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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

### **Working Party No. 3 on Co-operation and Enforcement**

#### **PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL**

-- Note by Australia --

**14-15 June 2016**

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*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm](http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm)*

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## AUSTRALIA

### Introduction

1. In Australia there are certain circumstances in which public interest factors may be considered in merger control under the competition law and/or under the foreign investment and banking laws. The nature and consideration of these factors varies according to the law administered by each decision making body.
2. There are three decision making bodies that may review a merger in Australia: the Australian Competition and Consumer Commission (**ACCC**), the Australian Competition Tribunal (**Tribunal**) and, in limited circumstances, the Treasurer. Public interest considerations are only applicable to the tests determined by the Tribunal and the Treasurer.
3. Each of these bodies has a separate and independent role. The ACCC and the Tribunal are both first instance decision making bodies responsible for undertaking competition assessments but with different tests to be applied.
4. The test applied by the ACCC is whether a merger is likely to substantially lessen competition in breach of section 50 of the *Competition & Consumer Act 2010*. This is effectively a consumer welfare standard model and does not take into account any public interest considerations. While there are no mandatory pre-merger notification requirements,<sup>1</sup> parties may apply to the ACCC for clearance which is either: non-statutory (that is, the ACCC provides its ‘informal’ view<sup>2</sup>) or statutory (which if granted, provides ‘formal’ clearance and therefore legal immunity for the transaction).
5. Either as an alternative, or in addition, parties may elect to apply for authorisation from the Tribunal which, if granted, provides statutory protection for a merger. As the merger authorisation process is independent of the ACCC informal and formal review processes and is subject to a different statutory test, parties may also apply for merger authorisation after the ACCC has opposed a merger either informally or formally.
6. The Tribunal considers whether a merger would lead to such a benefit to the public that it should be allowed to occur. The Tribunal’s approach has been to apply a modified total welfare standard that balances the likely benefits to consumers, shareholders and producers and the detriments of a merger. While the Tribunal may consider anything of value to the community as a benefit, in most cases the Tribunal has focused on economic considerations.

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<sup>1</sup> The ACCC has published thresholds at which it encourages parties to seek ACCC clearance. These thresholds are where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

<sup>2</sup> There is no legislation underpinning the informal process, rather it has developed over time to provide an avenue for merger parties to seek the ACCC’s informal view on whether a merger proposal is likely to substantially lessen competition. In contrast the formal merger process is underpinned by legislation and confers statutory protection to the person to whom clearance is granted, both from the ACCC and from third parties.

7. Notwithstanding the different avenues of merger review, almost all merger parties choose to apply to the ACCC for informal clearance. In the 2014-2015 financial year, the ACCC considered 322 mergers on this basis. In contrast, since 2007 when the formal merger process and the direct to Tribunal process for merger authorisations were introduced, there have been no applications for formal merger clearance and three applications for merger authorisation.

8. Separately, in the case of acquisitions by foreign entities that exceed certain thresholds and necessitate approval, the Treasurer has the ability to make orders prohibiting a merger if it is considered to be contrary to the national interest. In this context 'national interest' is a general consideration which can include both economic and non-economic factors. For example the national interest factors include national security, competition, the impact on the economy and the community and taxes and other government policies.

9. The Treasurer's consent is also required for any merger involving a deposit taking institution (bank). In making a decision, the Treasurer must also take into account the national interest. The powers of the Treasurer operate independently of the merger review processes conducted by the ACCC and the Tribunal.

**1. Public interest is not considered by the ACCC under the substantial lessening of competition test**

10. As noted above, under the informal and formal merger clearance processes the ACCC considers whether a proposed merger or acquisition is likely to substantially lessen competition.<sup>3</sup> Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable or there is an increased risk of coordinated conduct so that prices are likely to be higher, quality or service lower and/or innovation weakened.

11. This approach is effectively a consumer welfare standard meaning that efficiencies that accrue mainly to producers are not taken into account. However, the ACCC does consider efficiencies to the extent they change the competitive constraints and the efficiency of markets (rather than the efficiency of individual firms).

