



Australian
Competition &
Consumer
Commission

Informal Merger Review Process Guidelines

September 2013*

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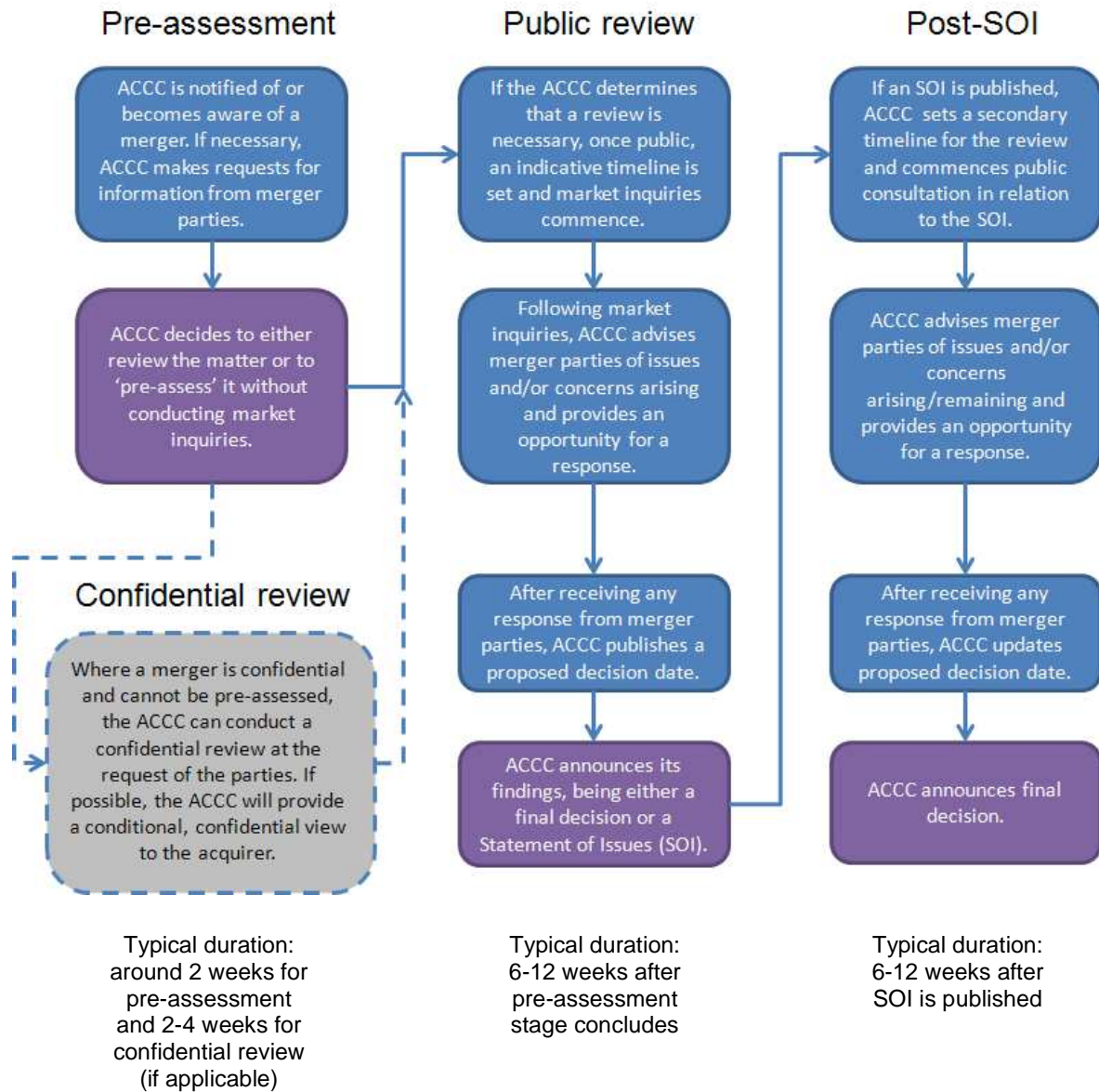
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Glossary

ACCC	Australian Competition and Consumer Commission
Act	<i>Competition and Consumer Act 2010</i>
Announcement of ACCC findings	This can either be a final decision or a decision to publish a Statement of Issues.
Final decision	The ACCC's final decision will be to oppose, not oppose, or to not oppose subject to the acceptance of s. 87B undertakings.
Indicative timeline	Timelines published by the ACCC to give the merger parties and the public a guide to the likely timing of an informal merger review.
Market inquiries	The ACCC's consultation with interested parties who may have information that can assist the ACCC's assessment or who may be affected by the transaction
Merger	In these guidelines the term 'merger' includes mergers and acquisitions of shares and assets
Mergers register	The section of the ACCC's website that lists all the mergers currently subject to a public merger review as well as information about completed public reviews – www.accc.gov.au/mergersregister
Pre-assessment	An assessment made, based on the information provided, that there is a low risk of a merger substantially lessening competition, and therefore that it is not necessary for the ACCC to conduct a public review of that merger.
Proposed decision date	The decision date that replaces the provisional decision date. This will occur following market inquiries and any response by merger parties to issues raised during market inquiries.
Provisional decision date	The decision date published by the ACCC at the outset of a public review which is subject to later review and amendment.
Public Competition Assessment	A summary of the reasons for the ACCC's decision and the key issues involved in the ACCC's review.
Public merger review	A review of a merger which is in the public domain and usually where the ACCC conducts public market inquiries.
Section 87B	The section of the Act that empowers the ACCC to accept court enforceable undertakings to address competition concerns raised by a merger.
Section 155	The section of the Act that gives the ACCC the power to require a person to provide information, documents and/or give evidence under oath or by way of affirmation.
Statement of Issues	A document published by the ACCC in merger reviews where the ACCC has come to a preliminary view that a proposed merger raises competition concerns that require further investigation.

Overview of informal merger review processes



Notes: Undertakings may be offered at any time during or prior to the commencement of a review and this will generally impact on the sequence and duration of stages.

