



Australian
Competition &
Consumer
Commission

Formal merger review process guidelines

JUNE 2008





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Important notice

The Trade Practices Legislation Amendment Bill (No. 1) 2006 (the Bill) was first introduced into parliament on 17 February 2005. Among other things, the Bill amended Part VII of the *Trade Practices Act 1974* to introduce a process whereby parties can apply to the Australian Competition and Consumer Commission (ACCC) for clearance in respect of proposed acquisitions of shares or assets. If a clearance is granted by the ACCC, then s. 50, which prohibits anti-competitive acquisitions of shares or assets, does not prevent the acquisition of shares or assets in accordance with the clearance. The Bill also amended the *Trade Practices Act 1974* so that parties seeking authorisation of proposed acquisitions that might be anti-competitive, but which can be conferred protection from application of s. 50 on public benefit grounds, must make such applications directly to the Australian Competition Tribunal (Tribunal). These changes were designed to implement recommendations made by the Dawson review of competition policy which was released in 2003.

The Bill passed the House of Representatives on 10 March 2005. During debate in the Senate on 11 October 2005, a motion to split the Bill and debate its parts separately failed. A second motion, that schedule 1 (the mergers provisions) of the Bill 'stand as printed', was then put. The vote on this second motion was tied and as a result schedule 1 was excised from the remainder of the Bill.

Schedule 1 of the Bill, including some additional amendments, was reintroduced into parliament on 18 October 2006. The additional amendments included increased powers to the ACCC in assisting the Tribunal in merger authorisations and the provision for the ACCC to extend the period for review of formal clearance applications in certain circumstances. The Bill was passed by the Senate and the House of Representatives on 20 October 2006 and received royal assent on 6 November 2006, becoming the *Trade Practices Amendment Act (No. 1) 2006* (the Amendment Act). Most of the provisions in the Amendment Act, including the formal merger review provisions, became law on 1 January 2007.

The ACCC's *Formal merger review process guidelines* (Formal review guidelines) outline the approach that the ACCC will take in assessing applications for formal clearance and the requirements on applicants for merger clearances under the *Competition and Consumer Act 2010* (the Act), formerly the *Trade Practices Act, 1974*. The Formal review guidelines also outline the legislative requirements on parties wishing to apply to the Tribunal for authorisation of proposed mergers and acquisitions. While these guidelines reflect the ACCC's current views and understanding of the approach that the Tribunal is likely to adopt in considering merger authorisation applications, they are preliminary.

The ACCC's views may change over time in light of judicial precedent, general practice and experience with formal merger clearance applications.

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Glossary

ACCC	Australian Competition and Consumer Commission
Act	<i>Competition and Consumer Act 2010</i> (Cwlth), formerly the <i>Trade Practices Act, 1974</i>
Amendment Act	<i>Trade Practices Amendment Act (No. 1) 2006</i> (Cwlth)
Bill	Trade Practices Legislation Amendment Bill (No. 1) 2006
Dawson Review	Trade Practices Act Review Committee (2003), <i>Review of the Competition Provisions of the Trade Practices Act</i> , Commonwealth of Australia: Canberra.
Federal Court	The Federal Court of Australia
Merger review process guidelines	Australian Competition and Consumer Commission (July 2006), <i>Merger review process guidelines</i> , Commonwealth of Australia: Canberra.
Merger factors	The non-exhaustive list of factors set out in subs. 50(3) of the <i>Competition and Consumer Act 2010</i> (Cwlth) that a court must take into account when assessing whether a proposed merger or acquisition will contravene the Act.
Tribunal	Australian Competition Tribunal

1. Mergers, acquisitions and the Competition and Consumer Act

- 1.1 The Australian Competition and Consumer Commission (ACCC) recognises that mergers perform an important role in the efficient functioning of the economy. They allow firms to achieve efficiencies such as economies of scale and/or scope, complementarities and risk spreading. They also provide a mechanism by which underperforming firms and managers are replaced by better performing ones.
- 1.2 However, in some cases, mergers may also have anti-competitive effects by altering the structure of markets and hence the ability and/or incentives for firms to behave in a competitive manner. The **Competition and Consumer Act 2010** (Act) prohibits mergers that have, or would be likely to have, anti-competitive effects. One of the ACCC's roles is to prevent such mergers from occurring.

Section 50 of the Competition and Consumer Act

- 1.3 The merger and acquisition provisions in the Act are part of the competition provisions of Part IV of the Act. Section 50 of the Act prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia, in a state, territory or region of Australia.
- 1.4 Section 50 of the Act provides that:
 - (1) A corporation must not directly or indirectly:
 - (a) acquire shares in the capital of a body corporate; or
 - (b) acquire assets of a person
if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.
 - (2) A person must not directly or indirectly:
 - (a) acquire shares in the capital of a corporation; or
 - (b) acquire assets of a corporation
if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.
- 1.5 Section 50 applies to the following types of acquisitions:
 - acquisitions of shares or assets within Australia, including shares in Australian companies, domestic businesses, local intellectual property such as trademarks and local plant and equipment
 - acquisitions of shares or assets wherever situated if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen or is an ordinary resident in Australia.
- 1.6 The application of s. 50 to mergers and acquisitions is discussed in more detail in the ACCC's *Merger guidelines*.

- 1.7 The *Merger guidelines* outline the ACCC's administration and enforcement policies in relation to mergers. It includes an analysis of the so-called 'merger factors'—that is, the non-exhaustive list of factors set out in subs. 50(3) of the Act that a court must take into account when assessing whether a proposed merger or acquisition will contravene the Act. The ACCC uses these merger factors when considering a merger proposal. The *Merger guidelines* also set out matters relevant to merger authorisations and court enforceable undertakings. The *Merger guidelines* do not have any legal force in determining whether a proposed merger is likely to breach the Act—final determination on the issues is a matter for the courts.
- 1.8 The ACCC's *Merger review process guidelines* were published in July 2006 and replaced the 2004 *Guideline for informal merger reviews*. The *Merger review process guidelines* update the ACCC's processes for informal merger assessments and supplement the existing *Merger guidelines*. The *Merger review process guidelines* aim to promote greater transparency and accountability, while preserving the benefits of the existing informal system. In particular the *Merger review process guidelines*:
- set out timeframes for informal merger reviews
 - establish a public register and
 - detail the circumstances in which the ACCC will publish
 - statements of issues inviting comment on stated concerns by the ACCC with a proposed merger and
 - public competition assessments providing details of the ACCC's reasons for a decision in a proposed merger of significant interest.

Formal merger review process guidelines

- 1.9 The publication of the *Formal merger review process guidelines* (Formal review guidelines) followed the introduction and passage of the *Trade Practices Legislation Amendment Act (No. 1) 2006* (the Amendment Act) in 2006. The Amendment Act amended the Act in response to recommendations by the *Review of the Competition Provisions of the Trade Practices Act 1974* (the Dawson review).¹ A number of the Dawson review's recommendations related to the ACCC's consideration of mergers and acquisitions and led to the introduction of formal clearance processes and a process whereby merger authorisation applications are made directly to the Australian Competition Tribunal (the Tribunal), discussed in more detail in paragraphs 1.14 and 1.15. Before the Amendment Act's passage, the consideration of mergers and acquisitions was primarily through an informal review system and, to a lesser extent, application to the ACCC for merger authorisation.
- 1.10 These guidelines explain and discuss the formal merger clearance and merger authorisation processes available to merging parties under the Act, especially for mergers and acquisitions subject to s. 50 of the Act.

¹ Trade Practices Act Review Committee (2003), *Review of the Competition Provisions of the Trade Practices Act 1974*, Commonwealth of Australia: Canberra.

- 1.11 The Formal review guidelines publication does not replace the *Merger guidelines*, and parties wishing to make an acquisition should read both the Formal review guidelines and the *Merger guidelines*, which discuss in more detail the ACCC's analytical processes for mergers and acquisitions.
- 1.12 The Formal review guidelines are designed to provide guidance to the business community, their advisers and the public generally. It is not possible to set out a prescriptive response to particular mergers; this requires detailed analysis of the specific market characteristics and their interaction. The purpose of the Formal review guidelines is to show the ACCC's approach when considering mergers and acquisitions and the types of information that are relevant.

Recommendations of the Dawson review

- 1.13 Notwithstanding widespread support for the informal merger review system—in particular, for its speed and efficiency—the Dawson review noted the absence of an effective mechanism for review of ACCC decisions and the absence of reasons for these decisions. It recommended that some changes be made to the informal process and that a formal merger clearance process be introduced.
- 1.14 The Dawson review formed the view that the creation of a voluntary formal merger clearance process would 'retain the advantages of the current system but overcome some of its disadvantages.'² It was suggested that a formal system for assessing merger applications include a time limit to reduce delays. Additionally, it was hoped that a formal system would reduce uncertainty by assisting in the development of a body of precedent and by providing protection to the applicant from proceedings under s. 50 of the Act. The Dawson review stated that 'the provision of reasons in these instances would allow a better understanding of the ACCC's decisions and reduce uncertainty about the way in which the process operates.'³ In addition, it held that 'the availability of a review would increase the accountability of the ACCC for its decisions.'⁴
- 1.15 The Dawson review considered the key authorisation process issues to be the time taken by the ACCC to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. The Dawson review stated that 'the merger authorisation process could be made more attractive to business by making it more timely and reducing uncertainty.'⁵ The Dawson review recommended that these goals be achieved by requiring applications for authorisation of s. 50 conduct to be made directly to the Tribunal (and no longer to the ACCC) and by implementing a statutory time limit for consideration of such applications. It was also proposed that the Tribunal be enabled to remit authorisation applications to the ACCC for decisions based on competition issues, which are more suitably made by the ACCC.

2 *ibid.*, p 69.

3 *ibid.*, p 61.

4 *ibid.*, p 61.

5 *ibid.*, p 69.

New provisions in the Act

- 1.16 With the exception of the recommendation that the Tribunal should have discretion to remit authorisation applications involving competition issues to the ACCC, the key recommendations of the Dawson review were accepted by the Australian Government and, as outlined above, enabling legislation was introduced and passed by parliament in 2006, taking effect on 1 January 2007.
- 1.17 The amendments did not change the test that determines which mergers and acquisitions are prohibited by the Act—s. 50 continues to prohibit mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market(s). However, a new voluntary formal clearance system was introduced into the Act. The formal clearance system enables an acquirer to apply to the ACCC for clearance of a proposed acquisition which, if granted, provides protection to the acquirer from legal action under s. 50. If an acquirer is dissatisfied with an ACCC merger clearance decision, they may apply to the Tribunal for review of the decision.
- 1.18 Amendments to merger authorisation provisions in the Trade Practices Act 1974 were also passed. Parties continue to be able to apply for exemption from legal action on public benefit grounds for acquisitions that are at risk of contravening s. 50. However, rather than making such an application to the ACCC, they must now apply directly to the Tribunal.⁶ The ACCC will continue to take a role in merger authorisations by assisting the Tribunal in making its determination in relation to merger authorisation applications. Merits review is not available for the Tribunal's merger authorisation decisions.
- 1.19 The merger authorisation process, including the ACCC's role, is discussed in more detail in chapter 6, 'Merger authorisation applications to the Tribunal', below.
- 1.20 No changes were made to the process of seeking authorisation of acquisitions that are at risk of contravening s. 50A of the Act and such authorisation applications will continue to be handled by the ACCC.
- 1.21 The ACCC intends to publish a single document consolidating and updating both the informal and formal merger review processes in the near future.

Joint ventures

- 1.22 The ACCC's Mergers and Acquisitions Group will continue to consider the competitive effect of joint ventures that are at risk of raising concerns under both the merger provisions (arising from the acquisition of shares or assets) and restrictive trade practices provisions (resulting from ancillary arrangements which may be required to give effect to the joint venture).

⁶ A merger authorisation granted by the ACCC under the previous scheme will continue to have effect under the revised merger authorisation scheme for the duration of the authorisation.

- 1.23 It is important to note, however, that applications for merger clearance can only be made for acquisitions covered by s. 50. Any ancillary arrangements or non-merger aspects of a transaction cannot be granted clearance under the formal merger clearance provisions of the Act. Parties may therefore wish to have these considered under the informal review process outlined in the ACCC's *Merger review process guidelines*.
- 1.24 Parties may alternatively seek to have the proposed acquisition and ancillary arrangements authorised and therefore granted protection from the application of the Act. To seek authorisation of the proposed acquisition, parties should apply to the Tribunal. The Tribunal will grant authorisation if it is satisfied that the proposed acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to occur. This process is discussed in more detail in chapter 6, 'Merger authorisation applications to the Tribunal'.
- 1.25 To seek authorisation of the ancillary arrangements, parties should apply to the ACCC. The ACCC can grant protection from the application of the competitive provisions of the Act if the proposed conduct results in a benefit to the public that outweighs the detriment to the public from any lessening of competition.

Section 50A conduct

- 1.26 As outlined in paragraph 1.5, s. 50 applies to acquisitions of shares or assets within Australia and acquisitions of shares or assets wherever situated if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen or is an ordinary resident in Australia provided that such acquisition would have the effect or likely effect of substantially lessening competition in an Australian market.
- 1.27 Additionally, foreign acquisitions for which an acquirer is not considered to be carrying on a business within Australia may fall under s. 50A of the Act for consideration.
- 1.28 Section 50A of the Act applies to overseas acquisitions of a controlling interest in a body corporate which, by reason of that acquisition, obtains a controlling interest in an Australian corporation (for example a domestic trading company or foreign company registered in Australia). Section 50A of the Act operates quite differently to s. 50 of the Act.
- 1.29 Merger parties may apply for authorisation of acquisitions which would or would be likely to result in a contravention of s. 50A of the Act. Such applications must be made directly to the ACCC, not the Tribunal.
- 1.30 For acquisitions within the meaning of s. 50A that are not protected by authorisation, the minister⁷, the ACCC or a person may apply to the Tribunal for a declaration that the obtaining of the controlling interest will substantially lessen competition in a substantial market in Australia. In considering whether to make a declaration, the Tribunal will also assess whether the acquisition of the controlling interest will result in such a benefit to the public that it should be allowed.

⁷ The meaning of 'minister' in s. 50A of the Act is derived by reference to s. 19A of the *Acts Interpretation Act 1901* (Cwlth). The ministers 'administering' the Act can be ascertained by reference to the Administrative Arrangements Order, made by the Governor-General and notified in the *Gazette*. The Act falls within the portfolio of the minister administering the Department of the Treasury.

- 1.31 If the Tribunal makes a declaration, then the corporation or corporations in which the person has the controlling interest shall cease carrying on business in the market(s) to which the declaration relates. If such a declaration is made, then the parties have six months, or such further time as the Tribunal may permit (not exceeding a further six months), to remedy the situation. A contravention of such a declaration opens the corporation or corporations to all the penalties available in Part VI of the Act.
- 1.32 This guideline does not deal with mergers and acquisitions which are likely to fall under s. 50A of the Act for consideration.
- 1.33 Parties who consider that a merger or acquisition may fall under s. 50A of the Act for consideration are encouraged to contact the Executive General Manager of the Mergers and Acquisitions Group of the ACCC to discuss the acquisition at an early stage before lodging an application for authorisation.

2. ACCC consideration of proposed mergers

- 2.1 There are a number of avenues through which proposed acquisitions come to the ACCC's attention.
- 2.2 With the introduction of the formal clearance process in 2007, merger parties have three avenues available to have a proposed acquisition or merger considered and assessed under the Act. These options are:
- ACCC assesses the proposed merger or merger on an informal basis
 - ACCC assesses an application for formal clearance of a proposed merger
 - Tribunal assesses an application for authorisation of a proposed merger.
- 2.3 As there is no legislative requirement that parties notify the ACCC of a proposed acquisition, merger parties also have the option of proceeding with a merger without seeking any regulatory consideration. However, pursuing this option may put merger parties at risk of the ACCC or other interested parties taking legal action under s. 50 on the basis that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in one or more substantial markets.
- 2.4 The ACCC may also become aware of proposed mergers and acquisitions through channels other than direct contact from merger parties such as complaints, media speculation or notification from other regulators. The ACCC will continue to consider acquisitions which come to its attention in these ways on an informal basis.
- 2.5 If the ACCC is asked to provide informal clearance, or is otherwise notified about a proposed merger (either by the parties or through some other avenue) and it receives the cooperation of the relevant parties, it will generally follow the processes set out in its *Merger review process guidelines*. This process involves setting a public timeframe for consideration, allowing for a statement of issues to be released before reaching a final decision, and the publication of a public competition assessment where appropriate. If the ACCC is considering a merger application under its informal merger review process, it will provide an indication of whether it is likely to take action under s. 50 of the Act.
- 2.6 If the merger is the subject of a formal clearance application, the ACCC will follow the processes set out in chapter 3, 'Formal merger clearance'. The ACCC will continue to play a role in Tribunal merger authorisation considerations and, if a merger or acquisition is subject to an authorisation application to the Tribunal, the processes outlined in chapter 6, 'Merger authorisation applications to the Tribunal', will be followed.
- 2.7 If, however, the ACCC considers it necessary to investigate a merger that has not been notified to it by the parties, is not the subject of a formal clearance or authorisation application and has been completed prior to the ACCC having an opportunity to consider and express its view on whether or not it contravenes s. 50, the ACCC may investigate and take whatever legal actions it considers necessary. This may be conducted in any timeframe the ACCC deems appropriate and the ACCC may not necessarily follow the informal merger assessment process outlined in its *Merger review process guidelines*.

