1 Overview

1.1 The focus of this submission

Paragraph 5.31 of the Competition Policy Review Issues Paper asks this question:

> *Do the merger provisions of the CCA operate effectively, and are they being applied effectively by the regulators and the courts?*[1]

This is an important question.

On the one hand, mergers and acquisitions potentially lessen competition in Australian markets, and when they do, may significantly lower total economic welfare.[2] Further, because mergers and acquisitions are more likely to deliver permanent or long lasting change, they can pose a greater risk to competitive markets than other forms of collaboration or cooperation between firms.

On the other hand, mergers and acquisitions also have the potential to deliver substantial economic benefits to the Australian economy as a whole by delivering efficiency gains and other public benefits.[3] But merger control laws and review processes can deter beneficial mergers if the risks, time and burden involved in completing a merger are too great. When this happens, it is a cost to society.[4]

That means it is critical that Australia's merger control laws strike the appropriate balance between deterring and preventing anti-competitive mergers, and still encouraging and permitting mergers that increase economic welfare.

This also means there is a clear public interest in having merger review processes that facilitate timely and accurate decisions on whether or not particular mergers and acquisitions would contravene section 50 of the *Competition and Consumer Act 2010* (Cth) (the **Act**), and whether those mergers and acquisitions would deliver net public benefits.[5]

It is this latter aspect that motivates this submission. Specifically, this submission focuses on the merger review processes that are currently available in Australia for obtaining comfort that a merger or acquisition would not contravene section 50 of the Act. Those processes comprise the ACCC's informal merger review process,[6] the 'formal' merger clearance process provided for in Part VII of the Act, and the merger authorisation process, which is also provided for in Part VII of the Act.[7]

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[1] Competition Policy Review Issues Paper, 14 April 2010, para 5.31 at p 34.

[2] See Hay G and Walker J, "Merger Policy and the TPC's Draft Merger Guidelines" (1993) 1 CCLJ 33 for a discussion of the theoretical impact of mergers upon allocative, productive and dynamic efficiency.

[3] See Hay G and Walker J, "Merger Policy and the TPC's Draft Merger Guidelines" (1993) 1 CCLJ 33 at 34- 35. Also see Bork R H, *The Antitrust Paradox* (The Free Press, 1993) at p 222.

[4] Coleman, M, Pleatsikas C and Teece D, "The Merger Guidelines in the United States, Australia and New Zealand: An Economic Perspective" (1998) 6 TPLJ 153 at 153 – 154.

[5] See Strickland P, "Do we need a better way for reviewing mergers?" (2012) 40 ABLR 143 at 144 – 147 for a detailed discussion of why a timely and accurate merger review process is desirable.

[6] The informal merger review process is commonly known as informal merger clearance.

[7] We list the merger authorisation process here, because it permits a merger to proceed on public benefit grounds even if it would otherwise contravene section 50 of the Act.

1.2 Our view

For most mergers and acquisitions completed each year in Australia, the current processes are well adapted to achieving the public interest. In particular, because merger review in Australia is voluntary, this means most mergers that pose negligible competition law risk do not need to incur the time and expense of seeking merger clearance.

Further, virtually all merger reviews in Australia take place under the ACCC's informal merger review process. In the vast majority of cases, its flexibility and lack of formality means the burden for the merger parties is proportionate, and the process is usually timely, with public merger reviews often being completed within 6 to 12 weeks.

However, for those mergers where the impact on competition is complex or particularly contentious, the currently available merger review processes are not well adapted to achieving the public interest in deterring anti-competitive mergers while encouraging mergers that increase economic welfare. The design, in particular, of the informal merger review process and the formal merger clearance process are not apt for guaranteeing timely and accurate merger review in these more complex and contentious matters.

The principal concerns with merger clearance processes in Australia are not new – they were canvassed extensively during the 2003 Dawson Review[8] – and are well known.[9] They centre on the following matters:

- Accountability – that is, are there sufficient checks and balances in the current review processes to ensure that regulatory decision-makers reach the correct decision, and that they are seen to be doing so?
- Timeliness – that is, is there sufficient discipline in the current review processes to ensure that merger review decisions are appropriately timely?
- Transparency – that is, is there sufficient transparency in the merger review decision-making process to guarantee procedural fairness and accountability?
- Burden – that is, are the burdens of merger review proportionate to the benefits that mergers and acquisitions may contribute to Australia's economic welfare?

Both the Federal Government and the ACCC sought to respond to the concerns submitted during the Dawson Review process and in the Dawson Report.

Acting on recommendations of the Dawson Report, the Federal Government amended the Act in 2006 to include a new formal merger clearance process, and a new merger authorisation process that involves direct application to the Australian Competition Tribunal.[10]

The ACCC also made significant reforms to the informal merger review process throughout the past decade to boost its levels of accountability and transparency. These reforms include Statements of Issues, Public Competition Assessments and letters to the merger parties often referred to as 'transparency letters'. The ACCC should be commended for its efforts to improve the level of accountability and transparency in its informal merger review process.