1. Introduction

- 1.1. Mergers and acquisitions are important for the efficient functioning of the economy. They allow firms to achieve efficiencies, such as economies of scale or scope, and diversify risk across a range of activities. They also provide a mechanism to replace the managers of underperforming firms.
- 1.2. In the vast majority of mergers, sufficient competitive tension remains after the merger to ensure that consumers and suppliers are no worse off. Indeed, in many cases, consumers or suppliers benefit from mergers. In some cases, however, by altering the structure of markets and the incentives for firms to compete, mergers have anti-competitive effects. Not all mergers that lessen competition are prohibited by s. 50 of the *Competition and Consumer Act 2010* (the Act); only those that have the effect or likely effect of substantially lessening competition.
- 1.3. These Informal *Merger Review Process Guidelines* (Process Guidelines) set out the administrative informal process by which the ACCC undertakes assessments of mergers and acquisitions.¹ Separately, the ACCC has published the *Merger Guidelines* which set out the analytical approach to merger analysis under s. 50. Both documents are of relevance to parties intending to undertake mergers that potentially raise competition issues.
- 1.4. The *Process Guidelines* are designed to provide guidance to the business community, their advisers and the public about the ACCC's processes for considering mergers and the types of information that will assist the ACCC in making an assessment. The *Process Guidelines* reflect the ACCC's continuing commitment to the guiding principles and recommended practices developed by the International Competition Network (ICN)², particularly as to timely, consistent and transparent assessment of mergers within Australia's informal regime.

Types of merger assessments

- 1.5. Merger parties have two avenues available to have a merger considered and assessed:
 - the ACCC assesses the merger on an informal basis applying a substantial lessening of competition test
 - applicants apply to the ACCC for merger authorisation, which will be assessed according to the statutory test for authorisation.³
- 1.6. These *Process Guidelines* relate only to the ACCC's consideration of mergers on an informal basis. Guidance on merger authorisations can be found in the ACCC's *Merger Authorisation Guidelines*.⁴
- 1.7. As merger parties are not legally required to notify the ACCC before completing a merger, there is also the option of proceeding with the merger without seeking clearance. However, this will not prevent the ACCC from subsequently investigating the merger, including making market inquiries to assist its investigation and, if necessary, taking legal action. Proceeding without clearance may put merger parties at risk of the ACCC taking legal action on the basis that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in one or more markets in contravention of s. 50. One possible consequence of successful ACCC action would be an order by the court to unwind the transaction.

¹ For convenience, the term 'merger' in these guidelines includes mergers and acquisitions of shares and assets.

² www.internationalcompetitionnetwork.org

³ Pursuant to s. 90(7), the ACCC may grant merger authorisation if it is satisfied that either:

- the proposed acquisition would not be likely to substantially lessen competition; or
- the likely public benefit from the proposed acquisition outweighs the likely public detriment.

⁴ Available at <https://www.accc.gov.au/publications/merger-authorisation-guidelines>

What is an informal merger review?

- 1.8. The informal merger review process enables merger parties to seek the ACCC's view on whether the proposed acquisition is likely to have the effect of substantially lessening competition. There is no legislation underpinning the informal process; rather, it has developed over time to provide an avenue for merger parties to seek the ACCC's view prior to completion of a merger.
- 1.9. The ACCC reviews those mergers it becomes aware of that have the potential to raise concerns under s. 50. Such mergers are generally brought to the ACCC's attention by merger parties⁵ who request an informal review. Alternatively the ACCC may become aware of a proposal through media reports, from complaints or through referral from other government bodies (such as the *Foreign Investment Review Board* – see Box 1, p10).
- 1.10. If the ACCC reaches a view that an acquisition is likely to have the effect of substantially lessening competition (referred to in these guidelines as a decision to 'oppose' a merger) and the parties do not agree to modify or abandon the acquisition, the ACCC can apply to the Federal Court for orders which may include an injunction, divestiture or penalties. Only the ACCC can apply for an injunction to restrain an acquisition prior to completion and/or penalties for a contravention of s. 50. Third parties and the ACCC can apply for declarations and/or divestiture (including setting aside the acquisition in certain cases). Any person suffering loss or damage as a result of a merger that breaches s. 50 can seek damages. The various avenues for legal challenge are summarised in Table 1, below.

Table 1 – Action that can be taken and remedies or relief that can be sought in relation to possible s. 50 breaches

	Application to the court for injunction to restrain acquisition prior to completion	Application to the court for divestiture and declarations	Application to the court for penalties and damages
ACCC	✓	✓	Penalties
Merger parties	Not applicable	Declarations	Not applicable
Third parties	Not available	✓	Damages

- 1.11. As a decision by the ACCC under the informal review process is not underpinned by legislation, the decision does not confer protection from subsequent legal action based on an alleged contravention of s. 50, in particular by third parties.⁶ However, a decision by the ACCC to not oppose a merger under the informal clearance process provides merger parties with a significant level of comfort regarding the ACCC's position.⁷
- 1.12. In contrast, an ACCC decision to grant merger authorisation confers legal protection from subsequent legal proceedings by the ACCC and other parties.

Section 50 of the Act

- 1.13. Section 50 of the Act prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia.

⁵ For the purposes of these guidelines, merger parties may refer to either the acquirer and target or acquirer only.

⁶ Although third party legal action is possible, it is extremely rare in this context.

⁷ A decision by the ACCC not to oppose an acquisition indicates the ACCC's view based on information available at the time of the decision. The ACCC may reconsider a transaction should new information come to light, or should it become aware that any information upon which it has based its view is incorrect or incomplete.

1.14. Specifically, s. 50 of the Act states:

(1) A corporation must not directly or indirectly:

- (a) acquire shares in the capital of a body corporate; or
- (b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

1.15. In assessing the likely effect on competition of proposed acquisitions, the ACCC will take into account the merger factors listed in s. 50(3) of the Act including, among other things, the potential for entry and expansion, market concentration and the level of imports. More information on the ACCC's approach to the merger factors is set out in the *Merger Guidelines* (see, in particular, chapter 7). Other factors not listed in s. 50 may also be relevant to a merger assessment. The ACCC's approach to these issues and other analytical issues is set out in the *Merger Guidelines*.

2. Informal merger review processes

2.1. This chapter sets out the broad framework for ACCC informal merger review. There are three categories of merger assessment that the ACCC may make:

- Pre-assessment (see from 2.10)—a view is formed, based on the available information, that the risk of a substantial lessening of competition is low and therefore neither a confidential or public review is necessary.
- Conditional confidential (see from 2.17)—a preliminary conditional view is provided to merger parties on a confidential merger proposal where one is requested by the merger parties.
- Public (see from 2.23)—a final decision is made following a public review and in some cases will be preceded by the publication of a Statement of Issues (see discussion on Statements of Issues from 2.51).

