



Australian
Competition &
Consumer
Commission

Formal merger review process guidelines

Addendum

May 2011

Foreword

In 2006, the ACCC released the Formal Merger Review Process Guidelines (the Formal Review Guidelines). The Formal Review Guidelines are designed to be a reliable, comprehensive and detailed guide to merger parties, the business community, their advisers and the public that can be drawn on to predict the processes that will be applied by the ACCC to examine merger clearance applications.

Since its initial publication, the Formal Review Guidelines have been updated in 2008. In 2011, the Formal Review Guidelines were updated in order to reflect the renaming of the *Trade Practices Act 1974* as the *Competition and Consumer Act 2010* (the **Act**) on 1 January 2011.

Recent reforms to the *Freedom of Information Act 1982* (the FOI Act) have also necessitated amendments to the Formal Process Guidelines. The *Freedom of Information Amendment (Reform) Act 2010* has introduced a new information publication scheme for Australian Government Agencies. Under this scheme, which commences on 1 May 2011, Government Agencies are required to publish specific categories of information, including the agency's operational information. That is, information that assists the agency to exercise its functions or powers in making decisions or recommendations that affect members of the public.

In order to meet its FOI obligations, the ACCC has made some changes to the Formal Review Guidelines, as contained in the following Addendum.

Addendum to the Formal merger review process guidelines–May 2011

New provisions in the Act–(p. 4)

< In paragraph 1.21,

- after the words ‘...The ACCC’ delete the words ‘intends to’ and replace with the word ‘may’.
- After the word ‘...processes in the’ delete the word ‘near’.

Joint ventures–(p. 4)

< In paragraph 1.23, after the words ‘...the Act.’ delete the sentence:

‘Parties may therefore wish to have these considered under the informal review process outlined in the ACCC’s Merger review process guidelines.’

What is a merger clearance?–(p. 9)

< In paragraph 3.5, after the words ‘...orders under’ delete the words ‘Part IV’ and replace with the words ‘Part VI’.

The form–(p. 10)

< Following paragraph 3.18, insert the following paragraph:

- 3.18A Applicants should note that an applicant may not claim confidentiality over an answer to a question on the form or part thereof. Where an applicant has claimed confidentiality over an answer or part thereof to a question on the form, the form will be considered invalid. It may be the case that a question in the form asks for information that in certain circumstances, the applicant believes to be commercially or confidentially sensitive. Parties are encouraged to contact the ACCC in advance of submitting an application to discuss any potential concerns regarding information of this nature.

< In paragraph 3.19, following the words ‘....competitive environment.’ add the following sentence:

Where such an accompanying submission contains information the applicant believes to be of a confidential nature, it may expressly request the ACCC exclude the confidential information from the public register and the ACCC website and provide supporting reasons why such information is confidential (discussed in paragraph 3.61 below). If the ACCC refuses the request or part thereof, the information may be subsequently withdrawn. However, if the application does not substantially comply with the requirements for a valid application in the absence of the additional information, the ACCC may invalidate the application.

Other requirements for valid applications—(p. 11)

< Delete paragraph 3.25, 3.26 and 3.27 and insert the following paragraphs:

- 3.25 Applications, together with other materials to be provided, may be given to the ACCC in either electronic format (placed on compact disc or equivalent media or provided via email to the email address listed in 3.26) or received by the ACCC in hard copy format. The signed s. 87B undertaking must be received in hard copy format. The ACCC's preference is for applicants to provide the application and materials other than the signed s. 87B undertaking, to the extent possible in an electronic format. All information and documents provided electronically should be scanned at a resolution of 300 DPI in searchable PDF format and be placed on compact disc or equivalent media.
- 3.26 The application and all associated information and documents must either be emailed to mergers@accc.gov.au, 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 The ACCC prefers payment by electronic funds transfer (EFT) . Payment by cheque will also be accepted in the event that payment by EFT is not possible. You should contact the ACCC at mergers@accc.gov.au to obtain the ACCC's EFT account details in order to make a payment by EFT.
- 3.27A For proof of payment by EFT, applicants should include a copy of the receipt of the transaction from their financial institution with their application which includes the following details:
- The receipt number
Transaction date and time
From account details
To account details
To account description
The value of the payment made in Australian dollars

3.27B Cheques should be made out to the Australian Competition and Consumer Commission.

