



National Australia Bank Ltd and Australian Competition and Consumer Commission [2013] AICmr 84 (11 December 2013)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant: National Australia Bank Ltd

Respondent: Australian Competition and Consumer Commission

Other parties: AXA Asia Pacific Holdings Ltd
Anonymous

Decision date: 11 December 2013

Application number: MR11/00142

Catchwords: Freedom of information — Whether giving access would disclose information that would reasonably be regarded as irrelevant to the request — Whether documents subject to legal professional privilege — Whether material obtained in confidence — Whether documents contain commercially valuable information — Whether documents contain deliberative matter — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency — Whether disclosure of personal information unreasonable — Whether disclosure would unreasonably affect organisation’s business affairs — Whether contrary to public interest to release conditionally exempt documents — (CTH) *Freedom of Information Act 1982* ss 22, 42, 45, 47, 47C, 47E, 47F and 47G

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Summary

1. I set aside the access refusal decision of the Australian Competition and Consumer Commission (the **ACCC**) of 4 April 2011 and substitute my decision, under ss 11A(5) and 22 of the *Freedom of Information Act 1982* (the **FOI Act**), refusing access to some of the documents sought and granting access to others, some modified by deletions.

Background

2. The ACCC is responsible for administering the *Competition and Consumer Act 2010 (CCA)*. Section 50 of the CCA prohibits acquisitions that substantially lessen competition in a market, or are likely to do so. If the ACCC grants a 'merger clearance' under s 95AC of the CCA, s 50 does not apply to prevent the acquisition.¹ The ACCC offers an 'informal merger review process' which 'provides the merger parties with the ACCC's informal view on whether a merger proposal is likely to breach s 50'.²
3. In December 2009, AMP Ltd (**AMP**) applied to the ACCC for an informal view on AMP's proposed acquisition of the Australian and New Zealand businesses of AXA Asia Pacific Holdings Limited (**AXA APH**). In January 2010, National Australia Bank Ltd (the **NAB**) applied to the ACCC for an informal view on the NAB's proposed acquisition of the same businesses of AXA APH.
4. On 19 April 2010, the ACCC decided to oppose the NAB's proposed acquisition of AXA APH, and decided not to oppose AMP's proposed acquisition. That is, the ACCC issued an informal view that the NAB's proposed acquisition would be in breach of s 50 of the CCA, but that AMP's would not.³
5. On 24 December 2010, the NAB applied to the ACCC, under the FOI Act, for access to the following documents:
 - written submissions received by the ACCC from third parties regarding the NAB proposed acquisition, the North platform,⁴ the AXA APH proposed undertaking, or the NAB proposed undertaking;⁵
 - transcripts of examinations conducted by the ACCC pursuant to its statutory powers under s 155(1)(c) of the TPA⁶ or otherwise, regarding the AMP proposed acquisition, the NAB proposed acquisition, the North platform, the AXA APH proposed undertaking, or the NAB proposed undertaking; and
 - minutes (draft and final) of, and documents tabled at or provided in advance of, any meetings of the members, or meetings of the Merger Review Committee at which it was decided to reject or recommend the rejection of approval to the NAB proposed acquisition, the AXA APH proposed undertaking, or the NAB proposed undertaking.

¹ Under s 95AT of the CCA, the Australian Competition Tribunal may grant a 'merger authorisation' which has the same effect.

² See www.accc.gov.au/business/mergers/merger-reviews.

³ See www.accc.gov.au/media-release/accc-to-oppose-nab-bid-for-axa-and-to-clear-amp-bid.

⁴ The North platform is an online service used by financial advisers and planners to connect their clients to various financial products.

⁵ AXA APH and NAB proposed to address the ACCC's concerns about NAB's proposed acquisition by offering undertakings, including for the divestment of the North platform.

⁶ The *Trade Practices Act 1974*, which was replaced from 1 January 2011 by the CCA.