2.2. The categories of decisions are neither mutually exclusive nor sequential. If a matter is pre-assessed, then a confidential or public decision will not be required. Similarly some mergers may proceed straight to a public review while others may first be considered on a confidential basis.

2.3. The ACCC aims to provide the informal review process as a flexible, transparent and efficient way for merger parties to have transactions considered by the ACCC. It is expected that the informal merger review processes will continue to evolve and develop over time to reflect these objectives.

Monitoring possible mergers

2.4. In some circumstances the ACCC will become aware of a possible merger and will undertake a period of 'monitoring' of the transaction. Typically, this will occur when there are public reports of a potential merger that may warrant a review. In such circumstances, the ACCC will place an entry on its public register indicating that the proposed transaction is being monitored, and therefore that the ACCC has a potential interest in reviewing it should it be confirmed that the transaction is proceeding.

Notifying the ACCC of a proposed merger

2.5. The vast majority of informal merger reviews are initiated at the request of the merging parties. Merger parties are encouraged to consult with the ACCC well before completing a merger where both of the following apply:

- the products of the merger parties are either substitutes or complements

- the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s.⁸
- 2.6. Mergers that are either public or confidential can be notified to the ACCC and the ACCC can undertake a review accordingly. See below for further information about public and confidential merger reviews.
 - 2.7. The ACCC encourages merger parties to approach the ACCC as early as possible when a merger is contemplated and well before a merger is completed, to ensure the ACCC has sufficient time to consider whether a review is necessary and, if so, to conduct such a review.
 - 2.8. Regardless of how the ACCC becomes aware of a merger, the ACCC will determine whether, once public, it requires a public review. This includes public and confidential mergers notified by the merger parties (including 'courtesy' notifications where informal clearance is not sought). It is also not uncommon for the ACCC to request details of transactions from firms contemplating proposed mergers which have not been notified, or not yet notified, to the ACCC. These are transactions the ACCC becomes aware of via complaints, referrals from other agencies or via its own monitoring activities.
 - 2.9. The ACCC takes a scaled approach to information requirements which does not require merger parties to provide a complete information package at the outset and instead advises merger parties of the information that will be required throughout the review depending on the issues raised. The trade off in this approach is that merger parties are required to respond to these information requests promptly. Failure to provide the ACCC with a base level of information at the outset may delay the ACCC's review and final decision. Appendix A of these *Process Guidelines* includes a list of the initial level of information that the ACCC will generally require in order to undertake an informal review.

Initial assessment

- 2.10. For each merger, the ACCC will make an initial assessment based on the information available to determine whether a public review will be required. Where the ACCC is satisfied, based on the information provided, that there is a low risk of a merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review of that merger. These mergers are described as being 'pre-assessed'.⁹
- 2.11. Both public and confidential mergers can be pre-assessed and are done so on the basis of the information provided by the parties and other information the ACCC has before it.
- 2.12. A significant proportion of the mergers notified to the ACCC are able to be pre-assessed expeditiously, often within two weeks of notification to the ACCC.
- 2.13. A decision to pre-assess a merger without market inquiries is not taken lightly and is dependent on the ACCC's familiarity with the relevant industry and the adequacy of the information provided by the merger parties to support such a finding, including supporting evidence. For example, claims of ease of entry are given greater weight when supported by examples of recent new entry or expansion.
- 2.14. Where mergers are pre-assessed, the notifying parties will generally be informed that the ACCC does not intend to conduct a public review of the transaction to make an assessment under s.50 but reserves the right to reconsider the merger if new information comes to the ACCC's attention or information upon which the ACCC has based its view is incorrect or incomplete.

⁸ Mergers that fall outside the notification threshold will rarely require investigation by the ACCC. However, the notification threshold is indicative only. It is intended to provide a starting point for identifying those mergers that may raise competition concerns and therefore require investigation.

⁹ In the case of confidential mergers, this indicates that the ACCC does not consider that a public review will be required once the transaction becomes public.

- 2.15. Following an initial consideration, where a decision is made that a merger cannot be pre-assessed:
- For mergers in the public domain, the ACCC will advise the merger parties that it intends to conduct a public review and begin discussions with the merger parties about the process involved.
 - For confidential mergers, the ACCC will advise the merger parties that the merger cannot be pre-assessed and will require a review. Merger parties can then request the ACCC to conduct a confidential review or a public review (see below for further details on the confidential and public review processes).
- 2.16. The ACCC does not publish details of mergers that are pre-assessed.

Box 1 - The Foreign Investment Regime

Proposals by foreign persons to undertake investment in Australia that are subject to the *Foreign Acquisitions and Takeovers Act 1975* or Australia's Foreign Investment Policy are examined by the Foreign Investment Review Board (FIRB) to ensure that they are not contrary to the national interest. The FIRB advises the Treasurer, who is responsible for making decisions on whether or not foreign investment proposals should be allowed to proceed.

Although the foreign investment regime is clearly distinct from the ACCC's role in the assessment of mergers under Australian law, Australia's Foreign Investment Policy states that the impact of the transaction on competition is a relevant factor when considering the national interest. Where competition considerations are relevant to a particular proposal, the FIRB will consult with the ACCC.

When the FIRB refers a matter to the ACCC for comment, the ACCC provides the FIRB with advice on the ACCC's s. 50 assessment. Where a FIRB referral relates to a transaction that is the subject of a public review by the ACCC, the ACCC will advise the FIRB of this fact and provide details of the indicative timeline.

Where the ACCC requires further information about a proposal that the FIRB has notified to the ACCC, the ACCC will in most cases seek that information directly from the merger parties.