- 2.8 Where the application is not being considered under the informal merger review process and in the absence of an express application from the parties for an informal review or clearance, the ACCC may not provide an indication as to whether it is likely to take action under s. 50 of the Act.
- 2.9 The majority of mergers do not raise competition concerns and the ACCC has objected to only a small number of the many thousands it has investigated since the substantial lessening of competition test was introduced. In some cases, the ACCC's concerns are resolved through negotiated undertakings, including for example an obligation to divest certain assets. Under the informal merger review process, divestiture or other agreements are formalised through the giving of an undertaking under s. 87B of the Act. Under the formal clearance process, concerns may be addressed through the imposition of conditions on any clearance. Such conditions will, in most cases, require compliance with s. 87B undertakings. In other cases, parties may abandon the proposal in light of the ACCC's concerns.
- 2.10 If, however, the ACCC considers at the conclusion of either an informal or formal review that an acquisition is likely to contravene s. 50 of the Act and the merger parties seek to proceed with the proposal, the ACCC can apply to the Federal Court of Australia (the Federal Court) for an injunction to prevent an acquisition from proceeding, as well as divestiture or penalties. Other parties (such as customers, competitors or other interested parties) may also apply for a declaration and divestiture, and any person suffering loss or damage as a result of a merger which breaches s. 50 can apply for damages.
- 2.11 Merger parties are encouraged to approach the ACCC on a confidential and informal basis as soon as there is a real likelihood that a proposed acquisition may proceed, to discuss possible competition issues and options for having the matter considered. It is imperative that parties choose from the outset whether to pursue either an informal or formal merger clearance, not both. Any perception of improper use of the processes may jeopardise the ability of the ACCC to maintain both the informal and the formal merger review processes as effective means by which to consider the impact of mergers and acquisitions.

3. Formal merger clearance

What is a merger clearance?

3.1 The Act provides that:

The Commission may grant a clearance to a person:

- (a) to acquire shares in the capital of a body corporate; or
- (b) to acquire assets of another person.⁸

3.2 If the ACCC so grants a clearance:

... section 50 does not prevent the person from acquiring the shares or assets in accordance with the clearance.⁹

3.3 Obtaining a clearance for an acquisition has the effect of conferring protection to the person to whom clearance was granted from the application of s. 50 of the Act. This protection means that neither the ACCC nor any other party may initiate legal action on the basis of an alleged contravention of s. 50 of the Act for an acquisition which has been granted clearance, so long as the acquisition takes place in accordance with the clearance.

3.4 The ACCC may not grant clearance to acquisitions that have already taken place.¹⁰ Applicants who apply for formal clearance are required to give an undertaking under s. 87B to the ACCC that they will not proceed with the acquisition while the ACCC is considering the application.¹¹

3.5 Should clearance be rejected by the ACCC, s. 50 will apply to the acquisition. Contravention of s. 50 permits the Federal Court to make a range of orders under Part IV of the Act including injunctions (s. 80), penalties (s. 76) and divestiture orders (s. 81 of the Act).

When will the ACCC grant clearance?

3.6 The ACCC may, upon the application of the acquiring party and when the relevant test is met, clear the acquisition of shares or assets within the meaning of s. 50 of the Act.

3.7 Clearance cannot be granted for mergers and acquisitions under s. 50A of the Act or for any non-merger aspect of the transaction, such as price fixing, market sharing and joint purchasing agreements.

8 Subsection 95AC(1) of the Act.

9 Subsection 95AC(2) of the Act.

10 Subsection 95AN(2) of the Act.

11 Subsection 95AE(2) of the Act; regulation 73.

The test

3.8 The Act sets out when the ACCC must not grant clearance:

The Commission must not grant a clearance in relation to a proposed acquisition of shares or assets unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition (within the meaning of section 50).¹²

3.9 Accordingly, the ACCC will, on application, grant clearance to a proposed acquisition only if it is satisfied that it would not have the effect, or likely effect, of substantially lessening competition in a market or markets. The ACCC must be satisfied that the acquisition will not have such an effect, and so justify the clearance.

How to apply for clearance

3.10 To assist prospective applicants, the ACCC encourages parties to participate in informal discussion with, and seek procedural guidance from, the ACCC before lodging an application.

3.11 Applications for merger clearance must be made to the ACCC by the person seeking the clearance. Only the acquiring party may apply for clearance—formal clearance cannot be sought by the target.¹³

3.12 Section 95AE establishes that, to be valid, a clearance application must:

- (a) be in a form prescribed by the regulations and contain the information required by the form; and
- (b) be accompanied by such other information or documents as are prescribed by the regulations; and
- (c) be accompanied by the fee (if any) prescribed by the regulations.

3.13 The Act further states that:

The regulations may prescribe that the application form contain a requirement that the applicant give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Commission.¹⁴

3.14 Consistent with the requirements in the Act and given the timeframes and requirements on the ACCC in assessing an application for formal clearance, the ACCC will strictly enforce the legislated validity requirements. This is necessary to ensure that the ACCC can begin to assess a clearance application as soon as one is received. Also, the effective functioning of the formal clearance process requires that applicants provide full and accurate information to the ACCC when making an application.

The form

3.15 Applications for clearance must be made on *Form O, Application for merger clearance* as set out in the Competition and Consumer Regulations 2010. The form is available on the ACCC's website at www.accc.gov.au/mergers.¹⁵

¹² Subsection 95AN(1) of the Act.

¹³ Section 95AD of the Act.

¹⁴ Subsection 95AE(2) of the Act.

¹⁵ Form O is also available at any ACCC office.

- 3.16 The form asks a series of questions of the acquirer and is designed to elicit important information from the applicant at an early stage. The questions largely relate to the merger factors in subs. 50(3) of the Act and require detailed responses from the applicant, including evidence in support of any contentions made in the application or any accompanying submissions. Further information on each of the merger factors and the ACCC's consideration of them is available in the *Merger guidelines*. Prospective applicants are encouraged to consult the *Merger guidelines* when completing an application for clearance.
- 3.17 When completing the form, applicants must have regard to the questions contained in the form and directions to the form.
- 3.18 For an application to be valid the applicant must answer all questions on the form. However, some applicants may not have access to all the information required to answer every question. Should an applicant consider this to be the case, it is preferable that the applicant discuss this with the ACCC in advance of lodging the application. Where information is omitted from the form on the basis that information is not available to the applicant, this should be indicated on the form (or in the attached submission) with sufficient explanation as to why the required information is not available. In the event that the applicant fails to provide information that is legitimately available to the applicant, the ACCC will declare the application invalid.
- 3.19 Applicants should also submit any additional information which will be relevant and necessary for the ACCC to obtain a complete and accurate picture of the operations of the acquirer and target, the relevant markets and the competitive environment.
- 3.20 It is in the best interests of the applicant to provide such information regardless of whether a question contained in the form specifically requires it. This will assist the ACCC to make a considered and thorough assessment of the clearance application. The applicant should also be aware that there are significant penalties associated with providing false or misleading information to the ACCC, including by way of omission. The penalties associated with providing false and misleading information are discussed in more detail in paragraphs 3.44 to 3.46.
- 3.21 All the information on which the applicant is seeking to rely must be included in the application form. By providing information to the ACCC after an application has been submitted, an applicant risks the ACCC not being able to consider the information in its assessment of the application. Where the applicant refers to an accompanying submission in answering a question, the applicant should specify the exact part or parts of the submission that are relevant to that question (for example the relevant page and paragraph numbers in the submission).

Other requirements for valid applications

- 3.22 The application must be accompanied by the relevant fee as specified in the Competition and Consumer Regulations. The fee for a formal merger clearance application is currently set at \$25 000.¹⁶

16 The fee for merger clearance applications may change over time and parties should consult the Competition and Consumer Regulations 2010 to confirm the current fee prior to lodging an application. Fees levied in respect of merger clearance applications cannot be varied or waived by the ACCC.

- 3.23 The application must also be accompanied by a signed undertaking under s. 87B of the Act that the applicant will not make the acquisition while the application is being considered by the ACCC. Such an undertaking is required because the ACCC will not be able to grant clearance for an acquisition which has already been completed. The form of undertaking to be given to the ACCC is attached to Form O.
- 3.24 Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be returned to the applicant.
- 3.25 The ACCC requires that applicants provide it with electronic versions of the application and any other documents. All information and documents should be scanned at a resolution of 300 DPI in searchable PDF format and be placed on compact disc or equivalent media. In addition, unbound hard copies should also be provided.
- 3.26 The electronic application and all associated information and documents, including all hard copies, and the associated fee (payable by cheque made out to the Australian Competition and Consumer Commission) may be lodged at any ACCC office or sent to the following address:
- Executive General Manager
Mergers and Acquisitions Group
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601
- 3.27 Applications for clearance and all associated information and documents can also be emailed to mergers@acc.gov.au (with hard copies sent to the above address). Applicants should note, however, that the date on which the valid application is considered to be received will be the date on which a complete electronic application, meeting all of the requirements of validity, is received by the ACCC.

Invalid applications

- 3.28 If an application for clearance is made to the ACCC but does not comply with the requirements set out above, the ACCC will declare the application invalid.
- 3.29 The ACCC must notify an applicant of an invalid application within five business days. Applications will be scrutinised thoroughly during this period for compliance with the information requirements set out in the application form and regulations. During this time, the ACCC will also assess requests to exclude information from the public register due to confidentiality requests (discussed in paragraph 3.61 below) and determine whether the granting of such claims would have an impact on the validity of the application. Those applications which do not meet the designated requirements will be deemed invalid and the clearance assessment process ceased. The applicant will be advised in writing of the ACCC's decision and the reasons for the decision.
- 3.30 The applicant will then have the option of either discussing the deficiencies in the application with the ACCC with a view to resubmitting the application, or not proceeding with the

application. Where a fee has been paid for an application that is ultimately determined to be invalid, the fee will be returned to the applicant.

- 3.31 To avoid unnecessary delays in the ACCC's consideration of a clearance application, it is important that applicants fill out the application for clearance correctly. If applicants are experiencing difficulties in filling out the form, they should contact the ACCC's Mergers and Acquisitions Group for guidance.

Under what circumstances might an application be declared invalid?

- 3.32 Applications that do not include the requisite information in response to questions will be considered by the ACCC to be invalid. Likewise, applications that are not accompanied by the correct fee, and/or are not accompanied by an undertaking under s. 87B of the Act that the acquisition will not be completed while the ACCC is considering the application, or do not attach documents that might be required in the form (which might include board papers and annual reports), will be declared invalid and will not be considered by the ACCC.
- 3.33 Requests to exclude information from the public register due to confidentiality may also affect the validity of an application (and/or the ACCC's ultimate determination regarding the clearance application). If the ACCC denies a request to have information excluded from the register on the basis that it is confidential (because the request is not accompanied by sufficient supporting information or because it considers that the information is not confidential in nature) the ACCC will inform the party making the request of its decision.
- 3.34 Where the ACCC denies a request, the party may withdraw the information. If the party does not amend or waive the confidentiality request in the timeframe specified by the ACCC (usually one to two business days), the ACCC will return the information for which exclusion was denied, and the information will be considered as withdrawn from the ACCC's consideration. In this case, the relevant information will not be placed on the public register.
- 3.35 If the ACCC withdraws and returns the relevant information to the party or the party chooses to withdraw the information subject to an exclusion request, the ACCC will not use the information in its decision-making processes.
- 3.36 Examples of the type of information that will be considered to be confidential and not displayed on the public register are secret formulae or processes, and the cash consideration offered for the acquisition of shares. Confidentiality is discussed further in paragraph 3.61 and in the ACCC publication, *Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes* available on the ACCC website, www.accc.gov.au/mergers.

Box 1 Tips for applicants: completing the clearance application form

So that you can avoid unnecessary delays in obtaining the ACCC's view on your clearance application, as a prospective applicant you should note the following tips when completing the application for clearance. This list is not exhaustive and applicants should familiarise themselves with the information contained in this guideline.

- **Read the *Merger guidelines*.** The ACCC considers 'merger factors' such as market concentration, barriers to entry and imports in assessing whether acquisitions are likely to result in a substantial lessening of competition, and many of the questions in the form ask for information about these. The merger factors and the ACCC's approach in assessing whether acquisitions are likely to result in a substantial lessening of competition are discussed in detail in the *Merger guidelines*, and you are encouraged to read this publication before submitting your application. Electronic copies of the *Merger guidelines* are available on the ACCC website, www.accc.gov.au/mergers, free of charge.
- **Refer to the questions and the directions contained in the forms.** To comply with the requirements of the form, you must refer to each of these when answering the questions. The directions provide additional guidance to applicants and outline areas of detail which must be covered when answering the relevant questions.
- **Answer every question.** The ACCC recognises that in some cases information may not be available to the applicant to answer some questions. If you think this is so, it is preferable that you discuss this with the ACCC before lodging the application. Where information is omitted from the form on the basis that information is not available to the applicant, you should indicate this on the form (or in the attached submission) and provide sufficient explanation as to why the required information is not available. In the event that you fail to provide information that is legitimately available to you the ACCC will declare the application invalid. In addition, if you answer a question by referring to the submission, you should specify the exact part or parts of the submission that are relevant to the question (for example the relevant page and paragraph numbers in the submission).
- **Ensure that the description of the acquisition is complete.** The ACCC is not only concerned with acquisitions of shares and assets. For example you must also provide details of supplier or customer contracts that will be transferred as part of the acquisition. If the proposal is to acquire a partial shareholding, you must outline any ancillary arrangements that will be entered into, such as contracts to supply or purchase jointly post-acquisition, sales and marketing arrangements, servicing and maintenance agreements or preferred supplier arrangements.
- **Be aware that related or ancillary agreements may raise concerns other than under s. 50 of the Act.** Proposed acquisitions of partial shareholdings which form part of a broader agreement between competitors—such as a joint venture, cooperative agreement or alliance—may also raise issues under ss. 45 or 47 of the Act. Clearance, if granted by the ACCC, does not give parties protection from legal action for conduct at risk of breaching sections other than s. 50 of the Act, and the ACCC's determination will not involve an assessment of the likelihood of a breach of other provisions in the Act. Price fixing, market sharing and joint purchasing agreements—to name a few—may raise issues under the Act which would not be covered by the clearance. Prudent applicants will seek legal advice on the likelihood of ancillary agreements breaching the Act.

- **Ensure that you detail both arguments and evidence.** While a number of the questions in the form are expected to seek purely factual information rather than submissions, you should not feel limited to such when responding. You should provide the ACCC with submissions which detail logical and well-supported arguments as to why a substantial lessening of competition is unlikely and why clearance should be granted.
- **Provide all information that might be relevant.** The responses to questions in the form are the minimum requirement to the information which will be relevant to the ACCC's assessment of an acquisition. They do not necessarily cover all matters which might be relevant in any one case. Applicants should provide all information that might be relevant to its consideration of a clearance application, regardless of whether it is specifically requested in the form—the ACCC will assist you to do so at the time of making an application. There are significant penalties associated with providing false or misleading information to the ACCC, including by way of omission.
- **Keep in mind that the ACCC is concerned with the impact on competition not public benefits.** Efficiencies are primarily only relevant in the context of authorisation assessments (consistent with the application of the public benefit test) rather than in clearance assessments which are concerned only with competition issues. However, if efficiencies will be generated as a result of an acquisition and if these affect the competitiveness of a market, they may be relevant to clearance consideration. So, for example, if the acquisition is going to generate such savings in marginal production costs that prices will fall, this will be a relevant factor for clearance. Only if you consider that such efficiencies may affect the competitiveness of a relevant market, should you mention this in 'Other grounds for grant of clearance.' Acquisitions that are likely to result in a lessening of competition but are also likely to result in public benefits may be more appropriately dealt with by authorisation rather than by clearance.
- **Talk to ACCC staff before lodging a clearance application.** Communication with ACCC staff at an early stage in the process will help to ensure that potentially problematic issues are detected early and unnecessary delays in the process are avoided.
- **Make sure confidential information is identified when it is submitted to the ACCC and that confidentiality is not claimed over anything but commercially sensitive information.** Examples of the type of information which you may claim confidentiality over are secret formulae or processes, and the cash consideration offered for the acquisition of shares. You should provide a redacted version of your application which does not include information over which confidentiality is being claimed, and which may therefore be displayed on the public register.

