

## Form W

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 111 (1)*

### APPLICATION TO THE TRIBUNAL FOR REVIEW OF A MERGER CLEARANCE

PLEASE FOLLOW DIRECTIONS TO THIS FORM

1. I (here insert the name and address of applicant – where the applicant is a corporation, the corporation's name must be inserted here, not the name of an officer of the corporation) hereby apply to the Australian Competition Tribunal pursuant to section 111 of the *Trade Practices Act 1974* for a review of the determination of the Australian Competition and Consumer Commission dated the ..... day of ..... 20..... (Commission file No.....).
2. I am the applicant for the clearance to which the determination relates. The determination was in respect of (here delete whichever is not applicable):
  - (a) an application for clearance under section 95AC; or
  - (b) an application for minor variation of a clearance under section 95AR; or
  - (c) an application for revocation of a clearance under subsection 95AS (1); or
  - (d) an application for revocation of a clearance and a substitution of another clearance under subsection 95AS (1); or
  - (e) the revocation of a clearance under subsection 95AS (5); or
  - (f) the revocation and substitution of a clearance under subsection 95AS (5).
3. I am dissatisfied with the determination of the Commission in the following respects:  
.....  
.....  
.....  
(See Direction 1 of this Form)
4. The determination I am seeking from the Tribunal is as follows:  
.....  
.....  
.....
5. Attachments are as follows (See Directions 2 and 3 of this Form):
  - (a) a copy of the Commission's determination;
  - (b) particulars of the facts upon which I intend to rely in support of the application for review;
  - (c) particulars of the contentions and grounds upon which I intend to rely in support of the application for review;
  - (d) a statement of the issues as I see them;

- (e) a list of any information that was referred to in the Commission's reasons for making the determination which was not information given to the Commission in connection with the making of the determination;
- (f) a signed undertaking to the Commission under section 87B of the Act to not make the acquisition while the application for review of a clearance is being considered by the Tribunal.

*(Attention is directed to the Tribunal's Practice*

*Direction No. [ ] dated [ ])*

6. My address for service of documents is (here insert address in Australia at which documents may be served for the purpose of proceedings):

.....  
.....  
.....

Dated this ..... day of ..... 20.....

Signed by/on behalf of the Applicant

.....

(Signature)

.....

(Full Name)

*Note* If the Applicant is a corporation, state position occupied in the corporation by person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

## **DIRECTIONS**

1. In completing this part, the applicant must include references to particular paragraphs and pages in the determination for which review is sought.
2. If the applicant wishes to rely upon or refer to:
  - (a) information or documents given to the Commission in connection with the making of the determination; or
  - (b) information or documents referred to in the Commission's reasons for making the determination which was not given to the Commission in connection with the making of the determination;

such information and the passages in the documents to which reference is proposed to be made by the applicant must be specifically identified and, if necessary, reference to page and paragraph numbers must be given.

3. If, to the best of the applicant's knowledge, any document that is referred to or relied upon by the applicant in support of this application was not in the possession of the Commission at the time of making the determination for which review is sought, this fact must be stated.

*Trade Practices Act 1974*

**Undertaking to the Australian Competition and Consumer  
Commission given for the purposes of section 87B**

**by**

**[Insert name of company] (ACN [Insert ACN])**

1. This undertaking (the Undertaking) is given to the Australian Competition and Consumer Commission (the Commission) by [company name, company ACN] of [company address] under section 87B of the *Trade Practices Act 1974* (the *Act*).
2. [Company name] has made an application for revocation of an authorisation and substitution of a new authorisation in respect of an application pursuant to section 111 of the Act for review of a merger clearance.
3. [Company name] hereby undertakes that it will not make the acquisition the subject of the application referred to in paragraph 2 while the application is being considered by the Australian Competition Tribunal.
4. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by [company name]; and
  - (b) the Commission accepts the Undertaking so executed.
5. [Company name] acknowledges that the Commission will make this Undertaking available for public inspection.