Confidential merger reviews

- 2.17. For mergers that have not been publicly announced, and which the ACCC considers cannot be pre-assessed¹⁰, the ACCC can conduct a confidential review at the request of the merger parties.¹¹ The ACCC will not conduct confidential reviews of proposed mergers that are public knowledge, completed mergers (see from 2.65, below) or purely speculative or hypothetical mergers.
- 2.18. Where merger parties request a confidential review, this process will usually take around 2-4 weeks, but can be longer if the materials to be considered by the ACCC are substantial or particularly complex. The ACCC expects merger parties to provide sufficient written information to the ACCC, taking into account the guidance provided in Appendix A. The ACCC may request further information from the merger parties throughout its confidential review.
- 2.19. Any view the ACCC is able to provide merger parties on a confidential basis will be qualified. Specifically, the ACCC's views regarding confidential mergers are based on the information available at the time of the review and are not formed with the benefit of information gathered through market inquiries. Subject to that qualification, the outcome of a confidential review will be, based on the information available to the ACCC at the time, one of the following:

¹⁰ Initially, the ACCC will assess a confidential merger to determine whether it can be pre-assessed under the process described from 2.10, above.

¹¹ In some circumstances, where the merger parties request a confidential review, ACCC staff may indicate to the merger parties that the ACCC is unlikely to be able to reach any view without market inquiries. In such cases, this will allow merger parties to consider whether to proceed with their request for a confidential review (which may not result in the ACCC being able to form a view in the absence of market inquiries), or to request that the ACCC proceed to a public review.

- The ACCC's preliminary view is that the proposed acquisition does not appear to raise competition concerns pursuant to s. 50 of the Act.¹²
 - The ACCC is not in a position to determine whether the proposed acquisition raises competition concerns pursuant to s. 50 of the Act without market inquiries.¹³ The ACCC will conduct a public review once the transaction is public.
 - The ACCC is concerned that the proposed acquisition may (or is likely to) substantially lessen competition in contravention of s. 50 of the Act and the ACCC will conduct a public review once the transaction is made public.¹⁴
- 2.20. In conducting confidential reviews, the ACCC is careful to ensure that it does not provide an inappropriate level of comfort to merger parties given that market inquiries have not been undertaken which may impact on the competition assessment.
- 2.21. Upon providing a confidential view, the ACCC will request that merger parties keep the ACCC informed of the progress of the merger proposal, including whether the parties intend to proceed with publicly announcing the merger.
- 2.22. Details of confidential merger reviews and the ACCC's views on them are not posted on the ACCC's public register. This includes circumstances where a confidential review is conducted and the ACCC subsequently conducts a public review of the merger.¹⁵

Public merger reviews

- 2.23. Acquisitions that are in the public domain and that the ACCC has determined cannot be pre-assessed undergo a public merger review. These reviews involve market consultation with interested parties who have information that may assist the ACCC's assessment (or who may be affected by the transaction) as well as further engagement with the merger parties. The ACCC refers to this process as 'market inquiries'. The results of these market inquiries assist the ACCC to decide whether to publish a Statement of Issues (identifying its preliminary competition concerns), and to ultimately form a view as to whether or not the transaction is likely to substantially lessen competition. The various stages of public merger reviews are discussed in more detail below from 2.26.
- 2.24. All public reviews under consideration by the ACCC and related information are recorded on the ACCC's public register at www.accc.gov.au/mergersregister. The outcomes of previously completed reviews are also recorded.
- 2.25. The ACCC may conduct public merger reviews of *proposed* acquisitions and *completed* acquisitions. However, reflective of the ACCC's preference that merger parties notify it prior to completion of a transaction, there are some important differences in the approach taken to each which are outlined in section 2.65.

Stages of public reviews

- 2.26. The ACCC aims to conduct informal merger reviews as expeditiously as possible. The ultimate objective, however, is to reach a properly informed and correct decision.
- 2.27. The ACCC seeks to be as transparent as possible about the timing of its reviews, both in communications with merger parties and with the public more generally. For this reason, the ACCC publishes an indicative timeline for its public reviews of mergers on the ACCC's website – www.accc.gov.au/mergersregister.

¹² The ACCC's experience is that this outcome in confidential review is less likely, given that, prior to conducting any confidential review, the ACCC will have previously decided that the matter could not be pre-assessed.

¹³ In communicating such a view, the ACCC will usually identify the issues that the ACCC proposes to focus on in its market inquiries and, if possible, any preliminary competition concerns that have been identified.

¹⁴ In communicating such a view, the ACCC will provide reasons in writing.

¹⁵ An exception to this is where merger parties publicly disclose, in whole or in part, the substance of the ACCC's confidential preliminary view. Then, the ACCC reserves the right to confirm the fact that a confidential review was requested and to make statements confirming, clarifying or explaining aspects of that view.

- 2.28. The ACCC's experience is that there can be significant variation in the duration of merger reviews and this depends on a number of factors, including:
- The complexity of the matter and the issues involved
 - The sufficiency of information available to the ACCC
 - The responsiveness of merger parties and other information providers in supplying information to the ACCC
 - Whether a Statement of Issues is published
 - Whether and at what stage undertakings are proposed by the merger parties
 - Whether overseas competition regulators are also reviewing the merger
- 2.29. Indicative timelines are published by the ACCC to give the merger parties and the public the best possible guide to the likely timing of an informal merger review. However, these timelines are subject to review and amendment where circumstances require, such as when a Statement of Issues is published. Therefore the timelines will record any changes and the reasons for these.
- 2.30. Tables 2, 3 and 4 set out the main stages that may be part of an informal public merger review. Not all reviews will include all stages and the need for each stage will be assessed on a case-by-case basis. Therefore, the information set out below should be used only as a guide to the possible stages in an informal merger review. Further details on these stages are provided from paragraph 2.32.
- 2.31. The ACCC's mergers register for each merger will generally set out the stages of the review from the first column in Tables 2, 3 and 4 that are applicable to that particular review.

