

EXECUTIVE OFFICE



23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

Contact officer: Richard Home
Contact phone: 03 9290 6960

tel: (02) 6243 1111
fax: (02) 6243 1199

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www.accc.gov.au

Professor Ian Harper
c/ Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Sent via email to contact@competitionpolicyreview.gov.au

Dear Ian

Competition Policy Review: ACCC Supplementary Submissions

In addition to the Australian Competition and Consumer Commission's (ACCC) submission provided to the Review Panel on 25 June 2014, I am pleased to provide the attached four short supplementary submissions.

These short submissions target specific areas regarding the ACCC's role in merger clearances. Specifically, these papers discuss issues concerning:

- global markets
- merger timelines
- appeals on merger decisions, and
- transparency and disclosure to merger parties of the record on which the ACCC makes its informal clearance decisions.

I hope this additional information is of assistance to the Review Panel throughout the course of its deliberations.

Thank you again for taking the time to consider the information provided by the ACCC. Should you require any further information, please do not hesitate to contact me. Alternatively, you could contact Richard Home on (03) 9290 6960 or by email (richard.home@accc.gov.au).

Yours sincerely

Rod Sims
Chairman



Australian
Competition &
Consumer
Commission

Australian Competition & Consumer Commission

Supplementary submission to the Competition Policy Review

ACCC's role in merger clearances

8 August 2014

1. Taking into account global factors in merger assessments

Key issues

- The ACCC's approach to assessing mergers under section 50 currently recognises the impact of globalisation and the changing nature of constraints imposed in dynamic markets. The ACCC takes into account imports, online competitors and other innovative new entry.
- Harvard Professor Michael Porter has for many years emphasised that domestic rivalry drives higher economic productivity *and encourages efficient globally competitive firms*. When local industries are subject to vigorous domestic rivalry, this puts pressure on firms to innovate and improve driving firm efficiency which leads to increased competitiveness globally. Proposals which advocate for the creation or maintenance of national champions without regard to the risks identified by Professor Porter are likely to result in lower productivity in Australia and therefore reduce the competitiveness of Australian firms competing in markets overseas.
- Preserving domestic competition is important for promoting the global competitiveness of traded products. Products supplied domestically which are not traded internationally may be inputs into an end product which is traded internationally. The global competitiveness of the traded product will therefore often rely on the cost effectiveness and continued innovation of the non-traded input.
- The majority of submissions which advocate for national champions at the expense of domestic competition appear to be based on a sole example of a merger where the ACCC identified preliminary concerns in domestic markets, despite the arguments by the acquirer that the merger would result in increased global competitiveness¹. The acquirer later appropriately applied to the Australian Competition Tribunal for merger authorisation on public benefits grounds. As the application for merger authorisation was withdrawn before the matter was heard and determined, no decision was made by the Tribunal.

1.1. Current ability under section 50 to take into account global issues

1. The current competition test for mergers under section 50 of the Competition and Consumer Act 2010 (CCA) recognises that Australia operates in a global economy and provides a framework for global factors to be taken into account.
 - In considering whether a merger is likely to result in a substantial lessening of competition, the ACCC is required to consider a range of potential constraints not just domestically but also constraints outside Australia. Section 50 mandates that, when determining whether an acquisition is likely to substantially lessen competition, consideration must be given to the actual or potential level of import competition in the market.
 - Where actual or potential imports provide an effective constraint on the merged firm's operations in Australia, the ACCC is unlikely to have competition concerns. The ACCC has cleared (or not opposed) a large number of mergers across a wide range of industries on the basis of actual or potential direct competition from imports, even though, in many of the cases, the merger would have led to

¹ Murray Goulburn's application for merger authorisation to acquire Warrnambool Cheese and Butter.

a significant reduction in the number of domestic competitors. In those cases imports were considered to provide an effective constraint on the merged firm. For example, the **OneSteel/Smorgon Steel** merger resulted in a monopoly of domestically based manufacturers of a range of steel products, but was cleared due to the effective competitive constraint imposed by imports. See **Attachment 1** for other examples.