**EXECUTED BY** [Company name and ACN] pursuant to section 127 (1) of the *Corporations Act 2001*.

.....	.....
Signature of Authorised Person	Signature of Authorised Person

.....	.....
Office Held	Office Held

.....	.....
(Print) Name of Authorised Person	(Print) Name of Authorised Person

This [insert day] day of [insert month] [insert year].

**ACCEPTED BY THE COMMISSION PURSUANT TO SECTION 87B OF THE  
ACT**

.....  
Commission Chairperson

## DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by, or on behalf of, the Applicant.
2. In all cases, evidence must be provided to support the contentions made in responding to the questions on this Form.
3. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in Item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so. The Applicant for revocation and substitution of an authorisation must be the same person as the person to whom the original authorisation was granted.
4. The response must include details of the ownership structure (including a list of shareholders with a greater than five per cent shareholding) and interests of the Applicant. The response must also include a copy of the Applicant's most recent annual report.
5. The following definitions apply in relation questions 1 (c) and 3 (c):

***related body corporate*** means:

- (a) a holding company of another body corporate; or
- (b) a subsidiary of another body corporate; or
- (c) subsidiary of a holding company of another body corporate.

***subsidiary***, in relation to a body corporate (***first body***) means a first body that is controlled by another body (***other body***), because:

- (a) the other body:
  - (i) controls the composition of the first body's board; or
  - (ii) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the first body corporate; or
  - (iii) holds more than one half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
- (b) the first body is a subsidiary of a subsidiary of the other body.

***holding company***, in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary.

6. The response must include details of the ownership structure (including a list of shareholders with a greater than five per cent shareholding) and interests of the Target. The response must also include a copy of the Target's most recent annual report.
7. The response must include the date on which the contract, arrangement, understanding or proposal was, or is intended to be, concluded, the date on which the public bid was or is intended to be made, the intended date on which the acquisition will be consummated and the consideration exchanged in relation to the acquisition. Where available, a copy of the contract, arrangement, understanding or proposal between the Applicant and the Target and the public offer document must be provided with this Form.

8. The response must include background information in relation to the industry sector(s), and a description of the role of the Applicant and the Target in the industry sector(s), including a description of the goods or services supplied both in Australia and internationally.
9. Product and geographic areas of overlap must be specified and the response must include the whereabouts of all major production, supply or distribution facilities of the Applicant and the Target.
10. Such agreements may include, but are not limited to, arrangements or alliances relating to distribution, supply, purchasing, joint development, or research and development. The response must include the type of agreement(s), the subject matter, the parties to the agreement(s) and the duration of the agreement(s), and whether the agreement(s) will continue following consummation of the acquisition.
11. In order to determine whether a particular acquisition breaches section 50 of the Act, an assessment of the relevant market(s) is required. Section 4E of the Act provides that:

**4E      Market**

For the purposes of this Act, unless a contrary contention appears, ‘market’ means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.

The response must address the relevant product, functional, geographic and time dimensions of the market(s). The product dimension of the market must address sources and potential sources of substitutes for the goods or services produced by the merger parties. Both supply and demand side substitutability must be addressed. The functional dimension of the market must address the vertical stages of production and distribution which comprise the relevant arena of competition (for example, wholesale or retail distribution). The geographic dimension of the market must identify the area or areas over which the merger parties and their competitors currently supply or could supply the relevant product(s) and to which customers could practically turn. The time dimension of the market must address the period over which substitution possibilities must be considered.

12. The response must provide details of at least ten suppliers (or all suppliers if there are less than ten), comprised of a cross-section of entities including large, medium and small suppliers. The response must include a description of the goods and services supplied by each of these suppliers and an estimation of the value of the goods or services supplied.
13. The response must include the location of each of the suppliers identified and the areas to which each of the identified entities supplies.
14. The response must provide details of at least ten customers (or all customers if there are less than ten), comprised of a cross-section of entities including large, medium and small customers. The response must include a description of the goods or services and the value of the goods or services purchased by these customers.