Information relating to the proposed target

- 3.37 As outlined above, applications for clearance may only be made by the acquiring party. The ACCC encourages acquiring parties to, wherever possible, consult with the target in preparing a clearance application, particularly in respect of information provided in relation to the target and its operations. Where the target has been consulted during the preparation of the application form, the target must indicate on the form that this is the case and certify that information provided by the applicant gives a complete and accurate picture of the target, its operations and its position in the relevant markets.
- 3.38 Where the target has not been consulted or has not signed this declaration, the ACCC will contact the target and seek the target's verification that the information provided by the acquirer is complete and accurate.

Expert reports

- 3.39 Parties wishing to rely on expert reports to support or supplement the information or contentions provided in the application must do so at the time of making the application to the ACCC. Expert reports provided to the ACCC should comply with the Federal Court's *Guidelines for Expert Witnesses* which sets out that written reports should, to avoid criticism of partiality:¹⁷
- be clearly expressed and not argumentative in tone
 - be concerned with expressing an opinion, upon a clearly defined question or questions, based on the expert's knowledge
 - identify the factual premises and assumptions upon which the opinion is based
 - explain the process of reasoning by which the expert reached the opinion expressed
 - be confined to the area or areas of the expert's specialised knowledge
 - identify the nature of any relevant pre-existing relationship with the ACCC or with any interested party to the proposed acquisition.
- 3.40 Additionally, the expert's written report should contain the following information and details:
- the expert's qualifications
 - the literature or other material used in making the report
 - all assumptions of fact
 - the identity and qualifications of any person who carried out tests or experiments relied on by the expert in compiling the report
 - a summary of opinions provided in the report
 - reasons for each opinion expressed in the report
 - copies of any material, including photographs, plans, calculations, analyses, measurements and survey reports, referred to by the expert in the report

¹⁷ Available from the Federal Court's website at www.fedcourt.gov.au/how/prac_direction.html.

- a declaration that the expert ‘has made all the inquiries which are believed to be desirable and appropriate and that no matters of significance which are considered to be relevant have been withheld’ and
- a statement of the questions or issues that the expert was asked to address, the factual premises upon which the report is based and the documents and other materials that the expert was instructed to consider.

3.41 If the expert report provides quantitative analysis such as statistical analysis, econometric analysis or quantitative merger modelling then the expert should:

- state clearly and precisely the exact question or questions that will be addressed by the analysis and why the analysis is an appropriate methodology to address these questions.
- provide a complete specification of the theoretical economic model that underpins the analysis, including a complete statement of the assumptions used in this model and the specific facts relied on by the expert when preparing the theoretical economic model.
- fully specify the relationship between the quantitative tests used by the expert and the underlying theoretical economic model, including any assumptions about data (for example that the data is drawn from a normal distribution) used in the quantitative analysis and the facts relied on by the expert to justify these assumptions.
- provide the ACCC with the complete data set used in the quantitative analysis, including a statement of the precise source of the data. The expert should clearly state any limitations on the data that they are aware of, how those limitations have been addressed in the quantitative analysis and how those limitations affect the quantitative results provided by the expert.
- provide the ACCC with the entire data set used in the quantitative analysis, including any censored or otherwise altered data (for example ‘outlying’ data removed from the analysis) together with a statement from the expert stating why the censoring or other alterations are appropriate. The report must include a declaration by the expert stating that, to the best of their knowledge, all relevant data has been provided to the ACCC.
- clearly and precisely state the statistical techniques and tests of statistical precision that have been used in the analysis, including a statement as to why these techniques and tests are appropriate given the data and the economic issues addressed by the expert. If alternative statistical techniques and tests of statistical precision are available, the expert should clearly explain why the alternative tests were not chosen. Please note that appropriate tests of statistical precision should accompany all empirical estimates provided in the expert report and that failure to provide such tests for any estimates may result in the ACCC placing little weight on the entire analysis.
- provide a clear statement of the results of the quantitative analysis. If the expert has interpreted the results, the expert must make such interpretations clear to the ACCC, including a complete statement of any assumptions made in the interpretation and the facts relied on by the expert in making the interpretations. Any deficiencies or limitations in the results or the interpretation of the results should be clearly specified and fully explained.

- provide appropriate tests of robustness for all results provided in the expert report. For example the expert should provide the ACCC with tests for the sensitivity of results to model specification and to the sample of the data used. The expert should also provide the ACCC with sensitivity tests addressing the institutional features and other factual issues assumed by the expert in the analysis.

- 3.42 When appropriate the ACCC may attempt to replicate the quantitative analysis provided by an expert, and the ACCC will place little weight on quantitative analysis that cannot be rigorously tested by the ACCC.
- 3.43 If the expert's opinion changes materially at any stage, this should be communicated promptly to the ACCC. If a report is incomplete or not fully researched, this must be clearly indicated, and if a particular issue or question falls outside of the expert's area of expertise, this should also be clearly indicated.¹⁸

Providing false or misleading information

- 3.44 In completing the application form, applicants should be aware that the provision of false or misleading information to the ACCC may result in significant penalties being imposed. In addition to pecuniary penalties, the Federal Court can also order other remedies including injunction or divestiture. The Act contains a specific prohibition against the provision of false or misleading information in this context¹⁹ and clearances or authorisations granted on the basis of such information may be revoked.²⁰
- 3.45 The applicant must ensure that information provided in an application for clearance, or in submissions in support of an application for clearance, gives a full and accurate representation of the operations of the acquirer and target, the relevant markets and the likely competitive consequences of the proposed acquisition.
- 3.46 If, at any stage during the ACCC's consideration of a clearance application (or indeed, once a clearance has been granted), it becomes apparent to the applicant that information provided to the ACCC was in any way incorrect or incomplete, the ACCC must be advised immediately.

Amending and withdrawing applications for clearance

- 3.47 Generally, an application for clearance cannot be amended once lodged with the ACCC; however, discretion will be retained by the ACCC to accept very minor amendments to applications. As a guide, the only amendments that will be accepted by the ACCC during its consideration of an application are those that are technical (such as typographical errors, inconsequential omissions and very minor factual corrections) and would in no way affect the nature, scope or consequences of the acquisition as originally detailed in the application. It is vitally important that, before applying for clearance, merger parties settle the details of the acquisition such that no amendments to an application will be necessary once formally submitted to the ACCC.

¹⁸ A full copy of the Federal Court's *Guidelines for Expert Witnesses in Proceedings of the Federal Court of Australia* is available on the Federal Court's website at www.fedcourt.gov.au.

¹⁹ Section 95AZN of the Act.

²⁰ Subsections 95AS(5) and 95AZM(6) of the Act.

- 3.48 If the applicant wishes to amend the application outside of the bounds outlined above or to substitute a new application, the original application must be withdrawn and a new application lodged with the ACCC.
- 3.49 The applicant may withdraw the application at any time by notifying the ACCC in writing.²¹ Applicants should advise the ACCC at the time of withdrawing the application why the applicant is withdrawing the application and whether they intend to proceed with the acquisition which was the subject of the clearance application. Applicants should also note that the fee paid will not be returned upon withdrawal of a valid application.

Time limits for the ACCC to determine clearance applications

- 3.50 The Act requires that the ACCC issue a determination on a clearance application within 40 business days of receiving a valid application.²² This 40-day period begins on the day the valid application is given to the ACCC and ends on the 40th business day after that day. The ACCC will provide written reasons in response to every decision on an application. In most cases, the determination will constitute the ACCC's reasons for its decision.
- 3.51 If no decision is made within this period, the ACCC is taken to have refused the application.

Extensions to the time limit for determining a clearance application

- 3.52 The time allowed for the ACCC to make a determination may be extended if the applicant agrees to the ACCC taking a specified longer period to make the decision. If the ACCC considers that an extension is required, it will request an extension, in writing, and expects that an applicant would respond to such a request by close of business the following day.
- 3.53 More than one extension may be sought by the ACCC and granted by the applicant.²³
- 3.54 If before the end of the 40-day period (or an extended period that has been agreed to by the applicant) the ACCC decides that it cannot make a determination on the application because of its complexity or because of other special circumstances, the ACCC may extend the period to make a determination by a further 20 days. It is expected that the ACCC will make a decision to extend the period to make its determination infrequently and only in complex and/or contentious matters. If the ACCC decides that such a further extension is required, it will notify the applicant in writing as early as possible during the clearance application process.

21 Section 95AL of the Act.

22 Section 95AO of the Act. A business day is defined in the Act as a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory (s. 95AB).

23 Subsection 95AO(2) of the Act.

Merger clearance register

- 3.55 The process whereby the ACCC assesses applications for clearance is public, transparent and consultative. The clearance process set out in the Act establishes that the ACCC must maintain a merger clearance register which is available for inspection by the public. This register must contain, subject to confidentiality:
- applications for clearance
 - any document provided to the ACCC in relation to an application or proposal
 - particulars of oral submissions made to the ACCC in relation to an application and
 - the ACCC's determination on the application and an accompanying statement of reasons.²⁴
- 3.56 The ACCC will create written records of all oral submissions made by the applicant and interested parties. These records will not be verbatim but will be comprehensive summaries of the issues raised during the oral submissions. The ACCC will place records of oral submissions on the register as soon as possible after they are made.
- 3.57 Applications, documents and submissions must be placed on the register by the ACCC even if the application to which they relate is subsequently withdrawn.
- 3.58 In addition to excluding information that is confidential in nature, the ACCC may exercise its discretion to exclude any other information from the register and/or website if it considers that it is beneficial to do so. This may occur where, for example, the ACCC considers that, to avoid confusion, any submissions not considered by the ACCC because they were received outside of the consultation period (see box 3) should be excluded from the merger clearance register.
- 3.59 The ACCC is also required to place on the merger clearance register applications, documents and submissions relating to minor variations, revocation or revocation and substitution of clearances. Each of these processes is discussed in chapter 4, Varying, revoking and substituting clearances.
- 3.60 The merger clearance register will be largely mirrored on the ACCC's website. Persons wishing to obtain merger clearance applications, submissions and decisions should first consult the ACCC's website at www.accc.gov.au/mergers. Copies of documents not on the ACCC website may be requested from the ACCC's public register officer for a fee.

24 Section 95AH of the Act, and subject to the confidentiality provisions in section 95AI of the Act.

Confidentiality

- 3.61 The Act and Competition and Consumer Regulations 2010 set out the process for the ACCC to assess requests for information to be excluded from the merger clearance register and from the ACCC's website because of its confidential nature.²⁵ The ACCC has published a guideline which outlines the requirements on applicants and interested parties wishing to request that information be excluded from the ACCC's public register and website, and the way in which the ACCC will assess such requests in relation to applications or submissions for non- merger authorisation, merger clearance and notification processes. A copy of this guideline, *Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes* is available on the ACCC website, www.accc.gov.au/mergers.
- 3.62 Applicants and interested parties may, at the time of providing information to the ACCC in relation to an application, request that certain information be excluded from the merger clearance register and the ACCC website because it is confidential. The ACCC will endeavour to respond to requests for excluding information because of confidentiality by close of business the following day. If a request to exclude information is rejected, the party who provided the information can either withdraw the information or agree to it being made publicly available. As a general rule, the ACCC will allow the relevant party until close of business the following day to respond before the information is taken to be withdrawn from ACCC consideration. If an applicant or interested party chooses to withdraw information because a request for confidentiality has been rejected, that information cannot be considered or taken into account in the clearance.
- 3.63 If an applicant or interested party makes a request to exclude information because of its confidential nature, it should provide the ACCC with both a redacted and un-redacted version of their application. The redacted version should omit the information to be excluded and which may therefore be placed on the public register.
- 3.64 Applicants should be aware that any request to exclude information from the public register contained in the application form that is refused by the ACCC, and subsequently withdrawn by the applicant, may potentially affect whether the application meets the information requirements and, as such, whether it is a valid application.
- 3.65 In the event of a Tribunal review of the ACCC's decision, the ACCC is required to give the Tribunal all the information that the ACCC took into account in making its determination and identify which, if any, of that information was excluded from the mergers public register. In conducting its review, the Tribunal may disclose this information to such persons and on such terms as it considers reasonable and appropriate for the purposes of clarifying that information.

²⁵ Section 95AI of the Act.

Box 2 Checklist for applicants: submitting a clearance application	
<p>As a prospective applicant for a formal merger clearance, you should be familiar with the following obligations.</p> <p>Before submitting an application</p> <p>Have you:</p> <ul style="list-style-type: none"> discussed your application with ACCC staff? <input type="checkbox"/> consulted with the target in preparing your application, verifying that information provided about the target and its operations is correct? <input type="checkbox"/> provided sufficient detail in your application to enable a full assessment of the acquisition by the ACCC and evidence to satisfy the ACCC of your claims that the proposed acquisition will not substantially lessen competition? <input type="checkbox"/> <p>Submitting an application—the ACCC expects that the following will be provided with the application forms</p> <p>Have you:</p> <ul style="list-style-type: none"> completed the prescribed form, including all information and documents which must be provided with the form including: <input type="checkbox"/> <ul style="list-style-type: none"> annual reports? <input type="checkbox"/> board papers? <input type="checkbox"/> contact details of customers, suppliers and competitors? <input type="checkbox"/> section 87B undertaking not to complete the acquisition until a determination is made? <input type="checkbox"/> specified the period for which clearance is sought, with reasons justifying the duration? <input type="checkbox"/> clearly marked any information that you wish to exclude from the public register due to confidentiality, with reasons justifying why confidentiality should be granted? <input type="checkbox"/> provided a redacted version of your application which may be placed on the public register (if you are requesting that any information be excluded from the public register because it is confidential)? <input type="checkbox"/> where applicable, provided a draft undertaking under s. 87B of the Act with the application, addressing any competition concerns that you consider the proposed acquisition may raise? <input type="checkbox"/> provided details of persons who can be contacted regarding the application, including postal and email addresses, telephone and facsimile numbers? <input type="checkbox"/> submitted the electronic version of the application and associated documents (in searchable PDF format on compact disc or equivalent media) and unbound hard copies in person at an ACCC office or by post to General Manager, Mergers and Asset Sales, ACCC, GPO Box 3131, Canberra ACT 2601? <input type="checkbox"/> paid the correct lodgment fee of \$25 000? <input type="checkbox"/> emailed electronic versions of the application and associated documents to mergers@accc.gov.au? <input type="checkbox"/> 	

The formal clearance process

- 3.66 The following section sets out the steps the ACCC must take in its consideration and assessment once a valid application for clearance has been lodged and details other processes which the ACCC intends to follow in its consideration of a clearance application.
- 3.67 The ACCC's consideration of a formal merger clearance application commences when a valid application is lodged with the ACCC.

Summary of the clearance process

- 3.68 Please note that this is a suggested timeline only. It has been designed to ensure that the ACCC can properly review and consider the clearance application and all submissions and make a determination within the statutory timeframe of 40 days (or as agreed or by the review period plus 20 days if the ACCC extends the period).²⁶

Day 1	Application lodged.
By Day 2	Applicant notified of outcome of request to exclude information from the public register due to confidentiality (if any). Where target has not been consulted, ACCC writes to target requesting confirmation of information provided by applicant and further information including contact details of customers, suppliers and competitors.
By Day 5	Where applicable, applicant notified of decision of invalidity of application.
By Day 6	ACCC writes to target requesting a submission with respect to the impact on competition of the proposed acquisition. ACCC writes to potentially interested parties requesting submissions. ACCC places notice on website inviting submissions.
By Day 15	Final date for written submissions made by interested parties. Final date for interested parties who have provided a written submission to request a conference.
By Day 20	Where applicable, conference is held.
By Day 35 (or by Day 55 if ACCC extends period)	Where applicable, ACCC issues a statement of concerns.
By Day 40 (or as agreed or by review period plus 20 days if ACCC extends period)	The ACCC makes a determination on the application.

²⁶ Days are business days in the Australian Capital Territory, not calendar days.

Public consultation and assessment

- 3.69 The ACCC may conduct a public consultation process to help it assess the competitive effects of the proposed acquisition. The ACCC may also seek to confirm or clarify information provided by the applicant and identify any additional issues that may be relevant to its consideration of a proposed acquisition.
- 3.70 Consultation with relevant stakeholders ensures that the ACCC can make a thorough and accurate assessment of the competitive effects of a proposed acquisition and, accordingly, whether clearance ought to be granted. The importance of the information obtained by the ACCC during the public consultation process and the reliance placed on it by the ACCC in forming its decision of whether to grant clearance for a proposed acquisition should not be underestimated.
- 3.71 During the consultation process, and when requested by parties, the ACCC may provide informal guidance in relation to the clearance process. This may include discussions to clarify the types of issues the ACCC is seeking information on and providing assistance to parties relating to the form of their submissions. However, the ACCC will not comment on the merits of the application or the likely outcome of the application prior to the release of the determination or the expiry of the 40-day period (or as agreed or by the review period plus 20 days if the ACCC extends the period), except in circumstances where the ACCC issues a statement of concerns.

Box 3 Important information for applicants and interested parties providing submissions and information to the ACCC

To ensure that information is considered by the ACCC in undertaking its assessment of a clearance application, applicants and interested parties must follow the timeframes specified by the ACCC for submissions and the provision of information. Any information received by the ACCC outside of these specified timeframes may be disregarded by the ACCC for the purposes of making a determination.