Table 2 - stages up to the release of a Statement of Issues or a final decision

Review stage	Description	Approximate duration
Setting of indicative timeline	An indicative timeline will be placed on the mergers register. Initially, this will include a period for market inquiries and a provisional decision date for the announcement of the ACCC's findings (which can be either a final decision or publishing of a Statement of Issues).	
Initial market inquiries	This is the first opportunity the ACCC will have to collect information from market participants regarding the proposed merger and identify the markets that will potentially be affected. The ACCC will usually contact interested parties and place a letter on the mergers register which sets out details of the transaction, the parties involved, the issues on which the ACCC is seeking information and relevant ACCC contact details.	2-5 weeks from commencement of a public review.
ACCC assessment of information provided during market inquiries and consultation with merger parties on any relevant issues or concerns arising	The ACCC will ordinarily need to undertake a period of assessment of the information it has gathered during market inquiries. This will generally also involve outlining in writing to the merger parties the issues arising from market inquiries. Following receipt of any response by merger parties to feedback from market inquiries (see paragraph 2.46), the ACCC will publish a proposed decision date.	Approximately 2-4 weeks from close of market inquiries period but potentially longer if merger parties request additional time to respond to the issues raised in market inquiries.
ACCC announcement of findings	At this point of the review, the ACCC may release a Statement of Issues or announce a final decision. In the majority of reviews, the ACCC's final decision is to not oppose the merger without the release of a Statement of Issues.	The duration of reviews in which a Statement of Issues is issued tends to be longer.
<i>Approximate length of review up to Statement of Issues or announcement of final decision without a Statement of Issues:</i>		<i>6-12 weeks¹⁶</i>

¹⁶ As noted at paragraph 2.34, most merger reviews in which substantive competition concerns do not arise will be completed within eight weeks.

Table 3 - release of a Statement of Issues and the stages that follow

Review stage	Description	Approximate duration
ACCC release of a Statement of Issues	The ACCC releases a Statement of Issues in circumstances where it considers competition concerns may arise or are likely to arise and there are issues which require further consultation with the merger parties and other relevant parties before reaching a final decision.	
ACCC consultation in relation to Statement of Issues	The ACCC will usually conduct a period of consultation which is targeted at the issues raised in the Statement of Issues.	Varies depending on the complexity of the issues involved, with the closing date for submissions usually around 2-3 weeks after release.
ACCC assessment of information provided in response to Statement of Issues and consultation with merger parties on any issues or concerns arising	The ACCC will ordinarily need to undertake a period of assessment of the information it has gathered in response to the Statement of Issues. This will generally also involve outlining in writing to the merger parties the issues arising from the consultation process.	Between 4-10 weeks from closing date for submissions in response to Statement of Issues but potentially longer if merger parties request the opportunity to respond to the issues raised in the consultation process.
ACCC final decision	The ACCC will announce its final decision to oppose, not oppose or to not oppose subject to the acceptance of undertakings.	
<i>Approximate length of review following a Statement of Issues</i>		<i>6-12 weeks</i>

Table 4 - stages that can occur at any time throughout a review

Review stage	Description	Approximate duration
<p>ACCC request for information from merger parties and other parties</p>	<p>The ACCC will make requests of the merger parties for information where it considers it will be relevant to its decision. These requests will be made from time to time and can occur before, during or after the initial market inquiries process, including after the release of a Statement of Issues.</p>	<p>Varies depending on time taken by merger parties to respond to requests and whether information is sought pursuant to the ACCC's statutory information gathering powers (s. 155). For informal requests for information, merger parties are usually requested to respond within 1-2 weeks.</p> <p>Where merger parties provide large amounts of information in response to information requests, the ACCC may require a period of time to properly consider that information.</p>
<p>ACCC consultation on s. 87B undertakings proposed by merger parties</p>	<p>Where a proposed s. 87B undertaking is in a suitable form, the ACCC may consult publicly on its content.</p> <p>This may occur at any stage throughout a review.</p>	<p>Varies depending on the complexity of the issues and remedies proposed.</p>

Provisional decision dates

2.32. When the ACCC commences a public review, the ACCC will publish on its website an indicative timeline for review including a provisional decision date by which the ACCC's findings are expected to be announced (a decision at this point may be a final decision or the decision to publish a Statement of Issues). The decision date provided at the outset of a review is denoted 'provisional', as the ACCC will not know with any certainty how long a merger review is likely to take and the date will be subject to subsequent review and amendment.¹⁷ An example of an indicative timeline that may be published at the outset of a review is provided below.

Indicative timeline	Date	Event
	4 th July	ACCC commenced review under the Merger Process Guidelines.
	1 st August	Closing date for submissions from interested parties.
	29 th August	Provisional date for announcement of ACCC's findings (as outlined in the Informal Merger Review Process Guidelines, this may be a final decision or release of a Statement of Issues).

2.33. Provisional decision dates will be set based on the ACCC's experience and expectations about the length of time required to assess a matter on a case-by-case basis. For most reviews, the ACCC will set a provisional decision date of between 6 and 12 weeks. Where it is clear to the ACCC that the matter is complex or contentious it may set indicative timelines which are longer than 12 weeks from the outset of the review.

Amendments to indicative timelines

2.34. Most informal merger reviews in which substantive competition concerns do not arise will be completed within eight weeks. However, the complexity and competition concerns involved in a matter are not always clear from the outset of a review. For example, it will rarely be clear from the beginning of a review whether a given merger will raise competition issues which may require a Statement of Issues and therefore whether the initial indicative review period will need to be extended.

2.35. Provisional decision dates will generally remain in place until the ACCC provides feedback to the merger parties on issues arising from market inquiries (see from 2.45) and, if the merger parties intend to provide a response to that feedback, the ACCC's consideration of such a response.

2.36. At this point in the review, the ACCC will re-assess the provisional decision date and publish a proposed decision date which will be dependent on the expected time the ACCC will require to consider all information before making a decision. The ACCC expects that from this point to the announcement of the ACCC findings will be around 4 weeks.¹⁸ An example of an indicative timeline where this has occurred is provided below.

¹⁷ While the indicative timeline is subject to amendment at any stage throughout a review, the ACCC's experience is that the decision dates set at the beginning of a review are often amended following market inquiries, at which stage the ACCC has a better understanding of the scope of the issues involved in the review.

¹⁸ In certain circumstances this period will necessarily be longer, particularly where complex competition concerns have been raised and are being considered by the ACCC.

Indicative timeline	Date	Event
	4 th July	ACCC commenced review under the Merger Process Guidelines.
	1 st August	Closing date for submissions from interested parties. ACCC assessing information provided during market inquiries and consulting with merger parties on relevant issues or concerns arising.
	7 th August	ACCC requested further information from merger parties.
	17 th August	ACCC received further information from merger parties. ACCC amended former provisional date for announcement of findings (29 th August).
	12 th September	Proposed date for announcement of ACCC's findings (as outlined in the Informal Merger Review Process Guidelines, this may be a final decision or release of a Statement of Issues).