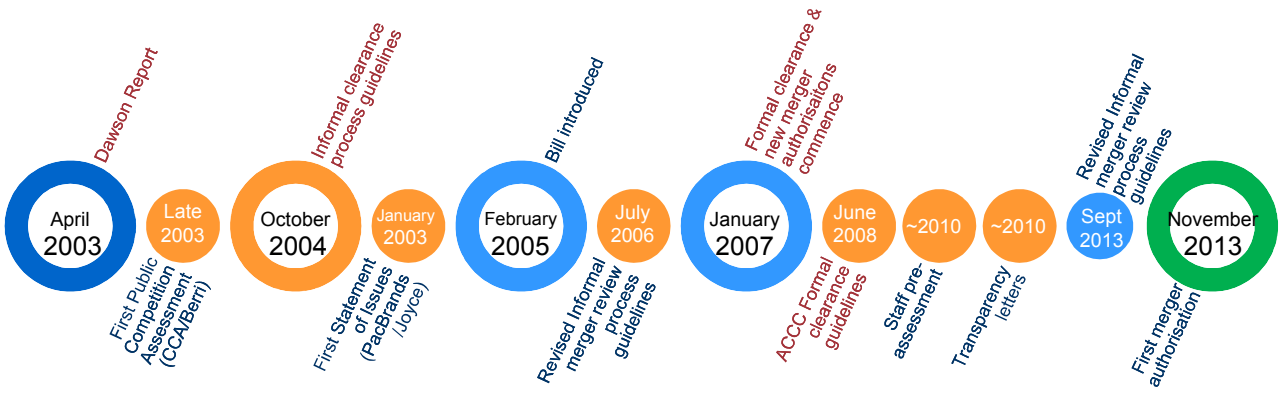
Key steps in these reforms over the last decade are captured in the timeline in Figure 1.

[8] See Chapter 2 of the *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

[9] See Strickland P, "Do we need a better way for reviewing mergers?" (2012) 40 ABLR 143 at 148 – 161 for a detailed discussion of the various concerns with informal merger review and formal merger clearance.

[10] *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth), which commenced on 1 January 2007.

Figure 1: Timeline since Dawson Report on reform of merger processes:



But for complex and contentious mergers these reforms by the Federal Government and the ACCC have not sufficiently improved the accountability, timeliness, transparency and burden of merger review to achieve the public interest in deterring anti-competitive mergers while encouraging mergers that increase economic welfare.

1.3 Structure of this submission and suggested reforms

This submission is structured as follows:

- Section 2 discusses the reasons why the ACCC's informal merger review process and the formal merger clearance process are not sufficiently well adapted to providing the requisite accountability, timeliness and transparency that is necessary for complex and contentious merger reviews;
- Section 3 outlines a number of possible reforms for Australia's merger clearance processes that would assist in achieving the public interest; and
- Section 4 discusses our recent experience of the merger authorisation process and proposes possible ways in which this process could be improved.

Suggested reforms – informal and formal merger clearance

- **New public merger register for informal clearance**: insert a statutory obligation similar to s 95AH that requires the ACCC to publish all documents and information it receives in connection with any merger review on its merger register, subject to confidentiality claims.
- **Enhance accountability in formal clearance**: either reverse the clearance test in s 95AN, or repeal s 116 (which requires Tribunal review of merger clearance decisions to be 'on the record') or amend s 116 to permit the Tribunal to grant an applicant leave to adduce further evidence during a Tribunal review.
- **Strict time limit in formal clearance**: repeal s 95AO(2) to ensure that merger clearance reviews take no more 60 business days at the ACCC stage.

Alternative suggested reform – merger clearance

- **New notification process**: Repeal the 'formal' merger clearance process and introduce a merger specific notification process, similar to the existing exclusive dealing notification process. This would replace the informal merger review process and 'formal' merger clearance process.

Suggested reforms – merger authorisation

- **An electronic Tribunal**: permit the applicant to file all material electronically with confidential and non-confidential versions.
- **Coordination between the Tribunal and the ACCC**: require greater coordination between the Tribunal and the ACCC on information requests. Giving to the Tribunal the power to regulate the exercising of the ACCC's powers.
- **Amend or replace the Form S**: either reduce the mandatory sections of the Form S, or replace it with a statement of facts, issues and contentions.

2 Concerns with current merger clearance processes

2.1 The accountability concern

The ACCC's informal merger review process has no reliably quick, simple and efficient process for testing an ACCC informal clearance decision before an objective umpire. Similarly, although the formal merger clearance process provides for a right of merits review before the Australian Competition Tribunal with strict timeframes (a maximum period of 90 business days),[11] it does not sufficiently provide the accountability that is needed, especially for complex or contentious merger reviews.

(a) Lack of accountability in informal merger review

Informal merger review is not provided for in the Act, and as a consequence, does not appear to be amenable to any kind of judicial review, either under the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

In circumstances where the ACCC opposes a proposed merger after completing an informal merger review, one option available to the merger parties is to threaten to proceed with the merger on the expectation that the ACCC will make an application to the Federal Court for an interim injunction restraining completion. If the ACCC does that, this allows for the issue of whether or not the proposed merger contravenes section 50 of the Act to be debated before the Federal Court. The ACCC would also bear the onus of proof.

But a corporation cannot be certain the ACCC will commence proceedings before it completes the merger, and the ACCC may simply reject the informal clearance application without taking any action to restrain the merger, as happened, for example, in the AGL merger case in 2003 where Justice French noted:[12]

> In this case the opposition of the ACCC is unequivocal. It has not proceeded to claim injunctive relief but has threatened post-acquisition divestiture action. It is not in the least surprising that AGL would not wish to enter into this major transaction with that sword of Damocles hanging over it and the other members of the consortium. Indeed it is difficult to see how, if the transaction were to proceed in the face of such a threat, the public interest would be served with such uncertainty hanging over the operation of a major public utility.

That uncertainty over what the ACCC will do is likely to be unappealing and commercially unacceptable for many corporations, particularly when it involves exposure to substantial pecuniary penalties in circumstances where the ACCC has obtained through its market

[11] Section 111 of the Act provides for the review. Section 118 of the Act provides for the time limit, and it is strict.

