



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Merger Authorisation Guidelines

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Australian Competition and Consumer Commission 23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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1 Introduction

- 1.1 These *Merger Authorisation Guidelines* reflect the proposed approach of the Australian Competition and Consumer Commission (ACCC) to assessing applications for authorisation of proposed acquisitions under the *Competition and Consumer Act 2010* (Cth) (the Act).
- 1.2 Acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in any market are prohibited by section 50 of the Act. The ACCC's approach to assessing the likely competition effects of a proposed acquisition under section 50 is set out in the ACCC's [Merger Guidelines](#).
- 1.3 Amendments to the Act which give the ACCC power to authorise proposed acquisitions (referred to as 'merger authorisation') came into effect on 6 November 2017 following recommendations by the Competition Policy Review, chaired by Professor Ian Harper.
- 1.4 Pursuant to section 90(7), the ACCC can grant merger authorisation if it is satisfied that either:
 - (i) the proposed acquisition would not be likely to have the effect of substantially lessening competition, or
 - (ii) the likely public benefit resulting from the proposed acquisition outweighs the likely resulting public detriment.
- 1.5 The merger authorisation process provides an alternative to the informal merger review process. Details regarding the informal merger review regime are set out in the ACCC's [Informal Merger Review Process Guidelines](#).
- 1.6 These guidelines are not intended to be exhaustive on all the issues that may arise in respect of an application for merger authorisation and may be updated from time to time. Parties are encouraged to contact the ACCC if they have any questions.
- 1.7 Inquiries about lodging an application for merger authorisation should be directed to the General Manager, Merger Investigations Branch at mergers@acc.gov.au.

The authorisation framework

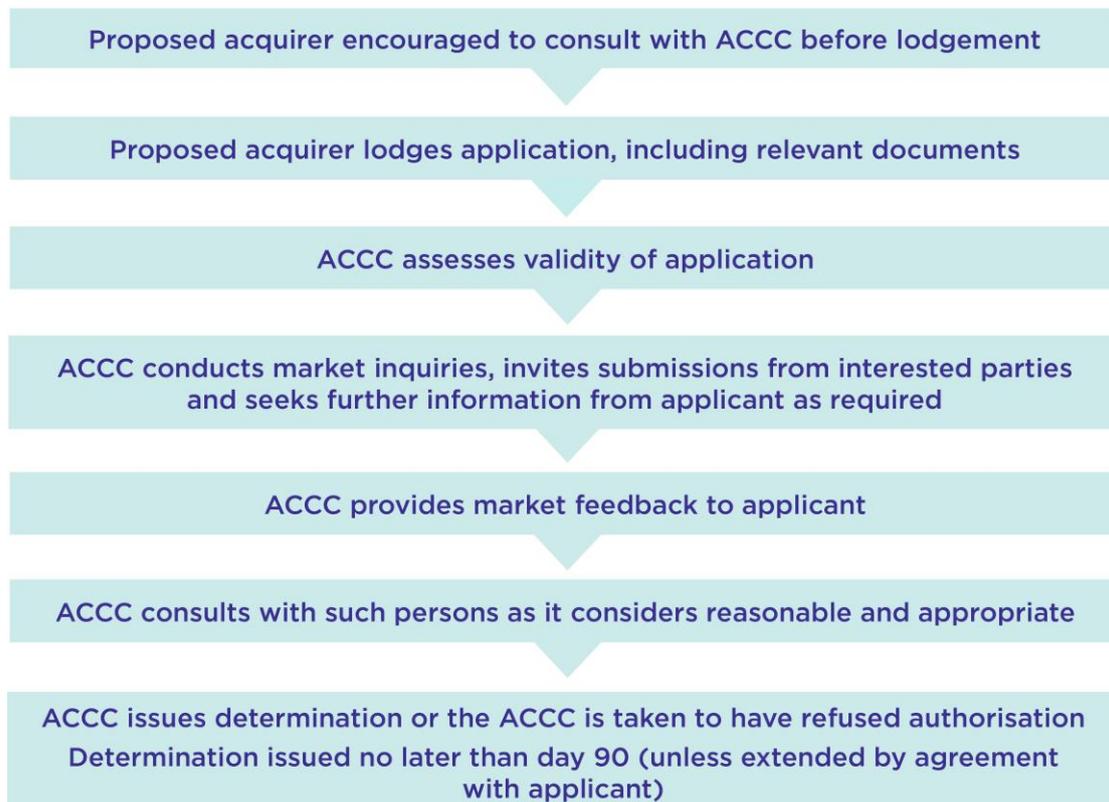
- 1.8 The authorisation process in the Act is an important feature of Australia's competition laws. It recognises that, in certain circumstances, proposed acquisitions may not harm competition or may give rise to benefits to the public that outweigh the public detriments.
- 1.9 These guidelines outline the process for merger authorisation. Merger authorisation provides statutory protection from legal action for acquisitions subject to section 50 of

the Act. The ACCC may only grant authorisation where the statutory test is met (outlined above at paragraph 1.4).

1.10 The Act requires the ACCC to consider a merger authorisation application within 90 days of the application being lodged. The applicant may agree to extend the timeframe. The ACCC must make a determination either granting authorisation, granting authorisation subject to conditions (such as imposing a condition to give and comply with an undertaking under section 87B), or denying authorisation. If the ACCC does not make a determination within 90 days (or within the extended time period as agreed), the application is taken to be refused. See Chapters 3 and 4 for more information on how to apply for merger authorisation and an outline of the steps in the merger authorisation process.

1.11 This chart provides an overview of the steps in a merger authorisation process.

Chart 1: Steps in the merger authorisation process



2 What authorisation provides

Why apply for merger authorisation?

- 2.1 A person who obtains merger authorisation from the ACCC obtains statutory protection from legal action under section 50 of the Act in respect of the proposed acquisition. That is, while the merger authorisation is in force,¹ the person to whom authorisation applies will be able to acquire the relevant shares or assets without risk of the ACCC or third parties taking legal action against them for a contravention of section 50 of the Act.
- 2.2 In some cases, a proposed acquisition may involve or be connected with other conduct that would or might breach other provisions of the Act. Parties should ensure that they apply for authorisation in respect of any non-merger conduct, as well as applying for merger authorisation for the proposed acquisition itself. The process for doing so is set out in the ACCC's [Guidelines for authorisation of conduct \(non-merger\)](#). See paragraphs 4.36 - 4.38 below for more information on applications involving both merger and non-merger conduct.

Who can apply for merger authorisation?

- 2.3 Any person² proposing to acquire shares or assets where that acquisition would or might breach section 50 of the Act may apply for merger authorisation.
- 2.4 Parties may wish to obtain legal advice on whether a proposed acquisition would or might breach section 50 of the Act and whether they should consider applying for merger authorisation. The ACCC cannot provide legal advice, although it can provide general guidance on the application and assessment process.

Acquisitions that can be authorised

- 2.5 The ACCC can grant merger authorisation only in respect of an acquisition that has not yet been made. The ACCC cannot authorise a completed acquisition.³

1 See paragraph 4.34 for information on the period for which authorisation is granted.

2 The Act generally applies to corporations. However, under the Competition Code all unincorporated entities and individuals are subject to the provisions on anti-competitive conduct in the Act and may apply for authorisation.

3 Section 88(6).

3 How to apply for merger authorisation

Pre-lodgement discussions with the ACCC

- 3.1 The ACCC strongly encourages any potential applicant to contact the ACCC for informal discussion before lodging an application for merger authorisation.
- 3.2 These discussions provide the potential applicant with the opportunity to discuss the proposed application with the ACCC. This will assist in ensuring that the application, when lodged, is valid and that the applicant will have provided sufficient documents and information for the ACCC to commence its review on receipt of the application.
- 3.3 The ACCC will not be able to suggest arguments in support of an application or comment on the likely outcome of an application. However, the ACCC can assist by explaining in general terms the issues that an applicant should address in an application, and the various steps in the ACCC's assessment process.
- 3.4 The ACCC also recommends that an applicant provide a draft application (including relevant information and documents) to the ACCC before the pre-lodgement meeting so that the ACCC can provide more specific guidance during the meeting.
- 3.5 A draft application provided during pre-lodgement discussions can be given to the ACCC in confidence and will not be placed on the public register (see Chapter 5 for further information on the public register).

Lodging a valid application

- 3.6 The Act requires that, for an application to be valid, it must be:
 - in writing in a form approved by the ACCC
 - accompanied by any other information or documents prescribed by the *Competition and Consumer Regulations 2010* (the Regulations), and
 - accompanied by the fee (if any) prescribed by the Regulations.⁴
- 3.7 The ACCC is required to assess the validity of an application within five business days of receiving it.⁵ See paragraphs 3.21 to 3.23 for further information about what might render an application invalid.