3.27C The date of receipt of the application will be the date on which a completed application meeting all the requirements of validity is received. Where fees are paid electronically or by cheque, the payment is taken to be received, when lodged on a business day, that day, and when lodged on a weekend or public holiday in the ACT, the next business day in the ACT.

Invalid applications—(p. 12)

< In paragraph 3.29, after the words ‘... (discussed in paragraph 3.61 below)’ delete the words ‘and determine whether the granting of such claims would have an impact on the validity of the application’.

< In paragraph 3.29, after the words ‘... requirements will be’ delete the word ‘deemed’.

Under what circumstances might an application be declared invalid?—(p. 13)

< In paragraph 3.33, after the words ‘... Requests to exclude information’ insert the words ‘in an accompanying submission’.

< In paragraph 3.35, after the words ‘... decision-making processes.’ add the following sentence:

If the form and accompanying submission (excluding the withdrawn information) does not substantially comply with the requirements for a valid application then the application will be invalid.

Box 1—Tips for applicants: completing the clearance application form—(p. 14)

< After the sentence ‘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,’ add the following paragraph:

- Do not claim confidentiality over an answer to a question on the form, or part of the form. The form must be placed on the ACCC’s register and website in its entirety. Talk to ACCC staff at an early stage to discuss any potential concerns regarding information that you believe should be excluded from the ACCC’s register and website.

- < After the words ‘Make sure confidential information’ insert the following words ‘contained in a submission relating to an application (or submission accompanying an application)’.
- < After the words ‘... You should provide a redacted version of your’ delete the word ‘application’ and replace with the word ‘submission’.

Merger clearance register—(p. 20)

- < Replace paragraph 3.55 with the following:

- 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 applications for clearance and, subject to confidentiality or exclusion for other reasons determined by the ACCC:
- 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

Confidentiality—(p. 21)

- < In paragraph 3.63, after the words ‘...un-redacted version of their’ remove the word ‘application’ and replace with the words ‘submission and written reasons explaining why such information is confidential and should be excluded’
- < In paragraph 3.64, after the words ‘...contained in’ replace the words ‘the application form’ with the words ‘an accompanying submission to an application’.
- < After paragraph 3.64 insert the following paragraph:

- 3.64A Requests by applicants and third parties to place further confidentiality restrictions on the ACCC’s use of the relevant material will not be accepted. Whilst the ACCC will assess whether information is confidential on a case by case basis (other than for information contained in the application form, which, as noted, will not be considered as confidential), the ACCC will only accept confidential material on the following basis:
1. There is no restriction on the internal use, including future use, the ACCC may make of the information consistent with its statutory functions.
 2. Information provided to the ACCC on a confidential basis may be viewed by the ACCC’s external consultants (for example legal, economic and industry advisers) on the condition that each such consultant will be informed of the obligation to treat the information as confidential.

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

3. The ACCC will not disclose confidential information to any third parties (other than its external consultants) unless otherwise compelled to do so by law or in accordance with s 155AAA of the Act.

Box 2–Checklist for applicants: submitting a clearance application–(p. 22)

- < In the first dot point under the heading ‘Submitting an application–the ACCC expects that the following will be provided with the application forms’ before the words ‘section 87B undertaking’ add the word ‘signed’.
- < In the third dot point under the heading ‘Submitting an application–the ACCC expects that the following will be provided with the application forms’, after the words ‘clearly mark any information’ insert the words ‘in the accompanying submission’
- < In the fourth dot point under the heading ‘Submitting an application–the ACCC expects that the following will be provided with the application forms’, delete the word ‘application’ and replace with the words ‘accompanying submission’
- < Delete the dot point ‘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 Executive General Manager, Mergers and Acquisitions Group, ACCC, GPO Box 3131, Canberra ACT 2601?’ and replace with the following dot point:

submitted the application and associated documents in hard copy or in electronic form (with the exception of the signed s. 87B undertaking which must be received by the ACCC in hard copy format) in person at an ACCC office or by post to Executive General Manager, Mergers and Acquisitions Group, ACCC, GPO Box 3131, Canberra ACT 2601 or emailed to mergers@accc.gov.au?

- < After the words ‘...paid the correct lodgement fee of \$25 000’ insert the words ‘and included a copy of the receipt of the transaction if making payment by EFT’.
- < Delete the final dot point.