6. The NAB sought documents for the period 3 December 2009 to 9 September 2010, inclusive, and did not seek access to duplicates of documents, attachments to written submissions or transcripts of oral submissions.
7. On 13 January 2011, the ACCC notified the NAB under s 24AB(2) of the FOI Act of the ACCC's intention to refuse to grant access to the documents. The ACCC said that the work involved in processing the request would substantially and unreasonably divert its resources from its other operations.
8. On 3 February 2011, the NAB revised the scope of its request to the following documents brought into existence or acquired in the period from 3 December 2009 to 9 September 2010, inclusive:
 - final transcripts of examinations conducted by the ACCC pursuant to its statutory powers under s 155(1)(c) of the TPA or otherwise, regarding the AMP proposed acquisition, the NAB proposed acquisition, the North platform, the AXA APH proposed undertaking, or the NAB proposed undertaking; and
 - minutes (draft and final) of, and documents tabled at or provided in advance of, any meetings of the members, or meetings of the Merger Review Committee at which it was decided to reject or recommend the rejection of approval to the NAB proposed acquisition, the AXA APH proposed undertaking, or the NAB proposed undertaking.
9. The NAB also clarified that it was not seeking access to duplicates of documents, or to parts of documents that identify (or reasonably enable a person to identify) a third party. The NAB later clarified that it also was not seeking access to documents already in its possession, except where those documents contained annotations.
10. On 4 April 2011, the ACCC advised that it had identified 18 documents within the scope of the NAB's revised request:
 - full access was granted to two documents
 - access was refused in full to seven documents (two of these on the basis that the ACCC had already provided them to the NAB outside the FOI Act—those two documents are not the subject of this IC review), and
 - access was granted to part of nine documents, with material edited on the basis that it was irrelevant (s 22 of the FOI Act) or exempt under s 42 (legal professional privilege), s 45 (material obtained in confidence), s 47(1)(b) (commercially valuable information), s 47C (deliberative processes), s 47E (certain operations of agencies) or s 47G (business).
11. On 3 June 2011, the NAB sought IC review of this decision under s 54L of the FOI Act.

Decision under review

12. The decision under review is the decision of the Department on 4 April 2011 to refuse the NAB full access to 14 of the 18 documents identified, namely:
- documents 1, 2 and 7: transcripts of interview
 - documents 5 and 6: emails regarding AXA APH matters
 - documents 8, 12 and 13: other emails
 - documents 9, 10 and 16: records of Commission meetings
 - documents 11 and 18: staff papers
 - document 14: email regarding legal strategy meeting

Transcripts of interview (documents 1, 2 and 7)

13. Section 155 of the CCA gives the ACCC the power, in certain circumstances, to require that a person provide information, produce documents or attend to give evidence.
14. Documents 1, 2 and 7 are transcripts of interviews—examinations under s 155(1)(c)—of three third parties. The interviews were undertaken by the ACCC as part of its investigation into the merger and acquisition applications of the NAB and AMP.
15. Section 155AAA of the CCA provides that the ACCC must not disclose ‘protected information’ to any person, except when required or permitted by the CCA or any other law of the Commonwealth. ‘Protected information’ is defined in s 155AAA(21) to include information that was obtained under s 155.
16. The ACCC exempted the transcripts in full, applying the material obtained in confidence exemption (s 45) and the business exemption (s 47G).

Material obtained in confidence exemption (s 45)

17. Section 45(1) of the FOI Act relevantly provides that ‘[a] document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for a breach of confidence’.
18. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that the exemption under s 45 of the FOI Act is available where the person who provided the confidential information would be able to bring an action under

the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from the disclosure.⁷

19. The Guidelines explain that, to found an action for breach of confidence—for s 45 to apply—the following five criteria must be satisfied:
 - the information must be specifically identified
 - it must have the necessary quality of confidentiality
 - it must have been communicated and received on the basis of a mutual understanding of confidence
 - it must have been disclosed or threatened to be disclosed, without authority, and
 - unauthorised disclosure of the information has or will cause detriment.⁸
20. In its decision, the ACCC said that the documents were exempt under s 45 of the FOI Act because the information in those documents was obtained on a confidential basis, and there was an agreed relationship of mutual confidence between the ACCC and the interviewees. In submissions to the OAIC, the ACCC said:

A vital part of the ACCC's informal merger review process is its market inquiry process. This process relies on merger parties and third parties providing information and views, on a confidential basis, relating to particular transactions under review. Merger parties provide detailed information to the ACCC when seeking informal clearance. Third parties, including competitors, customers and suppliers, act as a sounding board to test the views and information provided by merger parties to the ACCC.
21. I have examined documents 1, 2 and 7. All five criteria, for s 45 to apply, are satisfied.
22. The Guidelines explain that, for information to have the quality of confidentiality, it must be secret or only known to a limited group; information that is common knowledge or in the public domain will not have the quality of confidentiality.⁹ The information in the three documents may be known to officers of the ACCC or a limited number of other people, and it may be public knowledge that the ACCC undertakes interviews with third parties for the purposes of undertaking an assessment of an application for informal merger clearance. However, the nature of the information discussed by the third parties and the ACCC, and the identity of the third parties is not common or public knowledge. Documents 1, 2 and 7 have the necessary quality of confidentiality.

⁷ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (2010)* [5.139].

⁸ *Guidelines* [5.143].

⁹ *Guidelines* [5.146].

23. I am satisfied that, even though the third parties were required to attend and give evidence under s 155, the protected and commercially sensitive nature of the information meant that the evidence they provided was given on the understanding that it would be treated confidentially. I am also satisfied, after examining the transcripts of interview, that the ACCC received the information on an understanding of confidentiality. The third parties who are the interviewees in the documents 1, 2 and 7 participated in the ACCC's investigation on the basis of a mutual understanding of confidence regarding the information they provided and their identity.
24. The third party interviewees have not consented to the disclosure of the information they provided in confidence to the ACCC for the purposes of its investigation.
25. The disclosure of the documents is reasonably likely to cause detriment to the third parties who provided the information. The documents provide detailed information including the pricing of company products and company strategic business plans which may not otherwise be known by their competitors and other market participants. Disclosure of the information has the potential to cause detriment to those third parties by having an adverse impact on their commercial affairs including their ability to be competitive in relevant markets.

Findings

26. Documents 1, 2 and 7 are exempt in full under s 45. It is not necessary for me to consider the application of s 47G.

Emails regarding AXA APH matters (documents 5 and 6)

27. Documents 5 and 6 are email correspondence between ACCC officers about the market definition for the supply of retail investment platforms in relation to the merger and acquisition applications. Parts of document 5 are duplicated in document 6.
28. The ACCC edited parts of the documents under the material obtained in confidence exemption (s 45), the commercially valuable information exemption (s 47), the deliberative processes exemption (s 47C), the certain operations of agencies exemption (s 47E) and the business exemption (s 47G).

Material obtained in confidence exemption (s 45)

29. The information that the ACCC redacted from documents 5 and 6 identifies third parties interviewed by the ACCC as part of its investigation into the merger and acquisition applications of the NAB and AMP, and some of the information that those third parties provided to the ACCC. It is not clear from the documents whether that information was provided voluntarily or under a

s 155(1)(c) notice. Nonetheless, for the same reasons as given above,¹⁰ I am satisfied that the identities of the parties interviewed, and the evidence they provided for the purposes of the ACCC's investigation, is exempt under s 45.

30. Documents 5 and 6 are exempt under s 45. It is not necessary for me to consider the application of the conditional exemptions that the ACCC applied to those parts of the documents that are also exempt under s 45.

Deliberative processes exemption (s 47C)

31. Section 47C(1) of the FOI Act provides:

47C Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
- (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.

32. The ACCC applied s 47C to part of document 6. In its reasons for decision, the ACCC said that the information contained its consideration and analysis of the proposed acquisitions and undertakings of the NAB and AMP, including discussions about available options, recommendations, opinions and noting areas for further comment, investigation or discussion.
33. I agree with the ACCC: the information in document 6 that the ACCC conditionally exempted under s 47C is deliberative matter. It comprises opinions, areas for further discussion, options and recommendations of ACCC staff in relation to the proposed merger. This information is conditionally exempt under s 47C.