12. Australian merger law requires a non-exhaustive list of factors to be taken into account when assessing whether a merger would be likely to substantially lessen competition. These are the actual and potential level of imports, the height of barriers to entry, the level of concentration in a market, the degree of countervailing power in a market, the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins, the extent to which substitutes are available, the dynamic characteristics of the market, whether the acquisition removes a vigorous and effective competitor from the market and the nature and extent of vertical integration in the market.

13. The ACCC also recognises that other factors such as government regulation may be relevant in so far as they affect competition and competitive constraints. However the ACCC does not consider public interest factors other than consumer welfare, economic efficiency or effects on the competitive process as part of its assessment.

14. While Australia does not have a failing firm defence, it will take into consideration circumstances where one of the merger parties claims they are likely to exit the market in the near

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<sup>3</sup> If the ACCC reaches a view that an acquisition is likely to have the effect of substantially lessening competition, the parties may decide to abandon the merger, offer a remedy to resolve the ACCC's competition concerns, or take steps to complete the merger despite ACCC opposition. In the latter case, the ACCC can apply to the Federal Court for orders which may include an injunction to stop the merger, divestiture or penalties.

future. In these cases the ACCC does not consider any non-competition considerations in reaching a decision. Rather the ACCC compares the likely future state of competition with and without merger, taking into account the likely exit of one of the firms or its assets from the industry.

## **2. Public interest is considered by the Tribunal in applications for merger authorisation**

15. As noted earlier, in Australia it is possible for merger parties to apply to have a merger 'authorised' on public benefit grounds. If granted, this provides statutory immunity for the transaction.

16. Up until 2007 merger parties applied to the ACCC for authorisation, with merits review available on application the Tribunal. Following reforms introduced in 2007, merger authorisation applications must now be made directly to the Tribunal.<sup>4</sup> There is no merits review of a Tribunal decision available for merger authorisation.

17. Merger authorisations are relatively few. For the ten year period prior to 2007, when merger authorisation was undertaken by the ACCC, there were nine applications for merger authorisation decided by the ACCC. Since the regime was amended in 2007, three applications for merger authorisation have been made to the Tribunal.

18. In deciding whether to grant authorisation the Tribunal must be satisfied that the proposed merger is likely to result in such a benefit to the public that the merger should be allowed to occur. In practice, this means the Tribunal weighs the benefits and detriments likely to result from a proposed merger.

19. In assessing benefits, the Tribunal examines the benefits to the public said to be generated from the merger. It does so by considering the benefits which flow not only to consumers but also to the merger parties and their shareholders (a 'modified' total welfare approach). This approach is described as 'modified' because the weight that is given to benefits achieved by producers may be adjusted by the Tribunal depending on whether and to what extent it considers that any cost savings or other benefits are likely to be passed through to consumers.

20. The Tribunal has interpreted 'public benefit' broadly. It has held that anything of value to the community generally or any contribution to the aims pursued by society including the achievement of the economic goals of efficiency and progress as benefits to the public. Notwithstanding this, in most cases the Tribunal has focused on economic benefits.

21. In addition, the Australian legislation provides that the Tribunal must regard any significant increase in the real value of exports, any significant substitution of domestic products for imported goods or all other matters that relate to the international competitiveness of any Australian industry as a public benefit.

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<sup>4</sup> The ACCC retains a statutory role of assisting the Tribunal in relation to merger authorisation applications. This role includes preparing a report for the Tribunal in relation to any matters specified by the presiding member of the Tribunal, and in relation to any matter the ACCC considers relevant to the application. The ACCC also assists the Tribunal by calling witnesses, reporting on statements of fact, examining or cross examining witnesses and making submissions to the Tribunal on issues relevant to the application. The Tribunal may also require the ACCC to give such information, reports or other assistance as the Tribunal specifies.

**Murray Goulburn application to the Tribunal for merger authorisation to acquire Warrnambool Cheese and Butter (WCB)**

Murray Goulburn (a dairy cooperative located in south east Australia that processes and manufactures drinking milk and other dairy products) filed an application for merger authorisation to acquire WCB (a publicly listed, Australian based, dairy processor) in November 2013.