The formal clearance process—(p. 23)

- < In the timetable set out in paragraph 3.68, delete the words ‘Day 1’ and replace with the words ‘Day 0’.

Notice on the ACCC website—(p. 25)

- < In paragraph 3.72, after the words ‘...paragraph 3.68 above which’ delete the words ‘summarises the timeframe that will apply to’ and replace with ‘provides a suggested timetable for’.

Meetings—(p. 26)

- < In paragraph 3.79, after the words ‘...meeting on the merger clearance register’ insert the words ‘and on the ACCC website at www.accc.gov.au’.

Statement of concerns—(p. 29)

- < In paragraph 3.93, after the words ‘raises competition concerns’ add the words ‘which warrant a statement of concerns.’ and delete the sentence ‘The ACCC may decide to place a statement of concerns on the merger clearance register’.
- < Delete paragraph 3.95.

Minor variations of clearances—(p. 33)

- < After paragraph 4.25, insert the following paragraph:

4.25A However, an applicant may not claim confidentiality over an answer to a question on the form or part thereof. Where an applicant has claimed confidentiality over an answer or part thereof to a question on the form, the form will be invalid. It may be the case that a question in the form asks for information that in certain circumstances the applicant believes to be commercially or confidentially sensitive. Parties are encouraged to contact the ACCC in advance of submitting an application for minor variation to discuss any potential concerns regarding information of this nature.

- < In paragraph 4.26, after the words ‘...because it is confidential’ delete the words ‘in an application or’.
- < In paragraph 4.27 delete the words ‘Subject to confidentiality claims as discussed above’.

- < In paragraph 4.31, after words ‘... contentious matters).’ insert the sentence ‘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.’

Revocation of clearance—(p. 38)

- < After paragraph 4.51, insert the following paragraph:

4.51A However, an applicant may not claim confidentiality over an answer to a question on the form or part thereof. Where an applicant has claimed confidentiality over an answer or part thereof to a question on the form, the form will be invalid. It may be the case that a question in the form asks for information that in certain circumstances the applicant believes to be commercially or confidentially sensitive. Parties are encouraged to contact the ACCC in advance of submitting an application for revocation to discuss any potential concerns regarding information of this nature.

- < In paragraph 4.52, after the words ‘...because it is confidential’ delete the words ‘in an application or’.
- < In paragraph 4.53 delete the words ‘Subject to confidentiality claims as discussed above’ and insert the following words ‘The ACCC will place a valid application for revocation on its website and invite submissions from interested parties in response to the application. Similarly, where the ACCC initiates revocation,’
- < In paragraph 4.56, after words ‘... contentious matters).’ insert the sentence ‘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.’

Revocation and substitution of a new clearance—(p. 41)

- < After paragraph 4.77, insert the following paragraph:

4.77A However, an applicant may not claim confidentiality over an answer to a question on the form or part thereof. Where an applicant has claimed confidentiality over an answer or part thereof to a question on the form, the form will be invalid. It may be the case that a question in the form asks for information that in certain circumstances the applicant believes to be commercially or confidentially sensitive. Parties are encouraged to contact the ACCC in advance of submitting an application for revocation and substitution to discuss any potential concerns regarding information of this nature.

- < In paragraph 4.78, after the words ‘...because it is confidential’ delete the words ‘in an application or’.
- < In paragraph 4.79 delete the words ‘Subject to any confidentiality claims’ and insert the following words ‘The ACCC will place a valid application for revocation and substitution on its website and invite submissions from interested parties in response to the application. Similarly, where the ACCC initiates revocation and substitution,’
- < In paragraph 4.82, after words ‘... contentious matters).’ insert the sentence ‘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 role of the ACCC in Tribunal reviews—(p. 49)

- < In paragraph 5.22, after the words ‘material to the issues before the Tribunal’, remove the word ‘and’ and add the following dot point:
- < assist the Tribunal to evaluate the information by such means as appropriate, including the cross-examination of witnesses and production of additional information to correct, qualify or contradict information already supplied and

Applications for revocation of authorisation—(p. 62)

- < In the heading following paragraph 6.90, delete the words ‘minor variation’ and insert the words ‘revocation’.

Applications for revocation of authorisation and substitution of a new authorisation

—(p. 65)

- < In the heading following paragraph 6.108, delete the words ‘minor variation’ and insert the words ‘revocation and substitution’.