Certain operations of agencies exemption (s 47E)

34. Section 47E of the FOI Act relevantly provides that '[a] document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to ... (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'.

¹⁰ See [17]–[25] above.

35. In its reasons for decision and submissions to the OAIC, the ACCC said that, when undertaking informal merger investigations and clearance, it relies on third party market participants to provide information voluntarily about market structure, performance and conduct. The information provided by third parties is often commercially sensitive and confidential.
36. Whilst it does have the power under s 155 to compulsorily obtain information, the ACCC said—and I accept—that it is more time- and cost-efficient to obtain this information voluntarily. If the ACCC were to disclose information obtained cooperatively, it is likely that market participants would be reluctant to provide this type of information voluntarily in the future.
37. The ACCC said that if third parties were reluctant to participate in future investigations, it would have a substantial adverse effect on the ACCC's ability to obtain information upon which it relies in order to perform one of its functions, namely the investigation of proposed mergers and acquisitions.
38. In submissions to the OAIC, the NAB contested the ACCC's claim that disclosure would result in third parties being reluctant to participate in future investigations. The NAB said that many of the third parties who provide information voluntarily to the ACCC are competitors of merger applicants and have a vested interest in the outcome of the investigation. Because of this interest, the NAB argued, disclosure would not deter third parties from continuing to provide the information in ACCC investigations.
39. I am not convinced by this argument: the prospect of the disclosure of a third party's evidence may be enough to deter that third party from giving the ACCC information even when that third party has a vested interest in the outcome of the ACCC's investigation. But, in this case, s 47E(d) does not apply, for another reason.
40. I am only considering here the application of s 47E(d) to the information in documents 5 and 6 to which I have not already found that s 45 or s 47C applies. The remaining information in document 5 (duplicated in document 6) is a reference to an examination under s 155 that the ACCC was scheduled to conduct and an email from an ACCC officer expressing preliminary views regarding the market definition. This is not commercially sensitive information provided by third parties. Its disclosure would not have any effect on the willingness of third parties to provide information to the ACCC. Its disclosure would not have an adverse effect on the proper and efficient conduct of the ACCC's operations.
41. The remaining information in documents 5 and 6 is not conditionally exempt under s 47E(d).

Findings

42. Documents 5 and 6 are exempt under s 45 for the reasons that the ACCC gave, and in relation to the information that the ACCC identified.
43. Document 6 is conditionally exempt under s 47C for the reasons that the ACCC gave, and in relation to the information that the ACCC identified.

Records of Commission meetings (documents 9, 10 and 16)

44. Document 9 is the minutes of an ACCC meeting of 19 April 2010. Document 10 is an ACCC minute about the same meeting. The information that the ACCC redacted from documents 9 and 10 is one paragraph about a correction to an ACCC staff paper. The ACCC exempted this information under ss 45 and 47G.

Material obtained in confidence exemption (s 45)

45. The exempt paragraph contains the name and advice of an external academic expert engaged by the ACCC in relation to a market definition. The expert's advice was provided for the purposes of the ACCC's investigation into the merger and acquisition applications.
46. For the same reasons as given above in relation to the third party evidence,¹¹ I am satisfied that the identity of the expert is confidential. However, I do not consider that the advice of the expert has the necessary quality of confidentiality. The expert is not a market participant. Their advice does not concern the commercial arrangements or commercially sensitive information of any third party. It is academic advice regarding a number of definitions or issues relating to the applications.
47. Documents 9 and 10 are exempt under s 45, but only in relation to the identity of the expert. The remaining information is not exempt under s 45.

Business exemption (s 47G)

48. The ACCC decided that documents 9 and 10 were conditionally exempt on the basis of the business exemption (s 47G) in relation to the same information to which it applied s 45.

¹¹ See [17]–[25] above.