⁴ Section 89(1).

⁵ Section 89(1A).

3.8 The Act provides that substantial compliance with the requirements of the form is sufficient for an application to be valid.⁶ Whether an application 'substantially complies' with the requirements will be considered on a case-by-case basis.

Form of application

3.9 An application for merger authorisation should be consistent with the [form](#) approved by the ACCC and be accompanied by electronic versions of any relevant information, documents and evidence.

3.10 An applicant must include:

- a public version of their application, which will be placed on the ACCC's public register
- a signed declaration that the information in their application is true, correct and complete, and
- a section 87B undertaking⁷ not to complete the proposed acquisition while the ACCC is considering the application.

3.11 The declaration provided as part of the form must be signed by the applicant or a person appropriately authorised by the applicant. The declaration confirms that the information given in response to the questions on the form is true, correct and complete; complete copies of documents required by the form have been produced; estimates provided are best estimates; and opinions expressed are sincere. The applicant must advise the ACCC immediately of any material change in circumstances relating to the application.

3.12 An application for merger authorisation will be assessed more efficiently if the information and evidence provided in the application are comprehensive. The level of detail and the type of information required for an application to be valid will differ depending on the nature and complexity of the issues raised by the proposed acquisition. Some questions on the form might not be relevant to a particular application and, where this is the case, the applicant should provide a brief explanation in support.

6 Section 172(3).

7 Section 89(1AA) of the Act provides that the form may require an application for a merger authorisation to contain an undertaking under section 87B that the applicant will not make the acquisition to which the authorisation relates while the ACCC is considering the application. Annexure A of the [form](#) contains the section 87B undertaking for the applicant to execute.

- 3.13 In addition to providing a copy of the relevant transaction documents with the application, the form requires an applicant to describe the proposed acquisition for which merger authorisation is sought in a sufficiently precise manner to enable the ACCC to consult with interested parties and assess the proposed acquisition.
- 3.14 An application supported by evidence is likely to be given greater weight than one supported only by submissions.

Form of information requested

Details of the applicant acquirer(s) and other parties to the proposed acquisition

1. Provide details for the applicant acquirer(s) and separately any other parties to the proposed acquisition such as the target company (together, the parties), including:
 - 1.1. name, address (registered office), telephone number, ACN or international equivalent
 - 1.2. contact person's name, position, telephone number, and email address
 - 1.3. a description of business activities
 - 1.4. email address for service in Australia
 - 1.5. for each party to the proposed acquisition, a company structure chart identifying each party, its respective subsidiaries, and all related bodies corporate and companies in which it holds minority shareholdings that are involved in a relevant business for purposes of assessing this application
 - 1.6. a current organisation chart for each party and for each of the party's relevant businesses, identifying the key personnel with their full name, title, and contact details.

The proposed acquisition

2. Provide details of the proposed acquisition, including:
 - 2.1. the assets and/or shares to be acquired, and the structure of the proposed acquisition, including any proposed ancillary arrangements
 - 2.2. diagrams to show the change in ownership structure post acquisition
 - 2.3. the rationale for the proposed acquisition
 - 2.4. the expected completion date.
3. Provide the following documents:
 - 3.1. executed or most recent versions of the transaction documents, such as the sale and purchase agreement, heads of agreement, offer documents, and any related agreements
 - 3.2. final or most recent versions of documents governing or particularising the sale process for the proposed acquisition, such as information memoranda or documents required for schemes of arrangement, takeover bids or trust schemes

- 3.3. documents submitted to the applicant's board or prepared by or for the applicant's senior management for purposes of assessing or making a decision in relation to the proposed acquisition, and any minutes or record of the decision made. Provide the same documents from other parties to the proposed acquisition, to the extent available.

Market information and concentration

4. Describe the products and/or services and the geographic areas supplied by the parties.
5. Describe the industry or industries affected by the proposed acquisition. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.
6. Describe any upstream or downstream activities currently undertaken by the parties (including their related bodies corporate).
7. Identify all products and services in the relevant areas in which the parties overlap or have a vertical relationship.
8. For each relevant product or service in respect of which the parties overlap or have a vertical relationship, provide (for each party):
 - 8.1. the geographic locations in which the product or service is manufactured, distributed, or supplied
 - 8.2. the sales revenues and volumes and, where relevant, current capacity and capacity utilisation
 - 8.3. gross revenue earned from each of its top ten customers
 - 8.4. an estimate of the total market size (by sales in dollars and units and, where relevant, capacity or an alternative measure if more appropriate) and the current market shares for each of the parties and each competitor (including via imports). Identify the source of the data used to prepare this information, and any assumptions used.
9. Provide each party's most recent annual report, audited financial statements, business and strategic plans, and management accounts for the company as a whole and for each relevant division or business unit.

Competition effects

10. Describe the constraints on the parties to the proposed acquisition in the relevant industry or industries, including any likely change to those constraints should authorisation be granted and the proposed acquisition proceed. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the competition effects. You should address:
 - 10.1. existing or potential competitors to the parties, including via imports
 - 10.2. the likelihood, sufficiency and timeliness of entry and expansion by existing and potential competitors (including the estimated cost of new entry or expansion)
 - 10.3. the countervailing power of customers
 - 10.4. any other relevant factors.

Public benefits and detriments

11. Describe all benefits and detriments to the public likely to result from the proposed acquisition, including those likely to result from any lessening of competition. In addressing the likely benefits of the proposed acquisition, include details of any significant increase in the real value of exports, any significant substitution of domestic products for imported goods, and any other relevant matters that relate to the international competitiveness of any Australian industry. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits and detriments.

Contact details of relevant market participants

12. For each area of overlap, provide names and, where possible, contact details (email addresses and phone numbers) for:
- actual or potential competitors
 - each party's top 10 to 30 customers (depending on the total number of customers)
 - each party's top 5 to 10 suppliers (depending on the total number of suppliers)
 - trade or industry associations in which one or more of the parties are members.

Additional information

13. Provide any other information or documents you consider relevant to the ACCC's assessment of the proposed acquisition. This may include proposed remedies that the applicant wants considered as part of the authorisation.

Undertaking not to proceed

14. Consistent with s 89(1AA) of the Act, the ACCC requires the application to contain an undertaking that the applicant acquirer(s) will not complete the proposed acquisition to which authorisation relates while the ACCC is considering the application.[^]

Identify filings in other jurisdiction (where applicable)

15. Provide a list of overseas competition agencies that have or will be notified of the proposed acquisition and the date on which those agencies were or will be notified.

[^] Annexure A of the form contains the section 87B undertaking for the applicant to execute.

- 3.15 If the application (including the supporting documents) contains confidential information, the applicant must follow the process set out from paragraph 5.10 of these guidelines.

Fees

- 3.16 A valid merger authorisation application must be accompanied by the relevant lodgement fee of \$25,000⁸ or evidence that the fee has been paid (for example, evidence that an electronic transfer has been made).
- 3.17 The lodgement fee can be paid by electronic funds transfer, credit card, cheque or in cash. See the ACCC's website at <https://www.accc.gov.au/business/mergers/forms-fees> for details.

⁸ Regulations Schedule 1B. The fee for lodging an application for revocation and substitution of a merger authorisation is also \$25,000. No fee applies for applications for minor variation or applications to revoke an existing authorisation.

How to lodge a valid application for authorisation

- 3.18 The ACCC prefers applications for merger authorisation to be lodged by email to the General Manager, Merger Investigations Branch, at mergers@acc.gov.au.⁹
- 3.19 A complete application is considered to be lodged on the business day when the fee and application have been received or, when this occurs on a weekend or a public holiday in the Australian Capital Territory (the ACT), the next business day in the ACT.
- 3.20 Once an application is lodged and assessed as valid, it will be placed on the public register, which is available on the [ACCC's website](#).

Invalid applications

- 3.21 If the ACCC considers an application to be invalid, it will, within 5 days of receiving the application, notify the applicant and provide written reasons why the application is not valid. In most cases, the applicant will be provided with an opportunity to rectify and re-submit the application (with no additional fee, provided the correct fee was paid initially). The date of lodgement in this situation will be the date the rectified application is received by the ACCC (assuming it is valid).
- 3.22 If the person decides not to submit a rectified application, the application fee paid to the ACCC will be refunded.
- 3.23 If the ACCC considers the rectified application is valid, it will place the application on the public register on the ACCC's website and commence public consultation.
- 3.24 If, at some point during the merger authorisation process but after the initial five business day period, the ACCC becomes aware that an application is not valid, the ACCC will raise this with the notifying party.