[12] *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317 at [612].

inquiries information that is not available to the corporation. Further, this option of threatening to complete the merger may not be possible in any event.[13]

An alternative to threatening completion of the merger would be to seek a declaration from the Federal Court that the proposed acquisition would not contravene s 50 of the Act. But the problem with this is that the merger parties bear the onus of proof, which leads to an asymmetric outcome. Specifically:

> there is a substantive difference between the task which faces an applicant for declaratory relief, and the task which faces the ACCC in seeking an injunction restraining the acquisition. Whereas the ACCC in an injunction proceeding need only show a likely substantial lessening of competition in *one* relevant market, the applicant for declaratory relief needs to establish that there would be no likely substantial lessening of competition in *any* relevant market. In some cases, there could be multiple markets that are potentially impacted by the proposed acquisition, and without concessions from the ACCC in respect of a number of those markets, the applicant would need to prove its case in every single one. That could present a considerable (and potentially insurmountable) evidentiary burden.[14]

Not only is the burden for the merger parties in a declaration proceeding greater than the ACCC's burden in an injunction proceeding, it is inefficient to expand the scope beyond areas where there is properly a debateable competition issue.

Both of these options also involve substantial delay for the merger, with the litigation potentially taking at least 12 months to complete. For example, if the ACCC's informal merger review took 6 months to complete (which is not uncommon in complex or contentious merger reviews), that could mean a total review time in excess of 18 months.[15]

In summary, under the current informal merger review process, an ACCC decision on informal clearance to oppose a merger will prevent a merger, without any grounds of review, unless:

- the merger parties are prepared to proceed with the merger at the risk of ACCC pecuniary penalty proceedings, or if they are prepared to proceed on the expectation that the ACCC will commence injunction proceedings in the Federal Court where the merits would be adjudicated in advance of completion (as occurred most recently in Metcash in 2010);
- a merger party is willing to commence its own declaration proceedings in the Federal Court (as did AGL in 2003); or
- a merger party resorts to one of the formal merger review processes – merger authorisation (as AGL did in 2014 with its merger authorisation application)[16] or

[13] See Strickland P, "Do we need a better way for reviewing mergers?" (2012) 40 ABLR 143 at 151, who argues, "For example, if the acquisition involves a scrip based offer, or is proceeding by way of a takeover or scheme of arrangement, the ultimate success of the takeover or scheme, which relies upon shareholder votes, may depend upon the prospect that the acquisition ultimately would not be prevented or interrupted by legal proceedings alleging a contravention of s 50 (particularly if those proceedings were to be commenced after completion). As a consequence, the takeover or scheme may not be feasible without prior clearance, either from the ACCC or a court." Also see Corkhill A, "Merger Regulation Reform: Do we need a formal clearance process? Reassessing the relevance of the Trade Practices Legislation Amendment Bill (No 1) 2005" 28 Sydney Law Review 535 at 537 – 538.

[14] Strickland P, "Do we need a better way for reviewing mergers?" (2012) 40 ABLR 143 at 151.

[15] By way of illustration, the proposed acquisition by Metcash of the Franklins supermarket business, commenced in a public informal merger review process on 29 July 2010. After a 16 week process, on 17 November 2010 the ACCC announced its decision to oppose the acquisition. Shortly after, on 23 November 2010, Metcash announced that it had notified the ACCC that it intended to take further steps to proceed with the proposed acquisition. In December 2010 the ACCC commenced Federal Court proceedings to restrain the acquisition and after it was unsuccessful it brought a Full Federal Court appeal. The appeal decision was handed down on 30 November 2011. The process finally came to an end on 5 December 2011 when the ACCC announced that it would not make a special leave application to the High Court – a total merger review process of nearly 70 weeks. Metcash in fact completed the transaction in September 2011 after the ACCC failed to secure an interim injunction restraining Metcash from proceeding with the acquisition until a full appeal was heard and determined.

[16] Application by AGL Energy Limited for merger authorisation of Macquarie Generation – ACT 1 of 2014.

formal merger clearance (which no party has utilised since it was introduced in 2007).

To the extent it can be said that such a 'review' mechanism for informal merger review exists via Federal Court options (injunction and declaration), it does not allow for a sufficiently timely merger review process.

(b) Problems with accountability in formal merger clearance

The form of merits review provided for in the formal merger clearance process has two key problems.

First, the review mechanism involves a reversed onus of proof compared with the scheme of the Act (under which the ACCC or an applicant must establish a contravention, or potential contravention, of s 50). That comes with the problem that the applicant must establish there is no substantial lessening of competition in any relevant market, which may inefficiently expand the scope of the review beyond areas where there is properly a debateable competition issue.

Secondly, the review mechanism creates an inherent unfairness for the applicant from an evidentiary perspective. Specifically, because the Act largely limits the Tribunal to considering the material that the ACCC 'took into account',[17] the applicant may not have an adequate opportunity to ensure that all relevant material in support of its case is put before the Tribunal. For example, if the ACCC raises issues late in its review process, or only in its final decision. The applicant is also disadvantaged because it is unable to ensure that potentially relevant evidence from third parties is before the Tribunal, given there is no subpoena power during the ACCC's review.

2.2 The timeliness concern

In more contentious merger reviews, the ACCC's informal merger review process can take months, instead of weeks. For instance, the ACCC's informal merger review public register for 2012 – 2014 reveals that for more complex matters it is not uncommon for the duration of the process to exceed 6 months. The table in the Attachment to this submission provides a list of such matters for 2012 – 2014.

There are two principal reasons for this. First, there is no statutory requirement whatsoever that limits the time the ACCC can take to review a proposed merger. Secondly, with no efficient and effective review mechanism, merger parties understandably will often continue making submissions to the ACCC in the hope of persuading it not to oppose the proposed merger. The problem is that timeframes of this length, particularly when combined with the time that would be involved in seeking any form of court adjudication, are not conducive to achieving the public interest in deterring anti-competitive mergers while encouraging mergers that increase economic welfare.