- The ACCC did not oppose significant market concentration of ‘bricks and mortar’ travel agents (**Jetset Travelworld’s acquisition of Stella Travel Services** which included the retail brands Harvey World Travel and Best Flights, among others) in large part due to the significant growth in online travel agents which would continue to compete strongly against the merged entity.
 - The Law Council of Australia (Business Law Section) has not advocated for changes to the current substantive competition test for mergers set out in section 50 to reflect global competition. This group of practitioners is very familiar with section 50 and understand first hand from practical application the reach of section 50 and its limitations.
2. The review of **Murray Goulburn’s proposed acquisition of Warrnambool Cheese and Butter** is the only merger that appears to be given as an example of the ACCC focussing on domestic markets without regard to the impact on the merged firm’s ability to grow and compete globally.
- The ACCC did not have the opportunity to form a final view about the competitive effects of the transaction in an earlier review of the same transaction in 2010, although it did raise concerns in a Statement of Issues. Murray Goulburn then decided to withdraw the proposed acquisition from the ACCC’s consideration part way through the process. Murray Goulburn’s application before the Australian Competition Tribunal in November 2013 was also withdrawn before the Tribunal was able to form a final view.
 - It may assist the Review Panel to seek examples of other mergers in support of the concerns raised.
3. The arguments for national champions are only relevant to mergers involving trade exposed sectors. The ACCC opposed four mergers in 2013/14 and none involved markets involving products that are traded internationally. Products supplied domestically which are not subject to import competition may be inputs into end products which are traded internationally. Therefore, preserving domestic competition is important for promoting the global competitiveness of the traded product.

1.2 Market definition

1. While market definition is a useful tool for merger analysis, by itself it cannot determine or establish a merger’s impact on competition. The ACCC considers a range of other commercially relevant factors in its assessment of mergers and it is common for the ACCC to find it unnecessary to reach a concluded view on the strict boundaries of the relevant markets in forming a view on a merger.
2. The ACCC may define multiple markets as relevant to its assessment of a merger. These separate, but often related markets may be global, national, state-based, regional or local. Section 50 prohibits mergers that are likely to substantially lessen competition in *any* market in Australia. Therefore, a breach of section 50 can occur as a result of the impact of the merger in only one market, notwithstanding that the merger does not have anti-competitive effects in other relevant markets.

3. While globalisation may impact on competition in an industry, it does not necessarily mean that each market relevant to the assessment of a merger in the industry is global from a competition perspective. For example, in 2008 the ACCC decided to not oppose **BHP's proposed acquisition of Rio Tinto**, having considered the impact of the merger in both global and national markets for the supply of iron one lump and iron ore fines.
 - In industries where suppliers are active globally, there may still be factors which necessitate the ACCC defining a national market, such as where not all suppliers are active in Australia and barriers to entry and expansion are present, or where Australian prices are not set by reference to global prices.
 - The fact that global competitors exist does not mean that these competitors will necessarily provide a sufficient constraint on the merged firm in each relevant market. While competition in export markets may prevent the merged firm from raising its export prices, the merged firm's export operations may not limit its ability to exercise market power in acquisition markets in Australia. A merger may involve export markets which are subject to global sources of competition and prices are set by reference to global prices, however the merger may also result in reduced competition in domestic markets, for example by offering lower farm gate prices to dairy farmers for raw milk. This issue arose in the **Murray Goulburn merger authorisation matter** (discussed further below)
 - Similarly supply markets within Australia may not be subject to effective import competition despite the relevant product being exported. This may arise where a supplier has market power due to a product's brand loyalty with domestic customers. Additionally, where there is a divergence between the import parity price and export parity price of a product, a domestic supplier may have market power in domestic markets which enables it to set the price in the domestic market at import parity despite export parity being the competitive price.

1.3 Merger authorisation involves a separate test which can consider additional factors

1. The ACCC recognises that merger-related efficiencies may be pro-competitive, such as where the merger reduces a firm's marginal costs post-merger and the firm has the incentive to pass on cost reductions by lowering prices and increasing the level of competitive tension in a market. However section 50 has no 'offset' which enables a merger that results in a substantial lessening of competition being cleared on the basis that the merger results in improved efficiencies for the merged entity which may allow it to compete more effectively in a global market.
2. While under section 50 the ACCC cannot take into account public benefit considerations such as international competitiveness, merger authorisation is the appropriate avenue for merger parties to seek clearance on this basis. Under the merger authorisation process the CCA requires a balancing between competitive detriments and public benefits to deal with tension between, for example, a likely reduction in competition in an acquisition market compared to claimed beneficial effects of greater scale in national or international markets. In cases where a merger is likely to result in a net public benefit, the merger may proceed if authorised by the Australian Competition Tribunal. The Tribunal must take into account all relevant matters that relate to the international competitiveness of any Australian industry. The Tribunal may also consider whether gains in efficiency (such as increasing scale to compete globally) constitute a public benefit that outweighs the public detriment arising from any lessening of competition.