Amending an application

- 3.25 There are no provisions in the Act that expressly allow an applicant to amend their application once it is validly lodged with the ACCC. In practice, the extent to which the ACCC can accept amendments will be constrained by the 90-day merger authorisation assessment period (see paragraphs 4.3 – 4.9 for more information on the 90-day statutory period).

9 Applications for authorisation may also be lodged by mail or in person at an [ACCC office](#).

- 3.26 The ACCC will consider a request to amend an application for merger authorisation having regard to the nature of the amendment, whether it would require further consultation with interested parties, and the timing of the amendment in the context of the process. The ACCC will be unlikely to accept any substantial change needing additional consultation without an appropriate extension to the time period.
- 3.27 If the ACCC does not accept a request to amend an application, depending on the nature of the amendment, the applicant may withdraw the application and lodge a new application incorporating the amended proposal (which would start the merger authorisation process again and reset the statutory timeframe). Alternatively, the applicant could proceed with its original application and, if merger authorisation is granted, then seek a minor variation or a revocation and substitution, depending on the nature of the amendment (see Chapter 11 for further information).

Withdrawing an application

- 3.28 An applicant may withdraw their application by advising the ACCC in writing at any time before the ACCC makes its final determination.¹⁰
- 3.29 There is no provision for the ACCC to refund fees if an application is withdrawn.
- 3.30 The ACCC is required to keep a record of withdrawn applications on the public register.¹¹

Providing false or misleading information

- 3.31 Providing false or misleading information to the ACCC in relation to a merger authorisation application may have serious consequences.
- 3.32 Knowingly giving false or misleading information to the ACCC is a serious criminal offence.¹²
- 3.33 Section 92 of the Act specifically prohibits a person from giving information to the ACCC in connection with an application for merger authorisation, or related applications,¹³ if the person knows, or is reckless or otherwise negligent as to

10 Section 88(7).

11 Section 89(3).

12 *Criminal Code* (Cth), section 137.

13 Namely, applications for a minor variation, revocation or revocation and substitution of a merger authorisation.

whether, the information given is false or misleading in a material particular. Breaches of section 92 may attract pecuniary penalties.¹⁴

- 3.34 In addition to taking steps to revoke a merger authorisation granted on the basis of information that was false or misleading, in appropriate circumstances, the ACCC may seek orders from the Federal Court of Australia (Federal Court) including an injunction to stop the proposed acquisition from proceeding,¹⁵ or divestiture if the acquisition has already completed.¹⁶

14 Section 76(1)(a)(iii).

15 Section 80AC.

16 Section 81A.

4 Steps in the merger authorisation process

- 4.1 Once a valid application is received, the ACCC will:
- conduct market inquiries, including inviting interested parties to lodge written (or oral) submissions commenting on the application
 - engage with the applicant, including seeking further information and evidence as needed, providing written feedback following market inquiries and inviting the applicant to lodge a written submission in response to interested party submissions, and
 - issue a written determination granting such authorisation as it considers appropriate or dismissing the application.
- 4.2 A chart depicting the merger authorisation process is provided at paragraph 1.11.

90-day time limit for merger authorisations

- 4.3 If the ACCC has not made a decision in respect of an application for merger authorisation within 90 days of the application being validly lodged (unless extended), the ACCC is taken to have refused to grant the authorisation sought.¹⁷ The 90-day limit also applies to an application for revocation, revocation and substitution, or minor variation of a merger (see Chapter 11).
- 4.4 The 90-day period begins on the date the ACCC receives a valid application for merger authorisation.¹⁸
- 4.5 The 90-day period can be extended if the applicant for authorisation informs the ACCC in writing before the expiration of the 90-day period that the applicant agrees to the ACCC taking a specified longer period for the determination of the application.¹⁹
- 4.6 The 90-day period for the ACCC's consideration of merger authorisation applications imposes a discipline on all those involved in the merger authorisation process. However, there may be circumstances where an extension to the timeframe will be more likely to be requested, for example:
- the issues are complex and require extensive engagement with the applicant or third parties

17 Section 90(10B).

18 The 90-day period is based on calendar days. This period is counted inclusive of the date of lodgement.

19 Section 90(12).

- the ACCC needs to obtain or review extensive material, for example, responses to section 155 notices
 - there is a delay in the parties providing information to the ACCC in response to a voluntary information request or section 155 notice
 - the applicant seeks to amend the application for authorisation, requiring additional third party consultation
 - the application is made in conjunction with an application for authorisation of non-merger conduct, which is subject to different statutory timeframes and processes
 - the applicant proposes a remedy to address possible ACCC concerns with the application.
- 4.7 The applicant may agree to multiple subsequent extensions of the period for the ACCC to make a determination, provided in each case the applicant advises the ACCC of its agreement in writing before the expiration of the existing time period.²⁰
- 4.8 The ACCC will include on the public register an indicative timeline for the assessment of the application, including the closing date for market consultation and the proposed date for its final determination and, where relevant, any extensions agreed to by the applicant.
- 4.9 As the 90-day period is based on calendar days, it is possible for it to expire on a weekend or public holiday. In these cases, the ACCC will endeavour to release its final determination before the end of the last business day in the ACT before the conclusion of the 90-day period.

Public consultation

- 4.10 Once the ACCC has received a valid application and processed any claims for exclusion from the public register, the public version of the application will be placed on the [public register](#).²¹ Once the application is public, the ACCC will commence market inquiries. This will usually occur within one week of the application becoming public.
- 4.11 During its consultation process, the ACCC aims to consult broadly with a range of persons that may be directly affected by the proposed acquisition. In the application, applicants should provide names and, where possible, contact details of potentially

²⁰ Section 90(13).

²¹ Section 89(3) requires the ACCC to keep a public register of applications for authorisation. Section 89(2) requires the ACCC to publicise the receipt of an application 'in such manner as it thinks fit'.

interested parties, including major customers, competitors and suppliers, relevant industry associations or peak bodies, consumer groups, State and Commonwealth Government Departments and relevant regulatory bodies. The ACCC will use this information to contact the interested parties, so providing this information upfront will avoid unnecessary delays.

- 4.12 Where a proposed acquisition is likely to affect large numbers of parties (such as consumers or businesses), the ACCC will seek to identify appropriate representative bodies, such as consumer or business groups or a subset of the potentially affected parties, for consultation purposes.
- 4.13 Generally, the ACCC's consultation letter to potentially interested parties will:
- include a copy of the application or a link to the ACCC's website where the application can be accessed
 - invite interested parties to comment on the application and the proposed acquisition
 - where appropriate, identify specific issues that the ACCC wants interested parties to address
 - nominate an ACCC contact officer for the application
 - request both written and oral submissions by a specified date, and
 - outline the ACCC's public register requirements and how to request exclusion from the public register.
- 4.14 A copy of the letter to potentially interested parties will be placed on the public register.
- 4.15 Any other person who becomes aware of an application, but who was not contacted by the ACCC, may lodge a submission.
- 4.16 The ACCC may also consult with such persons it considers reasonable and appropriate for the purposes of making its determination.²²
- 4.17 The ACCC takes all submissions received by the date specified in the consultation letter into account.²³ However, given the timeframes involved, the ACCC may be

22 Section 90(6)(d).

23 Section 90(6A).

unable to extend deadlines for lodging submissions. The ACCC may, but need not, take into account any submissions or information received after the specified date.²⁴

How to lodge a submission

- 4.18 Interested parties who wish to lodge a submission with the ACCC are encouraged to provide it in writing, addressed to the General Manager, Merger Investigations Branch, and send it by email to mergers@acc.gov.au and, if possible, copied to the nominated ACCC contact officer.
- 4.19 Alternatively, submissions may be posted or delivered in person to one of the [ACCC's offices](#).
- 4.20 Some interested parties may prefer to make a submission orally to an ACCC staff member in person or by telephone. Interested parties who wish to set up a time to make an oral submission should contact the nominated ACCC contact officer for the application (as advised in the ACCC's consultation letter – see paragraph 4.13) or send an email to mergers@acc.gov.au.
- 4.21 Written submissions and particulars of oral submissions will be placed on the public register. Interested parties may ask that confidential information provided in a written or oral submission be excluded from the public register (see paragraphs 5.5 to 5.13).