In the case of the formal merger clearance process, the Act notionally provides for strict timeframes. These are 40 business days (which can be extended to 60 business days) for the ACCC's review, and 30 business days (which can be extended to 90 business days) for the Tribunal's review. However, it is likely that in practice these timeframes could become illusory.[18] That is because the Act allows the applicant to agree to extensions of time during the ACCC's review,[19] and no doubt most applicants would want to do so to maximise the prospect of obtaining a clearance at the ACCC stage. That

[17] This is subject to the Tribunal's ability to consult with persons for the purpose of clarifying that material, and to direct the ACCC to provide information, reports or assistance as specified by the Tribunal. See ss 113, 114, 115 and 116 of the Act.

[18] Strickland P, "Do we need a better way for reviewing mergers?" (2012) 40 ABLR 143 at 156. Cf. Tonking I, "Let the sun shine in: New merger approval procedures under the Trade Practices Act" (2005) 13 CCLJ 73 at 75.

[19] Section 95AO(2) of the Act.

means, despite the best of intentions, the formal merger clearance process does not necessarily solve the timeliness problem.

2.3 The transparency concern

(a) Access to submissions, information and documents

The transparency concern largely relates to the ACCC's informal merger review process. That is because, in the case of the formal merger clearance process, the Act requires the ACCC to publish the clearance application, any documents received in relation to the application and the ACCC's determination and reasons for decision on its public register, subject to confidentiality claims.[20]

It should also be reiterated that the ACCC is to be commended for improving the transparency of its informal merger review process in the past decade by introducing Statements of Issues, Public Competition Assessments and 'transparency' letters.[21] These measures have significantly increased the transparency of the process beyond what was provided when the Dawson Review considered the informal merger review process over a decade ago.

However, despite these developments, there remains a key area of the informal merger review process where the level of transparency is unsatisfactory. This is the ACCC's policy and practice of keeping all submissions, information and documents that it receives in connection with the merger review confidential. This applies both to material provided to the ACCC by the merger parties and third parties.

We understand the ACCC's rationale for doing this is its concern that by keeping third party material confidential, this will provide third parties with comfort to provide potentially adverse information regarding the merger.[22]

The problem is that, by keeping this material confidential, including from the merger parties and their external legal advisors, the efficiency and fairness of the merger review process is seriously undermined, particularly in complex and contentious merger reviews. It is very difficult for merger parties to provide persuasive evidence that is truly responsive to opposing submissions or material when the precise source of the material, and the specific details of the material, are unknown to them.

The lack of transparency in this regard also contributes to a perceived lack of accountability, because the public is not able to assess the strength of the arguments for and against the proposed merger.

(b) Public Competition Assessments

Also relevant to concerns on transparency is the approach that appears to continue to be adopted by the ACCC to Public Competition Assessments. These are often the subject of delay, not uncommonly released after many months have passed since the clearance decision. This delay undermines the purpose that Public Competition Assessments serve as reasons for the ACCC's decision.

Public Competition Assessments were originally introduced during the debate leading up to and during the Dawson Review and the recommendations of the Dawson Report. Specifically, while acknowledging the strengths of the process that emerged from its informal nature, the Dawson Committee also acknowledged that inherent in this informality were some of the process's weaknesses, including that the ACCC was not

[20] Section 95AH of the Act.

[21] See ACCC, *Informal Merger Review Clearance Process Guidelines*, September 2013, p 18 (paras 2.45 – 2.50) regarding transparency letters.

[22] Samuel G, *Current Issues on the ACCC's Radar* (Paper delivered at the Competition Law Conference 2010, 29 May 2010) p 18.

required to give reasons for its decision. The Dawson Report identified the potential for improvements that could flow if the ACCC were to provide its reasons, stating:[23]

> At a minimum, the informal process would be improved, and the potential for regulatory error reduced, if the ACCC were required (taking care to protect any confidentiality) to provide adequate reasons for its decisions when requested to do so by the parties and in cases where it rejected a merger or accepted undertakings. The provision of reasons in these instances would allow a better understanding of the ACCC's decisions and reduce uncertainty about the way in which the process operates. Confining the informal obligation to give reasons to these three instances would minimise the administrative burden on the ACCC and should not contribute to any significant delay in the process.

Recommendation 2.1 of the Dawson Report dealt with the issue:

> 2.1 The ACCC should provide adequate reasons for its decisions (taking care to protect any confidentiality) in the informal clearance process when requested to do so by the parties and in cases where it has rejected a merger or accepted undertakings.

This recommendation received support from the Government of the day:[24]

> The Government supports the provision of reasons by the ACCC for its informal clearance decisions when requested by the applicants and in cases where it has rejected a merger or accepted undertakings. This will improve the process by promoting a better understanding of the ACCC's decisions and reducing uncertainty.

The ACCC's introduction of Public Competition Assessments into its informal merger review process (in late 2003) was a welcome response to these concerns and recommendations.

Despite the ACCC's apparent support for the objectives of Public Competition Assessments, including the inclusion in the recently revised Informal Merger Review Process Guidelines of a statement that it will aim to publish Public Competition Assessments within 30 business days of making a decision, the reality is that we continue to see substantial delays. As noted in the Attachment, some matters where the ACCC has noted on its public register that a Public Competition Assessment will be issued 'in due course' have still not seen one published after over 6 months from the decision date.

3 Proposals for reform of Australian merger clearance processes

This section describes two possible approaches for reforming the current merger clearance processes. The first approach suggests a number of amendments to the existing processes that could be adopted in the interests of improving accountability, transparency and timeliness. An alternative, and preferable approach, would be to replace informal merger review and formal merger clearance with a 'notification' process that bears similarity to the notification processes already in the Act for exclusive dealing.

3.1 Possible amendments to existing processes

(a) Improving transparency in informal merger reviews

If the ACCC's informal merger review process is retained in its current form, it will continue to suffer from a lack of the desired level of accountability. That is because, being a non-statutory process, there will never be a sufficiently timely and commercially feasible review mechanism.

[23] Dawson Report at p.61.

[24] Government response issued by the then Treasurer dated, 16 April 2003.