1.4 Murray Goulburn's application for merger authorisation

1. As **Murray Goulburn's merger authorisation application to acquire Warrnambool Cheese and Butter** was withdrawn prior to any decision being reached by the Tribunal, it cannot be known whether the merger may have received clearance on public benefit grounds. The ACCC considers that merger authorisation was the appropriate avenue for considering the efficiency claims submitted by Murray Goulburn.
2. The proposed merger involved consolidation of dairy processing facilities which acquired raw milk from dairy farmers as an input to products sold domestically and internationally. It has previously been submitted by individual dairy farmers, as well as dairy farmer representative groups seeking authorisation from the ACCC to collectively bargain, that dairy farmers are at a significant disadvantage relative to dairy processors as they often have little choice of processor which leaves farmers with virtually no bargaining power. During the ACCC's merger review of the same transaction in 2010, a significant number of dairy farmers strongly opposed the merger due to concerns the merger would result in reduced competition and lower farm gate prices to dairy farmers for raw milk in certain regions.
3. The ACCC considered that in addition to the export markets for processed dairy products (cheese, milk powders, whey products), it was also relevant to consider the impact of the proposed acquisition in domestic markets (for the acquisition of raw milk from dairy farmers). The geographic boundaries of markets for the acquisition of raw milk are limited by the physical location of milk processing facilities and the transportation distances for raw milk. These markets were considered to be regional in nature and limited to only domestic competitors (milk processors) and where suppliers of raw milk (dairy farmers) are unable to redirect their raw milk supply to export markets.
4. Had the Tribunal made a final determination of the application for merger authorisation, the Tribunal's determination would have taken into account the competitive impact of the merger on domestic and global markets against the public benefits likely to result from the acquisition.

1.5 National champions argument

1. The argument for a weakening of domestic competition policy in order to create so called national champions which can become leading competitors in a global market is not supported on economic grounds. Research by Professor Michel Porter concludes that competition in domestic markets promotes efficient, productive firms which are better able to compete in global markets. In *The Competitive Advantage of Nations*, Professor Porter considered as dubious the view that domestic competition is a barrier to competing globally. To the contrary, his study of 10 countries with leading positions in a particular industry found that these often exhibit strong domestic rivalries. Professor Porter concluded from this result that domestic competition makes domestic firms more innovative, creating a competitive advantage in domestic markets, but also for global competition. By contrast, protected firms tend to be static with no incentive to find more sustainable sources of competitive advantage.
2. During the Murray Goulburn merger authorisation matter, comparisons were drawn between the scale of Fonterra in New Zealand and Australian dairy processors. Also in submissions to the Review Panel it is claimed that the success of Fonterra supports the need for changes to be made to section 50 to enable mergers in Australia to be cleared so that Australia can develop successful global firms in the same way as Fonterra was allowed to grow through acquisition. It should be noted that the consolidation of dairy processors in New Zealand occurred by direct government intervention via legislation combined with ongoing regulation of Fonterra's pricing in domestic markets, rather than any amendments or relaxation to the substantive competition test for mergers in New Zealand.

3. Arguments in favour of softening merger competition tests to allow national champions to grow and compete in a globalised world economy are not unique to Australia. The European Commission has rejected such arguments in recent years, stating that companies can only become global champions if they are encouraged to become more efficient, not by shielding them from competition. See - http://europa.eu/rapid/press-release_SPEECH-11-561_en.htm?locale=en.

2. Timeliness of merger reviews

Key points

Evolution of the informal merger clearance regime

- The informal merger clearance process developed as a practical service to merger parties because they wanted advice on whether the ACCC (or its predecessor, the TPC) would be likely to challenge a merger. There is no legislative basis for the informal system and it reflects a cooperative approach between the ACCC and trade practices practitioners. The informal clearance service developed over the years providing merger parties with a significant degree of regulatory certainty and has become the preferred method for seeking merger clearance by merger parties.
- The formal merger clearance system was introduced in 2007 to address concerns with the timeliness, transparency and accountability of the informal system. However the informal system has continued to be the preferred method for obtaining merger clearance and no formal clearance application has been received to date.