Engagement with the applicant

- 4.22 As noted above, an applicant should provide a comprehensive application, accompanied by the information, data and documents outlined in the form, as well as any additional material which is likely to be relevant to the ACCC's assessment of the proposed acquisition (see paragraphs 3.9 to 3.14).
- 4.23 If the ACCC requires further information from the applicant, it may either write to the applicant requesting additional information to be given within a specified period,²⁵ or issue the applicant with a written notice under section 155 of the Act requiring information, documents or evidence to be provided.²⁶ (See paragraphs 4.27 to 4.30 for more information.)
- 4.24 The applicant will be invited to provide a response to issues raised in market inquiries by a specified date, usually between one and two weeks after the deadline for interested party submissions.

24 Section 90(6A).

25 Section 90(6)(b).

26 Sections 155(1) and 155(2)(b)(iii).

- 4.25 The ACCC intends to provide informal feedback to the applicant throughout the process. For example, the ACCC will seek to keep the applicant informed of key developments and milestones through the process. The form and timing of such feedback will vary depending upon the application.
- 4.26 The ACCC expects to provide public feedback once during the process prior to the final determination. Where the ACCC provides public feedback, it will likely be in the form of a letter to the applicant and will provide a non-confidential summary of the issues raised by market participants and identify any outstanding areas of concern to the ACCC. Any public feedback will be included on the public register.

Section 155 notices

- 4.27 The ACCC will, where appropriate, use its statutory information and document gathering powers under section 155 to compel an applicant (and in some limited cases, third parties) to provide information, documents or evidence to the ACCC.
- 4.28 The ACCC will seek information and documents in this way when it considers it will be the most effective and/or efficient way of gathering the information and documents necessary for the ACCC to make its decision. The ACCC may use these powers where:
- it is important to have confidence that the ACCC has full and complete information on key issues in circumstances where voluntary requests will not deliver the same confidence
 - a party may have previously failed to respond or respond fully to a voluntary request
 - a party is unable to cooperate because of legal or confidentiality restrictions on disclosure
 - a third party requests that the information or documents be compulsorily required to avoid being seen to be cooperating freely with the ACCC and to be protected from possible retaliation from the applicant
 - the ACCC has obtained information from other sources that is inconsistent with the information voluntarily provided
 - the ACCC has concerns that a voluntary request will be met with delays
 - a party does not want to cooperate with the ACCC
 - critical information required by the ACCC will be most efficiently sought through the use of a section 155 notice
 - the ACCC faces timing pressures in the merger authorisation process.

- 4.29 The ACCC endeavours to target the scope of a section 155 notice appropriately to ensure that only material that is necessary and relevant is sought for the purposes of the review, and takes into account the likely burden on the recipient.
- 4.30 For more information, see the [ACCC Guidelines – Use of section 155 powers](#).

Determination

- 4.31 The ACCC's determination may grant authorisation, grant authorisation subject to conditions (usually this will take the form of a condition to give and comply with an undertaking under section 87B – see Chapter 9 for more information on imposing conditions), or deny authorisation. The determination must be in writing and provide reasons.²⁷
- 4.32 The ACCC will send a copy of its final determination to the applicant and place a copy on the public register.

Commencement of statutory protection

- 4.33 A merger authorisation will come into force on the day specified in the determination. This date cannot be earlier than 21 days after the determination is issued to accommodate the appeal period.²⁸ Should an application to review the determination be made to the Australian Competition Tribunal (the Tribunal) before the 21-day period expires, the commencement of the statutory protection is deferred pending a decision of the Tribunal.²⁹ If the application to the Tribunal is subsequently withdrawn, the ACCC determination takes effect on the day the application is withdrawn.³⁰ The role of the Tribunal is outlined in Chapter 10.
- 4.34 An authorisation remains in force for the period specified by the ACCC in the authorisation.³¹ The ACCC will generally grant a merger authorisation for a period of no longer than twelve months from the date of the determination. In order to have the legal protection conferred by the merger authorisation, the authorised party will need to complete the relevant acquisition during the specified period.
- 4.35 The applicant will be requested to notify the ACCC when they have completed the acquisition that is the subject of a merger authorisation.

27 Section 90(1); section 90(4).

28 Section 91(1A).

29 Section 91(1A).

30 Section 91(1A)(c).

31 Section 91(1).

Applications involving both merger and non-merger conduct³²

- 4.36 Where authorisation is sought for both merger and non-merger conduct, the ACCC will endeavour to consider the applications in parallel, coordinating the timelines and process requirements to the extent possible. For example, the ACCC may conduct market inquiries on both applications at the same time.
- 4.37 The ACCC will consider the extent to which the proposed conduct and acquisition are related when determining how best to align the timelines. A difficulty in mirroring the timeframes is that there are additional statutory requirements for non-merger conduct authorisation applications, such as issuing a draft determination and the option to call a conference, which do not apply to merger authorisation applications.
- 4.38 In some cases, in order to finalise its consideration of merger and non-merger applications at the same time, the ACCC may request the applicant to agree to extend one, or both, of the statutory timeframes that apply.

32 For more information on authorisation of conduct, refer to the ACCC's [Guidelines for Authorisation of Conduct \(non-merger\)](#).

5 Public register

- 5.1 Under the Act, the ACCC is required to keep a public register containing the following documents:
- applications for merger authorisation, minor variation, revocation and revocation and substitution, including applications that have been withdrawn or abandoned
 - documents and submissions provided to the ACCC in relation to any application
 - particulars of any oral submissions made to the ACCC in relation to an application
 - final determinations.³³
- 5.2 The ACCC usually includes a copy of key ACCC correspondence with the applicant and interested parties (such as inviting submissions from interested parties).
- 5.3 The ACCC will also publish an indicative timeline for its review on the public register.
- 5.4 The merger authorisation public register is available on the [ACCC's website](#).

Dealing with confidential information

- 5.5 An applicant and interested parties may, when providing documents or making oral submissions in relation to an application for merger authorisation, request that the documents or submissions, or parts of them, be excluded from the public register by reason of the confidential nature of any of the matters contained in the document or submission.
- 5.6 Parties providing confidential information to the ACCC should:
- clearly identify the confidential information
 - provide a confidential version and a public version with the confidential information redacted, and
 - make a request that the identified information be excluded from the public register and provide reasons for the request.
- 5.7 When a request is made to exclude confidential information from the public register, the ACCC must exclude the following information:

33 Section 89(4).

- a secret formula or process
 - the cash consideration offered for the acquisition of shares or assets
 - the current costs of manufacturing, producing or marketing goods or services.³⁴
- 5.8 In any other case the ACCC may, if it is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in the document or submission, exclude that document or submission (or parts of it) from the public register.³⁵
- 5.9 The ACCC will consider requests for confidentiality on a case-by-case basis. Where the ACCC accepts confidential information, it does so on the following basis:
- there is no restriction on the internal use, including future use, that the ACCC may make of confidential information consistent with the ACCC's statutory functions
 - confidential information may be disclosed to the ACCC's external advisors and consultants on the condition that each such advisor or consultant will be informed of the obligation to treat the information as confidential
 - the ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 89(7)³⁶ or section 155AAA of the Act.³⁷

How to request exclusion of confidential information from the public register

- 5.10 Any request to exclude a confidential document or oral submission, or parts of it, from the public register must be made at the time the document or oral submission is provided to the ACCC.³⁸ Reasons must be provided in support of a request for exclusion.
- 5.11 The Regulations prescribe how a request for excluding a confidential document, or parts of it, from the public register can be made. Specifically:

34 Section 89(5A)(a).

35 Section 89(5A)(b).

36 Under section 89(7), the ACCC may disclose information excluded from the public register to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application concerned.

37 Under section 155AAA of the Act, the ACCC is permitted to disclose confidential information relating to certain ACCC functions under the Act to certain ministers, government departments, royal commissions and other government agencies (including international competition and consumer agencies). For more information, see the [ACCC's Information Policy on The collection, use and disclosure of information](#).

38 Section 89(5).

- when a request is made for a whole document to be excluded from the public register, the words ‘Restriction of Publication Claimed’ should appear in red writing near the top of each page³⁹
- when a request is made to exclude part of a document, the words ‘Restriction of Publication of Part Claimed’ should appear in red writing near the top of the first page (and where the document is more than five pages, a description of where in the document that part of the document is to be found) and by clearly marking in red that part of the document.⁴⁰

5.12 The ACCC will consider requests for exclusion that do not comply with this process provided it is clear which information is confidential and the reasons why such information is confidential.

5.13 Parties should not include standard headers claiming confidential communication in documents unless they contain information the applicant wants excluded from the public register. If the information is not confidential and the header cannot be removed, parties should clearly state at the beginning of correspondence provided to the ACCC that exclusion from the public register is not requested.