Parties should also make clear to the ACCC during any discussions whether they are making or intend to make an oral submission which they wish the ACCC to consider in making its determination.

In the event of a Tribunal review (discussed in more detail at chapter 5, Reviewing ACCC clearance determinations), if the ACCC has not had regard to the submission or information in its deliberations, it will not be considered by the Tribunal in the review.

Notice on the ACCC website

- 3.72 Once the ACCC has considered whether an application for clearance is valid, the ACCC will place copies of the clearance application and accompanying information and documents (subject to confidentiality) on its website at www.accc.gov.au/mergers.²⁷ At that time, the ACCC will also invite submissions from interested parties to be made by a specified date. This date will ordinarily be no later than three weeks after the receipt of the application. Please refer to the timeline in paragraph 3.68 above which summarises the timeframe that will apply to the ACCC's consideration of applications for clearance.

Written submissions

- 3.73 In the initial stages of its assessment of the proposed acquisition, the ACCC will also undertake a targeted public consultation process during which it will write to and seek information from potentially interested parties.
- 3.74 Contact details of a representative selection of customers, suppliers and competitors must be provided by the applicant in its application for clearance. In addition to those contacts provided by the applicant, the ACCC will identify other relevant stakeholders, including customers, suppliers and competitors, the customers and suppliers of competitors, industry associations and peak bodies, government departments, ministers, consumer groups, trade unions and overseas regulators. The ACCC will write to these parties and invite them to make submissions with respect to the competitive impact of the proposed acquisition.
- 3.75 The type of information that the ACCC seeks from stakeholders is consistent with the information sought from applicants and again relates to the market definition and the merger factors as outlined in the Act. These factors are:
- the actual and potential level of import competition in the market
 - the height of barriers to entry to the market
 - the level of concentration in the market
 - the degree of countervailing power in the 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 in the market or are likely to be available in the market
 - the dynamic characteristics of the market, including growth, innovation and product differentiation
 - the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor
 - the nature and extent of vertical integration in the market.²⁸

²⁷ Section 95AG of the Act.

²⁸ Subsection 50(3) of the Act.

- 3.76 Information relating to these factors will provide an indication of the likely competitive effects of the proposed acquisition. It is this information which is most valuable to the ACCC. It is understood that not all of the merger factors will be relevant to every proposed merger. The ACCC also recognises that the merger factors are not exhaustive and encourages parties to provide it with any information that may be relevant to its consideration of the competitive impact of a proposal. Such information may include information about strategic behaviour and pricing decisions of the merger parties and their competitors. Similarly, the ACCC may specifically request information about the relevant market and whether the relevant markets are substantial. The importance of this information and the reliance placed on it by the ACCC in forming its decisions should not be underestimated by interested parties.
- 3.77 Interested parties will ordinarily be given 10 business days to provide a written submission to the ACCC in response to a clearance application. Consistent with the merger register requirements on the ACCC outlined in paragraphs 3.55 to 3.60 above, submissions from interested parties will (subject to confidentiality) be placed on the ACCC's merger clearance register and on the ACCC's website at www.accc.gov.au/mergers. Requests to exclude information from the public register are discussed at paragraphs 3.61 to 3.65.
- 3.78 The ACCC has a strong preference for submissions from interested parties to be provided electronically. Submissions should be scanned at a resolution of 300 DPI and in searchable PDF format, placed on compact disc or equivalent media and posted to GPO Box 3131, Canberra ACT 2601. Alternatively, submissions can be emailed to mergers@acc.gov.au. Unbound hard copies of submissions should be sent to the above address.

Meetings

- 3.79 Consistent with the merger clearance register requirements outlined in paragraphs 3.55 to 3.60, if, at any stage during the clearance process, the ACCC agrees to meet with the applicant, target or an interested party, it will (subject to confidentiality) place a record of the meeting on the merger clearance register.
- 3.80 The ACCC may also hold informal discussions with the applicant, target or interested parties during the clearance process. As the ACCC has a preference for written submissions in the first instance, informal discussions will usually not be a forum to make formal submissions to the ACCC.
- 3.81 If, during an informal discussion with an ACCC staff member, a party decides to make an oral submission, the onus is on that party to advise the ACCC staff member of their intention.
- 3.82 If it is agreed that it is appropriate to make an oral submission, the ACCC staff member will, depending on the nature of the submission, either record their oral submission at that instant or make an appointment to take a submission at a later date.

Conference

- 3.83 The ACCC may decide to convene a conference chaired by a senior ACCC staff member or commissioner to hear oral submissions from interested parties, including the applicant. The conference will ordinarily be convened shortly after the final date for receipt of written submissions from interested parties. This is likely to be within 20 business days of receiving the formal clearance application.
- 3.84 Requests for the ACCC to convene a conference to hear oral submissions will only be considered from interested parties who have provided a written submission to the ACCC by the due date. A request by an eligible interested party must be made in writing to the ACCC and should outline why they consider they have an interest in the outcome of the proposed acquisition, the issues they consider need to be raised in oral submissions and why such issues are best raised orally. Parties wanting the ACCC to convene the conference must advise the ACCC of such before the closing date for written submissions.
- 3.85 The ACCC has the discretion not to convene a conference if it considers that the issues are best addressed otherwise or are irrelevant to its consideration of the proposed acquisition.
- 3.86 In ordinary cases, the ACCC will prepare a record of the oral submissions made at the conference. The record will not be verbatim but will record the issues raised at the conference. If a party's oral submission is particularly complex or technical, the ACCC may ask that party to provide a written record of their oral submission to the ACCC within a specified period. Conference records will be made available to interested parties and placed on the merger clearance register and on the ACCC's website at www.accc.gov.au/mergers.

Providing false or misleading information

- 3.87 Interested parties should be aware that the prohibition in the Act against the provision of false or misleading information also applies to third parties. As discussed in paragraphs 3.44 to 3.46, the provision of false or misleading information to the ACCC may result in significant penalties being imposed.

Requests for additional information

- 3.88 During the public consultation process, the ACCC will also conduct initial research, and may seek additional information from and consult with the applicant, market participants and other organisations. The ACCC may seek information and consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the proposed acquisition.²⁹
- 3.89 If additional information is required, the party will be expected to respond as soon as possible. The ACCC will specify a deadline for responses to requests for information with responses ordinarily required within five business days. While the exact timeframe for responses may vary depending on the nature of information sought and the stage of the assessment process, parties must have regard to the timeframe specified by the ACCC, as information provided late may be disregarded by the ACCC.

²⁹ Subsection 95AK(2) of the Act.

Box 4 Checklist for applicants: once a valid application is lodged

As an applicant, you should ensure that you are familiar with your obligations after an application has been submitted.

You must:

- ☐ keep the ACCC advised of any developments relevant to the clearance application.
- ☐ advise the ACCC of any changes to contact persons. Contact persons should be available to respond to the ACCC promptly during normal business hours.
- ☐ respond to ACCC decisions on any confidentiality claims by close of business the following day.
- ☐ respond to any requests for extensions from the ACCC by close of business the following day.
- ☐ respond to any requests for further information as soon as possible and, in any event, within the period specified by the ACCC.

If you do not respond to ACCC requests for information within the period specified, the ACCC may disregard the information provided. If this occurs, the information will not be before the Tribunal in the event of a review.

Statutory information-gathering powers

- 3.90 The ACCC has statutory information-gathering powers under s. 155 of the Act which empower it to obtain information, documents and evidence if it has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or might constitute, a contravention of the Act.³⁰ In certain circumstances these powers extend to the formal clearance process.
- 3.91 The ACCC will only use these statutory information-gathering powers in considering when an acquisition appears likely to constitute a breach of s. 50 and when relevant information such as internal company documents are not provided by parties voluntarily and cannot be obtained by any other means.
- 3.92 It is an offence to fail to comply with a s. 155 notice, including by deliberately giving information or evidence that is false or misleading.³¹ Non-compliance with a s. 155 notice is punishable by a fine or imprisonment.³²

³⁰ Subsection 155(1) of the Act.

³¹ Subsection 155(5) of the Act.

³² Subsection 155(6A) of the Act.

Statements of concerns

- 3.93 After the public consultation process, and after assessing the relevant market information, the ACCC may consider that the proposed acquisition raises competition concerns. The ACCC may decide to place a statement of concerns on the merger clearance register. This will generally be within 35 business days of receiving the formal clearance application (or within 55 days where the ACCC has extended the determination period because the matter is complex and/or contentious and/or the parties have agreed to such an extension).
- 3.94 The statement of concerns will outline the nature and extent of the ACCC's concerns and will provide reasons for those concerns, having regard to submissions and information provided by market participants and other interested parties. Statements of concerns issued by the ACCC provide an opportunity for the applicant to agree to an extension in order to attempt to reduce or resolve those concerns before the ACCC issues a final decision.
- 3.95 Statements of concerns will be placed on the merger clearance register and the ACCC's website at www.accc.gov.au/mergers and will be forwarded to any party that has made a submission to the ACCC.
- 3.96 If an applicant wishes to give an undertaking or provide submissions to address the concerns raised by the ACCC, or otherwise respond to the statement of concerns, the ACCC will need sufficient time to consult with market participants and interested parties. This may require that the period within which the ACCC must make a determination be extended. In such cases the ACCC will request an extension of time from the applicant before inviting the applicant to give an undertaking or make further submissions.
- 3.97 To allow ample time for consultation and assessment, around 20 business days would be needed after receipt of a draft undertaking or submission; however, this will be agreed with applicants on a case-by-case basis. The provision of undertakings by an applicant is discussed in further detail below.

Undertakings under s. 87B

- 3.98 Section 87B of the Act gives the ACCC the discretion to accept an undertaking given in connection with a clearance or to grant a clearance subject to the condition that the person to whom clearance is granted gives an undertaking to the ACCC under s. 87B of the Act.³³ Undertakings under s. 87B of the Act may provide an alternative to the ACCC simply refusing to grant a clearance when competition concerns are such that the ACCC cannot be satisfied that in the absence of the undertaking the proposal would not have the effect, or would not be likely to have the effect of substantially lessening competition within the meaning of s. 50. Undertakings given under s. 87B of the Act can be enforced by the ACCC in the Federal Court.
- 3.99 If parties are considering giving the ACCC a draft undertaking, they should commence discussions with the ACCC at an early stage about an appropriate time to give the draft undertaking and the impact of giving such an undertaking on the timeframe for assessment.

33 Subsections 87B(1A) and 95AP(2) of the Act.

- 3.100 In some circumstances, an applicant may consider that there is a real prospect that the proposed merger or acquisition for which clearance is sought may raise competition concerns such that the proposal would, or would be likely to, result in a breach of s. 50 of the Act. The applicant may give an undertaking under s. 87B of the Act to pre-empt competition concerns. In such cases, the applicant should provide a draft of that undertaking to the ACCC at the time of lodging the clearance application. While such an undertaking will not be considered to be a constituent part of the application, public comment will be sought on it during the public consultation process on the clearance application itself.
- 3.101 If the ACCC forms the preliminary view, after inquiring into a proposed acquisition, that the proposal is likely to substantially lessen competition in breach of s. 50, it will generally provide parties with reasons for that view in the form of a statement of concerns (see paragraphs 3.93 to 3.97). If the applicant subsequently forms the view that undertakings could be given to reduce or eliminate the ACCC's stated concerns, it may wish to consider giving the ACCC an undertaking aimed at restructuring the transaction.
- 3.102 As outlined above, the ACCC would only consider such an undertaking in its deliberations if it considered that it had sufficient opportunity to consider the undertaking, consult interested parties on the draft undertaking and resolve any issues arising from this consultation. As indicated in paragraph 3.96 and 3.97 above, it is likely that this would require the applicant to agree to an extension to the timeframe for consideration (it is expected that, ordinarily, an extension of approximately 20 business days would suffice).
- 3.103 Except in circumstances where an undertaking to pre-empt competition concerns is given to the ACCC at the start of the clearance process (that is, the undertaking is lodged together with the clearance application) it is likely that the ACCC will require that the applicant agrees to an extension of time every time a draft undertaking (including any revised draft undertaking) is given to the ACCC by the applicant. If no such extension is offered by the applicant at the time of giving the undertaking, the s. 87B undertaking will not be considered by the ACCC in making its determination. If the ACCC is not satisfied that a substantial lessening of competition is not likely in the absence of such an undertaking, it will refuse the clearance.
- 3.104 The ACCC will not grant clearance to a proposed merger or acquisition unless any undertaking proposed under s. 87B has been accepted by the ACCC prior to it making its determination. An undertaking which has been accepted by the ACCC prior to the ACCC making its determination ensures that the ACCC can make its final decision with greater certainty than if the undertaking has not yet been finalised. Undertakings attached to mergers or acquisitions which are the subject of a clearance will, in the ordinary case, be attached to the clearance through a condition requiring compliance with the undertaking. Conditions are discussed in more detail in paragraphs 3.111 to 3.114.
- 3.105 The *Merger guidelines* contain further information on enforceable undertakings. In particular, chapter 7 of the *Merger guidelines* includes information on the types of undertakings which the ACCC is inclined to accept and those which it is unlikely to favour. The ACCC generally favours undertakings that address structural issues in the relevant markets (such as divestiture undertakings) over behavioural undertakings (such as price, output, quality and service guarantees and obligations). The *Merger guidelines* also discuss procedural issues relating to s. 87B undertakings.

- 3.106 In the event of non-compliance with a s. 87B undertaking, the ACCC may apply to the Federal Court for an order. The Federal Court may, if it is satisfied that the party to the undertaking has breached a term of the undertaking, make a range of orders, including ordering the person to comply with the undertaking, and an order to compensate persons who have suffered loss or damage as a result of the non-compliance.³⁴

ACCC determination

- 3.107 As outlined above, the ACCC may only grant clearance if it is satisfied that the proposed acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in a market or markets under s. 50 of the Act.
- 3.108 The ACCC's determination will take into account all submissions and any additional information received from merger parties and other interested parties in respect of the application. As outlined above, any submissions and additional information sought by the ACCC but received outside the specified time periods may be disregarded.
- 3.109 The ACCC's determination will result in either:
- clearance being granted
 - clearance being granted, subject to conditions or
 - clearance being refused.³⁵
- 3.110 When the ACCC has made its determination, the written determination and reasons for the determination will be provided to the applicant, placed on the merger clearance register and posted on the ACCC's website at www.accc.gov.au/mergers.

Conditions

- 3.111 Clearance only provides protection from s. 50 if the acquisition is completed in accordance with the clearance, including any conditions attached to the clearance.³⁶ The ACCC may grant clearance subject to certain conditions where those conditions are designed to reduce or eliminate competition concerns.
- 3.112 Acquirers to whom clearances have been granted subject to conditions must comply with such conditions regardless of whether they are to be complied with prior or subsequent to the acquisition taking place.³⁷ Non-compliance will result in exposure to legal action under s. 50 of the Act in respect of the acquisition. If conditions are attached to a clearance, the terms of the conditions, timing of their application and how they may be fulfilled will be clearly delineated by the ACCC.
- 3.113 Additionally, non-compliance with a condition constitutes grounds for revocation of the clearance to be initiated by the ACCC.³⁸ Revocation of clearances is discussed in more detail in chapter 4, 'Varying, revoking and substituting clearances'.

³⁴ Subsection 87B(4) of the Act.

³⁵ Sections 95AM and 95AP of the Act.

³⁶ See Note to subs. 95AC(1) of the Act.

³⁷ See Note 2 to subs. 95AP(1) of the Act.

³⁸ Subsection 95AS(5) of the Act.

3.114 In most cases, conditions will be in the form of a requirement to comply with an undertaking to the ACCC under s. 87B of the Act.³⁹ Section 87B undertakings are discussed in more detail in paragraphs 3.98 to 3.106 above.

Clearances granted for a specified period

3.115 By its nature, a clearance provides protection from the application of s. 50 of the Act to an acquirer at the time of making an acquisition (subject to compliance with all conditions) rather than on an on-going basis. In recognition of this, the Act provides that the ACCC may express a clearance to be in force for a specified period.⁴⁰ In the ordinary case, clearances granted by the ACCC will be expressed to be in force for a specified period and this period will only extend beyond six months in exceptional circumstances. Applicants should specify in their applications the duration for which clearance is sought and provide reasons justifying the duration sought.

3.116 The ACCC recognises that circumstances may arise in which it becomes apparent to parties to whom a clearance is granted that a proposed acquisition will not be completed within the specified period. In such cases, parties should contact the ACCC to discuss this no later than 40 business days before the expiry of the clearance. During these discussions, the parties and the ACCC may examine whether a minor variation or revocation and substitution of the clearance would be appropriate in the circumstances. Both minor variation and revocation and substitution of a clearance are discussed in more detail in chapter 4, 'Varying, revoking and substituting clearances'.

When does the ACCC's determination come into effect?