There is an important link between information requirements imposed on merger parties and the time required to complete a merger review

- In effect, the onus is on the ACCC to positively establish that a substantial lessening of competition is likely to arise from a proposed acquisition in an informal review.
- In contrast to many other jurisdictions, there is no upfront information requirement imposed on merger parties seeking informal clearance in Australia, thus reducing the burden on merger parties in the vast majority of mergers that are considered and are cleared. There is clear support for this aspect of the ACCC's clearance process to continue.
- Given this scaled approach to information requirements, the ACCC's ability to reach an informed decision is dependent on having the ability to seek further information from the merger parties. The by-product of this approach is that merger review timelines can be affected. Importantly, the responsiveness and compliance of merger parties to these requests can significantly impact on the review timelines. Equally, merger parties who avoid or down play issues that are relevant to the competition assessment, also contribute to delays to the timelines.
- By contrast, the formal merger review system has strict timelines and strict upfront information requirements (regardless of the complexity or contentiousness of the matter) and places the onus on the merger parties to establish that the proposed acquisition will not result in a substantial lessening of competition.

2.1 Assessing the duration of merger reviews in context

1. The majority of mergers are cleared quickly and with relatively minimal information being provided by or requested from the parties. The benefits of these aspects of the informal system are not disputed in any of the submissions to the Panel – in fact the general consensus is to retain this flexible approach to information requirements.
2. Simply taking the start date and end date for a public merger review does not take into account the fact that for considerable periods of time during the course of complex or potentially contentious reviews the ACCC is either waiting for parties to provide information or documents or the parties have asked for further time to make submissions or formulate remedies.

- The ACCC measures the length of public merger reviews by calculating the elapsed number of days since the review commenced less the number of days when the ACCC was waiting for a response from the merger parties to an information request or the timeline was suspended at the request of the parties to allow them to provide further submissions or to negotiate remedies.
- Comparisons of the duration of merger reviews over a number of years based only on public merger reviews are not representative as they do not take into account pre-assessed mergers. Using only public merger reviews indicates that the average review days has increased however this perceived increase is essentially due to more mergers being cleared by pre-assessment over the past few years.
- Since 2009/10, the ACCC has introduced a pre-assessment process which has resulted in truncated reviews and improved timeliness for non-contentious matters. A large proportion of these pre-assessments are completed within two weeks. The number of mergers assessed as not requiring review as a proportion of total mergers considered has increased as follows:

Table 1 Mergers assessed as not requiring a review

	Number of mergers pre-assessed	% of total mergers considered
2008-09	0	0
2009-10	153	48%
2010-11	236	63%
2011-12	250	74%
2012-13	213	74%
2013-14	242	81%

3. Measuring and comparing review timelines over recent years without taking into account mergers that are pre-assessed greatly skews the average and fails to take into account the improvements the ACCC has introduced to deal with non-contentious mergers expeditiously.
4. Taking these into account, of the 297 transactions considered in 2013-14, 8% were public merger reviews that took more than 8 weeks to consider. This level is consistent with 2012-13 and 2011-12 where these matters represented 7% and 8% respectively.

2.2 Why doesn't the ACCC complete public merger reviews within set timeframes?

1. Complex and contentious matters often require extensive inquiries and detailed analysis.
 - In those matters that raise preliminary competition concerns a Statement of Issues will be published which will necessitate a second round of market inquiries. Additionally where parties propose remedies to address competition concerns, extensive negotiations are often required between the merger parties and ACCC and in many cases, a further round of public consultation. In 2013/14, ten mergers were cleared subject to undertakings.