Checklist for requesting confidential information be excluded from the public register

- Have you identified the specific sections of the document to which the request relates?
- Have you outlined reasons for requesting that the document or information be excluded from the public register?
- Have you provided a copy of the full document and highlighted the confidential sections?
- Have you provided a public register version of the document and masked or removed those parts you want excluded?
- Are you aware that requests to exclude confidential information from the public register must be made at the time the information is provided to the ACCC?

How the ACCC assesses requests for the exclusion

5.14 Confidential information subject to a request for exclusion from the public register will not be placed on the public register while the ACCC assesses the request.⁴¹

5.15 The ACCC aims to respond to requests in an appropriate timeframe. The ACCC’s ability to provide a prompt response is greatly enhanced if requests are limited to

39 Regulation 24(1A)(a).

40 Regulation 24(1A)(b).

41 Section 89(5E).

information that is genuinely confidential, if confidential information is clearly marked, and if claims are accompanied by a detailed explanation of why the information should be excluded.

- 5.16 When the ACCC decides to exclude information from the public register, this information may still be used by the ACCC in its consideration of the application for merger authorisation and otherwise consistently with its statutory functions under the Act.
- 5.17 If the ACCC decides not to exclude information from the public register, either because the claim is not accompanied by sufficient justification or because it considers that the information is not confidential in nature, the ACCC will inform the relevant party of its decision. If the party provided the document or submission on a voluntary basis and the ACCC refuses to exclude the material from the public register, the party may ask the ACCC to return the document or part of the document.⁴² Alternatively, the party may advise the ACCC that it wishes to withdraw or amend the request for exclusion from the public register.
- 5.18 For more information, see [Guidelines for excluding information from the public register](#).

Exclusion of information for reasons other than confidentiality

- 5.19 Where it is satisfied that it is desirable to do so, the ACCC may exclude a document or submission, or parts of a document or submission, from the public register for any reason other than the confidential nature of the matters contained in the document or submission.⁴³ Such reasons may include that:
- disclosure of the identity of the producing party may affect commercial relationships or there is fear of reprisal if the views are made known
 - the material is defamatory
 - it contains personal information of third parties, or
 - disclosure will have a substantial adverse effect on the ACCC's ability to carry out its functions or operations.

Disclosure of information

- 5.20 The ACCC is committed to treating confidential information responsibly and in accordance with the law. Parties should be aware that a decision by the ACCC to

42 Section 89(5B).

43 Section 89(5D).

exclude information from the public register does not provide any broader 'confidentiality' protection. However, the ACCC does not provide access to material excluded from the public register as a matter of course.

- 5.21 In some circumstances, the ACCC may be legally required to produce confidential information, for example, under the *Freedom of Information Act 1982* or as part of Court or Tribunal processes.
- 5.22 The Act also provides the ACCC with the ability to disclose information in certain circumstances. For example:
- under section 89(7), the ACCC may disclose information excluded from the public register to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application concerned
 - the ACCC may disclose confidential, or 'protected' information in accordance with section 155AAA in certain circumstances.
- 5.23 The ACCC will endeavour to notify and consult the person who provided the confidential information about the proposed release of that information before doing so.
- 5.24 A guideline on the ACCC's general policy on the collection, use and disclosure of information is available on the [ACCC's website](#).

Provision of documents to applicants

- 5.25 Public submissions received by the ACCC in connection with an application for merger authorisation will be placed on the public register as soon as possible.
- 5.26 In addition, the applicant can request, under section 157 of the Act, that the ACCC provide it with a copy of all documents:
- provided to or obtained by the ACCC, or
 - in the possession of the ACCC that came to its attention,
- in connection with a matter to which the application relates and which tend to establish the case of the applicant. There are a number of exceptions to this potential disclosure. For example, the ACCC is not required to disclose documents pursuant to

such a request if they were obtained from the person making the request or were prepared by an officer or professional adviser of the ACCC.⁴⁴

5.27 The Court can direct the ACCC to comply with a section 157 request, but may refuse to do so where it considers it inappropriate to make such an order by reason that the disclosure sought would prejudice any person or for any other reason.⁴⁵

44 Section 157(1AB).

45 Sections 157(2) and (3).

6 The authorisation test

The test

- 6.1 The ACCC may grant merger authorisation if it is satisfied in all the circumstances that:
- the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
 - the proposed acquisition would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition.⁴⁶
- 6.2 The ACCC has the power to grant merger authorisation where it is satisfied that at least one limb of the above test is met.
- 6.3 The applicant may wish to indicate in its application which limb of the test it believes is most readily met in the circumstances of the merger.
- 6.4 The ACCC's power to grant authorisation is discretionary.⁴⁷ While not narrowly defined, the ACCC's discretion to grant authorisation is limited by the subject matter, scope and purposes of the Act.⁴⁸
- 6.5 The ACCC's views on what may constitute a substantial lessening of competition or a public benefit or public detriment are set out in more detail in Chapters 7 and 8.

Onus on the applicant to satisfy the ACCC

- 6.6 The applicant bears the onus of satisfying the ACCC that at least one limb of the test for authorisation is met.⁴⁹ The ACCC will also conduct its own inquiries as part of its assessment.

Forward looking nature of analysis

- 6.7 The ACCC adopts a forward looking approach when applying the merger authorisation test. That is, the analysis focuses on assessing the likely competition

46 Section 90(7).

47 *Re Medicines Australia Inc* [2007] ACompT 4 at [106].

48 'The discretion is not narrowly confined given the enormous variety of circumstances to which it may have to be applied. It is neither necessary nor desirable to try to define its outer limits. It is sufficient to say that considerations relevant to the objectives of the Act may play a part in the exercise of the discretion even where the public benefit test has been satisfied': *Re Medicines Australia Inc* [2007] ACompT 4 at [126].

49 See *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,244.

effects, and public benefits and detriments that would result, or be likely to result, from the proposed acquisition.

Future with and without

- 6.8 In applying the authorisation test, the ACCC generally compares the likely future with the proposed acquisition that is the subject of the authorisation application to the likely future without the proposed acquisition.⁵⁰ In particular, the ACCC will compare the state of competition and the public benefits and detriments likely to arise in the future where the acquisition occurs, against the future in which the acquisition does not occur. This approach enables the ACCC to focus its assessment on the impact of the acquisition rather than other effects that would occur irrespective of whether the acquisition occurs. For most merger matters, the likely future without the acquisition, for purposes of analysis, will be the status quo.
- 6.9 A comparison with the future without the acquisition can assist in the public benefit assessment in a number of ways, including:
- if the claimed public benefits are unlikely to exist without the proposal, they can be described as benefits flowing from the proposal
 - if some of the claimed public benefits will likely exist regardless of the proposed acquisition, they will be given little, if any, weight.
- 6.10 The ACCC determines the likely future with and without positions on a case-by-case basis. In identifying what is likely, the ACCC does not take into account mere possibilities. The ACCC is concerned with whether there is a real chance of an outcome occurring.

Role of market definition in ACCC's assessment

- 6.11 As a preliminary step in its assessment of an application for authorisation, the ACCC identifies the areas of competition that may be affected by the proposed acquisition. This establishes the broad 'field of inquiry' relevant to the ACCC's consideration of the application.

ACCC's approach to identifying relevant markets or areas of competition

- 6.12 Market definition is a tool to assist in assessing an authorisation application. Defining the relevant areas of competition identifies the range of buyers and sellers that could be affected by the proposed acquisition, and the nature of the competitive

50 See *Re Medicines Australia Inc* [2007] ACompT 4 at [120].

environment in which the proposed acquisition will occur. It assists in identifying the likely competition effects, benefits and detriments, and the extent to which other factors might constrain such effects.

- 6.13 However, it is rarely possible to draw a clear line around the market, and it is often sufficient to identify the relevant areas of competition in which the proposed acquisition or its effects will occur, without precisely defining the boundaries of the relevant market.⁵¹
- 6.14 A more detailed explanation of the ACCC's approach to market definition is set out in the ACCC's [Merger Guidelines](#).

51 In assessing applications for merger authorisation the ACCC adopts a purposive approach to market definition. That is, the definition of the market is considered in the context of the proposed acquisition. Accordingly, the way a market is defined for the purposes of assessing a particular application for authorisation may differ to the market definition relevant to the ACCC's consideration of other matters, for example, mergers in the same or related industries.