49. Section 47G(1) of the FOI Act provides:

47G Public interest conditional exemptions—business

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
 - (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

50. In its decision, the ACCC said that the conditionally exempt information relates to the business affairs of third parties, including pricing policies, market contracts and shares, projected and anticipated investments, and other financial, business and commercial information obtained from the internal documents of third parties.
51. The ACCC said that the disclosure of the material would undermine competition and might disadvantage those participants by causing them to suffer competitive or commercial detriment.
52. The ACCC also advised that disclosure of the information would prejudice the future supply of information to the ACCC in investigations if the ACCC were unable to provide an assurance of confidentiality to participants. The ACCC said that it relies on the assistance of market participants when investigating applications for mergers or acquisitions, and without this assistance the ACCC would not be aware of the full extent of relevant information and documentation available for the purposes of its investigations.
53. But, as noted above (in relation to s 45), the information redacted from documents 9 and 10 is the advice of an external academic expert engaged by the ACCC. The expert is an economist, and the advice relates to a market definition. To the extent that this information relates to any person's business affairs, it relates only to those of the expert. The disclosure of this information (the expert's opinion) cannot reasonably be expected to unreasonably adversely affect the expert in their professional affairs—especially when, as explained above, the documents are exempt under s 45 in relation to the expert's identity.
54. The disclosure of information in documents 9 and 10 about the views of the expert would not be unreasonable. Those documents are not conditionally exempt under s 47G.

Irrelevant matter (s 22)

55. Under s 22 of the FOI Act an agency can edit from a document 'information that would reasonably be regarded as irrelevant to the request for access' before giving access to an edited copy of the document.
56. Document 16 is the minutes of an ACCC meeting of 8 September 2010. In its reasons for decision, the ACCC explained that it had edited information from document 16 that it considered irrelevant to the NAB's request. It said that that information did not relate to the decision to reject the NAB's proposed acquisition, the AXA APH proposed undertaking or the NAB proposed undertaking.
57. I have examined an unedited copy of document 16. I agree with the ACCC that the material it deleted from that document is irrelevant to the NAB's request. The material relates to other matters being considered by the ACCC unrelated to the NAB's request.

Findings

58. Documents 9 and 10 are exempt under s 45, but only in relation to the identity of the external academic expert.
59. The information that the ACCC deleted from document 16 is irrelevant to the NAB's request.

Staff papers (documents 11 and 18)

60. Documents 11 and 18 are ACCC staff papers about the NAB's and AMP's proposed acquisitions of AXA APH. The staff papers include information about the market enquiries undertaken by the ACCC in relation to the merger and acquisition applications, staff conclusions and recommendations on the applications, and a number of supporting documents considered by staff in reaching their conclusions.
61. The ACCC exempted parts of these documents applying the legal professional privilege exemption (s 42), the material obtained in confidence exemption (s 45), the commercially valuable information exemption (s 47), the deliberative processes exemption (s 47C), the operations of agencies exemption (s 47E) and the business exemption (s 47G).

Legal professional privilege exemption (s 42)

62. Section 42 of the FOI Act relevantly provides:

42 Documents subject to legal professional privilege

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the documents in legal proceedings waives that claim.

63. Legal professional privilege protects confidential communications between a lawyer and a client from compulsory production. The Guidelines explain that, at common law, determining whether a communication is privileged requires a consideration of the following:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.¹²

64. Section 42 may exempt communications between agencies and their legal advisers, including government legal advisers.¹³

65. I have examined documents 11 and 18. Document 11 contains reference to the receipt of legal advice from external counsel, copies of the actual legal advice and summaries of the advice. Document 18 contains reference to the receipt of legal advice from external counsel and a summary that legal advice.

66. The advice was provided by external legal providers to the ACCC at the ACCC's request. There existed a legal adviser-client relationship between the ACCC and the external legal providers and the advice provided to the ACCC was independent.