2. Timeliness of merger reviews involves a trade-off with mechanisms to enhance transparency and minimise information requirements.
 - The need for the ACCC to request additional information from the merger parties during a review is the necessary trade-off in a clearance regime with no upfront information requirements. While responses to these requests are generally prompt, there are numerous occasions where merger parties' responses are incomplete and/or delayed. For example, in the current CSR/Boral review², the merger parties have requested that the ACCC suspend the review for a period of approximately three months. This is to prepare a response to an ACCC information request as well as to provide further material and submissions. The timing for response to such a request would typically be provided in a much shorter time period, but the delayed timeline was accommodated at the request of the merger parties.
 - The ACCC continues to improve the transparency of its review process and market feedback at key stages of a typical merger review and this has follow on effects to the timelines. In particular the ACCC has committed to provide merger parties with a market feedback letter at two points in a contentious merger review outlining issues and concerns raised by interested parties and the opportunity to provide further submissions in response. The ACCC also agrees to meet with parties at any stage of a review to discuss the progress of a matter. The ACCC will also make relevant members of the Commission available for such meetings wherever possible.
3. The focus for merger parties is usually on getting a favourable decision rather than a fast decision no matter what the outcome.
 - With the increased transparency provided to merger parties of issues, merger parties now get a much greater sense of whether an adverse decision is likely. As a result, it is very common for parties to take as much time as they believe necessary to attempt to convince the ACCC to clear the merger by providing further information and/or offer remedies to resolve the perceived concerns. This point is acknowledged in the Herbert Smith Freehills submission (section 2.2). This can have a significant impact on timelines.
 - Despite merger parties frequently requesting these delays, the submissions to the Review Panel largely overlook this important point and simply refer to total review days. For example, the Telstra submission raises criticisms regarding delays in the review of its proposed acquisition of Adam Internet but omits the fact that the review was delayed at the request of Telstra for a period that extended the actual review by an extra 6 months.
4. Mergers that are completed without notification to the ACCC or completed before the ACCC completes its review.
 - Once a merger is completed, the incentive for the merger parties to cooperate with the ACCC's review is greatly reduced. These reviews are still listed on the merger register but no indicative decision date is included. This effectively means that the review is an enforcement investigation rather than a clearance review. For this reason the ACCC does not include these reviews in its reports regarding duration of public reviews.

² For review details see: <http://registers.accc.gov.au/content/index.phtml/itemId/1164631/fromItemId/750991>

2.3 ACCC merger review timeframes are comparatively shorter than many other jurisdictions

1. Overall, the ACCC's timeframes for merger review are considerably shorter than many other jurisdictions, even for mergers raising complex issues requiring extensive investigation.

Table 2 Comparative timing of merger review processes – US, EU and NZ

	United States (DOJ/FTC)	Europe (EC)	New Zealand (NZCC)
Initial phase	Initial waiting period of 30 days. After waiting period expires, transaction may be completed unless second request is issued.	Phase 1 completed within 5 weeks. This can be extended by 2 weeks if the parties submit remedies.	Phase I matters (15-25 days). Note: A 10 day clearance period is stipulated, however, in practice this is never met and NZCC agrees extended timeframes with merger parties.
Second phase	A second request in a complex matter would typically involve a timeline of 3 to 4 months (or longer). Note: No timeline where a second request is issued. Once parties certify compliance with second request (or substantial compliance agreed with the DOJ/FTC), a decision must be made in 30 days.	Reviews that proceed to Phase 2 investigations generally extend the review period by 18 weeks . This can be extended by a further 3-7 weeks if remedies are offered or if a one-off extension is sought.	Phase II (where concerns arise): 40-60+ days (60+ days in complex cases).

2. The ACCC aims to complete the majority of reviews within an 8-12 week period, while recognising that this will not be possible in complex or contentious matters that warrant closer examination, or where merger parties present complex remedies to address competition concerns. A secondary timeline is established where a Statement of Issues is published. More complex reviews that proceed to a second phase will typically take a further 6-12 weeks but this can be significantly longer, particularly when merger parties request a delay and/or remedies are proposed.

3. Options available for review and appeal of merger decisions in Australia

3.1. Current options for merger clearance in Australia

1. Although there is no mandatory pre-merger notification in Australia, merger parties may seek clearance or approval of a proposed acquisition using one or more of the following options:
 - **Informal merger clearance** by the ACCC, where the ACCC reviews a proposed acquisition and indicates to the merger parties whether the ACCC intends to oppose the proposed acquisition. This process has developed informally and is governed by ACCC guidelines and is not conducted pursuant to any statutory power.
 - Application for **Formal merger clearance** made to the ACCC, which involves the ACCC reviewing and making a formal decision in respect of the proposed acquisition within a strict statutory timeframe. To date, the ACCC has not received any applications for formal merger clearance.
 - Application for **Merger authorisation** made to the Australian Competition Tribunal (the **Tribunal**). There has been only one merger authorisation determination completed using this process: *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1. One other application was made to the Tribunal in late 2013 for a separate transaction and was then withdrawn in early 2014 by the applicant, Murray Goulburn.³
 - Applying for a declaration from the **Federal Court** that a proposed acquisition does not breach section 50 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) (either before or after the acquisition is completed). This would generally not be an attractive option for an acquirer due to the time such a case is likely to take, but was utilised by AGL in unusual circumstances in 2003.⁴ It is worth noting that the onus is on the party seeking the declaration to show that the transaction will not substantially lessen competition in breach of section 50.