7 Substantial lessening of competition

- 7.1 Competition is a state of ongoing rivalry between firms – rivalry in terms of price, service, technology and quality. Market participants are mutually constrained in their pricing, output and related commercial decisions to some extent by the activity of other market participants (or potential market participants). In other words, the greater the degree of competition in a market, the less market power each market participant will possess.
- 7.2 Acquisitions can alter the level of competition in a market. Some acquisitions enable the merged firm to meet customer demand in a way that facilitates more intense competition. Many acquisitions do not affect the level of competition at all because there are sufficient substitution possibilities to effectively constrain the merged firm.
- 7.3 Other acquisitions, however, lessen competition by reducing or weakening the competitive constraints or reducing the incentives for competitive rivalry. Acquisitions that increase the market power of one or more market participants may be detrimental to consumers because they may lead to an increase in price, or deterioration in some other aspect of the service offering. The extent of increase in market power and, therefore, the extent of likely consumer detriment, will depend on whether alternative actual or potential supply options are available post-acquisition to effectively constrain the merged firm. If market structure and circumstances mean that there is limited potential for alternative supply options or substitution possibilities to constrain the merged firm, then it will be profitable for the merged firm to raise prices or decrease its service offering, despite the potential for lost sales to alternative suppliers.
- 7.4 The ACCC's approach to assessing the likely competition effects of a proposed acquisition is set out in detail in the ACCC's [Merger Guidelines](#), the key points from which are outlined below. The ACCC encourages applicants to consider the Merger Guidelines prior to submitting their application for merger authorisation.
- 7.5 Broadly speaking, the ACCC's assessment of competitive effects is based on the theories of competitive harm – namely, unilateral and coordinated effects. Acquisitions result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on firms in a market. In cases where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged firm and/or other firms in a market, the acquisition is likely to substantially lessen competition.
- 7.6 The ACCC will consider a broad range of 'merger factors' relating to actual and potential competitive constraints faced by the merged firm, including:
- the level of concentration in the market

- the height of any barriers to entry and expansion
- actual and potential import competition
- the availability of substitutes
- the extent of any countervailing power
- the dynamic characteristics of the market
- the ability to increase prices or profit margins
- the presence of a vigorous and effective competitor, and
- the degree of vertical integration.⁵²

7.7 Some of these factors assist in identifying the presence of direct constraints while others provide insight into less direct forms of constraint relating either to the structure and characteristics of the market or the behaviour of actual and potential participants in a market. The ACCC recognises that competitive constraints are not static and strategic behaviour by market participants can affect competition.

7.8 The significance of the merger factors, and the weight that is placed on them, will depend on the matter under consideration. The likely presence of effective competitive constraints post-acquisition is a key indicator that a proposed acquisition is unlikely to result in a substantial lessening of competition. In some cases a single effective constraint can be sufficient to prevent a significant and sustained increase in the market power of the merged firm, while in other cases the collective effect of several constraints may be required. Conversely, the absence of a single particular constraint is unlikely to be conclusive of an increase in market power as a result of a proposed acquisition.

52 Section 50(3).

8 Public benefits and detriments

Public benefits

8.1 'Public benefit' is not defined in the Act. However, the ACCC has traditionally given it a broad meaning. As noted by the Tribunal it includes:

... "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress". Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.⁵³

8.2 The Act does not expressly limit the range of public benefits which may be taken into account by the ACCC. In assessing the benefits that are likely to flow from a proposed acquisition, the ACCC will be guided by the underlying object of the Act to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.⁵⁴

8.3 When considering the anticipated benefits put forward by an applicant, the ACCC will assess (among other things):

- whether the anticipated benefit is transaction specific
- who the benefit accrues to and how widely it is shared in the community
- whether the benefit is ongoing or a one-off
- how the benefit will arise
- when the benefit is likely to arise
- the likelihood that the benefit will be realised
- the magnitude of the benefit.

8.4 The ACCC takes into account any benefits that would result from the proposed acquisition regardless of the market in which that benefit arises.

53 *Re 7-Eleven* (1994) ATPR 41-357 at [42,677]. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012, at 17,242 and *VFF Chicken Meat Growers' Boycott Authorisation* (2006) ACompT 9 at [75].

54 Section 2.

Types of benefits

- 8.5 While economic efficiency is not the only focus of the ACCC's assessment of the benefits that are likely to result from a proposed acquisition, many benefits can be expressed as an increase in allocative, productive and/or dynamic efficiency.

Allocative efficiency

- 8.6 A proposed acquisition may result in allocative efficiency gains when it improves the allocation of society's resources to better reflect consumer preferences.
- 8.7 Claims of allocative efficiency gains are less common in proposed acquisitions than other forms of conduct. This is because horizontal acquisitions tend to reduce allocative efficiency, to the extent that they lead to an increase in market power and margins (with prices higher than marginal cost and a corresponding deadweight loss).

Productive efficiency

- 8.8 A proposed acquisition may improve productive efficiency by making the merged entity more cost effective by increasing economies of scale or scope, allowing better use of existing capacity, reducing cost through asset rationalisation, or through combining complementary production capabilities.
- 8.9 Not all of the parties' anticipated cost savings from the proposed acquisition would necessarily arise from an increase in productive efficiency. Some cost savings may arise simply as a result of a transfer from one producer to another. Cost savings of this nature would not constitute a public benefit.

Dynamic efficiency

- 8.10 A proposed acquisition may result in innovation that may not have occurred without the acquisition, including the introduction of new or improved product or production processes. For example, an acquisition may give rise to increased research and development activity.⁵⁵ Dynamic efficiencies resulting from acquisitions often relate to complementarities but can be harder to substantiate than productive efficiencies.

Other benefits

- 8.11 In the context of an application for merger authorisation, the ACCC must have regard to the following as benefits to the public (in addition to any other benefits to the public that may exist):

55 *Wattyl Australia Pty Ltd proposed acquisition of Taubmans - A30175 (denied 3 April 1996).*

- (i) a significant increase in the real value of exports
 - (ii) a significant substitution of domestic products for imported goods, and
 - (iii) all other relevant matters that relate to the international competitiveness of any Australian industry.⁵⁶
- 8.12 Examples of these types of benefits include a likely increase in exports, an increase in production to satisfy demand that would otherwise be satisfied by imports, or the creation of a strong and efficient Australian business operating in an international market.⁵⁷
- 8.13 Other benefits have also been recognised, for instance, an improvement in health and safety standards⁵⁸ and environmental benefits.⁵⁹

Attaching weight to public benefits

- 8.14 When considering whether there is a public benefit from a proposed acquisition, the ACCC generally considers whether benefits are of value to the community generally and, if so, how much weight society attaches to those benefits. Of particular relevance will be the number and identity of the likely proposed beneficiaries.
- 8.15 The ACCC considers that cost savings accruing to one or few firms arising from increases in productive efficiency can constitute public benefits and it is not necessary for the savings to be passed on to end consumers in the form of lower prices. The community at large has an interest in resource savings because these resources are released for use elsewhere in the economy.
- 8.16 However, the ACCC may give more weight to benefits which flow through to consumers or the broader community than if they are retained by the merged firm.⁶⁰

Public detriments

- 8.17 'Public detriment' is not defined in the Act, but the Tribunal has defined it as:
- ... any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...⁶¹

56 Section 90(9A).

57 *Application for authorisation lodged under s.88(1) of the Trade Practices Act by Qantas Airways Limited and British Airways Plc* - A90565 (granted 12 May 1995).

58 *Wattyl Australia Pty Ltd proposed acquisition of Taubmans* - A30175 (denied 3 April 1996).

59 *ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108 at [56,066-56,067].

60 *Qantas Airways Limited* (2005), ACompT 9.

61 *Re 7-Eleven Stores Pty Limited* (1994), ATPR 41-357 at [42,683].

- 8.18 The ACCC considers that in applying the public benefit test to a merger authorisation, all public detriments likely to arise from the proposed acquisition for which authorisation is sought can be taken into account.⁶²
- 8.19 It may be appropriate for the ACCC to assess detriments that occur outside of the market or markets in which a lessening of competition has been identified. For example, if the proposed acquisition was likely to increase pollution or reduce public health and safety the ACCC would take this into account in balancing the public benefits and detriments.
- 8.20 In most cases the likely identifiable detriments will be those constituted by a lessening of competition. The ACCC's approach to assessing the likely effects on competition is outlined in Chapter 7. However, a lessening of competition does not have to be substantial to comprise a detriment to the public.⁶³

Quantifying public benefits and detriments

- 8.21 The Act does not require the ACCC to quantify the level of public benefits and detriments likely to result from a proposed acquisition. However, where possible, and particularly with complex applications, the ACCC encourages applicants to quantify the size of claimed benefits and detriments.
- 8.22 Quantification can provide guidance on the relative weight to be attributed to particular benefits and detriments in the ACCC's overall assessment. Where applicants are able to provide monetary estimates of the value of the benefits or detriments from the proposed acquisition, they should also provide the ACCC with the assumptions and reasoning upon which the data relies. Without the detail and transparency behind the modelling used in the calculations, it may be difficult for the ACCC to place much weight on the size of the claims.
- 8.23 The ACCC recognises that in many cases it will not be possible to precisely quantify public benefits and detriments. The assessment of benefits and detriments does not necessarily involve an arithmetical or accounting exercise.⁶⁴ Claims of this nature will usually need to be qualitatively assessed and must have a sufficient basis for concluding that the benefits and detriments are likely to result from the proposed acquisition.