67. In submissions to the OAIC, the ACCC said that the legal advice was provided for the dominant purpose of advising the ACCC on anticipated litigation in relation to the merger and acquisition applications and that the advice was provided and received on an understanding of confidence. The ACCC also advised that the information has not been communicated outside the ACCC. Given that the advice was requested by the ACCC in the context of its investigation into the applications, I am satisfied that the advice was received in relation to anticipated litigation and that the advice was confidential. In my

¹² *Guidelines* [5.118].

¹³ *Guidelines* [5.121].

view, the ACCC's summary of the advice for inclusion in documents 11 and 18 also attracts privilege.

68. However, references in documents 11 and 18 to the request for, or receipt of, the legal advice does not attract privilege. Those parts of the documents would not be privileged from production in legal proceedings on the ground of legal professional privilege.

Material obtained in confidence exemption (s 45)

69. Documents 11 and 18 contain summaries and extracts of evidence given by individuals as part of the ACCC's investigation of the merger and acquisition applications.
70. For the same reasons as given above,¹⁴ the names of the individuals or third party companies who gave evidence or provided submissions to the ACCC for the purposes of its investigation into the applications, and the content of that evidence or those submissions, is confidential material and is exempt under s 45.
71. The names of the companies involved in the applications were publicly known at the time of the investigation and it is to be expected that they would be invited to make submissions or give evidence to the ACCC for the purposes of that investigation. Therefore, references to AMP and AXA APH providing submissions or giving evidence, where this information does not disclose the content of that evidence or submissions or the identity of the person providing the evidence, is not exempt under s 45.
72. For the reasons given above,¹⁵ the identity of the external academic expert used by the ACCC is exempt under s 45, but the expert's advice is not exempt. It is not necessary for me to consider the application of the conditional exemptions that the ACCC applied to those parts of documents 11 and 18 that are also exempt under s 45.

Documents disclosing commercially valuable information (s 47)

73. Section 47(1) of the FOI Act provides:

47 Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this Act would disclose:
- (a) trade secrets; or
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

¹⁴ See [17]–[25] above.

¹⁵ See [45]–[47] above.

74. The Guidelines explain that:

It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property.¹⁶

75. In its reasons for decision and submissions to the OAIC, the ACCC said that information in documents 11 and 18 has commercial value to third party organisations because it contains details such as the corporate structure, contractual arrangements, current and proposed investments, service arrangements and financial standing of various organisations. The ACCC further submitted that an arm's length buyer would be prepared to pay for that information because it is not otherwise known to market participants and would confer a competitive advantage.

76. I have examined unedited copies of documents 11 and 18. The information that the ACCC redacted under s 47 is not commercially valuable information. As discussed below,¹⁷ much of the information is business information about the applicants or third parties, however I am not satisfied that the threshold in s 47 has been met. The information is not important or essential to the profitability or viability of the third party organisations and does not have a commercial value to the organisations about which it relates.

Deliberative process exemption (s 47C)

77. The ACCC exempted some information in documents 11 and 18 under s 47C of the FOI Act. In its reasons for decision and submissions to this office, the ACCC said that the exempt information is an analysis of the merger and acquisition applications, discussion of available options, and identification of issues for further discussion or investigation.

78. Much of the information redacted by the ACCC is deliberative matter and is conditionally exempt under s 47C. This information includes ACCC staff deliberations and opinions on the applications, draft documents with annotations and discussion of possible options.

79. However, some of the information is not deliberative matter. Documents 11 and 18 contain information such as statements of action to be taken, details of information requested from the applicants and updates on the status of the investigation. This information is not deliberative and is not conditionally exempt under s 47C.

¹⁶ *Guidelines* [5.189].

¹⁷ See [83]–[87] below.

Operations of agencies exemption (s 47E)

80. The ACCC exempted parts of documents 11 and 18 under both ss 45 and 47E. Where I have already found that the information is exempt under s 45, I have not considered it further under s 47E. I have also not considered under s 47E those parts of the documents that are conditionally exempt under s 47C or s 47G.
81. Some of the remaining information in documents 11 and 18 discloses details of the ACCC's investigative processes or analysis undertaken regarding the merger and acquisition applications that might not otherwise be known. I am satisfied that disclosure of this information would, or could reasonably be expected to, adversely affect the ACCC's investigation of applications. The documents are conditionally exempt under s 47E in relation to this information.
82. However, parts of documents 11 and 18 disclose factual information, such as dates of submissions and requests for information, or general information sought from applicants. I do not consider the disclosure of this information could reasonably be expected to substantially adversely affect the ACCC in the manner in which it conducts its investigations or the quality of information received to assist any such investigations. This information is not conditionally exempt under s 47E.