3.117 Clearances that are granted without conditions will come into effect on the day the determination is made by the ACCC.⁴¹

3.118 In the event that the ACCC grants a clearance subject to conditions, the applicant may apply to the Tribunal for a review of the ACCC's determination (discussed in chapter 5, Reviewing ACCC clearance determinations). Applications for review of an ACCC determination must be lodged with the Tribunal within 14 days of the ACCC making its determination.

3.119 The day on which clearances granted subject to conditions come into effect will vary according to whether an application is made to the Tribunal for review. If an application for review is not made within the prescribed period or if the party advises the ACCC that it will not make an application for review, the ACCC's clearance comes into force at the end of the period or the day on which the ACCC receives the advice that its determination will not be appealed (whichever occurs first). If an application for review is made to the Tribunal, the clearance comes into effect either when that application is withdrawn or when the Tribunal makes a determination on the review.⁴²

39 Subsection 95AP(2) of the Act.

40 Subsection 95AQ(3) of the Act.

41 Subsection 95AQ(1) of the Act.

42 Subsection 95AQ(2) of the Act.

4. Varying, revoking and substituting clearances

- 4.1 Many of the powers and functions of the ACCC for assessing and determining applications for variations, revocation and revocation and substitution are the same as those it has for assessing and determining applications for clearances. For example the ACCC retains the power to seek information from applicants and any other party to assist its consideration, is able to impose conditions and is able to specify a period for which a clearance as varied or substituted is in force.
- 4.2 The ACCC may also use its powers under s. 155 of the Act to compel parties to provide information in assessing applications for variation, revocation or revocation and substitution in some circumstances.
- 4.3 The ACCC may also accept undertakings provided to it under s. 87B of the Act to address competition concerns associated with varied or substituted clearances and it may choose to exercise its discretion to issue statements of concerns and hold conferences in relation to applications for minor variation, revocation, and revocation and substitution of a new clearance.
- 4.4 The processes that the ACCC will follow for all of the above will generally be consistent with those it follows for applications for merger clearance.
- 4.5 The following sections deal only with matters specific to each of minor variation, revocation, and revocation and substitution. All other processes will mirror those outlined in detail in chapter 3, 'Formal merger clearance'.

Minor variations of clearances

- 4.6 Once a clearance has been granted or granted subject to conditions, a person may apply to the ACCC for a minor variation of the clearance. Parties may seek variations of clearances for a range of reasons; however, it is important to keep in mind that, to qualify as a minor variation, the variation proposed must be:
 - a single variation that does not involve a material change in the effect of the clearance...⁴³
- 4.7 Such a variation may only be sought once a clearance has been granted and before both the expiry of the clearance and the completion of the acquisition. When an acquisition has taken place, the acquisition will only be protected from the operation of s. 50 within the terms of the clearance as granted or as varied by the ACCC.
- 4.8 As a general guide, an applicant may apply for a minor variation if there is a minor change to the assets to be acquired, such as an inconsequential change in the number of shares to be acquired, or a change in the specific assets (such as machinery or equipment) to be acquired as part of the acquisition. A minor variation would not be the appropriate course of action

43 Section 95AB of the Act—definition of **minor variation**.

for an applicant to take if the target had changed or if there was a significant change in the shares or assets to be acquired.

- 4.9 An applicant may also apply for minor variation if there is to be a change in the date that the acquisition will be completed such that an extension of the period for which the clearance has been granted is required. Whether such a variation is considered by the ACCC to be minor will depend on various factors, including the initial period for which the clearance was granted, the length of the extension sought, the progress of the acquisition and the justification for the extension. A variation that involves a material change in the effect of the clearance should be treated as a revocation and substitution of a new clearance. For more detail on applications for revocation and substitution of a new clearance, see discussion in paragraphs 4.63 to 4.90.
- 4.10 To avoid unnecessary inconvenience, a party who wishes to apply for minor variation should contact the ACCC to discuss the proposed variation as soon as it becomes apparent that a minor variation to the clearance may be required.
- 4.11 Applicants must also be aware that it will generally take the ACCC 40 days to consider an application for minor variation (and in some cases this may be extended by agreement or by the review period plus 20 days if the ACCC decides to extend the determination period in complex and/or contentious matters). A party who wishes to apply for minor variation should contact the ACCC to discuss the application well in advance of the expiry of the clearance and certainly no later than 40 business days before the expiry date.
- 4.12 Once the ACCC has accepted that the variation proposed in an application for minor variation is, in fact, minor, it will commence its consultation and assessment process.

Valid applications

- 4.13 Section 95AR(2) establishes the requirements for a valid application for minor variation of a clearance and sets out that a valid application must:
 - (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- 4.14 Applications for minor variation of a clearance must be made on *Form P Application for minor variation of merger clearance* as set out in the Competition and Consumer Regulations 2010. The form is available on the ACCC's website at www.accc.gov.au/mergers.⁴⁴
- 4.15 The application for minor variation must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act that the applicant will not make the acquisition while the application for minor variation is being considered by the ACCC.⁴⁵ The form of undertaking to be given to the ACCC is attached to Form P. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one which will be returned to the applicant.

⁴⁴ Form P is also available from any ACCC office.

⁴⁵ Subsection 95AR(2A) of the Act.

- 4.16 There is currently no fee payable for an application for minor variation of a clearance.⁴⁶
- 4.17 The ACCC must notify an applicant of an invalid application within five business days. Applications will be scrutinised thoroughly during this period for compliance with the information requirements set out in the application form and the regulations. For applications which the ACCC considers are invalid within five days of receiving the application, the ACCC will advise the applicant in writing and provide the applicant with reasons for this decision.
- 4.18 The ACCC will not issue a determination on applications for minor variation in which the variation sought is not considered to meet the definition of minor variation.

Multiple variations

- 4.19 The ACCC may consider multiple minor variations jointly and as though they were a single variation in certain circumstances. For this to occur, the applications must have been submitted either at the same time or in such close succession that they can be conveniently dealt with together. The ACCC will only consider minor variations together where applications for multiple variations are received by the ACCC at the same time or before the consultation period in relation to the first minor variation applied for has commenced.
- 4.20 Additionally, the ACCC will only consider multiple variations together if the combined effect of the variations would not involve a material change in the effect of the clearance. For example a series of variations that significantly changed the target, the scope of the acquisition, the affected markets or the competitive effects of the acquisition would not be considered by the ACCC as constituting a variation which is minor.

The test

- 4.21 The ACCC cannot vary a clearance unless the ACCC is satisfied that the acquisition to which the clearance relates (as varied) would not have the effect, or be likely to have the effect, of substantially lessening competition.
- 4.22 This is the same test contained in s. 95AN of the Act described above, which is used to initially assess whether clearance should be granted.
- 4.23 Accordingly, the ACCC's approach to the assessment of an application for minor variation mirrors its approach to assessing an application for clearance (outlined in detail at chapter 3, Formal merger clearance) and, in making its assessment, the ACCC will consider the merger factors detailed in the Merger guidelines.

⁴⁶ The fee for clearance minor variations may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application.

Merger clearance register

- 4.24 The ACCC must keep copies of applications for minor variation on a merger clearance register. The ACCC must also place any document provided to it in relation to the application, particulars of oral submissions made to it in relation to the application and the ACCC's determination in relation to the application on the register.
- 4.25 The ACCC may exclude from the merger clearance register information that is confidential in nature. In addition, the ACCC may exercise its discretion to exclude any other information if it considers that it is beneficial to do so. This may occur where, for example, the ACCC considers that, to avoid confusion, any submissions not considered by the ACCC because they were received outside of the consultation period (see box 3) should be excluded from the merger clearance register.
- 4.26 The merger clearance register and the process for requesting that information is excluded from the merger clearance register and ACCC website because it is confidential in an application or in relation to an application are outlined in more detail in paragraphs 3.55 to 3.65.

Public consultation

- 4.27 Subject to confidentiality claims as discussed above, the ACCC will place a valid application for a minor variation on its website and invite submissions from interested parties in response to the application. The ACCC may consult with such parties and seek further information as it considers reasonable and appropriate for the purposes of making its determination. This is consistent with the public consultation process undertaken in relation to an application for clearance, and the ACCC will seek information from market participants as to whether the acquisition (as varied) would be likely to result in a substantial lessening of competition in any relevant market.
- 4.28 The ACCC will generally allow 10 business days for interested parties to make submissions.

Time limits for the ACCC to determine minor variation applications

- 4.29 After considering the application for minor variation, all submissions and any additional information received, the ACCC will make a determination either varying the clearance or refusing to vary the clearance. Any submissions and additional information in relation to the application for minor variation sought by the ACCC but received outside the specified time periods may be disregarded.
- 4.30 If the ACCC makes a determination to vary the clearance, it may also vary any conditions of the clearance to take account of the variation of the clearance.⁴⁷

⁴⁷ Subsection 95AR(6A) of the Act.

- 4.31 The ACCC will notify the applicant, in writing, of its decision and provide reasons for it. The Act requires that the ACCC issue a determination on an application for minor variation within 40 business days of receiving a valid application (or as agreed or by the review period plus 20 days if the ACCC extends the determination period in complex and/or contentious matters).⁴⁸ If no decision is made within this period, the ACCC is taken to have refused the application.

Extensions to the time limit for determining a minor variation application

- 4.32 The time allowed for the ACCC to make a determination may be extended if the applicant agrees to the ACCC taking a specified longer period to make the decision. If the ACCC considers it necessary, it will request an extension, in writing, and expect that an applicant will respond to such a request by close of business the following day. The extension must be agreed to by both the applicant and the ACCC before the original period expires if a determination is not to be made or deemed to have been made on the 40th day.
- 4.33 If before the end of the 40-day period (or as agreed) the ACCC decides that it cannot make a determination on the application for minor variation because of its complexity or because of other special circumstances, the ACCC may extend the period to make a determination by a further 20 days. It is expected that the ACCC will make a decision to extend the period to make its determination infrequently and only in complex and/or contentious matters. If the ACCC decides that such a further extension is required, it will notify the applicant in writing as early as possible during the application for minor variation process.

Withdrawal of application

- 4.34 The applicant may withdraw the application at any time, by notifying the ACCC in writing. If withdrawing an application for minor variation, the applicant should advise the ACCC as to why the application is being withdrawn.
- 4.35 Valid applications which have been withdrawn will remain on the public register.
- 4.36 Any fee paid for a withdrawn application for minor variation will not be returned to the applicant.

⁴⁸ Subsection 95AR(7) of the Act. A business day is defined in the Act as a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory (s. 95AB).

Revocation of clearance

- 4.37 Once a clearance has been granted, the holder of the clearance may apply to the ACCC to have that clearance revoked. A revocation may be sought by a clearance holder if, for example, the acquisition to which the clearance relates is no longer going to be made.
- 4.38 Additionally, the ACCC may initiate revocation of a clearance if one of the following occurs:
- (a) the clearance was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the clearance has not been complied with; or
 - (c) there has been a material change of circumstances since the clearance was granted.⁴⁹

Applications for revocation of clearance

- 4.39 The ACCC may revoke a clearance upon application by the person to whom the clearance was granted. It follows that, since applications may only be made by an acquirer, applications for revocation of a clearance may only be made by an acquirer and not a target.
- 4.40 The Act establishes the requirements for a valid application for revocation of a clearance. To be valid, an application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.⁵⁰
- 4.41 Applications for revocation of a clearance must be made on *Form Q Application for revocation of merger clearance* as set out in the Competition and Consumer Regulations 2010. The form is available on the ACCC's website at www.accc.gov.au/mergers.⁵¹
- 4.42 The application for revocation must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act that the applicant will not make the acquisition while the application for revocation is being considered by the ACCC. The form of undertaking to be given to the ACCC is attached to Form Q. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be returned to the applicant.
- 4.43 There is currently no fee payable for an application for revocation of a clearance.⁵²

49 Subsection 95AS(5) of the Act.

50 Subsection 95AS(2) of the Act.

51 Form Q is also available from any ACCC office.

52 The fee for clearance revocation may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application.

- 4.44 The ACCC must notify an applicant of an invalid application within five business days. Applications will be scrutinised thoroughly during this period for compliance with the information requirements set out in the application form and regulations. For applications which the ACCC considers invalid, the ACCC will advise the applicant in writing and provide reasons for this decision. Where a fee has been paid for an application that is ultimately determined to be invalid, the fee will be returned to the applicant.

Revocation by the ACCC without an application

- 4.45 As outlined in paragraph 4.38 above, the ACCC may initiate revocation of a clearance in the absence of an application by the person to whom clearance was granted in certain circumstances.
- 4.46 If the ACCC is considering revoking a clearance, the ACCC will advise the person to whom clearance was granted that it is considering doing so and why it is considering doing so. The ACCC will also initiate a public consultation process on the proposal to revoke the clearance.

The test

- 4.47 The ACCC may only revoke a clearance if either:
- no submissions are received objecting to the revocation (other than objections which are considered by the ACCC to be vexatious or frivolous) or
 - submissions are received objecting to the revocation, but the ACCC would have been prevented from granting a clearance to the acquisition if it were a fresh application for clearance.⁵³
- 4.48 That is, if submissions are received that object to the clearance being revoked, the ACCC may only revoke the clearance if it is not satisfied that the acquisition to which the clearance relates would not have the effect, or be likely to have the effect, of substantially lessening competition.
- 4.49 If no substantive objections are received to an application for revocation of a clearance, the ACCC may revoke the clearance if it is satisfied that one of the situations referred to in paragraph 4.38 applies.

Merger clearance register

- 4.50 The ACCC must keep copies of applications for revocation and ACCC proposals to revoke clearances on a merger clearance register. The ACCC must also place on the register any document provided to the ACCC in relation to the application or proposal particulars of oral submissions made to the ACCC on the application or proposal and the ACCC's determination on the application.

53 Subsection 95AS(8) of the Act.

- 4.51 The ACCC may exclude from the merger clearance register information that is confidential in nature. In addition, the ACCC may exercise its discretion to exclude any other information if it considers that it is beneficial to do so. This may occur where, for example, the ACCC considers that, to avoid confusion, any submissions not considered by the ACCC because they were received outside of the consultation period (see box 3) should be excluded from the merger clearance register.
- 4.52 The merger clearance register, and the process for requesting that information is excluded from the merger clearance register and ACCC website because it is confidential in an application or in relation to an application, are outlined in more detail in paragraphs 3.55 to 3.65.

Public consultation

- 4.53 Subject to confidentiality claims as discussed above, the ACCC will notify the person to whom clearance was granted, place notification of its consideration to revoke a clearance on its website and invite submissions in response. The ACCC will also initiate a targeted public consultation process and will, for example, write to parties who provided submissions on the original clearance application and invite them to make a submission on the application or proposal to revoke the clearance. The ACCC may consult with such parties and seek further information as it considers reasonable and appropriate for the purposes of making its determination on the application or proposal to revoke the clearance.
- 4.54 Consistent with the public consultation process undertaken in relation to an application for clearance, the ACCC will generally allow 10 business days for interested parties to make submissions.

Time limits for determining applications for revocation

- 4.55 After considering all submissions and any additional information received, the ACCC will make a determination in writing, with reasons either revoking the clearance or refusing to revoke the clearance. Any submissions and additional information sought by the ACCC on the application for revocation but received outside the specified time periods may be disregarded.
- 4.56 The Act requires that the ACCC issue a determination on an application for revocation of a clearance within 40 business days of receiving a valid application (or as agreed or by the review period plus 20 days if the ACCC extends the determination period in complex and/or contentious matters).⁵⁴ If no decision is made within this period, the ACCC is taken to have refused the application.
- 4.57 There is no time limit on the ACCC for making a determination on a proposal to revoke that it has initiated. However, the ACCC will endeavour to make such a determination within 40 days of issuing a revocation notice.

⁵⁴ Subsection 95AS(10) of the Act. A business day is defined in the Act as a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory (s. 95AB).

Extensions to the time limit for determining applications for revocation

- 4.58 The time allowed for the ACCC to make a determination may be extended if the applicant agrees to the ACCC taking a specified longer period to make the decision. If the ACCC considers it necessary, it will request an extension, in writing, and expect that the applicant would respond to such a request by close of business the following day. The extension must be agreed to by both the applicant and the ACCC before the original period expires if a determination is not to be made or deemed to have been made on the 40th day.
- 4.59 If before the end of the 40-day period (or as agreed) the ACCC decides that it cannot make a determination on the application for revocation because of its complexity or because of other special circumstances, the ACCC may extend the period to make a determination by a further 20 days. It is expected that the ACCC will make a decision to extend the period to make its determination infrequently and only in complex and/or contentious matters. If the ACCC decides that such a further extension is required, it will notify the applicant in writing as early as possible during the application for revocation process.

Withdrawal of application

- 4.60 The applicant may withdraw the application at any time, by notifying the ACCC in writing. If withdrawing an application for revocation, the applicant should advise the ACCC of the reason for withdrawing the application.
- 4.61 Valid applications that have been withdrawn will remain on the public register. Proposals by the ACCC to revoke an application, which are later withdrawn, will also be kept on the public register.
- 4.62 Any fee paid for a withdrawn application for revocation will not be returned to the applicant.