3.2. Grounds for review or appeal of merger decisions

- **ACCC informal clearance:** While strictly there is no appeal from a decision by the ACCC to oppose an acquisition, a merger party is not bound by the ACCC's view that an acquisition is likely to have the effect of substantially lessening competition. If the merger parties choose to proceed with the transaction, the ACCC can apply to the Federal Court for orders which may include an injunction, divestiture or penalties and the merger party can defend any proceedings commenced for a breach of section 50 of the CCA. Alternatively, a merger party may seek a declaration from the Federal Court (or alternatively merger authorisation or formal merger clearance) as a de facto appeal.
- **ACCC formal merger clearance:** Review of ACCC formal merger clearance decisions by the Tribunal is available under section 111 of the Act. This is a merits review of the

³ Prior to the Dawson amendments in 2007 which provided for merger authorisation applications to be made directly to the Tribunal, the ACCC had previously received a few applications for merger authorisation each year.

⁴ *AGL v ACCC (No. 3)* (2003) 137 FCR 317.

ACCC's decision and involves a review on the papers of the fact-finding behind a decision. The Tribunal may affirm, set aside or vary the ACCC's determination: section 119 of the CCA.

- **Tribunal merger authorisation:** The CCA does not expressly provide for appeal from Tribunal decisions to grant or refuse authorisation of mergers under section 95AZG(1), but as the Tribunal's decision is a decision made under an enactment, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) applies to enable judicial review of the Tribunal's decision. Unlike merits review, judicial review of administrative decisions are broadly limited to an examination of the original decision's lawfulness and do not consider the merits of the decision.⁵ There is therefore no merits appeal available to either party in a merger authorisation application to the Tribunal.

Section 5(1) of the ADJR Act provides that a person aggrieved by an administrative decision may apply for review on one or more of the following grounds:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
- (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision; and/or
- (i) that the decision was otherwise contrary to law.

The Federal Court's powers are limited in relation to judicial review under the ADJR Act. Notably, the Court cannot replace a decision with its own judgment (unlike a merits review of a formal merger clearance decision or an appeal from a decision of a single judge) and, in general, will refer the matter back to the original decision-maker. The Federal Court may quash or set aside the decision, or a part of the decision; refer the matter to the decision maker for re-consideration; declare the rights of the parties in respect of any matter related to the decision; and/or direct any of the parties to do/refrain from doing any act or thing.⁶

- **Federal Court proceedings** by the acquirer or the ACCC: An appeal to the Full Federal Court from a decision of a single judge is permitted by section 25(1) of the *Federal Court Act 1976* (Cth) in respect of an error of law. The basis of an appeal from a Federal Court decision is broadly an error of law of such significance that the decision should be overturned (this involves an incorrect legal principle being applied or an error of fact not supported by the evidence, or denial of natural justice). When considering an appeal from the Federal Court, the Full Federal Court may affirm, reverse or vary the original judgment; give such judgment/order as it thinks fit, or refuse to make an order; set aside all or part of the original judgment and remit the

⁵ *Hamblin v Duffy* (1981) 34 ALR 333; *Johnson v FCT* (1986) 72 ALR 625; See also *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, 26 (Mason CJ).