However, some legislative changes could be made with a view to improving the transparency of the informal merger review process. Such changes would also provide a greater degree of accountability. A section could be inserted into the Act that provides as follows:

> If the Commission reviews or investigates a non-confidential proposal by a corporation to acquire shares in the capital of a body corporate, or any assets of a person, for the purpose of considering whether the acquisition would contravene section 50, the Commission must publish all documents and information it receives, and particulars of any oral submission made to it, in connection with its review or investigation on the merger clearance register.

This section could also provide a carve out for confidential information in a manner similar to section 95AI, which forms part of the current formal merger clearance regime. In those circumstances, external lawyers for the merger parties or other interested parties, and where appropriate perhaps even selected employees of the merger parties or other interested parties, should be able to obtain the confidential information upon providing appropriate undertakings.

Further, by limiting this publication obligation to 'non-confidential' merger proposals, this proposal maintains the ACCC's current ability to conduct confidential merger reviews, and to provide confidential indicative views, before a merger proposal becomes public.

In one respect, this proposal is similar to the European approach to merger reviews, under which notifying merger parties have a right of access to the European Commission's 'file' after a Statement of Objections is released. Under the European regime, the Commission's file would include all documents it has obtained, produced or assembled during its investigation, subject to confidentiality, but would not include internal working documents.[25]

This proposal also represents an improvement on the European approach, because access to relevant information and documents is provided from the commencement of the ACCC's review, and not following an intermediate step in the process, such as the release of a Statement of Issues. This is to be preferred, because it would bring the transparency of the informal merger review process into line with the transparency provided in the existing formal merger clearance and merger authorisation processes.

(b) Improving accountability and fairness in formal merger clearances

If the formal merger clearance process is retained, the problems inherent in the reversed onus of proof and the fact that the Tribunal's review effectively would be 'on the record' should be addressed.

Option 1: One way to address these problems would be to amend section 95AN of the Act. The current section 95AN(1) provides that:

> The Commission must not grant a clearance in relation to a proposed acquisition of shares or assets unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition (within the meaning of section 50).

This could be replaced with an opposite formulation, namely:

> The Commission must grant a clearance in relation to a proposed acquisition of shares or assets unless it is satisfied that the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition (within the meaning of section 50).

This amendment would require the ACCC to be satisfied that there is likely to be a substantial lessening of competition before denying a clearance. That would mean the focus of a merger review, particularly when it reaches the Tribunal, would not be

[25] See, for example, *Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*.

inefficiently expanded beyond areas where there is properly a debateable competition issue. It would also be consistent with the scheme of the Act in section 50, which only prohibits mergers that substantially lessen competition in a market, and which the ACCC has the onus to establish.

Option 2: If the current test in section 95AN is retained, then the evidentiary disadvantage that applicants face by reason of the Tribunal's review effectively being 'on the record' should be remedied.

One way to achieve this would be repeal section 116 of the Act, which currently requires the Tribunal only to consider material before the ACCC.

If it is considered that conducting a fresh hearing on new evidence would be too inefficient, or too difficult to achieve in the short time frames proposed in the Act, then section 116 should at least be amended to allow the Tribunal to consider new evidence filed by the applicant with the leave of the Tribunal. That would allow the Tribunal the flexibility to remedy any procedural unfairness in circumstances where the applicant has had insufficient opportunity to file evidence in response to issues raised late during the ACCC's review.

(c) Improving the timeliness of formal merger clearance

In order to ensure strict time limits, section 95AO(2) should be repealed (this is the provision that allows the applicant to agree to an extension of time during the ACCC's merger review). By doing so, the ACCC will have a fixed 40 business days (extendable to 60 business days) in which to make a formal merger clearance decision. That will provide the ACCC with the incentives it needs to conduct its review efficiently, if it knows it cannot persuade applicants to extend the time (with the carrot that more time might allow the applicant to convince the ACCC to grant a clearance).

3.2 A preferable alternative: a new merger notification process

The best way to properly ensure accurate and timely merger review is to replace the current merger clearance processes with one statutory review process that combines the flexibility of the informal process with the statutory requirements for effective merits review, time limits and transparency.

To achieve this, we suggest repealing the merger clearance provisions of the Act and introducing a 'merger notification' regime that would be similar to the current exclusive dealing notification regime in Division 2 of Part VII of the Act.

A notification regime could include the following elements:

- A corporation would be able to lodge a merger notification with the ACCC regarding a proposed acquisition.
- If after a prescribed period (say 3 months), the ACCC has not given the corporation an 'opposition notice', the acquisition would not be taken for the purposes of section 50 as having the effect, or likely effect, of substantially lessening competition in a market.
- At any time 1 month after the notification is lodged, in matters that are complex or contentious,[26] the ACCC would be able give the corporation a notice that extends the prescribed period (say to 6 months) and that requires the corporation to file a form containing more detailed information relevant to the proposed acquisition.[27]

[26] The concept of 'contentious' could, for example, involve the ACCC having reasonable grounds to suspect that the proposed acquisition may substantially lessen competition.

[27] This form could, for example, be a prescribed form, or it might be a form containing questions specific to the proposed acquisition.

- The ACCC could only give a corporation an 'opposition notice' if it is satisfied the acquisition would have, or be likely to have, the effect of substantially lessening competition in a market. The ACCC would be required to provide written reasons for its decision to issue an opposition notice.
- The ACCC would be able to use information gathering powers in connection with a merger notification. This could be achieved by amending s 155 of the Act to expressly include merger notification as a circumstance in which those powers can be used. Alternatively, a specific merger information gathering power could be inserted that is proportionate to the circumstances of merger review.
- The corporation would be able to seek a review of an ACCC decision to give an opposition notice in the Australian Competition Tribunal.
- The Tribunal would be under a strict time limit to conduct its review and give its decision (say 2 months, extendable to 3 months where there are special circumstances or complexity).
- The Tribunal would have the power to summons a person to produce documents or to give evidence, including at the request of a party to the review.
- The applicant would have the ability to file additional evidence in the review, but only with the leave of the Tribunal.[28]
- The whole process before the ACCC and the Tribunal would be a public process, with all submissions, information and evidence received by the ACCC or the Tribunal being published on a public register, subject to confidentiality claims (including any material obtained compulsorily).