In its application, Murray Goulburn claimed that the proposed acquisition was likely to result in a significant increase in the real value of exports, and that it would significantly increase Murray Goulburn's scale so that it would be more competitive against international companies. In its supporting evidence Murray Goulburn claimed there were parallels between the proposed acquisition and the creation of Fonterra in New Zealand which occurred through the enactment of legislation which permitted the merger of the two largest co-operatives, together with the New Zealand Dairy Board to create a company that controlled almost all of New Zealand's dairy exports.

It also claimed that the proposed acquisition was likely result in cost savings and efficiencies that were likely to be passed through to farmers because of its cooperative structure.

Before the Tribunal had heard the application, control of WCB was acquired by a foreign rival bidder entering Australia, leading Murray Goulburn to withdraw its application. As a result the Tribunal did not consider whether Murray Goulburn's claims resulted in public benefits.

22. The Tribunal is required to weigh these benefits against any public detriment. Public detriments have been held to encompass any impairment to the community generally, including any harm or damage to the aims pursued by society. In many cases, the detriment likely to result from mergers or acquisitions will be constituted by a lessening of competition. However the Tribunal may also consider non-competition detriments (which may be economic or non-economic).

**AGL's application for Merger Authorisation to acquire Macquarie Generation**

In 2014, AGL Energy (a publicly listed Australian energy company) applied to the Tribunal for authorisation to acquire the assets of Macquarie Generation (a State-owned electricity generator). AGL's application for authorisation followed an announcement by the ACCC that it would oppose the acquisition on the basis that it was likely to substantially lessening competition.

The Tribunal granted authorisation to AGL subject to conditions.<sup>5</sup> The Tribunal was satisfied that the acquisition was likely to result in significant benefits to the public from the payment of \$1 billion to the State of NSW (which was proposed to be used by the State of NSW to finance new infrastructure projects) and by relieving the State of having to continue to operate the assets and, in the medium term future, of having to endeavour to sell the assets later to an entity other than AGL at a likely lower price.

The Tribunal considered that it was apparent the State of NSW had developed a policy that the State considered to be in the interests of the NSW public. The Tribunal stated that in those circumstances, it accepted the addition of \$1 billion to the infrastructure fund would lead to its application to infrastructure development which would be a significant benefit to the public.

In doing so, the Tribunal rejected the submissions from the ACCC that the contribution of the sale proceeds to the infrastructure fund did not represent a substantial public benefit. The ACCC contended that:

- the extent of any benefit was limited to the difference in the proceeds of sale and the value of retaining ownership of Macquarie Generation or selling the assets to another purchaser; and
- the purchase price represented a wealth transfer from AGL shareholders to the State of NSW and therefore had no impact on total welfare.

Separately, the Tribunal accepted that AGL's plans for maintenance expenditure were likely to result in a more reliable, long-term, baseload electricity supply and that this was a significant public benefit.

The Tribunal found that the benefits to the public were clear and substantial and outweighed any competitive detriments which it found were immaterial (the Tribunal did not consider that the acquisition was likely to result in a substantial lessening of competition). In undertaking its assessment it only examined competitive detriment as no other category of detriment was raised.

<sup>5</sup> The conditions were offered by AGL and require it to make a certain volume of NSW hedge contracts available to independent electricity retailers.

### 3. Public interest in relation to foreign acquisitions

23. Australia's foreign investment legislation requires parties to seek the Treasurer's<sup>6</sup> approval for certain "foreign" investment proposals.<sup>7</sup> The Treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to Australia's national interest<sup>8</sup>.