Revocation and substitution of a new clearance

- 4.63 Once a clearance has been granted, the holder of the clearance may apply to the ACCC to have that clearance revoked and substituted with a new clearance. This process may only commence on the application of the clearance holder or by the ACCC's initiation.
- 4.64 A clearance holder may apply for revocation of a clearance and substitution of a new clearance if, for example, there has been a change to the acquisition for which clearance was granted, such as a significant change in the shares or assets to be acquired. Clearance holders whose application for minor variation is revoked on the basis that the variation sought is not minor may wish to consider lodging an application for revocation and substitution of a new clearance.

4.65 The ACCC may initiate a revocation and substitution process only if one of the following has occurred:

- (a) the clearance was granted on the basis of information that was misleading in a material particular; or
- (b) a condition of the clearance has not been complied with; or
- (c) there has been a material change of circumstances since the clearance was granted.⁵⁵

Applications for revocation of clearance and substitution of a new clearance

4.66 The Act establishes the requirements for a valid application for revocation of a clearance and substitution of a new clearance. To be valid, an application must:

- (a) be in a form prescribed by the regulations and contain the information required by the form; and
- (b) be accompanied by such other information or documents as are prescribed by the regulations; and
- (c) be accompanied by the fee (if any) prescribed by the regulations.⁵⁶

4.67 Applications for revocation of a clearance and substitution of a new clearance must be made on *Form R Application for revocation of clearance and substitution of new clearance* as set out in the Competition and Consumer Regulations 2010. The form is also available on the ACCC's website at www.accc.gov.au/mergers.⁵⁷ An application for revocation and substitution are treated as one application using a single form.

4.68 The application for revocation and substitution must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act that the applicant will not make the acquisition while the application for revocation and substitution is being considered by the ACCC. The form of undertaking to be given to the ACCC is attached to Form R. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be returned to the applicant.

4.69 Additionally, the application must be accompanied by the relevant fee, which is currently set at \$25 000.⁵⁸

55 Subsection 95AS(5) of the Act.

56 Subsection 95AS(2) of the Act.

57 Form R is also available from any ACCC office.

58 The fee for applications for revocation and substitution of a clearance may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application. Fees levied in respect of clearance revocation and substitution applications cannot be varied or waived by the ACCC.

- 4.70 The ACCC must notify an applicant of an invalid application within five business days. Applications will be scrutinised thoroughly during this period for compliance with the information requirements set out in the application form and regulations. For applications that the ACCC considers invalid, the ACCC will advise the applicant in writing and provide reasons for this decision. Where a fee has been paid in respect of an application which is ultimately determined to be invalid, the fee will be returned to the applicant.

Revocation by ACCC without an application

- 4.71 As outlined in paragraph 4.65 above, the ACCC may initiate the process for the revocation and substitution of a new clearance in the absence of an application by the person to whom clearance was granted.
- 4.72 If the ACCC is considering revoking a clearance and substituting a new clearance, it will advise the person to whom clearance was granted that it is considering doing so and why it is considering doing so. It will also initiate a public consultation process on the proposal to revoke the clearance.

The test

- 4.73 The ACCC will not make a determination revoking a clearance and substituting a new clearance unless it is satisfied that the acquisition which is the subject of the substituted clearance would not have the effect, or be likely to have the effect, of substantially lessening competition.
- 4.74 This is the same test contained in s. 95AN of the Act described above, which is used to initially assess whether clearance should be granted.
- 4.75 Accordingly, the ACCC's approach to the assessment of an application for revocation and substitution of a new clearance mirrors its approach to assessing an application for clearance (outlined in detail at chapter 3, Formal merger clearance) and, in making its assessment, the ACCC will consider the merger factors detailed in the *Merger guidelines*.

Merger clearance register

- 4.76 The ACCC must keep copies of applications for revocation and substitution and ACCC proposals to revoke and substitute clearances on a merger clearance register. The ACCC must also place on the register any document provided to the ACCC on the application or proposal, particulars of oral submissions made to the ACCC on the application or proposal and the ACCC's determination on the application.
- 4.77 The ACCC may exclude from the merger clearance register information that is confidential in nature. In addition, the ACCC may exercise its discretion to exclude any other information if it considers that it is beneficial to do so. This may occur where, for example, the ACCC considers that, to avoid confusion, any submissions not considered by the ACCC because they were received outside of the consultation period (see box 3) should be excluded from the merger clearance register.

- 4.78 The merger clearance register and the process for requesting that information is excluded from the merger clearance register and ACCC website because it is confidential in an application or in relation to an application are outlined in more detail in paragraphs 3.55 to 3.65.

Public consultation

- 4.79 Subject to any confidentiality claims, the ACCC will notify the person to whom clearance was granted, place notification of its consideration to revoke a clearance and substitute a new clearance on its website and invite submissions from interested parties in response to the application. This is consistent with the public consultation process undertaken in relation to an application for clearance. It will also seek information from market participants as to whether the acquisition which is the subject of the substitute clearance would be likely to result in a substantial lessening of competition in any relevant market. The ACCC may consult with such parties and seek further information as it considers reasonable and appropriate for the purposes of making its determination on the application or proposal to revoke and substitute the clearance.
- 4.80 The ACCC will generally allow 10 business days for interested parties to make submissions.

Time limits for the ACCC to determine applications for revocation and substitution

- 4.81 After considering all submissions and any additional information received, the ACCC will make a determination in writing, with reasons either revoking the clearance and substituting a new clearance, or refusing to revoke the clearance. These are the only options available to the ACCC when making a determination on an application for revocation of a clearance and substitution of a new clearance. If an application for revocation and substitution has been made, the ACCC does not have the option of revoking a clearance and not substituting a new clearance. As with applications for clearance, any submissions and additional information sought by the ACCC for the application for revocation and substitution but received outside the specified time periods may be disregarded.
- 4.82 The Act requires that the ACCC issue a determination on a clearance application within 40 business days of receiving a valid application (or as agreed or by the review period plus 20 days if the ACCC extends the determination period in complex and/or contentious matters).⁵⁹ If no decision is made within this period, the ACCC is taken to have refused the application for revocation and substitution.
- 4.83 There is no time limit on the ACCC for making a final determination on a proposal to revoke and substitute a new clearance that it initiated. However, the ACCC will endeavour to make such a determination within 40 days of issuing a notice that it is intending to revoke and substitute a new clearance.

⁵⁹ Subsection 95AS(10) of the Act. A business day is defined in the Act as a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory (s. 95AB).

Extensions to the time limit for determining an application

- 4.84 The time allowed for the ACCC to make a determination may be extended if the applicant agrees to the ACCC taking a specified longer period to make the decision. If the ACCC considers it necessary, it will request an extension, in writing, and expect that an applicant would respond to such a request by close of business the following day. The extension must be agreed to by both the applicant and the ACCC before the original period expires if a determination is not to be made or deemed to have been made on the 40th day.
- 4.85 If before the end of the 40 day period (or as agreed) the ACCC decides that it cannot make a determination on the application for revocation and substitution because of its complexity or because of other special circumstances, the ACCC may extend the period to make a determination by a further 20 days. It is expected that the ACCC will make a decision to extend the period to make its determination infrequently and only in complex and/or contentious matters. If the ACCC decides that such a further extension is required, it will notify the applicant in writing as early as possible during the application for revocation and substitution process.

Substituted clearances granted for a specified time period

- 4.86 As with clearances, substituted clearances that are granted and are not subject to conditions will come into effect on the day the determination is made by the ACCC. The day on which substituted clearances granted subject to conditions come into effect will vary according to whether an application is made to the Tribunal for review (discussed at chapter 5, 'Reviewing ACCC clearance determinations'). In addition, a substituted clearance may be expressed to be in force for a specified time period. This period will only extend beyond six months in exceptional circumstances (see also discussion in paragraphs 3.115 and 3.116).

Conditions of granting a substituted clearance

- 4.87 As with an application for clearance, a substituted clearance only provides protection from s. 50 if the acquisition is completed in accordance with the substituted clearance, including any conditions attached to the substituted clearance.⁶⁰ In most cases, conditions will be in the form of a requirement to comply with an undertaking given to the ACCC under s. 87B of the Act.⁶¹

60 Subsection 95AP(1) of the Act.

61 Subsection 95AP(2) of the Act.

Withdrawal of application

- 4.88 The applicant may withdraw the application at any time, by notifying the ACCC in writing. If withdrawing an application for revocation and substitution of a new clearance, the applicant should advise the ACCC of why it is withdrawing the application.
- 4.89 Valid applications that have been withdrawn will remain on the public register. Proposals by the ACCC to revoke an application and substitute a new application, which are later withdrawn, will also be kept on the public register.
- 4.90 Any fee paid for a withdrawn application for revocation and substitution will not be returned to the applicant.

5. Reviewing ACCC clearance determinations

- 5.1 ACCC determinations of applications for clearance, minor variation, revocation and revocation and substitution may be reviewed by the Tribunal.

Tribunal review

- 5.2 Only applicants have a right to apply to the Tribunal for review of an ACCC determination on an application. Applicants may proceed down this path if they are dissatisfied with a determination made by the ACCC (for example if the ACCC refuses a clearance or if the ACCC grants a clearance subject to conditions that the applicant finds unsatisfactory).
- 5.3 Third parties (including the target) do not have a right of review to the Tribunal in respect of an ACCC determination.

The Tribunal

- 5.4 The Tribunal is a separate and independent organisation established under the Act. It is administered within the Federal Court structure and its registry forms part of the Federal Court registry. The Tribunal's contact details can be found on its website at www.competitiontribunal.gov.au.
- 5.5 The Tribunal consists of:
- a president and a number of deputy presidents, all of whom are judges of the Federal Court, and
 - several lay members with knowledge or experience in industry, commerce, economics, law or public administration.⁶²
- 5.6 Members of the Tribunal are appointed by the Governor-General for terms not exceeding seven years.
- 5.7 Applications for review of ACCC determinations are heard by a division of the Tribunal comprising:
- the President or a deputy president and
 - two lay members (typically an economist and a business person).
- 5.8 In Tribunal proceedings, there are three functions that only the presidential member can carry out. They are:
- presiding over the proceedings of the division of the Tribunal
 - presiding alone over proceedings where the proceedings relate to procedural matters such as directions hearings and
 - determining questions of law arising in matters before a division of the Tribunal.
- 5.9 All other functions of the Tribunal are exercised by the division and questions are decided by a majority of the division hearing a matter.⁶³

62 Section 31 of the Act.

63 Section 42 of the Act.

Limitations on the Tribunal

- 5.10 In reviewing a clearance determination, the Tribunal must only have regard to:
- information which was given to the ACCC in connection with the making of the determination to which the review relates
 - any other information referred to in the ACCC's reasons for making the determination
 - any information sought by the Tribunal for the purposes of clarifying information that the ACCC took into account in connection with making its determination and
 - any information or report given to the Tribunal which the Tribunal has required the ACCC to give.

When will the Tribunal grant clearance?

- 5.11 The Tribunal applies the same test for clearance as the ACCC uses in its assessment of formal merger clearances—that is, it must be satisfied that the proposed acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in one or more markets.

Applying for review

- 5.12 As outlined above, only the applicant for clearance may lodge an application for review. Applicants who are dissatisfied with an ACCC clearance determination must complete and lodge *Form W Application for review of decision relating to merger clearance* with the Tribunal. Form W is contained in the Competition and Consumer Regulations 2010 and is also available on the Tribunal's website at www.competitiontribunal.gov.au and the ACCC's website at www.accc.gov.au/mergers.⁶⁴
- 5.13 Applicants are required to lodge an application for review with the Tribunal within 14 days of the ACCC making its determination.
- 5.14 The application for review must also be accompanied by an undertaking to the ACCC under s. 87B of the Act (in the form prescribed by the Competition and Consumer Regulations 2010) that the applicant will not make the acquisition while the application for review is being considered by the Tribunal. The form of undertaking to be given to the ACCC is attached to Form W. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be sent back to the applicant.
- 5.15 There is currently no fee payable for an application for review of an ACCC merger clearance determination.⁶⁵

⁶⁴ Form W is also available from any ACCC office.

⁶⁵ The fee for reviews of merger clearance determinations may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application.

Time limits for review of decisions

- 5.16 The Tribunal must make a decision on the review within 30 business days of receiving the application for review.⁶⁶
- 5.17 If, before the end of the 30-day period, the Tribunal decides that the matter cannot be dealt with within that period due to its complexity or for any other special circumstance, the period within which it must make a decision will be extended by a further 60 business days. If the Tribunal decides that an extension is necessary, it must notify the applicant that this is the case before the expiry of the initial 30-day period.
- 5.18 If the Tribunal does not make a decision within the specified period (or the period so extended), the Tribunal is taken to have affirmed the ACCC's determination.⁶⁷

Tribunal process

- 5.19 Applicants should refer to the Tribunal's practice directions for guidance on the information it expects to be provided to it at the time of making an application for review and the processes which will be followed once an application has been made. A copy of the practice directions is available on the Tribunal's website at www.competitiontribunal.gov.au.

The role of the ACCC in Tribunal reviews

- 5.20 The Tribunal must notify the ACCC that it has received an application for review. After being notified of the application for review, the ACCC must, within two business days, give to the Tribunal all the information that it took into account in connection with the making of the determination to which the review relates.⁶⁸ The ACCC must identify which of that information was excluded from its website and the merger clearance register on the grounds of confidentiality. The Act requires the ACCC to give such information, make such reports and provide such other assistance to the Tribunal as the presiding member specifies.⁶⁹
- 5.21 While the provisions relating to Tribunal review of merger clearance determinations came into effect in January 2007, the ACCC has a long history of providing assistance to the Tribunal on reviews of ACCC authorisation determinations. In such reviews, the ACCC has a role assisting in proceedings before the Tribunal. The ACCC will often provide information at the Tribunal's request, make submissions, call witnesses and lead evidence before the Tribunal. In the *Media Council* case the then Trade Practices Tribunal stated that:

... [T]he Commission's function is to assist the Tribunal to reach, in the public interest, the correct decision.⁷⁰

66 Section 118 of the Act. A business day is a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

67 Section 118(3A) of the Act.

68 Subsection 113(1) of the Act.

69 Section 115 of the Act.

70 *Herald & Weekly Times Ltd. & Ors. (on their behalf and on behalf of Members of the constituent and affiliated associations of the Media Council of Australia)* (1978) ATPR 40-058.

- 5.22 The then Trade Practices Tribunal outlined the role of the ACCC in Tribunal proceedings in the *QCMA* case as assisting the Tribunal including by:
- examining any statements of facts and contentions put before the Tribunal by a party, in order to see if all material facts and considerations are fully and fairly presented, and to submit to the Tribunal the results of each such examination
 - furnishing the Tribunal with such additional information as the ACCC considers to be material to the issues before the Tribunal and
 - making submissions to the Tribunal as to the considerations which the ACCC considers material to the hearing before the Tribunal.⁷¹
- 5.23 While the nature of the review process in respect of clearance determination reviews is not identical to that in respect of non-merger authorisation reviews (in that reviews on merger clearance determinations are limited substantially to the information before the ACCC and non-merger authorisation reviews are not), the ACCC will continue to provide any advice and assistance that the Tribunal requires in review proceedings.

Tribunal decisions

- 5.24 On review of the ACCC's determination, the Tribunal will assess the proposed acquisition and will affirm, set aside or vary the ACCC's determination. The Tribunal's decision in this respect is taken to be the ACCC's determination. The Tribunal's decision takes effect immediately. If the Tribunal makes a determination subject to a s. 87B undertaking being given to the ACCC, the s. 87B undertaking must be accepted by the ACCC before the Tribunal's decision takes effect.
- 5.25 Additionally, the Tribunal has the power to make a determination by consent of both the applicant and the ACCC as to whether or not the Tribunal is satisfied of the matters outlined in s. 95AN of the Act (that is, that the acquisition would have the effect, or be likely to have the effect of, substantially lessening competition in a market or markets and that the acquisition has not already occurred).

What happens if an applicant is dissatisfied with the Tribunal's decision?

- 5.26 There is no right of appeal in respect of the merits of decisions made by the Tribunal on review of ACCC merger clearance decisions (or associated decisions including minor variation, revocation and revocation and substitution).

⁷¹ *Re Queensland Co-operative Milling Association Ltd., Defiance Holdings Ltd.* (1976) ATPR 40-012.

6. Merger authorisation applications to the Tribunal

- 6.1 As outlined above, the 2006 amendments provide that applications for authorisation in respect of conduct which may contravene s. 50 of the Act must be made directly to the Tribunal. An outline of the Tribunal is in paragraphs 5.4 to 5.9.

What is an authorisation?

- 6.2 The Act provides that:

The Tribunal may grant an authorisation to a person:

- (a) to acquire shares in the capital of a body corporate; or
- (b) to acquire assets of another person.⁷²

- 6.3 If the Tribunal grants an authorisation:

... then section 50 does not prevent the person from acquiring the shares or assets in accordance with the authorisation.⁷³

- 6.4 Essentially, authorisation is the process of granting protection to the acquirer from the application of s. 50 of the Act, on public benefit grounds, for mergers and acquisitions which would or might otherwise contravene s. 50.⁷⁴ Authorisation only provides protection from legal action for acquisitions that have not already taken place.