For non-contentious or non-complex mergers, this notification regime could work very similarly to the ACCC's current informal merger review process. The only differences would be that the corporation would commence the process by lodging a merger notification in addition to any submission that a corporation seeking informal merger clearance today would lodge, the ACCC would have three months to make its decision, and the ACCC would be subject to Tribunal review.

For contentious or complex mergers, although the corporation ultimately may need to establish to the Tribunal's satisfaction that the ACCC could not have been satisfied the proposed acquisition would be likely to substantially lessen competition in a market, this does not represent a reversed onus of proof in the sense of the current formal merger clearance test. This also should not be a problem for the ACCC, which would have 6 months to complete its review, could require the corporation to file a detailed form upon extending the prescribed period, and would be able to use compulsory information gathering powers to ensure that it is able to investigate the proposed acquisition effectively.

4 The merger authorisation process

4.1 Recent experience

Herbert Smith Freehills recently acted for Murray Goulburn in making the first application for merger authorisation under the Act. Although that application was withdrawn, the experience provided the first insight into an alternative way to obtain competition approval for a proposed merger.

[28] For example, the Tribunal might grant leave where there are new issues that were not addressed during the ACCC's review, or where the applicant had insufficient opportunity to address an issue during the ACCC's review.

Murray Goulburn's merger authorisation application direct to the Australian Competition Tribunal revealed that the merger authorisation process is viable, and more than that, it can be effective and efficient. The subsequent application by AGL in connection with its proposed acquisition of Macquarie Generation is further testament to this.

(a) Timeliness

A key feature of the new merger authorisation process introduced in 2007 is the timeliness of the process. This issue was also central to the Dawson Report's recommendation for a new authorisation process with applications made directly to the Tribunal.[29] Similarly, this underpinned the Government's response to the Dawson Report and the legislative purpose for the reforms.[30]

It is instructive to reflect on the features of the authorisation process that emphasise the importance of timeliness in the merger authorisation process.

1 The Relevant Period is defined as 3 months – half the period for non-merger authorisations – section 95AZI (cf. section 90(10A)).

2 The Relevant Period can only be increased by a determination of the Tribunal that the matter cannot be dealt with properly in that period either because of its complexity or other special circumstances.

3 If extended, the Relevant Period can only be extended for a specified period of no more than 3 months (section 95AZI(2) cf. 6 months for non-merger authorisations).

4 Unlike time frames in other clearance and authorisation processes in the Act:

- the Relevant Period cannot be extended with agreement of the applicant (cf. merger clearance: section 95AO(2);
- there is no general power to increase the Relevant Period (with the applicant's agreement) as in non-merger authorisations (section 90(10A)), where the relevant period is 6 months and can be extended by a further 6 months if the ACCC determines that it is so extended and the applicant agrees; and
- there is no 'clock-stopping' mechanism incorporated where the ACCC has requested additional information from the applicant (cf. section 90(11)(b) in connection with a s.88(9) authorisation application in connection with offshore acquisitions).

The recent experience both in the Murray Goulburn application and the most recent AGL application has demonstrated the timeliness of the process.

Murray Goulburn filed its application 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.

Had the application proceeded (it was withdrawn when Murray Goulburn announced it would sell into Saputo's bid in January 2014 – just over seven weeks after it was filed), Murray Goulburn likely would have had an authorisation determination within 3 months. That is remarkably efficient especially for a quasi-judicial process, and demonstrates that fears about timing of the merger authorisation process are unfounded.

[29] Dawson Report, at p.64.

[30] *Trade Practices Legislation Amendment Bill (No. 1)* 2005, Explanatory Memorandum, p.32.

It is possible that some may fear that the merger authorisation process cannot accurately determine the balance of public benefits and detriments when the process is so quick. It might be questioned on the basis that it is difficult to find evidence against a merger in such a short timeframe. But we consider it would be erroneous to jump to this conclusion. It must be remembered that, in order to obtain merger authorisation, the applicant bears the burden of satisfying the Tribunal that there is likely to be a net public benefit. The ACCC and interested parties can also rigorously test the evidence and arguments put by the applicant, including through cross-examination. If the applicant's evidence remains persuasive after going through that gruelling process, it is difficult to see why that would not favour the grant of authorisation.

(b) Transparency

Another aspect of Murray Goulburn's experience was that, within the short timeframe available, some 31 submissions from interested parties were published on the Tribunal's register. Murray Goulburn's application and supporting evidence were also placed on the register, open to scrutiny by interested parties. Although parts of these documents 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 review process.

We consider that giving all parties the opportunity to examine the evidence and submissions in support of, or against, a merger under review is a key element of procedural fairness that also aids good decision-making. Transparency gives an opportunity to test the credibility of the argument, and the person putting that argument. The Murray Goulburn experience demonstrates that the merger authorisation process allows this.

4.2 Opportunities to reform the merger authorisation process

(a) An electronic Tribunal

The efficiency of the merger authorisation process could be improved by moving to an 'electronic Tribunal'. This would avoid the need for printing thousands of pages of multiple copies of documents filed in the Tribunal. The burden of the paper process was evident from the volume of material that Murray Goulburn was required to file:

- The original application to the Tribunal comprised an original + 6 clean copies + 1 redacted copy + 1 "red-lined" version + 2 CDs. Murray Goulburn was also subsequently required to produced additional copies for the ACCC.
- The supplementary evidence in response to the ACCC's issues paper comprised 1 original + 4 clean + 2 redacted + 1 "red-lined" + an electronic copy.
- The document copying side of the process was very costly.
- The creation, checking and production of three versions of each document created a substantial burden on the applicant. It would be instructive to explore whether the directions could be amended to reduce this burden. One suggestion would be to consolidate the "red-line" and clean versions. So there would be two versions:

    1 The first version would be a document with the claimed confidential information clearly marked (in highlighting or "red-line").