15. The response must describe the duration of contracts, the nature and extent of exclusivity, rebates and discounts and identify any customers with contracts which are due to expire within the next two years and indicate the supply volumes associated with such contracts.
16. The market shares of each of the suppliers or purchasers identified, the Applicant and the Target in the relevant market(s) must be provided. In the case of supply markets, market shares must be given on the basis of productive capacity, sales and revenue and must be provided for each of the past five years. In the case of acquisition markets, market shares must be given on the basis of volume and value of inputs purchased and, again, must be provided for each of the past five years. The total size of the domestic market must be provided. The source(s) of the data relied upon in estimating market shares and total market sizes must be provided.
17. The response must address the ability of suppliers to switch from supplying inputs to the merger parties to other avenues, the ability of competitors in the relevant market(s) to increase supply, the ease with which customers could change suppliers including any switching costs that they would incur, whether goods and services produced in the relevant market(s) should be considered homogeneous or whether there are variations in price or quality and whether the relevant market(s) are characterised by brand loyalty. The response must also discuss whether the relevant market(s) are characterised by countervailing power, the market participants who are said to have such power and the extent that such power would be likely to constrain the merger parties post-acquisition.
18. The response must cover whether it is viable for customers to import substitutes and the origin of imports, and address issues including but not limited to: options for the transportation of imports (for example, air, sea or rail); transport costs; whether the product is a high or low value product; whether the product is high or low density; and whether the product is durable enough to be transported without damage or deterioration in quality. The response must also give details of historical import levels for the past five years and the source of the information provided. The response must include the outcomes of any anti-dumping investigations concluded in the past five years.
19. The response must provide details of the price of actual or potential imports (including additional costs such as freight and customs duties), whether existing import suppliers can accommodate a significant expansion in capacity without the need for significant investment and whether import competition would provide a constraint on the merged firm via a downstream market. The response must also include contact details of existing importers and their customers.
20. The response must cover whether it is viable for suppliers to export to alternative purchasers and the likely export markets, and address issues including, but not limited to, the following:
  - options for the transportation of exports (for example, air, sea or rail);
  - transport costs;
  - whether the product is a high or low value product;
  - whether the product is high or low density;
  - whether the product is durable enough to be transported without damage or deterioration in quality.

The response must also give details of historical export levels for the past five years and the source of the information provided.

21. The response must include contact details of existing exporters.
22. The response must include reference to the following:
- both the nature and height of barriers to entry and expansion;
  - details of exit, entry and expansion in the relevant market(s) in the previous five years;
  - any incentives or disincentives for new entry;
  - how long it would take for a new entrant to establish itself as a vigorous and effective competitor.

Barriers which must be addressed include, but are not limited to, the following:

- sunk costs in production capacity;
- accessing shelf space;
- advertising and promotion;
- regulatory restrictions;
- requirements for scarce inputs;
- brand loyalty;
- minimum efficient scales of operation;
- goodwill;
- access to intellectual property;
- the potential response of incumbents to new entry.

23. The response must include references including, but not limited to, the following:
- growth;
  - levels of innovation;
  - technological change; and
  - product and service differentiation,
- in the relevant market(s).

24. The response must refer to current and historical pricing and purchasing behaviour, its record of innovation, its growth relative to the growth of the relevant market(s), and its history of independent behaviour.

25. The response must indicate the extent to which the Applicant buys from, or sells to, the Target raw materials, supplies, services, capital or finished products for resale.

26. The response must discuss factors conducive to coordination in a market including, but not limited to, the following:
- the number of participants in the relevant market(s);
  - transparency;
  - homogeneity of product;
  - homogeneity of firms;
  - the size and frequency of purchases;
  - the presence of the same firms in more than one market.



27. The response must address the complementarity that occurs where there is significant commonality of customers' products and whether the strength of demand for one product is positively correlated with the strength of demand for another, either because the products form part of a range that distributors need to carry or because they must be consumed together for technical reasons.
28. The response must address the circumstances where two or more products are or could be supplied only as a bundle (pure bundling) or, if supplied individually, are also offered as a bundle at a price that is lower than the price charged if sold individually (mixed bundling). The response must also address circumstances where customers seeking to acquire one product are required also to purchase a second product, or carry amounts of the second product (tying).