- 2.37. Indicative timelines are set having regard to the likely need for the ACCC to request information from merger parties during a review (see from 2.40). When making requests for information from merger parties, the ACCC will usually request information to be produced within a set period of time – usually 1-2 weeks. The indicative timeline will be updated to indicate when information requests have been made of merger parties. Where merger parties provide large amounts of information in response to information requests, the ACCC may require a period of time to properly consider that information.
- 2.38. Where, following the initial market inquiries, the ACCC does not make a final decision and instead releases a Statement of Issues (see from 2.51), the review from that point will continue according to a revised timeline which will include a new proposed decision date.
- 2.39. The revised timeline will typically involve a period of consultation on the Statement of Issues and a period for the ACCC to consider the information provided in response to the Statement of Issues and engage with the merger parties on relevant issues. Generally, the ACCC will set a timeline for this phase of the review of between 6 and 12 weeks, but this will vary on a case-by-case basis.

Requests for information by ACCC

- 2.40. The ACCC may request information of merger parties prior to commencing and throughout a merger review. The ACCC also makes requests for information of third parties, as necessary, throughout its reviews. This is the primary way in which the ACCC gathers the information necessary to form a view in relation to a merger. Under the informal merger review system, since there are no compulsory pre-notification requirements, the ACCC relies primarily on merger parties and other interested parties providing information on a voluntary basis, as requested, throughout the review.
- 2.41. As stated at 2.9, the ACCC will expect to receive a certain level of information at the commencement of a review and will often need to request additional information as the review progresses. In some cases, progress of a review may be delayed pending receipt of such information.

2.42. The ACCC will, where appropriate, also use its statutory information gathering powers under s. 155 of the Act to compel merger parties (and in some limited cases, third parties) to provide documents or information to the ACCC or to compel certain persons to appear before the ACCC to provide evidence under oath or affirmation. The ACCC will seek information in this way only when it considers it will be the most effective and/or efficient way of gathering the information necessary for the ACCC to make its decision. Examples of where the ACCC may use these powers include, but are not limited to:

- Merger reviews in which critical information required by the ACCC will most efficiently be sought through the use of s. 155 notices.
- Where the ACCC considers certain information would be unlikely to be provided in response to a voluntary request for information.
- Where third parties would prefer to be compelled to provide certain information or documents rather than providing them voluntarily (for example where a third party fears reprisal or commercial damage if it provides information voluntarily).

Confidential information

2.43. The information provided by the merger parties and third parties during a review will often involve information that is commercially sensitive or confidential in nature. The ACCC will accept confidential submissions and information provided by the merger parties and third parties on the basis that:

- 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 confidential information to third parties (in addition to its external advisors and consultants) if compelled by law or in accordance with section 155AAA of the Act.

2.44. The ACCC will not ordinarily publicly disclose the submissions it receives during a review from the merger parties or third parties.¹⁹ However, it is important that any properly confidential parts of submissions provided to the ACCC are clearly marked.

Feedback from market inquiries

2.45. The ACCC will generally provide to merger parties, in writing, details of any relevant issues or concerns arising during market inquiries. There are two main points in a review where this may occur – following initial market inquiries and after the consultation process that follows a Statement of Issues.²⁰

2.46. The ACCC provides feedback in this manner to facilitate a no-surprises approach and afford merger parties an opportunity to respond to the issues raised and to provide any additional information considered relevant prior to the ACCC making a finding in respect of the proposed acquisition.

2.47. Merger parties may choose to respond to the issues raised by the ACCC. A period of time is provided for this – usually 1-2 weeks.

2.48. The nature of the feedback provided by the ACCC will be dependent on the matter at hand, the relevant competition issues and confidentiality surrounding information supporting the issues raised. The ACCC may raise issues which have been identified during market inquiries, but on which the ACCC has not yet formed a view, in order to test certain

¹⁹ An exception to this is where the ACCC is compelled to disclose information by law, for example under the *Freedom of Information Act 1982* or legal proceedings.

²⁰ In some circumstances there may be other times throughout a review where feedback of this nature is provided to merger parties, such as where public consultation on a proposed s. 87B undertaking has occurred.

propositions with the merger parties. Importantly, where additional relevant issues are raised in the ACCC's consultations following a Statement of Issues, the ACCC will provide merger parties with the opportunity to comment on these prior to making a final decision.

- 2.49. Feedback from market inquiries provides the merger parties with the opportunity to fully respond to all issues raised by market participants, while recognising that the ACCC may not have fully considered the materiality of those issues at that stage. In some circumstances, the ACCC's market inquiries will elicit substantial information which will allow the ACCC to express preliminary views about issues or competition concerns.
- 2.50. The issues and concerns raised will not necessarily be an exhaustive list of all of the issues the ACCC may encounter during the course of its review. The feedback provided may or may not provide an indication of the ultimate views the ACCC forms regarding the merger at the conclusion of its review.

Statements of Issues

- 2.51. A Statement of Issues is a document published by the ACCC in merger reviews where the ACCC has come to a preliminary view that a proposed merger raises competition concerns that require further investigation. A Statement of Issues sets out the preliminary findings of the ACCC's review, including any preliminary findings (and the basis for such findings) that the ACCC considers a merger may substantially lessen competition or is considered likely to do so. The release of a Statement of Issues will usually be accompanied by a press release.
- 2.52. The release of a Statement of Issues is aimed at providing guidance to the merger parties and other interested parties and provides a basis upon which the ACCC can obtain further information that may either alleviate or reinforce the concerns of the ACCC. This practice is consistent with the ICN's guiding principles for transparency and procedural fairness.
- 2.53. Following the release of a Statement of Issues, the ACCC will conduct further public consultation and may make specific requests for information from the merger parties and third parties. In some cases, information will be sought through the use of the ACCC's statutory information gathering powers (s. 155 notices - see section 2.42 for further details). As noted in paragraphs 2.46 and 2.49 above, the ACCC may also provide to merger parties details of any relevant issues or concerns raised during consultation on a Statement of Issues, and where additional relevant issues are raised, the opportunity to comment on these issues prior to the ACCC making a final decision. The duration of this phase of the review will, in part, depend on the responsiveness of parties to information requests and the length of time merger parties may require to respond to the additional issues raised during public consultation on a Statement of Issues.