    2 The second version would have this information redacted for the purposes of publication.

(b) Increase co-ordination between the Tribunal, the ACCC and the applicant

The process of gathering information could be improved. Currently both the Tribunal and the ACCC are given largely independent powers to issue information requests. In

principle, this seems appropriate. In practice, however, Murray Goulburn's application prompted a series of direct requests from the ACCC and the Tribunal as well as lengthy 'suggestions' from the ACCC to the Tribunal (that the Tribunal did not adopt) which the ACCC then (in part) included in its own independent request. This added to inefficiencies and costs with little substantive gain.

Coordination between the ACCC and the Tribunal, and communication with the Applicant (for example, by way of a notice from the Tribunal as to whether it was minded to accept the ACCC's proposed information request and issue a formal request under section 95AZC), should help:

- limit the scope of information requested to information agreed by the Tribunal and ACCC to be relevant; and
- focus the Applicant's attention and enable it to more promptly respond to the request.

(c) Amend or replace the Form S

Finally, Murray Goulburn's experience revealed that the "Form S", which is the detailed merger authorisation application form prescribed by the Regulations that shapes the application, is in need of serious review. In its current form, with a myriad of mandatory stipulations (regardless of their relevance to the particular application), the Form S breeds inefficiency and adds to costs. The Form S is a very blunt instrument and demands a checklist approach to a submission, which presents substantial challenges in the context of the merger authorisation process. This is compounded by the mandatory stipulations in the 26 detailed directions at the back of the Form which demand information that may (or may not) be relevant and may (or may not) be available. Such a prescriptive approach does not give adequate weight to the fact that the Applicant bears the burden of establishing the grounds for authorisation under the net public benefit test.

One feature of the early process in Murray Goulburn's application was the ACCC's focus on the detailed requirements of the Form S (and accompanying directions) regardless of whether those matters were likely to be significant to the case. Thankfully, the Tribunal adopted a more practical approach. As the Murray Goulburn matter proceeded towards hearing, it became increasingly clear that the focus would be on the filed evidence and opening submissions, not the original Form S. Murray Goulburn's experience reinforces the need for a rethink so that we do not overload the process and deter the use of a valid merger approval process.

There is room to soften the current stringent requirements of the Form S to reduce the mandatory directions (and therefore reflect the approach taken in non-merger authorisation forms[31]), or to replace the Form S altogether with a Statement of Facts, Issues and Contentions that could be tailored to the particular issues raised by the merger in question. This could be supplemented with information and documents that would be helpful to the Tribunal's processes such as specific documents relating to the proposed merger and market participant details.

Herbert Smith Freehills

17 June 2014

[31] It is interesting to contrast the Form S with the forms prescribed for non-merger authorisations (for example Form A, for exclusionary provisions and cartel conduct, and Form B for anticompetitive agreements). The differences are evident not only in the information sought in the body of the form but in the mandatory directions that are attached to the Form. For instance in respect of the information required to describe the market and for market definition Forms A and B correctly require a description of the relevant markets (Item 5 with Direction 7). In a highly prescriptive approach Form S, in contrast, stipulates an almost exhaustive list (Items 4-18 with Directions 9-26) of information that must be provided.

Attachment
ACCC informal merger review
Timing & PCAs in more complex matters

	Public review started	Date completed	Total review days*[32]	Total period of review#		Outcome	PCA due or issued	PCA delay[33]	
2014									
Healthscope/Brunswick Private Hospital	22/01/2014	12/06/2014	53 bus.days	102 bus.days	>5 months	Opposed	In due course	3 bus.days	>0 months
Caltex Australia/Scotts Group	27/02/2014	21/05/2014	35 bus.days	60 bus.days	>3 months	Not opposed with s.87B	No PCA		
Peregrine Corporation/Caltex Fullarton SA	24/12/2013	8/05/2014	55 bus.days	98 bus.days	>4 months	Opposed	In due course	28 bus.days	>1 months
Peregrine Corporation/25 BP petrol retail sites in SA	15/05/2013	8/05/2014	95 bus.days	257 bus.days	>12 months	Not opposed with s.87B	In due course	28 bus.days	>1 months
Healthe Care Australia/Brisbane Waters Private Hospital	6/12/2013	16/04/2014	43 bus.days	94 bus.days	>4 months	Not opposed	No PCA		
Melbourne International RoRo & Auto Terminal/Port of Melbourne	8/10/2013	27/03/2014	67 bus.days	123 bus.days	>6 months	Not opposed with s.87B	In due course	58 bus.days	>2 months
2013									
Gallagher Group/Country Electronics	25/10/2012	19/12/2013	92 bus.days	301 bus.days	>15 months	Not opposed with s.87B	In due course	128 bus.days	>6 months
Thermo Fisher Scientific Inc.	20/09/2013	19/12/2013	39 bus.days	65 bus.days	>3 months	Not opposed with s.87B	25/02/2014	49 bus.days	>2 months
BlueScope Steel Ltd/Orrcon Steel	4/09/2013	5/12/2013	47 bus.days	67 bus.days	>3 months	Not opposed	In due course	138 bus.days	>6 months
NBN Co Limited/TransAct	27/06/2013	14/11/2013	34 bus.days	101 bus.days	>5 months	Not opposed	No PCA		
Perpetual/The Trust Company	16/05/2013	19/09/2013	80 bus.days	91 bus.days	>4 months	Not opposed with s.87B	3/12/2013	54 bus.days	>2 months
Westfield Group/Westfield Retail Trust/Karrinyup	22/07/2013	5/09/2013	34 bus.days	34 bus.days	>1 months	Not opposed with s.87B	28/11/2013	61 bus.days	>3 months

[32] The ACCC public register records this period as the total number of business days less public holidays and time during which the review was suspended. We have also included the 'total period of review' which makes no deductions for public holidays or review suspensions as this is an indicator of the total period in which theregulatory process will impact on the proposed merger.