- 6.5 Once authorisation is granted in relation to an acquisition, neither the ACCC nor any other party may take action under s. 50 in respect of the acquisition. The protection is effective only, however, once authorisation is granted and for the period for which authorisation is granted. If an acquisition takes place outside this period, the applicant will not have the benefit of protection from the operation of s. 50 of the Act.

- 6.6 While both formal clearances and authorisations may only be granted before an acquisition has taken place, and both provide protection from legal action under s. 50, the tests used and the purposes of clearances and authorisations are different. Authorisations provide protection for mergers and acquisitions that would or might otherwise contravene s. 50 of the Act on the basis that the acquisition would result or be likely to result in such a benefit to the public that the acquisition should be allowed to occur. Clearances, on the other hand, provide protection from action under s. 50 of the Act on the basis that the acquisition would not have the effect or be likely to have the effect of substantially lessening competition in a market or markets. In short, clearances provide certainty for businesses that they will not be at risk of legal action because the acquisition is not considered to be a breach.

72 Subsection 95AT(1) of the Act.

73 Subsection 95AT(2) of the Act.

74 This guide deals only with authorisation applications in respect of conduct which may constitute a breach of s. 50 of the Act. Parties applying for authorisation for conduct which may constitute a breach of s. 50A of the Act must apply directly to the ACCC. Parties considering making such an application are encouraged to contact the ACCC to discuss the process of making such an application.

Authorisations also provide certainty by providing exemptions on the basis that, notwithstanding the result or likely result of a substantial lessening of competition, there would be associated benefits to the public from the acquisition.

When will the Tribunal grant authorisation?

- 6.7 The Tribunal may, upon the application of the acquiring party and where the relevant test is satisfied, authorise acquisitions of shares or assets which would otherwise contravene s. 50 of the Act.

The test

- 6.8 The Act sets out when the Tribunal must not grant authorisation:
- The Tribunal must not grant an authorisation in relation to a proposed acquisition of shares or assets unless it is satisfied in all the circumstances that the proposed acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.⁷⁵
- 6.9 The Act also sets out that, in determining what amounts to a benefit to the public, the Tribunal must have regard to the following as benefits to the public: significant increases in the real value of exports and significant substitution of domestic products for imported goods. Additionally, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.⁷⁶
- 6.10 A number of cases have confirmed that the onus is on the applicant to satisfy the decision maker that the public benefits of the acquisition outweigh any anti-competitive effects of the acquisition.⁷⁷
- 6.11 Authorisation cannot be sought for an acquisition that has already occurred and, except in certain circumstances, authorisation cannot be sought from the date upon which a contract for the acquisition has been entered into. Subs. 50(4) and (5) of the Act provide that, where a contract has been entered into for the acquisition of shares or assets, if the contract is subject to the granting of authorisation and the person applied for the granting of authorisation within a period of 14 days after the contract was entered into, the acquisition shall not be regarded as having taken place until the application is disposed of or the contract ceases to be subject to the condition.

How to apply for authorisation

- 6.12 An application under section 95AU for authorisation of a merger falling within the meaning of s. 50 must be made directly to the Tribunal.

75 Subsection 95AZH(1) of the Act.

76 Subsection 95AZH(2) of the Act.

77 See, for example, *QCMA*, op. cit., at 17,244; and *Re John Dee (Export) Pty Ltd & Ors.* (1989) ATPR 40–938, at 50,206.

- 6.13 Applications for authorisation must be made by completing and lodging *Form S Application for merger authorisation* with the Tribunal. Form S is set out in the Competition and Consumer Regulations 2010 and is also available on the Tribunal's website at www.competitiontribunal.gov.au and the ACCC's website at www.accc.gov.au/mergers.⁷⁸
- 6.14 The application for authorisation must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act (in the form prescribed by the Competition and Consumer Regulations 2010) that the applicant will not make the acquisition while the application is being considered by the Tribunal. The form of undertaking to be given to the ACCC is attached to Form s. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be sent back to the applicant.
- 6.15 Additionally, the application must be accompanied by the relevant fee as prescribed in the Competition and Consumer Regulations 2010, which is currently set at \$25 000.⁷⁹
- 6.16 It is important to note that in order for the application to be valid the application must contain the information required by the form and such other information or documents as are prescribed by the Competition and Consumer Regulations 2010. Applicants must have regard to the questions contained in the form, directions to the form and the Tribunal's practice directions when completing it.
- 6.17 Applications and the associated fee (payable by cheque) may be lodged at any Federal Court registry. Applicants are required to submit six (6) hard copies of the application, any accompanying information or documents, an electronic version of the application and any accompanying information or documents on a CD-ROM.

Invalid applications

- 6.18 If an application is made to the Tribunal but does not comply with the requirements set out above, the Tribunal may in accordance with s. 95AW of the Act declare that application invalid.
- 6.19 The Tribunal must notify an applicant of an invalid application within five business days of receiving the application. Applications will be scrutinised during this period for compliance with the information requirements set out in the application form and regulations. During this period, the Tribunal will also assess confidentiality claims (discussed in further detail in paragraphs 6.27 to 6.30) and determine whether the granting of such claims would be likely to have an impact on the validity of the application. Applications that do not meet the designated requirements may be declared invalid and the authorisation assessment process will thereupon cease. If an application is declared invalid, the Tribunal will advise the applicant in writing of the Tribunal's decision and the reasons for the decision within five (5) business days of receiving the application.

⁷⁸ Form S is also available at any ACCC office.

⁷⁹ The fee for merger authorisation applications may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application. Fees levied in respect of merger authorisation applications cannot be varied or waived by the Tribunal.

- 6.20 Where a fee has been paid for an application that is ultimately determined to be invalid, the fee paid will be returned to the applicant.

Providing false or misleading information

- 6.21 In completing the application form, applicants should be aware that the provision of false or misleading information to the Tribunal or the ACCC may result in the Federal Court imposing a pecuniary penalty or other remedies including an injunction restraining the acquisition or divestiture of the shares or assets.
- 6.22 If, after the granting of an authorisation, it becomes apparent that information provided by the applicants is false or misleading in a material particular, the ACCC may apply for revocation of the authorisation (see discussion on revocation in paragraph 6.76).

Withdrawing applications for authorisation

- 6.23 The applicant may withdraw the application at any time by notifying the Tribunal in writing.⁸⁰ Valid applications that have been withdrawn will remain on the public register.

Time limits for the Tribunal to determine authorisation applications

- 6.24 The Act requires that the Tribunal issue a determination on an authorisation application within three months of receiving a valid application.
- 6.25 If no decision is made within this period, the Tribunal is taken to have refused to grant the authorisation.

Extensions to the time limit for determining an authorisation application

- 6.26 There is scope for the Tribunal to extend the time allowed for making a determination by up to three months if it considers that the matter cannot be dealt with properly within the initial three months because of its complexity or because of other special circumstances. If the Tribunal wishes to extend the period for making a determination, it will notify the applicant in writing of the extension before the expiry of the initial three month period.

⁸⁰ Section 95AZE of the Act.

Merger authorisation register

- 6.27 The authorisation process set out in the Act requires that the Tribunal keep a merger authorisation register which is available for inspection by the public. The register must contain, subject to confidentiality:
- applications for authorisations, minor variations of authorisations, revocations or revocations and substitutions of authorisations
 - any document provided to the Tribunal in relation to an application
 - particulars of oral submissions made to the Tribunal in relation to an application
 - the Tribunal's determination on the application and the statement of reasons given by the Tribunal for that determination.⁸¹
- 6.28 Applications, documents and submissions must be placed on the register by the Tribunal even if the application to which they relate is subsequently abandoned or withdrawn.
- 6.29 Electronic copies and hard copies of documents may be obtained by contacting the Registrar of the Tribunal. Parties may be charged a fee for copies of documents on the Tribunal's merger authorisation register. Details of fees can be obtained by contacting the Tribunal's registrar.
- 6.30 The Act sets out when the Tribunal is required to grant confidentiality in respect of information and the process by which parties should claim confidentiality.⁸² Applicants and interested parties should refer to the Tribunal's practice directions (on the Tribunal's website at www.competitiontribunal.gov.au) for details relating to the requirements of the Tribunal on parties wishing to claim confidentiality.

The authorisation process

- 6.31 The Tribunal's consideration of a merger authorisation application commences when a valid application is lodged with the Tribunal.
- 6.32 The following section sets out the legislative requirements on the Tribunal in its consideration and assessment of a valid application and outlines the ACCC's role in the assessment process and the hearing.

Public consultation process and assessment

- 6.33 The Tribunal is required, in making its determination, to take into account any submissions in relation to the application made to it by the applicant, the Commonwealth, a state, a territory or by any other person which are filed with the Tribunal within the period specified by the Tribunal.⁸³ To this end, the Tribunal will conduct a process of consultation with market participants including the target and customers, competitors and suppliers of both the applicant and the target in relevant markets.

81 Section 95AZ of the Act.

82 Section 95AZA of the Act.

83 Subsection 95AZG(2) of the Act.

- 6.34 Market participants will be contacted directly by the ACCC and invited to make written submissions on issues relevant to the Tribunal's consideration of the merger authorisation application including competitive effects, each of the merger factors⁸⁴ and public benefit claims.
- 6.35 Consistent with the merger authorisation register requirements outlined above, any submission made to the Tribunal in respect of an application for authorisation will (subject to confidentiality) be placed on the register.

Notice on the ACCC website

- 6.36 The ACCC will, after receiving a copy of an application for authorisation, place a copy of it and any accompanying information or documents on the ACCC's website at www.accc.gov.au. The ACCC will also place a notice on its website inviting submissions to be made to the Tribunal on the application within a specified period as prescribed by the presiding Tribunal member.⁸⁵

The ACCC's role

- 6.37 The Act states that the Tribunal must require the ACCC to give a report to the Tribunal on the matters specified by the presiding member within the period specified by that member.⁸⁶ The ACCC may also include in that report any matter it considers relevant to the application.
- 6.38 The Act also states that, in assisting the Tribunal, the ACCC may:
- call a witness to appear before the Tribunal and to give evidence in relation to the application
 - report on statements of fact put before the Tribunal in relation to the application
 - examine or cross-examine any witnesses appearing before the Tribunal in relation to the application and
 - make submissions to the Tribunal on any issue the ACCC considers relevant to the application.⁸⁷
- 6.39 The Tribunal will consider a report from the ACCC on a merger authorisation application.⁸⁸ Subject to any issues of confidentiality, this report will be made available publicly and will raise issues associated with the application and outline the ACCC's views on submissions made to the Tribunal by the applicant and market participants on the competitive effects of, and public benefits associated with, the proposed acquisition. In making this report, the ACCC may make such enquiries as it considers reasonable and appropriate, and may seek additional information from market participants or other parties (such as government departments or experts in the relevant field) and request that such information be submitted to the Tribunal.⁸⁹
- 6.40 The ACCC's report will not constitute a decision by it on the application; rather it will be the ACCC's opinion on the application at that stage.

⁸⁴ Subsection 50(3) of the Act.

⁸⁵ Section 95AY of the Act.

⁸⁶ Section 95AZE of the Act.

⁸⁷ Subsection 95AZF(1) of the Act.

⁸⁸ Subsection 95AZG(2)(e) of the Act.

⁸⁹ Section 95AZFA of the Act

Requests for additional information

- 6.41 The Act allows the Tribunal to seek additional information and consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application. Additionally, the Tribunal may, during its assessment of an application for authorisation, seek additional information from the applicant. If additional information is required, the party will be expected to respond to that request within the period specified by the Tribunal.

Additional information on Tribunal process

- 6.42 The Act states that the Tribunal's procedures for considering an authorisation application are within the Tribunal's discretion. It requires that proceedings be conducted with as little formality and technicality, and as expeditiously, as possible. The Tribunal is not bound by the rules of evidence in its consideration of an authorisation application.
- 6.43 To supplement the procedural requirements set out in the Act and discussed above, applicants and market participants should refer to the Tribunal's practice directions for more detail as to the Tribunal's consideration of merger authorisation applications. The practice directions, among other things, provide guidance as to the information the Tribunal expects will be provided at the time of making an application for authorisation, the conduct of the public consultation process, the treatment of confidential information, the conduct of the hearing and the ACCC's role in Tribunal proceedings.
- 6.44 A copy of the Tribunal's practice directions is available on the Tribunal's website at www.competitiontribunal.gov.au.

Tribunal determinations

- 6.45 As outlined above, the Tribunal is required to make a determination on an application within three months of receiving the application (or within a period extended by the Tribunal to up to six months) and this determination will either grant or refuse to grant the authorisation.
- 6.46 If the Tribunal grants authorisation for an acquisition, the authorisation comes into effect on the date the Tribunal makes its determination to grant the authorisation.⁹⁰ If no decision is made by the Tribunal within the prescribed period, the Tribunal is taken to have refused to grant the authorisation.⁹¹
- 6.47 In making its determination, the Tribunal must take into account the application for authorisation and any additional information provided by the applicant, written submissions received from interested parties on the application, the ACCC's submissions and report on the application, information presented at the hearings and any other information which the Tribunal considers relevant. Any submissions and additional information sought by the Tribunal in relation to the application for authorisation but received outside the specified time periods may be disregarded.

⁹⁰ Subsection 95AZK(1) of the Act.

⁹¹ Subsection 95AZI(1) of the Act.

- 6.48 Following the determination, the written documentation and reasons for the determination will be provided to the applicant, placed on the merger authorisation register and posted on the Tribunal's website at www.competitiontribunal.gov.au. The determination and reasons will also be posted on the ACCC's website at www.accc.gov.au/mergers.

Conditions

- 6.49 The Tribunal may grant an authorisation subject to conditions.⁹² When an authorisation is granted subject to conditions, the authorisation will only provide protection from the operation of s. 50 if the acquisition is completed in accordance with the authorisation, including any conditions attached to the authorisation.⁹³
- 6.50 The Tribunal may consider it appropriate in particular cases to grant authorisation subject to conditions which ensure that the claimed public benefit is likely to eventuate or to lessen any detriment that might result from the acquisition. Conditions may include a requirement that the applicant make, and comply with, a s. 87B undertaking to the ACCC. The ACCC must have accepted such an undertaking prior to the conditional authorisation coming into effect. The Tribunal will not grant authorisation subject to a condition that a s. 87B undertaking be complied with unless that undertaking has been accepted by the ACCC, prior to the Tribunal making its determination.
- 6.51 Applicants to whom authorisation has been granted subject to conditions must comply with such conditions regardless of whether they are to be complied with before, during or after the acquisition takes place.⁹⁴ Non-compliance with a condition specified in an authorisation will remove the protection afforded by the authorisation from legal action under s. 50 of the Act. Such action may be initiated by the ACCC or any other party and, if the acquisition is found to be in breach of s. 50, the remedies under Part VI of the Act will apply.⁹⁵
- 6.52 If authorisation is granted for an acquisition that has not yet been completed and a condition has not been complied with, the ACCC will, if parties persist in not complying with the condition, initiate action to revoke the authorisation.

92 Section 95AZJ of the Act.

93 See Note to subs. 95AT(2) of the Act.

94 See Note 2 to subs. 95AZJ(1) of the Act.

95 See, for example, penalties under s. 76 and divestiture under s. 81 of the Act.

Authorisations granted for a specified period

- 6.53 The Act sets out that the Tribunal may express an authorisation to be in force for a specified period.⁹⁶ Accordingly, applicants are required to specify in their applications the duration for which authorisation is sought.

Amending, revoking and substituting authorisations

- 6.54 Applicants and market participants should refer to the Tribunal's practice directions for details relating to the processes in respect of applications to the Tribunal for minor variation, revocation and revocation and substitution of merger authorisations. A copy of the practice directions is available on the Tribunal's website at www.competitiontribunal.gov.au.
- 6.55 The ACCC's role in assisting the Tribunal in respect of applications for minor variation, revocation and revocation and substitution of merger authorisations is the same as that outlined in paragraphs 6.37 to 6.40 in respect of merger authorisation applications.
- 6.56 The following sections outline the legislative requirements on the Tribunal in determining applications for minor variation, revocation and revocation and substitution.

Minor variations of authorisations

- 6.57 Once an authorisation has been granted, the person to whom authorisation was granted may apply to the Tribunal for a minor variation of the authorisation. Parties may seek variations of authorisations. However, the Act states that a minor variation must be:
- a single variation that does not involve a material change in the effect of the ... authorisation.⁹⁷
- 6.58 Such a variation may only be sought once an authorisation has been granted and prior to both the expiry of the authorisation and consummation of the acquisition.

