



13 August 2009

Mr Greg Lake
Principal Researcher
Senate Economics Committee
Department of the Senate
Parliament House
Canberra ACT 2601

By email greg.lake@aph.gov.au

Dear Mr Lake

Inquiry into aspects of Bank Mergers – Transparency in the ACCC’s merger reviews

This supplementary submission provides the Committee with the further information requested at the hearing of 10 August 2009. CHOICE believes that the ACCC should be required to publish written submission in an effort to increase the transparency of merger review processes.

Publication of submissions will assist in the quality of decision making as those submissions will be capable of being subject to public scrutiny and comment. Publication of submissions and the potential for scrutiny also has the potential to increase public confidence in the ACCC’s consideration of mergers.

While the current ACCC Merger Guidelines are silent on the publication of written submissions - and therefore do not address how confidentiality requests would be addressed should it publish submissions – there are a number of other ACCC processes which do adequately address this issue.

The ACCC already deals with legal requirements to provide transparency while reasonably addressing concerns about confidentiality in relation to price inquiries and price notifications.

In the context of undertaking s95(H) Price inquiries, the ACCC is required to publish written submissions and is provided with guidance as to how to deal with confidentiality requests. Specifically, the ACCC must adhere to the following provisions of the *Trade Practices Act 1974*;

- s95R (5) The inquiry body may require or permit a person desiring to make a submission to the body to make the submission in writing.
- s95R (6) If a submission is so made in an inquiry held in public, the inquiry body must make available to the public in such manner as it thinks fit the contents of the submission.

Guidance is also provided to the ACCC with regard to addressing confidentiality concerns around information to be included in a register of price notifications, specifically;

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- s95ZC (4) A person who gives the Commission a document in relation to a locality notice, or who makes an oral submission to the Commission in relation to such a notice, may ask it to exclude from a document to be placed in the register any information:
- (a) that was in the document given by the person or in the submission made by the person; and
 - (b) that the person claims is confidential.
- s95ZC (5) The Commission may exclude the information if it is satisfied that the claim is justified and is not of the opinion that disclosure of the information is necessary in the public interest

In undertaking the Grocery Prices Inquiry, the ACCC was very clear about how it would deal with submissions it received. In its *Issues Paper* of 11 February 2008, the ACCC included the following explanation of how it would address confidential submissions:

“Interested parties are invited to make submissions to the ACCC in relation to the issues raised in this paper, or any other issues that they consider relevant to the inquiry.

Submissions should be made to the ACCC by no later than 5:00pm, 11 March 2008.

As this is a public inquiry, the ACCC prefers that all written submissions be publicly available to foster an informed, robust and consultative process. Accordingly, submissions will be considered to be public and posted on the ACCC’s website.

In making a submission to this inquiry, please title your document, “Public Submission to ACCC Grocery Inquiry by [INSERT NAME] on [INSERT DATE].”

Any information which parties would like to request the ACCC to exclude from the website should be provided in a separate document and clearly marked 'confidential' on every page. Reasons must be provided in support of the request for confidentiality.

The document containing confidential information should have a title such as “Confidential Annexure to Submission by [INSERT NAME] on [INSERT DATE].”

The ACCC will only accept a claim of confidentiality if the information is truly confidential in nature. Grounds on which confidentiality could be claimed include that the information disclosed is a trade secret or other non-public information such as the costs of manufacturing, producing or marketing goods or the consideration paid for an asset. The ACCC will not accede to a request for confidentiality if it would not be in the public interest to do so. If the ACCC considers the information should be disclosed (either because it is not confidential or because it would not be in the public interest to receive the information without public disclosure) the ACCC will provide the parties with an opportunity to withdraw the submission (or part of the submission) containing the information. If the submission (or part of the submission) is withdrawn then the ACCC will not take it into account. If a party elects not to withdraw the submission (or part of the submission) then the ACCC may disclose the information publicly.”

We trust this information will be of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Elissa Freeman', written over a light blue horizontal line.

Elissa Freeman
Senior policy officer