⁶ ADJR Act, s. 16(1).

proceeding to the court of first instance for further hearing and determination; and/or grant a new trial.⁷

3.3. ACCC's submission to the Review Panel

1. The ACCC's submission to the Review Panel recommended that merger authorisation by the Tribunal be replaced with merger authorisation by the ACCC with the right of merits review by the Tribunal. The reasons for this are twofold:
 - The ACCC is an experienced investigative body and it is more efficient and cost effective for the ACCC to investigate and determine applications for merger authorisation in the first instance, using its significant experience in both merger review and the application of the net benefits test in the context of merger authorisation determinations. Similarly, the Tribunal is the most appropriate body to conduct merits review on appeal from the ACCC's determination.
 - The direct application of merger authorisations to the Tribunal does not currently provide an avenue of appeal that would test the merits of the Tribunal's first instance decision. This is in contrast to other first instance decisions made by the ACCC, including informal and formal merger clearances.
2. As discussed above, if the ACCC or an interested third party is dissatisfied with the Tribunal's merger authorisation decision, the only recourse is to seek judicial review of the decision under the ADJR Act.

⁷ *Federal Court Act 1976 (Cth)*, s. 28.

4. Transparency and disclosure to merger parties of the record on which the ACCC makes its informal clearance decisions

Key points

- Submissions seeking “access to the file” often compare Australia’s informal merger review process to overseas formal merger clearance processes.
- In the United States, where the regulator is not the decision maker (as in Australia), access to the file is not provided.
- Providing access to the file would threaten the main advantage of the informal merger review process; its timeliness, flexibility and access to the widest array of market feedback.
- Australia’s formal merger clearance system provides for access to the file by way of a public register of submissions, similar to formal merger clearance systems overseas.

4.1 The informal merger review process currently provides a high degree of transparency

1. Submissions to the Harper Review have advocated for the ACCC’s informal merger clearance processes to be revised to increase transparency and disclosure to merger parties of the record on which the ACCC makes its informal clearance decisions, subject to appropriate confidentiality arrangements.
2. Submissions seeking increased transparency and disclosure of third party submissions or documents relied upon by the ACCC in forming a view on a transaction often compare the ACCC’s informal merger review process with formal merger processes in other jurisdictions, such as that of the European Commission. Formal merger review processes which provide merger parties with access to the file, or which have public registers typically involve longer timeframes. The informal merger review process seeks to balance transparency and timeliness. If a public register process or access to the file was imposed on the informal merger clearance regime the likely effect would be to increase the average time for the ACCC to reach a decision in all merger reviews.
3. The ACCC currently provides a high degree of transparency to merger parties. The ACCC has listened to key stakeholders, primarily the law council’s competition and consumer committee, and has committed to keep merger parties informed about the progress of merger reviews and the competition issues being raised. This has been reflected in the ACCC’s informal merger review process as follows:
 - First market concerns letter: Near the end of the first phase of a review the ACCC will generally write to the merger parties and set out the concerns or other relevant issues raised by third parties during market inquiries. In doing so the ACCC only includes concerns which appear to be credible and does not include issues which are neither credible or are not related to the proposed transaction. The parties are invited to provide submissions in response and/or meet with the ACCC.
 - Statement of Issues: Following initial enquiries if the merger raises sufficient competition concerns the ACCC will issue a Statement of Issues setting out the preliminary competition issues as understood by the ACCC. This will usually involve reflecting in some detail the concerns raised by market participants. This

is aimed at providing guidance to the merger parties and other interested parties and provides a basis upon which the ACCC can obtain further information that may either alleviate or reinforce the concerns of the ACCC. This practice is consistent with the ICN's⁸ guiding principles for transparency and procedural fairness.