ACCC's final decision

- 2.54. The ACCC's final decision in respect of an informal merger review can be:
 - A decision to not oppose the merger
 - A decision to not oppose the merger subject to acceptance of section 87B undertakings (see 3.1)
 - A decision to oppose the merger
- 2.55. The merger parties will usually be advised of the ACCC's decision just prior to the ACCC making its public announcement. The ACCC has a protocol in place to notify the Australian Securities Exchange of its merger announcements which may be market sensitive.
- 2.56. A significant majority of ACCC merger reviews result in a decision by the ACCC to not oppose the merger. Most of these reviews occur without the ACCC releasing a Statement of Issues.
- 2.57. In some very limited circumstances, the ACCC may oppose a merger without the release of a Statement of Issues. For example, the ACCC has previously opposed a merger without releasing a Statement of Issues where it received a substantial amount of information during market inquiries that enabled it to form the view that the merger was likely to result in a substantial lessening of competition and it was clear that a Statement of Issues would not provide significant new information. In such circumstances, the merger parties will be made

aware that the ACCC will be making a final decision and will not be releasing a Statement of Issues. The merger parties will be provided with the opportunity to respond to issues and concerns arising from market inquiries, as outlined from paragraph 2.45.

- 2.58. At the time of the ACCC's announcement of its final decision, the ACCC may issue a press release which summarises the ACCC's reasons for its decision. This will generally occur where the ACCC has decided to oppose a merger or where undertakings have been accepted. However, it may also do so where the merger under consideration is of particular public interest.
- 2.59. Following a final decision by the ACCC, for certain matters the ACCC will publish a Public Competition Assessment (see below from 2.68). For all other matters the ACCC will explain the reasons for its decision in a summary on the mergers register.

International mergers

- 2.60. Where a merger subject to review is also being reviewed by overseas competition agencies, the ACCC may consult with those agencies to inform the ACCC's review. Some circumstances may necessitate the ACCC suspending its review pending discussions with those agencies, such as where the ACCC and overseas agencies are liaising closely on substantive competition issues or proposed remedies. In other cases, where the merger raises issues in Australia that are of a global nature and there are no issues arising that are unique to Australia, the timeline for the ACCC's review may be adjusted to coordinate with the timing of reviews by overseas agencies, to allow the ACCC to take into account relevant information from overseas reviews.
- 2.61. Where discussions with other agencies do not involve protected information (as defined in s. 155AAA of the Act) then such discussions can occur without seeking permission from the merger parties. That is, discussions that only involve publicly available information can occur freely.
- 2.62. However, if the ACCC wants to exchange information of a confidential nature, or s. 155 materials, (including discussing such information or materials orally) or other protected information then it must either:
 - Follow the procedures for disclosure of information to an international agency pursuant to s. 155AAA; or
 - Seek confidentiality waivers – that is, obtain the permission of the parties to disclose protected information.
- 2.63. Obtaining consent by way of confidentiality waiver to permit such disclosure is the preferred approach in most cases, as it is less procedurally onerous, accords with the procedures of most other international competition agencies, and provides a clear and certain basis for the exchange of information.
- 2.64. It is important that confidentiality waivers are given in an acceptable form that is consistent with the ACCC's confidentiality rules. The ACCC will not accept waivers that would limit the ACCC's ability to use information received during merger reviews to perform its other statutory functions or duties. Therefore, the ACCC has developed a standard form waiver which will be provided to merger parties as appropriate.

Completed mergers

- 2.65. As noted above, the ACCC will review completed mergers²¹ where it considers they may raise competition concerns.
- 2.66. Reviews of completed mergers will generally undergo a different process to reviews of proposed acquisitions. Completed mergers will not be reviewed in accordance with the processes outlined in these guidelines but will rather be treated as investigations of potential breaches of the Act that have occurred. Completed mergers under review will be posted on the merger register but no indicative timeline will be published.

²¹ In this context, 'completed mergers' refers to mergers that have taken place without having been reviewed by the ACCC.

Recording duration of ACCC merger reviews

2.67. Once an ACCC merger review is completed, the mergers register will be updated to record the relevant information about the review, including the duration of the ACCC's review. The ACCC records 'total review days' which is the total number of business days in which the merger was subject to review, less the number of days during which the review was suspended or the ACCC was awaiting information from merger parties.

Public Competition Assessments

2.68. A Public Competition Assessment is a detailed summary of the ACCC's reasons and issues considered by the ACCC in a merger review and is generally published when:

- A merger is opposed
- A merger is subject to enforceable undertakings
- The merger parties seek such disclosure
- A merger is cleared but raises important issues that the ACCC considers should be made public.

2.69. In publishing a Public Competition Assessment, the ACCC aims to provide guidance to the public about the ACCC's analysis of the competition issues involved in certain merger reviews.

2.70. The ACCC endeavours to publish Public Competition Assessments as soon as practicable after the announcement of a final decision and will aim to do so within 30 business days of making a decision. However, where matters are complex and the competition issues raised are significant, the period of time needed to produce a Public Competition Assessment may be longer to ensure the account of the ACCC's reasons is accurate, having regard to any legal or commercial sensitivity. In addition, if a merger becomes the subject of litigation shortly after an ACCC decision to oppose it, the ACCC's publication of a Public Competition Assessment may be delayed.

2.71. Merger parties will be provided with a copy of the Public Competition Assessment at the time of publication or shortly after.

2.72. In publishing a Public Competition Assessment, the ACCC takes great care to protect confidential information provided to it throughout its review, including, in some cases, the identity of particular parties that have provided information to the ACCC. The ACCC endeavours to prepare the Public Competition Assessment in a way that provides an appropriate level of detail while maintaining confidentiality and protecting sources of confidential information.

3. Section 87B undertakings

3.1. When a merger raises competition issues at the outset or during a review, the merger parties may decide to offer remedies to the ACCC in the form of court enforceable undertakings under s. 87B of the Act in order to address the competition concerns identified by the ACCC.

3.2. This section outlines the process by which the ACCC will consider proposed undertakings. The *Merger Guidelines* discuss in detail the nature and purpose of s. 87B undertakings and the ACCC's analytical approach to accepting them for mergers.

Before an undertaking is offered

3.3. Merger parties are encouraged to discuss the proposed form and content of an undertaking with the ACCC before the document is prepared. The ACCC's approach to the substance of an undertaking will depend on the circumstances of each matter. However, the ACCC can provide merger parties with guidance on the content and form of an undertaking that may be suitable to the specific circumstances of a merger before the merger parties submit a

proposed undertaking. In this regard, the ACCC requires that all undertakings contain certain standard machinery clauses which the ACCC provides to merger parties. The ACCC does not generally accept variations to the text of these clauses, as it is the ACCC's view that they are in a form that is necessary to ensure the effectiveness of any undertaking.