Valid applications

- 6.59 Section 95AZL(2) establishes the requirements for a valid application for minor variation of an authorisation and sets out that a valid application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.
- 6.60 Applications for minor variations of an authorisation must be made by completing and lodging *Form T Application for minor variation of merger authorisation* with the Tribunal. The form is set out in the Competition and Consumer Regulations 2010 and is also available on the Tribunal's website at www.competitiontribunal.gov.au and on the ACCC's website at www.accc.gov.au/mergers.⁹⁸

⁹⁶ Subsection 95AZK(2) of the Act.

⁹⁷ Section 95AB of the Act—definition of **minor variation**.

⁹⁸ Form T is also available at any ACCC office.

- 6.61 The application for minor variation of the authorisation must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act (in the form set out in the Competition and Consumer Regulations 2010) that the applicant will not make the acquisition while the application is being considered by the Tribunal. The form of undertaking to be given to the ACCC is attached to Form T. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be sent back to the applicant.
- 6.62 There is currently no fee payable for an application for minor variation of a merger authorisation.⁹⁹
- 6.63 Applications may be lodged at any Federal Court registry. Applicants are required to submit six (6) hard copies of the application, any accompanying information or documents, an electronic version of the application and any accompanying information or documents on a CD-ROM.
- 6.64 The Tribunal must notify an applicant of an invalid application within five business days of receiving the application. For applications that the Tribunal considers are invalid, the Tribunal will advise the applicant in writing and provide reasons for this decision. Where a fee has been paid for an application that is ultimately determined to be invalid, the fee will be returned to the applicant.

Multiple variations

- 6.65 The Tribunal may consider multiple minor variations jointly and as though they were a single variation in certain circumstances. For this to occur, the applications must have been submitted either at the same time or in such close succession that they can be conveniently dealt with together.¹⁰⁰
- 6.66 Additionally, the Tribunal may only consider multiple variations together if the combined effect of the variations would not involve a material change in the effect of the authorisation.

The test

- 6.67 The Tribunal cannot vary an authorisation unless it is satisfied that:
- ... in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.¹⁰¹

99 The fee for minor variation applications may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application. Fees levied in respect of minor variation applications cannot be varied or waived by the Tribunal.

100 Subsection 95AZL(11) of the Act.

101 Subsection 95AZL(7) of the Act.

Merger authorisation register

- 6.68 The Tribunal must keep copies of applications for minor variation on a merger authorisation register. The Tribunal must also place on the register any documents provided to it in relation to an application, particulars of oral submissions made to it, its determination in relation to the application on the register and a statement of its reasons for that determination.¹⁰²
- 6.69 The merger authorisation register and the process for claiming confidentiality in respect of information provided to the Tribunal are outlined in more detail in paragraphs 6.27 to 6.30 above.

Public consultation

- 6.70 The Tribunal will forward copies of all applications for minor variation to the ACCC as soon as it is satisfied that the variation sought is minor and, after receiving the application, the ACCC will place a copy of the application on its website and invite submissions in respect of the application to be made to the Tribunal by a date specified by the presiding Tribunal member.

Time limits for the Tribunal to determine minor variation applications

- 6.71 After considering the application for minor variation of the authorisation, any submissions and additional information received, the ACCC's report on the application, information presented at hearings and any other information which the Tribunal considers relevant, the Tribunal will make a determination either varying the authorisation or refusing to vary the authorisation. Any submissions and/or additional information sought by the Tribunal in relation to the application for minor variation of the authorisation but received outside the specified time periods may be disregarded.
- 6.72 If the Tribunal makes a determination to vary the authorisation, it may also vary any conditions of the authorisation to take account of the variation of the authorisation.¹⁰³
- 6.73 The Tribunal will notify the applicant, in writing, of its decision and provide reasons for it. The Act requires that the Tribunal issue a determination on an application for minor variation within three months of receiving a valid application.¹⁰⁴ If no decision is made within this period, the Tribunal is taken to have refused the application.

Extensions to the time limit for determining a minor variation application

- 6.74 The time allowed for the Tribunal to make a determination may be extended by up to three months if it considers that the matter cannot be dealt with properly within that period either because of its complexity or other special circumstances.

102 Section 95AZ of the Act.

103 Subsection 95AZL(7A) of the Act.

104 Subsection 95AZL(9) of the Act.

Withdrawal of application

- 6.75 The applicant may withdraw the application at any time, by notifying the Tribunal in writing. Valid applications which have been withdrawn will remain on the public register.

Revocation of authorisation

- 6.76 Once an authorisation has been granted, the holder of the authorisation may apply to the Tribunal to have that authorisation revoked. Additionally, the ACCC may apply to the Tribunal to revoke an authorisation if one of the following occurs:
- (a) the authorisation was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the authorisation has not been complied with; or
 - (c) there has been a material change of circumstances since the authorisation was granted.¹⁰⁵

Applications for revocation of authorisation

- 6.77 The Act establishes the requirements for a valid application for revocation of an authorisation. To be valid, an application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.¹⁰⁶
- 6.78 Applications for revocation of an authorisation made by an authorisation holder must be made completing and lodging *Form U Application for revocation of merger authorisation* with the Tribunal. The form is contained in the Competition and Consumer Regulations 2010 and is also available on the Tribunal's website at www.competitiontribunal.gov.au and the ACCC's website at www.accc.gov.au/mergers.¹⁰⁷ The ACCC is not required to comply with Form U when making an application for revocation to the Tribunal but must satisfy the Tribunal that at least one of the factors outlined in paragraph 6.76 has occurred.
- 6.79 The application for revocation of the authorisation must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act (in the form set out in the Trade Practices Regulations 2006) that the applicant will not make the acquisition while the application is being considered by the Tribunal. The form of undertaking to be given to the ACCC is attached to Form U. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be sent back to the applicant.

¹⁰⁵ Subsection 95AZM(6) of the Act.

¹⁰⁶ Subsection 95AZM(2) of the Act.

¹⁰⁷ Form U is also available from any ACCC office.

- 6.80 There is currently no fee payable for an application for revocation of an authorisation.¹⁰⁸
- 6.81 Applications may be lodged at any Federal Court registry. Applicants are required to submit six (6) hard copies of the application, any accompanying information or documents, an electronic version of the application and any accompanying information or documents on a CD-ROM.
- 6.82 The Tribunal must notify an applicant of an invalid application within five business days of receiving the application. For applications which the Tribunal considers invalid, it will advise the applicant in writing and provide reasons for this decision. Where a fee has been paid in respect of an application which is ultimately determined to be invalid, the fee will be returned to the applicant.

The test

- 6.83 The Tribunal may only revoke an authorisation in the following circumstances:
- no submissions are received objecting to the revocation (other than objections which are considered by the Tribunal to be vexatious or frivolous) or
 - submissions are received objecting to the revocation—however, the Tribunal is satisfied that the authorisation should not have been granted because it would not result, or be likely to result, in the requisite benefit to the public.¹⁰⁹

Merger authorisation register

- 6.84 The Tribunal must keep copies of applications for revocation on a merger authorisation register. The Tribunal must also place on the register any documents provided to it in relation to the application, particulars of oral submissions made to it, its determination in relation to the application and a statement of its reasons for that determination on the register.¹¹⁰
- 6.85 The merger authorisation register and the process for claiming confidentiality in respect of information provided to the Tribunal are outlined in more detail in paragraphs 6.27 to 6.30.

Public consultation

- 6.86 If the Tribunal is considering making a determination revoking an authorisation on the ACCC's application, it must give notice to the authorisation holder that it is doing so, and a notice which complies with the following requirements must appear on the ACCC's website:
- (a) stating that [the Tribunal] is considering making the determination; and
 - (b) indicating the basis on which the determination is being proposed; and
 - (c) inviting submissions in respect of the determination within a period specified by the Tribunal.¹¹¹

¹⁰⁸ The fee for revocation of authorisation applications may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application. Fees levied in respect of revocation of authorisation applications cannot be varied or waived by the Tribunal.

¹⁰⁹ Subsection 95AZM(9) of the Act.

¹¹⁰ Section 95AZ of the Act.

¹¹¹ Subsection 95AZM(7) of the Act.

- 6.87 If an application for revocation has been initiated by the authorisation holder, the Tribunal will forward a copy of that application to the ACCC within three business days and, subject to confidentiality requirements, the ACCC will place a copy of the application on its website and invite submissions to be made to the Tribunal within a specified period.¹¹²
- 6.88 Consistent with the public consultation process undertaken in relation to an application for authorisation, the period for submissions will be specified by the presiding Tribunal member.

Time limits for determining applications for revocation

- 6.89 After considering the application for revocation of the authorisation, all submissions and any additional information received, the ACCC's report on the application, information presented at hearings and any other information Tribunal considers relevant, the Tribunal will make a determination in writing, with reasons, either revoking the authorisation or refusing to revoke the authorisation. Any submissions and additional information sought by the Tribunal in relation to the application for revocation but received outside the specified time periods may be disregarded.
- 6.90 The Act requires that the Tribunal issue a determination on an application for revocation of an authorisation within three months of receiving a valid application.¹¹³ If no decision is made within this period, the Tribunal is taken to have refused to revoke the authorisation.

Extensions to the time limit for determining a minor variation application

- 6.91 The time allowed for the Tribunal to make a determination may be extended by up to three months where it considers that the matter cannot be dealt with properly within that period either because of its complexity or other special circumstances.

Withdrawal of application

- 6.92 The applicant may withdraw the application at any time, by notifying the Tribunal in writing. Valid applications which have been withdrawn will remain on the public register.

Revocation and substitution of a new authorisation

- 6.93 Once an authorisation has been granted, the holder of the authorisation may apply to the Tribunal to have that authorisation revoked and substituted with a new authorisation. This process may only commence on the application of the authorisation holder or the ACCC.
- 6.94 The ACCC may initiate a revocation and substitution process if one of the following has occurred:
- (a) the authorisation was granted on the basis of information that was false or misleading in a material particular; or
 - (b) a condition of the authorisation has not been complied with; or
 - (c) there has been a material change of circumstances since the authorisation was granted.¹¹⁴

¹¹² Subsection 95AZM(5) of the Act.

¹¹³ Subsection 95AZM(12) of the Act.

¹¹⁴ Subsection 95AZM(6) of the Act.

Applications for revocation of authorisation and substitution of a new authorisation

- 6.95 The Act sets out the requirements for a valid application for revocation of an authorisation and substitution of a new authorisation. To be valid, an application must:
- (a) be in a form prescribed by the regulations and contain the information required by the form; and
 - (b) be accompanied by such other information or documents as are prescribed by the regulations; and
 - (c) be accompanied by the fee (if any) prescribed by the regulations.¹¹⁵
- 6.96 Applications for revocation and substitution of a new authorisation made by an authorisation holder must be made by completing and lodging *Form V Application for revocation of merger authorisation and substitution of new merger authorisation* with the Tribunal. The form is set out in the Trade Practices Regulations 2006 and is also available on the Tribunal's website at www.competitiontribunal.gov.au and the ACCC's website at www.accc.gov.au/mergers.¹¹⁶ The ACCC is not required to comply with Form V when making an application for revocation to the Tribunal but must satisfy the Tribunal that at least one of the factors outlined in paragraph 6.94 has occurred.
- 6.97 The application for revocation and substitution of a new authorisation must also be accompanied by a signed undertaking to the ACCC under s. 87B of the Act (in the form set out in the Trade Practices Regulations 2006) that the applicant will not make the acquisition while the application is being considered by the Tribunal. The form of undertaking to be given to the ACCC is attached to Form V. Once the ACCC Chairman signs the undertaking, the ACCC keeps the original undertaking and returns a copy of it to the applicant. If the applicant wishes to receive an original undertaking once it has been signed by the Chairman, the applicant should provide the ACCC with two signed original undertakings with the application—one to be kept by the ACCC and one to be sent back to the applicant.
- 6.98 Additionally, the application for revocation of an authorisation and substitution of a new authorisation must be accompanied by the relevant fee, which is currently set at \$25 000.¹¹⁷
- 6.99 Applications and the associated fee (payable by cheque) may be lodged at any Federal Court registry. Applicants are required to submit six (6) hard copies of the application, any accompanying information or documents, an electronic version of the application and any accompanying information or documents on a CD-ROM.
- 6.100 The Tribunal must notify an applicant of an invalid application within five business days of receiving the application. For applications that the Tribunal considers invalid, it will advise the applicant in writing and will provide reasons for this decision. If a fee has been paid for an application that is ultimately determined to be invalid, the fee will be returned to the applicant.

¹¹⁵ Subsection 95AZM(2) of the Act.

¹¹⁶ Form V is also available from any ACCC office.

¹¹⁷ The fee for applications for revocation and substitution of an authorisation may change over time and parties should consult the Competition and Consumer Regulations to confirm the current fee prior to lodging an application. Fees levied in respect of merger authorisation applications cannot be varied or waived by the Tribunal.

The test

- 6.101 The Tribunal will not make a determination revoking an authorisation and substituting a new authorisation unless it is satisfied that it would not be prevented from making a determination granting the authorisation if it were a fresh application.¹¹⁸ That is, the acquisition which is the subject of the substituted authorisation would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.¹¹⁹

Merger authorisation register

- 6.102 The Tribunal must keep copies of applications for revocation and substitution on a merger authorisation register. The Tribunal must also place any document provided to it in relation to the application, particulars of oral submissions made to it, its determination in relation to the application and a statement of its reasons for that determination on the register.¹²⁰
- 6.103 The merger authorisation register and the process for claiming confidentiality in respect of information provided to the Tribunal are outlined in more detail in paragraphs 6.27 to 6.30.

Public consultation

- 6.104 If the Tribunal is considering making a determination revoking an authorisation and substituting a new authorisation on the ACCC's application, it must give notice to the authorisation holder that it is doing so and a notice which complies with the following requirements must appear on the ACCC's website:
- (a) stating that [the Tribunal] is considering making the determination; and
 - (b) indicating the basis on which the determination is being proposed; and
 - (c) inviting submissions in respect of the determination within a period specified by the Tribunal.¹²¹
- 6.105 If an application for revocation and substitution has been initiated by the authorisation holder, the Tribunal will forward a copy of that application to the ACCC and, subject to confidentiality, the ACCC will place a copy of the application on its website and invite submissions to be made to the Tribunal within a specified period.¹²²
- 6.106 Consistent with the public consultation process undertaken in relation to an application for authorisation, the period for submissions will be specified by the presiding Tribunal member.

118 Subsection 95AZM(10) of the Act.

119 Section 95AZH of the Act.

120 Section 95AZ of the Act.

121 Subsection 95AZM(7) of the Act.

122 Subsection 95AZM(5) of the Act.

Time limits for determining applications for revocation and substitution

- 6.107 After considering the application for revocation and substitution of the authorisation, all submissions and any additional information received, the ACCC's report on the application, information presented at hearings and any other information that the Tribunal considers relevant, the Tribunal will make a determination in writing, with reasons either revoking the authorisation and substituting a new authorisation or refusing to revoke the authorisation. Any submissions and additional information sought by the Tribunal on the application for revocation and substitution but received outside the specified time periods may be disregarded.
- 6.108 The Act requires that the Tribunal issue a determination on an application for revocation and substitution of a new authorisation within three months of receiving a valid application.¹²³ If no decision is made within this period, the Tribunal is taken to have refused to revoke the authorisation.

Extensions to the time limit for determining a minor variation application

- 6.109 The time allowed for the Tribunal to make a determination may be extended by up to three months if it considers that the matter cannot be dealt with properly within that period either because of its complexity or other special circumstances.

Substituted authorisations granted for a specified time period

- 6.110 As with authorisations, substituted authorisations will come into effect on the day the determination is made by the Tribunal. In addition, the Tribunal may express that a substituted authorisation is in force for a specified time period only.¹²⁴ Accordingly, applicants are required to specify in their applications the duration for which the substituted authorisation is sought.

Conditions of granting a substituted authorisation

- 6.111 As with an application for authorisation, a substituted authorisation, where granted, only provides protection from s. 50 if the acquisition is completed in accordance with the substituted authorisation, including any conditions attached to the substituted authorisation.¹²⁵ The Tribunal may grant the substituted authorisation on a condition that the applicant provide an undertaking to the ACCC under s. 87B of the Act prior to the authorisation coming into effect.¹²⁶

Withdrawal of application

- 6.112 An applicant may withdraw an application at any time, by notifying the Tribunal in writing. Valid applications which have been withdrawn will remain on the public register.

¹²³ Section 95AZM(12) of the Act.

¹²⁴ Subsection 95AZK(2) of the Act.

¹²⁵ Subsection 95AZJ(1) of the Act.

¹²⁶ Subsection 95AZJ(2) of the Act.

What happens if an applicant is dissatisfied with the Tribunals' decision?

6.113 There is no right of appeal in respect of the merits of decisions made by the Tribunal on authorisation applications (or associated applications including applications for minor variation, applications for revocation and applications for revocation and substitution).

ACCC contacts

ACCC Infoline 1300 302 502
Website www.accc.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service www.relayservice.com.au.

TTY or modem users—phone 133 677 and ask for 1300 302 502.

Voice-only (speak and listen) users—phone 1300 555 727 and ask for 1300 302 502.

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