- Second market concerns letter: Following the collation of responses to the Statement of Issues a further summary of market concerns and feedback is typically provided to the merger parties. This provides the merger parties a further opportunity to respond to the issues raised by interested parties and to provide any additional information considered relevant prior to the ACCC forming a final view in respect of the proposed acquisition.
 - ACCC's final decisions and reasons are publicly available: Following a final decision by the ACCC, for certain matters the ACCC will publish a Public Competition Assessment (when a merger is opposed, subject to undertakings, requested by the parties, or raises important issues). For all other matters the ACCC will explain the reasons and conclusions for its decision in a summary on the mergers register.
4. The treatment of third party submissions and information under the current informal merger clearance process strikes a balance between providing the benefits of transparency and procedural fairness to the merger parties and the information needs of the ACCC in receiving full disclosure of confidential and commercially sensitive information and submissions from interested parties. The ACCC has real concerns with any proposals to publish or otherwise disclose the actual submissions of the merger parties or third parties for the following reasons:
- Submissions typically contain a great deal of commercially sensitive confidential information.
 - The ACCC experience in recent court and tribunal cases is that the process of negotiating the masking of confidential information is extremely time consuming especially where a large number of submissions are made.
 - More importantly, the majority of market participants, especially small business customers or competitors of the merger parties, are concerned about the real risk of retaliation and reprisals if they are critical of the merger. The fear of reprisal is particularly acute in industries with high levels of market concentration, the very mergers where competition concerns are more likely to arise. This will be likely to result in a significant reduction in the assistance received from third parties under the informal system. This was a significant problem in the AGL Macquarie Generation merger authorisation application to the Tribunal. During the ACCC's informal review of that acquisition prior to the application to the Tribunal, many market participants who had raised concerns subsequently refused to provide public submissions to the Australian Competition Tribunal or witness statements to the ACCC. This was due to the public nature of the Tribunal's merger authorisation process and the concerns of market participants that publicly raising concerns would negatively impact on their ongoing commercial relationship with the merger parties.
5. Transparency / access to the file in other jurisdictions – US, Europe and New Zealand
- Unlike some other jurisdictions, in the informal merger review process the ACCC is not a statutory decision maker. It is providing its view as to whether the merger would breach section 50. The process is akin to an enforcement investigation and the ACCC's inquiries of third parties form the basis of the evidence that it

⁸ International Competition Network

may need to use in court. The ACCC does not disclose its evidence in other investigations.

- In the United States, where the Federal Trade Commission / Department of Justice is not a decision maker but has to seek remedies in the court, there is no access to third party submissions.
- In Europe, access to the file is provided to parties to the transaction subject to confidentiality restrictions. This only occurs where a merger review proceeds to Phase II and where the European Commission has published a Statement of Objections. It is important to draw the distinction that merger decisions of the European Commission are binding on merger parties unlike ACCC decisions made under the informal process. Prohibition decisions by the European Commission are not subject to a full re-hearing of the case on appeal. Parties can seek review from the Courts on both procedural and substantive grounds.
- In New Zealand, a public register of submissions is made available, subject to confidentiality restrictions. However, the New Zealand merger review process is a formal statutory process. In Australia, the formal merger review process similarly provides for the publication of submissions on a public register and is available if merger parties choose to use it.

Mergers not opposed where imports were considered a significant competitive constraint

Transaction (Year)	Relevant product market/s
BlueScope Steel Ltd - proposed acquisition of Orrcon Steel (2013)	Supply of structural pipe and tube products; and the supply of inputs to pipe and tube manufacturers and other users
Amcor Ltd - proposed acquisition of Detmold Flexibles Pty Ltd and Detmark Pty Ltd (2013)	Supply of value-added flexible packaging, including printed, laminated and converted flexible packaging
Integrated Packaging Australia Pty Ltd - proposed acquisition of certain assets of Amcor Packaging Asia Pty Ltd (2012)	Supply of plain non-stretch polyethylene (PE) film
Amcor Limited - proposed acquisition of Aperio Group Pty Limited (2011)	Supply of value-added flexible packaging, including printed, laminated and converted flexible packaging
SABMiller plc - proposed acquisition of Foster's Group Limited (2011)	Supply of bulk and packaged beer
Pact Group Pty Ltd - proposed acquisition of Viscount Plastics Pty Ltd (2011)	Manufacture and supply of plastic pails; plastic building cartridges; and materials handling products
Johnson & Johnson - proposed acquisition of Synthes Inc (2011)	Supply of thoracolumbar interbody devices (IBDs), which are used to treat spinal degeneration in the thoracolumbar part of the spine; and anatomical plating systems for the wrist, which are used to treat wrist fractures
Nippon Paper Group, Inc - proposed acquisition of certain assets of Paper Australia Pty Ltd (2009)	Manufacture and/or supply of uncoated woodfree paper; coated mechanical paper; and coated woodfree paper
Murray Goulburn Co-operative Co Ltd - proposed acquisition of assets and shares of Australian Co-operative Foods Limited (Dairy Farmers) (2008)	Wholesale markets for the manufacture and supply of UHT white milk; and cheese
HJ Heinz Company Australia Ltd - proposed acquisition of Golden Circle Limited (2008)	Manufacture and wholesale supply of jams; shelf stable fruit products; infant food and beverages
One Steel Limited – proposed acquisition of Smorgon Steel Group Limited (2007)	Supply of manufactured steel including rod and bar; wire; and pipe and tube products