62 See *Re Australian Association of Pathology Practices Incorporated* (2004), ATPR 41-985 at [94].

63 See, for example, *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [11]: 'a mandatory consideration in the Tribunal's assessment of an acquisition will include any non-trivial competitive detriment which will result, or is likely to result, from the acquisition whether it occurs on a market-wide basis or not.'

64 *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [68].

- 8.24 In practice, a qualitative assessment involves making a judgment about the existence and size of the public benefit and detriment, having regard to all of the information the ACCC has before it.
- 8.25 In all cases, the ACCC expects applicants to provide robust evidence of benefits and detriments when submitting a merger authorisation application. Where an applicant considers its efficiency will improve, it should provide evidence to substantiate these claims wherever possible. Such evidence could include accounting statements, internal studies, strategic plans, integration plans, management consulting studies, consumer surveys or research, and other available data.

Balancing public benefits and detriments

- 8.26 The ACCC will balance the benefits to the public that would result, or be likely to result, from the proposed acquisition against the detriments to the public that would result, or be likely to result, from the proposed acquisition and determine which is the greater. The ACCC may grant merger authorisation if the public benefits outweigh the public detriments.⁶⁵
- 8.27 In weighing the benefits and detriments, the ACCC places less weight on those that are less likely to occur, those for which the evidence is less strong, and those which may not be realised for some time.

65 Section 90(7)(b).

9 Imposing conditions and section 87B undertakings

Imposing conditions

- 9.1 The ACCC may grant merger authorisation subject to conditions specified in the authorisation⁶⁶ including, but not limited to, a condition that a person must give and comply with an undertaking under section 87B of the Act.⁶⁷ For example, the ACCC may grant merger authorisation subject to conditions designed to increase the likelihood of the claimed public benefits eventuating or to reduce the detriments resulting from the acquisition.
- 9.2 The ACCC determines the nature, form and scope of any conditions imposed.

Amending applications for authorisation to avoid the imposition of conditions

- 9.3 In some cases, rather than have the ACCC specify conditions in a merger authorisation, an applicant may consider it preferable to amend their application to address any concerns before the ACCC makes its final determination.
- 9.4 However, in practice, the extent to which the ACCC can accept amendments will be constrained by the 90-day merger authorisation assessment period. An applicant may not be able to make amendments to an application, particularly if they are significant, without an extension to the assessment period.

Section 87B undertakings

- 9.5 The ACCC may grant a merger authorisation on the condition that a person must give, and comply with, an undertaking to the ACCC under section 87B.⁶⁸
- 9.6 Under section 87B(1A) of the Act, the ACCC may accept a court enforceable undertaking given by a person in connection with a merger authorisation.
- 9.7 Undertakings previously given in the informal merger review context have included structural (that is, a requirement to divest certain assets to a purchaser approved by the ACCC), behavioural or other measures intended to address competition concerns identified by the ACCC under section 50 of the Act.

66 Section 88(3).

67 Section 88(4).

68 Section 88(4).

- 9.8 Whether the ACCC chooses to exercise its discretion to authorise a proposed acquisition subject to a condition of this kind will depend on the nature and circumstances of the proposed acquisition, including the likelihood of a substantial lessening of competition resulting from the proposed acquisition, and the benefits and detriments likely to result.
- 9.9 The ACCC will also consider a range of matters, such as whether an undertaking:
- will be effective to address the ACCC's concerns
 - can be effectively administered
 - will be likely to deliver the required outcomes
 - will not give rise to unreasonable monitoring and compliance requirements.
- 9.10 The ACCC will also consider any risks to competition associated with the implementation of the undertaking (or failure to do so).

Consultation

- 9.11 Merger parties may propose section 87B undertakings to the ACCC at any time throughout the merger authorisation process. Merger parties are encouraged to begin discussions with the ACCC about possible undertakings as early in the process as possible.
- 9.12 Where appropriate, the ACCC will consult with:
- interested parties in relation to undertakings offered by the merger parties and
 - the merger parties and interested parties in relation to any conditions it proposes to specify in the authorisation.
- 9.13 Consultation may be streamlined, or may not be necessary, depending on the kind of conditions or undertaking being considered and the issues sought to be addressed.
- 9.14 Where an undertaking is proposed or the ACCC is otherwise considering granting authorisation subject to conditions, an extension to the 90-day timeframe may be requested.

Non-compliance with conditions or a section 87B undertaking specified as a condition of merger authorisation

- 9.15 The legal protection from the operation of section 50 of the Act conferred by a merger authorisation does not apply if any of the conditions specified in a merger

authorisation are not complied with.⁶⁹ Where a merger authorisation is granted on the condition that a person give and comply with a section 87B undertaking, non-compliance with a term of that undertaking will constitute a failure to comply with a condition of authorisation.

- 9.16 The ACCC will investigate suspected breaches of a term of a section 87B undertaking, which may include taking legal action under section 87B to seek an order from the court directing the person to comply with the term or any such order that the court considers appropriate if the court is satisfied that the person has breached a term of the undertaking.⁷⁰
- 9.17 The ACCC may also take steps to revoke a merger authorisation if a condition to which the authorisation was expressed to apply has not been complied with.⁷¹

69 Section 88(3).

70 Sub-sections 87B(3) and (4).

71 Section 91B(3).

10 Reviewing ACCC merger authorisation decisions

10.1 Applicants and interested parties have two avenues for the review of ACCC merger authorisation decisions – review by the Tribunal which will make its own findings of fact and reach its own conclusions, or by judicial review of the decision by the Federal Court on a question of law.

Review by the Australian Competition Tribunal

10.2 An applicant, or other person who the Tribunal is satisfied has a sufficient interest,⁷² who is dissatisfied with an ACCC determination on an application for merger authorisation, minor variation, revocation, or the revocation of a merger authorisation and substitution of a new merger authorisation (together, for the purposes of this chapter, merger authorisation), may apply to the Tribunal for a review of the determination.⁷³

10.3 A review by the Tribunal of an ACCC determination relating to a merger authorisation is not a re-hearing of the matter.⁷⁴

10.4 For the purposes of the review, the Tribunal must not have regard to any information, documents, or evidence other than:

- information referred to in the ACCC's reasons for making the determination
- information or reports the Tribunal has required the ACCC to provide to the Tribunal
- information given to the ACCC in connection with the making of the determination
- information given to the Tribunal at the request of the Tribunal for the sole purpose of the Tribunal clarifying the information given to the ACCC in connection with the making of the determination. The Tribunal may consult with such persons and seek such relevant information as it considers reasonable and appropriate for this purpose

72 Section 101(1AA). Third parties may apply for leave to intervene and establish their interest in order to be involved in the Tribunal process: section 109(2).

73 Section 101(1). The Tribunal may reconsider ACCC determinations on applications for authorisation and minor variation, and the revocation or revocation and substitution of authorisations.

74 Section 101(2).

- with leave of the Tribunal, information, documents, or evidence that the Tribunal is satisfied was not in existence at the time the ACCC made its determination.⁷⁵
- 10.5 The limitations on the material that may be considered by the Tribunal for the purposes of the review are intended to balance the interests of all parties to a review of a merger authorisation matter in the context where the Tribunal must make a determination within a defined period (90 to 120 days, as applicable, unless extended). The limitations are also to ensure that an applicant for merger authorisation provides the ACCC with all relevant material at the time of the application.
- 10.6 The procedure of the Tribunal is, subject to the Act and Regulations, within the Tribunal's discretion.⁷⁶ The proceedings should be conducted with as little formality and technicality, and with as much expedition, as the Act and a proper consideration of the matters before the Tribunal permits.⁷⁷
- 10.7 Hearings before the Tribunal are generally public.⁷⁸ Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may:
- direct that a hearing or part of a hearing take place in private ("in camera") and give directions as to who may be present; or
 - give directions prohibiting or restricting the publication of evidence given before the Tribunal or of matters contained in documents filed with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.⁷⁹
- 10.8 Ultimately the Tribunal must affirm, vary or set aside the ACCC's determination.⁸⁰ If the Tribunal does not make a determination within the required timeframe, the Tribunal is taken to have made a determination affirming the ACCC's determination.⁸¹

75 Section 102(10). This allows the Tribunal to take account of a change in circumstances that has occurred since the ACCC's determination that is relevant to the Tribunal's assessment. For example, if there is a new entry to the relevant market after the ACCC's determination is made, the Tribunal may allow a person to provide new information about the entrant so this change in circumstances can be taken into account.