Business exemption (s 47G)

83. As discussed above, in its decision the ACCC said that the conditionally exempt information in documents 11 and 18 relates to the business affairs of third parties, including pricing policies, market contracts and shares, projected and anticipated investments, and other financial, business and commercial information obtained from the internal documents of third parties.
84. The ACCC said that the disclosure of the material would undermine competition and might disadvantage those participants by causing them to suffer competitive or commercial detriment. The ACCC also advised that disclosure of the information would prejudice the future supply of information to the ACCC in investigations if the ACCC were unable to provide an assurance of confidentiality to participants.
85. Documents 11 and 18 contain business information about the parties to the merger and acquisition applications, including information about business capacity, contractual arrangements, business operation and information requested of these businesses by the ACCC.
86. Information such as statements regarding the capacity or viability of the applicants or third parties to the applications, and information about contractual arrangements or business operations, is business information. I am satisfied that the disclosure of this information would, or could reasonably be expected to, unreasonably affect those organisations in respect of their lawful

business, commercial or financial affairs by causing them to suffer competitive or commercial detriment

87. However, the disclosure of other information such as statistics, information that does not identify a particular organisation, dates of correspondence and the identities of AMP and AXA APH where the surrounding information is not exempt or conditionally exempt, cannot reasonably be expected to affect those organisations in respect of their business affairs.

Findings

88. Documents 11 and 18 are exempt under ss 42 and 45 and conditionally exempt under ss 47C, 47E and 47G.

Email regarding legal strategy meeting (document 14)

89. Document 14 is email correspondence between ACCC officers and an external legal provider regarding the ACCC's draft litigation plan in relation to anticipated proceedings arising from the merger and acquisition applications. The ACCC exempted document 14 in full under the legal professional privilege exemption (s 42).

Legal professional privilege exemption (s 42)

90. I have discussed the legal professional privilege exemption at [62]–[64] above. A legal adviser-client relationship existed between the ACCC and the external legal provider, and the advice provided was independent. The document contains the litigation strategy advice of the external legal provider and was confidential communication with the ACCC for the dominant purpose of providing legal advice in relation to the merger and acquisition applications. The advice was also communicated in relation to anticipated legal proceedings arising from the applications.
91. Document 14 attracts legal professional privilege and privilege has not been waived.

Findings

92. Document 14 is exempt under s 42 of the FOI Act.

Other emails (documents 8, 12 and 13)

93. Document 8 is an analysis, known as an HHI analysis, of the NAB's and AMP's applications. Document 12 is an email attaching correspondence between the NAB and other organisations regarding the ACCC's market inquiries. Document 13 is an email containing a PowerPoint presentation from a third party organisation regarding the ACCC's investigation. The ACCC exempted these documents in part under ss 45 and 47G.

94. The information in document 8 is an analysis undertaken by the ACCC to determine the effect of each of the merger and acquisition applications on the market. The ACCC exempted this information under ss 45 and 47G.
95. I am not satisfied that the ACCC's analysis meets the threshold for material obtained in confidence. However, the analysis is part of the ACCC's investigation process and, for the same reasons as given above in relation to the analysis contained in the ACCC staff papers,¹⁸ it is conditionally exempt under s 47E.
96. With the exception of the email cover pages, documents 12 and 13 are exempt in full under s 45. These documents contain copies of submissions made to the ACCC for the purposes of its investigation and, for the same reasons as given above in relation to the third party evidence,¹⁹ I am satisfied that this information was obtained in confidence and is exempt under s 45.
97. The cover page of document 12 contains the names of parties involved in the applications and the dates of their submissions to the ACCC. This information is not exempt under ss 45 or 47G, except for one line which summarises the content of a confidential submission: that line is exempt under s 45.
98. The cover page of document 13 is also not exempt under ss 45 or 47G because it does not contain material obtained in confidence or business information.
99. However, the name and contact details of the representative of the third party organisation who emailed the ACCC are conditionally exempt under s 47F. Section 47F(1) of the FOI Act provides that '[a] document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). The name and contact details of an individual representative of a third party organisation is the personal information of that person. That individual is not related to the matter being investigated by the ACCC, so the disclosure of their personal information would be unreasonable. That information is conditionally exempt under s 47F of the FOI Act.