[33] For those matters for which a PCA has not been issued the PCA delay is the period from the date of the clearance decision until 16 June 2014.

Shopping Centre	Public review started	Date completed	Total review days*[32]	Total period of review#		Outcome	PCA due or issued	PCA delay[33]	
Air New Zealand/Virgin Australia (6%)	6/06/2013	5/09/2013	53 bus.days	66 bus.days	>3 months	Not opposed	No PCA		
Baxter International/ Gambro AB - Healthcare	4/03/2013	4/09/2013	36 bus.days	133 bus.days	>6 months	Not opposed with s.87B	28/11/2013	62 bus.days	>3 months
Woolworths/Supa IGA Riverside Gardens, Banksia Beach & Rasmussen	14/05/2013	29/08/2013	25 bus.days	78 bus.days	>3 months	Not opposed	No PCA		
Telstra/Adam Internet	25/10/2012	19/07/2013	52 bus.days	192 bus.days	>9 months	Withdrawn (in face of ACCC opposition)	13/06/2013	-27 bus.days	>-2 months
Woolworths/Hawker Supa IGA	15/10/2012	4/07/2013	131 bus.days	189 bus.days	>9 months	Not opposed	17/10/2013	76 bus.days	>3 months
HJ Heinz/Raffertys Garden	20/10/2012	5/06/2013	101 bus.days	163 bus.days	>8 months	Opposed	26/07/2013	38 bus.days	>1 months
Woolworths/Glenmore Ridge Village Centre	20/06/2012	5/06/2013	74 bus.days	251 bus.days	>12 months	Opposed	25/10/2013	103 bus.days	>5 months
Shell Company of Australia/BP North Gundagai (post-completion review)	21/12/2012	30/04/2013	69 bus.days	93 bus.days	>4 months	Not opposed	No PCA		
Virgin/Tiger	2/11/2012	23/04/2013	88 bus.days	123 bus.days	>6 months	Not opposed	31/07/2013	72 bus.days	>3 months
Pact Group/Drum Reconditioners NSW	31/10/2012	22/04/2013	40 bus.days	124 bus.days	>6 months	Not opposed	No PCA		
Industrea/AJ Lucas Group	15/03/2012	12/02/2013	228 bus.days	239 bus.days	>11 months	Not opposed	No PCA	Query if PCA should issue	
Nestle/Pfizer	24/05/2012	22/01/2013	63 bus.days	174 bus.days	>8 months	Not opposed with s.87B	3/05/2013	74 bus.days	>3 months
2012									
Carsales/Tradingpost	30/08/2012	20/12/2012	65 bus.days	81 bus.days	>4 months	Opposed	13/06/2013	126 bus.days	>6 months
Sonic/Healthscope (Qld/WA)	16/05/2012	11/10/2012	72 bus.days	107 bus.days	>5 months	Opposed	28/08/2013	230 bus.days	>11 months
Seven/Consolidated Media Holdings	22/06/2012	11/10/2012	54 bus.days	80 bus.days	>4 months	Opposed	15/02/2013	92 bus.days	>4 months
Woolworths/G Gay hardware	13/02/2012	4/10/2012	65 bus.days	169 bus.days	>8 months	Opposed	5/12/2013	306 bus.days	>15 months
Universal Music Holdings/EMI Group	7/03/2012	17/09/2012	134 bus.days	139 bus.days	>6 months	Not opposed	No PCA		
Bunnings Group/Costas Mitre	15/03/2012	31/07/2012	95 bus.days	99 bus.days	>4 months	Not opposed (SoI)	No PCA		

10 Werribee	Public review started	Date completed	Total review days*[32]	Total period of review#		Outcome	PCA due or issued	PCA delay[33]	
ALH Group and Laundy Hotel Group/Caringbah Inn	1/03/2012	19/07/2012	62 bus.days	101 bus.days	>5 months	Not opposed	No PCA	Query if PCA should issue	
APA Group/HDUF	14/12/2011	19/07/2012	124 bus.days	157 bus.days	>7 months	Not opposed with s.87B	14/02/2013	151 bus.days	>7 months
ALH Group/Hotels & Takeaway stores NSW	22/12/2011	28/06/2012	107 bus.days	136 bus.days	>6 months	Opposed	In due course	513 bus.days	>25 months
Woolworths/Rocherlea Tasmania	3/11/2011	8/06/2012	114 bus.days	157 bus.days	>7 months	Withdrawn	Not applicable		
AGL/GEAC	24/02/2012	24/05/2012	41 bus.days	65 bus.days	>3 months	Not opposed	6/07/2012	32 bus.days	>1 months
Foxtel/Austar	26/05/2011	10/04/2012	106 bus.days	229 bus.days	>11 months	Not opposed with Special Access Undertaking and s.87B undertaking	14/06/2012	48 bus.days	>2 months
Pact Group/Viscount Plastics	4/10/2011	5/04/2012	75 bus.days	133 bus.days	>6 months	Not opposed (SoI)	No PCA	Query if PCA should issue	
Amcor/Aperio	14/11/2011	28/03/2012	73 bus.days	98 bus.days	>4 months	Not opposed (SoI)	No PCA	Query if PCA should issue	
Visy/HP entities (PET & plastic assets)	23/12/2011	21/03/2012	45 bus.days	64 bus.days	>3 months	Not opposed (SoI)	No PCA	Query if PCA should issue	