76 Section 103(1)(a).

77 Section 103(b).

78 Section 106(1).

79 Section 106(2).

80 Section 102(1).

81 Section 102(1AB).

Applying for a review

How to apply

- 10.9 A person may apply for a review by the Tribunal of an ACCC determination by completing and lodging *Form I Application to Tribunal for Review* with the Tribunal's registry. The Form I must be lodged with the Tribunal within 21 days from the date of the ACCC's determination.⁸²
- 10.10 A copy of Form I is contained in the Regulations and is also available on the [Tribunal's website](#).
- 10.11 The information requested by Form I requires the applicant to set out:
- the name of the applicant requesting the review
 - the ACCC's determination for which the review is requested
 - the applicant's interest in the determination (if not the original applicant for authorisation)
 - the reasons why the applicant for review is dissatisfied with the ACCC's determination
 - the determination sought from the Tribunal
 - the facts and contentions on which the applicant relies and the issues the applicant for review considers relevant. In doing so, the applicant must comply with the statutory limitations on information, documents and evidence to which the Tribunal can have regard in its review.⁸³
- 10.12 The applicant for review is also required to provide a copy of the application for review to the ACCC. If the applicant for review is not the original applicant for authorisation, a copy must also be provided to the original applicant for authorisation.⁸⁴

Withdrawal of applications for review

- 10.13 There is no express provision in the Act providing for the withdrawal of an application for review by the Tribunal. The applicant for review must seek leave of the Tribunal to do so. Generally, if the applicant seeks to withdraw its application for review, the Tribunal is likely to grant leave for them to do so unless the Tribunal considers it is in

82 Regulation 20(1). The 21 day period for lodging an application for review with the Tribunal is calculated as calendar days beginning from (but exclusive of) the date of the ACCC's determination.

83 Section 102(10).

84 Regulation 20(3).

the public interest for the process to continue.⁸⁵ The effect of permitting the applicant to withdraw an application for review by the Tribunal is to treat the application as no longer on foot and the ACCC's determination will stand.

The Federal Court of Australia

Judicial review of ACCC determinations

- 10.14 Review of ACCC determinations can be sought in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* or in the original jurisdiction of the Federal Court under section 39B of the *Judiciary Act 1903* on a question of law (judicial review).
- 10.15 Judicial review is concerned only with the legality of the decision, for example, whether the ACCC had the power to make the decision, whether it has taken into account an irrelevant consideration or failed to take into account a relevant consideration, or whether the decision was so unreasonable that no reasonable decision maker could have made it. The Federal Court cannot determine the merits of the case. In the event an applicant wishes to obtain a review of the merits of an ACCC determination, the Tribunal is the appropriate avenue for review.

Review of Tribunal determinations

- 10.16 The Full Federal Court can review Tribunal determinations only on questions of law, not questions of fact or the merits of the decision.
- 10.17 Information about the Federal Court and the process for filing an application to appeal can be obtained from its [website](#).

85 *Re Nursing Agencies Association of Australia* (2003), ATPR 41-936 at 47,066.

11 Varying, revoking and substituting authorisations

11.1 A person to whom authorisation has been granted may apply to the ACCC to have the authorisation varied (depending on the nature of the proposed variation) or apply for the revocation of the existing authorisation and its substitution with a new authorisation.

Minor variation

11.2 A person to whom a merger authorisation has been granted may apply to the ACCC to vary the authorisation.

11.3 An application for one or more minor variations should follow the [form](#) approved by the ACCC. No lodgement fee is payable.

11.4 When assessing applications for minor variations, the ACCC must:

- be satisfied that each proposed variation is a 'minor variation', in that it is a single variation that does not involve a material change in the effect of the authorisation,⁸⁶ and
- if the proposed variation is minor, assess whether it satisfies the relevant limb of the authorisation test.⁸⁷

11.5 The ACCC is required to make a decision on a minor variation of a merger authorisation within 90 days from the date of the application for a minor variation, or as otherwise extended by the applicant, otherwise the minor variation is deemed to be denied.⁸⁸

11.6 If the ACCC dismisses an application for minor variation, the statutory protection provided by the authorisation remains limited to the acquisition as originally authorised.

11.7 If the ACCC varies the authorisation, the acquisition as amended receives the protection of authorisation from the date the variation comes into force.⁸⁹

86 Section 87ZP(1).

87 Section 91A(4)(a) and (b).

88 Section 91A(5).

89 Section 91(1B).

Revocation and substitution of a new merger authorisation

11.8 The person to whom authorisation has been granted may apply to the ACCC to revoke the existing authorisation and substitute a new merger authorisation in its place. The ACCC may also review a merger authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.

Revocation and substitution at the request of the holder of an authorisation

11.9 Applications for revocation and substitution should follow the [form](#) approved by the ACCC. A lodgement fee is payable.

11.10 Applications for revocation and substitution must be lodged before the current authorisation expires. It is not possible to apply for revocation and substitution after an authorisation has expired.

11.11 When an application for revocation and substitution is received, the ACCC will place the application on the public register.⁹⁰

11.12 The process mirrors that for considering an application for merger authorisation⁹¹ set out in Chapter 4.

11.13 The ACCC may only grant an application for revocation and substitution if it is satisfied that the proposed substitute authorisation satisfies the test for granting merger authorisation (see Chapters 6 and 7).⁹²

Revocation and substitution at the initiative of the ACCC

11.14 The ACCC may, in certain circumstances, initiate a process to review an authorisation and revoke the authorisation and grant another authorisation in substitution, or decide not to revoke the authorisation.

11.15 The ACCC may initiate a review of an authorisation if it appears to the ACCC that:

- the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular
- a condition to which the authorisation was expressed to be subject has not been complied with, or
- there has been a material change of circumstances since the authorisation was granted.⁹³

90 Section 89(3)(d).

91 Sections 91C(4) to 91C(6).

92 Section 91C(7).

- 11.16 A 'material' change of circumstances is one that has 'a significant impact upon the benefits to the public or upon the detriment',⁹⁴ including a significant impact on competition.
- 11.17 The process mirrors that for considering an application for merger authorisation (see Chapter 4).⁹⁵
- 11.18 The ACCC may only revoke the authorisation and grant a substitute merger authorisation if it is satisfied that the proposed substitute authorisation satisfies the relevant test for granting authorisation.⁹⁶

Revocation

- 11.19 A person to whom a merger authorisation has been granted may apply to the ACCC for a revocation of the authorisation. The ACCC may also initiate a review of an authorisation with a view to revoking it in certain circumstances (see paragraph 11.24). Once revoked, parties no longer have statutory protection from legal action under the Act to give effect to the acquisition that was the subject of the merger authorisation.

Revocation at the request of the holder of an authorisation

- 11.20 Applications for revocation must be lodged on the appropriate [form](#). No lodgement fee is payable.
- 11.21 When an application for revocation is received, the ACCC will place the application on the public register.⁹⁷ The ACCC will also consult potentially interested parties on the application.⁹⁸
- 11.22 If no interested party objects to the revocation, and there are no other concerns about revoking the authorisation, the ACCC can be expected to issue a written

93 Section 91C(3).

94 *Re Media Council of Australia* (1996), ATPR 41-497 at 42,241. See also *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,212; *Re 7-Eleven Stores Pty Ltd* (1998), ATPR 41-666 at 41,462.

95 Sections 91C(4) to 91C(6).

96 Section 91C(7).

97 Section 89(3)(c).

98 Section 91B(2).

determination revoking the authorisation⁹⁹ and giving its reasons. The ACCC may disregard any objection it considers is vexatious or frivolous.¹⁰⁰

11.23 An application for revocation may be withdrawn by writing to the ACCC at any time during its consideration of the application.¹⁰¹

Revocation at the initiative of the ACCC

11.24 The ACCC may, for the reasons set out in paragraph 11.15,¹⁰² initiate a process to review an authorisation and make a determination revoking the authorisation or deciding not to revoke the authorisation.

99 Section 91B(4).

100 Section 91B(7).

101 Section 91B(6).

102 Section 91B(3).