Findings

100. Document 8 is conditionally exempt under s 47E.
101. Documents 12 and 13 are exempt under s 45.
102. Document 13 is conditionally exempt under s 47F.

¹⁸ See [80]–[82] above.

¹⁹ See [17]–[25] above.

The public interest test (s 11A(5))

103. I have found that five²⁰ of the documents that are the subject of this IC review are conditionally exempt under s 47C, s 47E, s 47F or s 47G of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'. As the Guidelines explain, [t]he pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure'.²¹
104. Of the factors favouring disclosure set out in s 11B(3), one is relevant to this IC review: promoting the objects of the FOI Act. The Guidelines also include a non-exhaustive list of further factors that favour access.²² Several of those factors are relevant to this IC review: disclosure would inform the community of the Government's operations; reveal further reasons for a government decision and background or contextual information that informed that decision; and enhance the scrutiny of government decision making.
105. The Guidelines also include a non-exhaustive list of factors against disclosure.²³ Of those factors, the one relevant to those documents conditionally exempt under s 47C is:
- disclosure would inhibit the effectiveness of the investigation, analysis and decision-making processes of the ACCC.
- In relation to those documents conditionally exempt under s 47E, the relevant factors are:
- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information, and
 - disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future.
- In relation to the document conditionally exempt under s 47F, the relevant factor is:
- disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.
- In relation to those documents conditionally exempt under s 47G, the relevant factor is:
- disclosure could reasonably be expected to harm the business or other interests of the parties involved.

²⁰ Documents 6, 8, 11, 13 and 18.

²¹ *Guidelines* [6.12].

²² *Guidelines* [6.25].

²³ *Guidelines* [6.29].

106. In balancing these factors—for and against disclosure—I give the greatest weight in this IC review:
- in relation to the documents that are conditionally exempt under s 47C—to the factors against disclosure, noting the importance of the ACCC being able to internally debate the merits of each merger and acquisition application
 - in relation to the documents that are conditionally exempt under s 47E—to the factors against disclosure, noting the importance of the ACCC being able to effectively and efficiently undertake investigation and analysis of such applications
 - in relation to the document that is conditionally exempt under s 47F—to the factors against disclosure, and
 - in relation to the documents that are conditionally exempt under s 47G—to the factors against disclosure.

Findings

107. Giving the NAB access to the documents that are the subject of this IC review and are conditionally exempt would, on balance, be contrary to the public interest.

Decision

108. Under s 55K of the FOI Act, I set aside the ACCC's decision of 4 April 2011 and decide, in substitution for that decision, that:
- documents 1, 2, 7 and 14 are exempt
 - documents 5, 6, 8–13 and 18 are exempt, but copies should be provided to the NAB, edited so as not to disclose exempt information, and
 - a copy of document 16 should be provided to the NAB, edited so as not to disclose irrelevant information.

The OAIC has prepared a copy of each document that is to be edited, indicating the material that is exempt or irrelevant in accordance with these reasons for decision. The OAIC has provided those copies to the ACCC together with these reasons for decision. The ACCC should now prepare copies of the documents under s 22, modified by the deletion of the material indicated. Before providing the edited documents to the NAB, the ACCC should allow the OAIC to examine the edited documents to confirm that the exempt and irrelevant material has been deleted.

James Popple
Freedom of Information Commissioner

11 December 2013

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.