suitable and sufficient for the assessment of the competitive impact of mergers across all sectors of the economy, including bank mergers. Section 50 of the TPA and its associated provisions, combined with the ACCC's Guidelines and practice in considering mergers complies with international best practice. Moreover, Australia's merger regime is comparable to the legislative and regulatory frameworks of Australia's primary trading partners, including the United States, the European Union, Canada and the United Kingdom.

5.10 The method for analysing and measuring competition in sectors of the economy affected by mergers is consistent and generally well understood by businesses and advisers. Moreover, the way in which a competition assessment is carried out in a merger by the ACCC is broadly consistent with international best practice. The factors considered are detailed in the Guidelines. In the Committees' view, these factors are sufficiently demanding and generally applicable to enable competition to be assessed accurately and efficiently in any sector.

5.11 Consistent with this view, the Committees do not believe that bank mergers should be subject to a bespoke legislative or regulatory framework. In particular, the Committees can see no economic or legal justification for the introduction of an alternative approach to analysing or measuring competition in relation to bank mergers.

Potential impact of creeping acquisitions proposals

5.12 The Committees note that the Federal Government is currently consulting on proposed changes to merger legislation to take account of 'creeping acquisitions'[18]. It is not clear precisely how the proposed changes would

[17] See ALRC Report 108 For Your Information: Australian Privacy Law and Practice, available online at: http://www.austlii.edu.au/au/other/alrc/publications/reports/108/1.html#Heading100.

[18] Treasury publication *Creeping Acquisitions - Discussion Paper*, 1 September 2008. 'Creeping acquisitions' are defined as a series of small acquisitions, which individually may not give rise to competition concerns but which, when aggregated, may

impact bank mergers specifically. However, the Committees believe that if creeping acquisitions amendments are made to the TPA, all merger activity in all sectors of the economy would be affected. It is likely that there would be an increase in the number of mergers notified to the ACCC, including those which raise no material competition issues. This would be likely to affect the ACCC's ability to focus resources on the most important mergers, and may potentially impact the ACCC's other enforcement priorities.

5.13 The Committees have not considered the proposed creeping acquisitions reforms in detail. However, the Committees' preliminary view is that amending the merger provisions of the TPA to account for creeping acquisitions is not legally necessary; the existing section 50 of the TPA would prohibit any transaction that would, or would be likely to, substantially lessen competition in any market. This would apply to a small acquisition as much as to a large acquisition. Consequently, under the existing legislation, the ACCC could seek to prohibit any merger - however small - that would breach section 50 of the TPA. Any amendment to the merger provisions of the TPA to take account of creeping acquisitions would put Australia out of step with international best practice and the merger regimes of other leading jurisdictions, such as the United Kingdom and European Union.

5.14 The Committees note that the United Kingdom Competition Commission has recently completed a detailed investigation into the acquisition of a small supermarket in Slough (a town in Berkshire, approximately 40 kilometres west of London) by Tesco plc. Tesco is the largest supermarket chain in the United Kingdom. As in Australia, there is no provision in United Kingdom merger legislation equivalent to the 'creeping acquisitions' proposal. Nevertheless, the Competition Commission prohibited the merger on the basis that it would, or would be likely to, result in a substantial lessening of competition locally in the supermarket sector[19]. This suggests that Australia's existing merger legislation should already allow for the prohibition of any merger (regardless of size) that would, or would be likely to, result in a substantial lessening of competition in any market. The Committees do not consider that any compelling analysis, in any public forum, has been presented by the ACCC or other body sufficient to justify changing current merger legislation or the regulatory framework in relation to so called creeping acquisitions.

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substantially lessen competition in the relevant market. Discussion Paper available online at: http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1409.

[19] Competition Commission Inquiry into Completed Acquisition of Co-op Store Slough by Tesco plc, 28 November 2007. Report available online at: http://www.competition-commission.org.uk/inquiries/ref2007/tesco/index.htm.