24. In deciding whether a foreign investment proposal is in the national interest, the government typically considers a number of factors, including:

- National security – the Government considers the extent to which investments affect Australia's ability to protect its strategic and security interests.
- Competition – the Government favours diversity of ownership within Australian industries and sectors to promote healthy competition. The Government considers whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia. The ACCC's examination of competition issues is independent of Australia's foreign investment framework. However, where competition considerations are relevant to a particular proposal, the ACCC will be consulted.
- Other Australian Government policies (including tax) – the Government considers the impact of a foreign investment proposal on Australian tax revenue. Investments must also be consistent with the Government's objectives in relation to matters such as environmental impact and agriculture.
- Impact on the economy and the community – the Government will consider the impact of any plans to restructure an Australian enterprise following an acquisition. It also considers the nature of the funding of the acquisition and the level of Australian participation in the enterprise after the foreign investment occurs, as well as the interests of employees, creditors and other stakeholders.
- Character of the investor – the Government considers the extent to which the investor operates on a transparent commercial basis and is subject to adequate transparent regulation and supervision.

25. The Treasurer may block a foreign investment proposal even if it does not raise competition issues.

#### **Archer-Daniels-Midland proposed acquisition of GrainCorp Ltd**

In May 2013 Archer-Daniels-Midland Co. (a US company with subsidiaries operating in Australia) proposed to acquire GrainCorp Ltd (an Australian grain exporter).

In June 2013 the ACCC announced that it would not oppose the proposed acquisition as it was unlikely to substantially lessen competition. This was because the ACCC considered the merged entity would continue to face competition from a number of sources and what market power it had through its wheat ports, many of which are local monopolies, was a 'bare transfer' of market power.

In November 2013 the Treasurer announced he would prohibit the proposed acquisition under the Foreign Acquisitions and Takeovers Act 1975. In doing so the Treasurer noted, inter alia, that the Australian grains industry had been transitioning through a significant deregulation process since the abolition of the wheat exports single desk in 2008. However he considered given the transition towards more robust competition continued and a more competitive network was still emerging it was not the right time for a 100 per cent foreign acquisition of a key Australian business.

<sup>6</sup> All references to the 'Treasurer' refer to the Treasurer of Australia, a minister in the Government of Australia.

<sup>7</sup> For example foreign persons must get approval before acquiring a substantial interest (at least 20 per cent) in an Australian entity that is valued above \$252 million.

<sup>8</sup> Part 3, *Foreign Acquisitions and Takeovers Act 1975* (Cth).

#### 4. Public interest considerations in relation to acquisitions in the financial sector

26. In Australia, an authorised deposit taking institution (such as a bank) must seek the Treasurer's consent before entering into an arrangement for any sale or disposal of its business. In making a decision whether to consent, the Treasurer must also take the national interest into account<sup>9</sup>. Since 1997 Australian governments have maintained the position that any merger between the largest four banks in Australia would be considered contrary to the national interest and would not be approved under the national interest test.

27. Additionally, under very specific circumstances, bank or insurance acquisitions may be exempted from competition scrutiny so that Australia's prudential regulator can respond to distress in the financial sector for example by transferring the business or assets of a distressed institution<sup>10</sup>.

#### 5. Proposed changes to merger review processes

28. Australia has recently completed a comprehensive independent review of Australian competition law and policy. The Competition Policy Review (**Harper Review**) concluded in 2015. While it recommended that the current substantive test – substantial lessening of competition – for mergers be retained along with the ACCC's informal merger review process, the Harper Review recommended some changes to Australia's formal merger clearance and authorisation processes.

29. In particular, it found that the formal merger clearance process needed reform to remove unnecessary restrictions and requirements that may have acted as a deterrent to its use and that merger authorisation applications should not be taken directly to the Tribunal, bypassing the ACCC.

30. The Harper Review recommended that the ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.

31. This would replace the current separate ACCC formal clearance process and the Tribunal authorisation process and make the ACCC the first instance decision maker for the combined test. Merger parties would be able to apply to the Tribunal for merits review of an ACCC authorisation decision.

32. No substantive changes were proposed in the Harper Review to the informal clearance process.

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<sup>9</sup> Section 63, *Banking Act 1959* (Cth).

<sup>10</sup> Sections 16AA and 16AU, *Banking Act 1959* (Cth); sections 62ZN and 62ZZV, *Insurance Act 1973* (Cth); section 179A, *Life Insurance Act 1995* (Cth); section 43, *Financial Sector (Business Transfer and Group Restructure Act) 1999* (Cth).