

Partner: Alice Muhlebach
Direct line: +61 3 9679 3492
Email: alice.muhlebach@ashurst.com

Ashurst Australia
Level 36, Grosvenor Place
225 George Street
Sydney NSW 2000
Australia

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GPO Box 9938
Sydney NSW 2001
Australia

Tel +61 2 9258 6000
Fax +61 2 9258 6999
DX 388 Sydney
www.ashurst.com

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600



Dear Panel Members

Role of merits review in the Panel's proposed formal merger process

We refer to the Panel's Draft Report, and to the Panel's proposal to combine the current formal merger clearance process and the merger authorisation process (Draft report, page 204). In particular, we refer to the Panel's view that the ACCC's decisions under that process "should be subject to review by the [Australian Competition] Tribunal".

We acknowledge the Panel's statement that the "specific features" of its proposed merger process should be settled in consultation with business, practitioners and the ACCC. However we understand that the Panel may also be considering whether, in conducting its review, the Tribunal should consider only the material which was before the ACCC as primary decision maker. The purpose of this letter is to urge the Panel not to take the view that the Tribunal's role should be limited in this way.

We have acted for parties involved in every challenge to an ACCC merger clearance decision in the last five years. This has included proceedings in the Federal Court and Full Federal Court in *Metcash* resisting the ACCC's application for an injunction to prevent the acquisition by Metcash of the Franklins business. Most recently, we acted for AGL Energy Limited in the Tribunal proceedings regarding merger authorisation of AGL's acquisition of Macquarie Generation. As a result, we are well familiar with complex merger clearance matters handled through the ACCC's informal clearance process, as well as with associated proceedings in the Tribunal and Federal Court. Based on that experience, we make the following observations.

- When an ACCC merger clearance decision is subject to challenge or review, it is appropriate that submissions and assertions made to and relied on by the ACCC should be substantiated, and should be able to be tested, under oath or on affirmation. In complex merger cases, the decision maker's ability to receive detailed factual evidence on the relevant markets, to hear evidence in person from industry and expert witnesses, and to test that evidence through questioning and cross-examination, is essential to achieving rigorous and evidenced based decisions. This has been true in all cases in which the substance of the ACCC's merger analysis has been considered by the Tribunal or the Federal Court. It was certainly true in AGL's recent Tribunal proceedings. In those proceedings, the Tribunal concluded, contrary to the view taken by the ACCC, that AGL's acquisition of Macquarie Generation would "have no adverse impact upon competition in the wholesale market for electricity ... and little or no adverse effect on competition in the retail market."¹ In coming to this conclusion, the Tribunal made factual findings that were contrary to the evidence of two of the three key

¹ *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (25 June 2014) at [374].

ACCC witnesses in the proceedings, and contrary to information on which the ACCC had relied in opposing AGL's application for informal clearance. In relation to two of those witnesses, key matters on which the Tribunal formed a contrary view were revealed during cross-examination, not through those witnesses' written evidence. In complex merger cases, it is simply not possible to determine contested factual matters without a forum in which witnesses' evidence can be tested and evaluated in person. To require the Tribunal to limit its review to the material before the ACCC would remove the substantial benefit that comes from cross-examination of witnesses, and from the application of the Tribunal members' legal, economic and commercial expertise in questioning witnesses. Limiting the Tribunal's function in this way would inevitably jeopardise the quality of merger clearance/authorisation outcomes.

- If the Tribunal's review was limited to the materials before the ACCC, there is a very real risk that the Tribunal's review would occur based on information and analysis to which the merger parties had not previously had access, and on which they had not had a meaningful opportunity to be heard. This risk arises where, as is usually the case, industry participants provide information to the ACCC on a confidential basis, such that the ACCC does not disclose the detail of that information to the merger parties. This occurs routinely during the informal merger clearance process; similarly, it was only during AGL's Tribunal proceedings that AGL was able to know in any detail some of the market information on which the ACCC had relied in opposing AGL's application for informal clearance. Limiting the Tribunal's review in this way would substantially undermine the fairness and quality of the Tribunal's decision making. At the very least, any revised formal merger process should require the ACCC to make available to the merger parties, in advance, all material based on which it intends to make its decision, regardless of the scope of the Tribunal's subsequent review function.
- Some participants in the Panel's review have suggested that it is desirable to limit the Tribunal to considering the materials before the ACCC in order to balance the need for a review function with the imperatives of tight commercial timelines in merger cases. We strongly disagree with this view. AGL's Tribunal proceedings demonstrated that the Tribunal is well equipped to conduct a rigorous and timely merger analysis and authorisation process without being limited to considering only the materials which were before the ACCC. Under the Panel's proposal, the Tribunal, the ACCC and the merger parties would in fact be better placed than they were in AGL's proceedings, since the ACCC would have considered both the competition and public benefits analysis before the case reached the Tribunal (whereas in AGL's proceedings, the ACCC's informal clearance process appropriately did not consider public benefits related to the acquisition). Limiting the scope of the Tribunal's review is simply not necessary in order to achieve merger decisions within commercial timeframes.

We strongly encourage the Panel:

- not to adopt or endorse the view that the Tribunal's review of ACCC merger decisions should be based on the materials which were before the ACCC; and
- to recognise that the Tribunal's ability to hear evidence from witnesses in person (including as tested through cross-examination), and to question those witnesses itself, is essential to enabling it to make rigorous, evidence based decisions in complex cases.

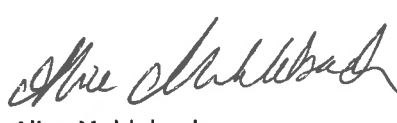
Yours sincerely


Peter Armitage
Partner


for Liza Carver
Partner


for Bill Reid
Partner


Ross Zurrini
Partner


Alice Muhlebach
Partner