When can an undertaking be offered?

- 3.4. Merger parties are free to propose undertakings to the ACCC at any time throughout the review process. Examples of when merger parties may propose an undertaking include:
 - at the outset of the review
 - after merger parties have been advised of competition concerns during a review, and
 - after a Statement of Issues has been published.
- 3.5. However, if an undertaking is to be offered, merger parties are encouraged to begin discussions with the ACCC as early in the process as possible.

Substance of an undertaking

- 3.6. It is important that any proposed undertaking is comprehensive in that it clearly and effectively addresses all competition issues raised by the merger. An iterative process of providing proposed undertakings to the ACCC which are unlikely to resolve ACCC concerns will cause unnecessary delays in the review process.
- 3.7. The *Merger Guidelines* (which set out the analytical approach to merger analysis under s. 50) provide more detailed guidance on the types of undertakings the ACCC generally accepts.²²

Process after an undertaking is offered

- 3.8. Generally, the ACCC will conduct market inquiries with interested parties on a proposed undertaking if the proposed undertaking:
 - is comprehensive
 - in the ACCC's preliminary view, has the potential to be enforceable and to address the competition concerns with a merger, and
 - is in a form that meets the ACCC's requirements.
- 3.9. Public consultation may include placing the proposed undertaking on the ACCC's website and may result in the indicative timeline being delayed. In some situations the ACCC may decide not to consult on a proposed undertaking, for example when issues relating to the undertaking have already been subject to consultation.
- 3.10. When interested parties raise concerns during consultation on a proposed undertaking, the ACCC may raise these concerns with the merger parties and where appropriate suggest amendments to the proposed undertaking to address these issues. The ACCC cannot direct merger parties to give or to change a proposed undertaking. However, the ACCC will take any relevant comments received from interested parties into consideration in deciding whether to accept a proposed undertaking.
- 3.11. Significant changes to a proposed undertaking may necessitate further public consultation. In determining whether further consultation is necessary, the ACCC will consider whether it has already received the information required to enable it to decide whether the revised proposed undertaking is likely to resolve the competition issues.
- 3.12. During, or at the end of its review, the ACCC may conclude that an undertaking offered by the merger parties (or part of it) is not necessary to reach a decision to not oppose the merger. In this circumstance, the ACCC may accept a lesser commitment than the undertaking offers, or clear the merger without accepting the undertaking at all.

²² <http://www.accc.gov.au/publications/merger-guidelines>

International mergers involving undertakings - liaison with overseas regulators

- 3.13. In the event of a merger which is also being reviewed by competition regulators in other countries, the ACCC will closely consult and coordinate with overseas competition regulators with the aim of ensuring consistency, including in relation to the agencies' approach in applying any remedies. Where appropriate, the ACCC will seek confidentiality waivers from merger parties that allow the ACCC to exchange confidential information with overseas regulators. The ACCC expects to be given the same notice of mergers and any potential remedies as overseas regulators with simultaneous lodgement of submissions where possible.
- 3.14. If competition concerns arise in Australia which can be resolved by way of undertakings, then the ACCC will generally require that undertakings be provided to the ACCC to address those issues in Australia and ensure that the ACCC has the ability to enforce them. This will generally be the case even if undertakings have been given to an overseas competition regulator.

After acceptance of an undertaking

- 3.15. Once finalised and accepted by the ACCC, s. 87B undertakings will be made available on the mergers public register and s. 87B undertaking register, subject to confidentiality considerations. These undertakings can be accessed on the ACCC's website at www.accc.gov.au under 'Public Registers'.
- 3.16. The ACCC has an ongoing role in relation to undertakings accepted in relation to mergers which includes:
- Monitoring parties' compliance with undertakings, including liaising with independent auditors where relevant.
 - Investigating suspected breaches and enforcing undertakings, including by pursuing litigation where appropriate.

ACCC contact

For enquiries regarding the ACCC's informal merger review processes, please contact:

Merger & Authorisation Review Division
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Email: mergers@acc.gov.au

Telephone: (02) 6243 1368

Appendix A – information requirements for ACCC’s review

As noted in these *Process Guidelines*, the ACCC takes a scaled approach to information requirements for its merger reviews. This section provides a guide to the level of information that the ACCC will generally require in order to undertake an informal review of a merger. The ACCC may request additional information of merger parties throughout its review.²³

Failure to provide the ACCC with an adequate level of information at the outset of a review may delay the ACCC’s review and final decision.

Level of information initially required by the ACCC

The following list is considered by the ACCC to be the level of information initially required to undertake an informal merger review:

- Information about the parties to the transaction (including any relevant related bodies corporate) including trading names and ownership details
- Details of the proposed transaction including:
 - A description of the shares or assets to be acquired
 - whether the transaction is confidential or public
 - Timing – expected or proposed completion date
 - Key information about the sale agreement (including the value of the transaction and whether the transaction is conditional on ACCC clearance)
 - Rationale for the proposed transaction
- Details of the Australian business operations, interests and assets of the acquirer and target including:
 - A detailed description of their business activities, including the nature of products/services supplied and at which functional levels of the market (e.g. retail, wholesale)
 - The geographic location(s) of any relevant manufacturing sites, distribution centres or retail operations and/or the area in which products and/or services are supplied
 - Actual or estimated revenues (to the extent possible, delineated by product or service market)²⁴
 - Any significant contractual arrangements that exist in the industry (e.g. long term or exclusive supply contracts or distribution arrangements)

²³ For more detail on the information which may be of use to the ACCC during a merger review, please refer to the *Merger Guidelines*, pages 19, 37, 41, 43, 46, 48-51.

²⁴ If available, a more detailed breakdown (e.g. by distribution channel or customer) will be of assistance to the ACCC.

- For any markets in which both the acquirer and the target currently supply goods or services, or for any market in which the acquirer and target have a customer/supplier relationship with one another:
 - Market shares of the suppliers for each market²⁵
 - The extent of imports to the market(s)
 - Any evidence of recent or likely future new entry or expansion
- For mergers which the ACCC considers require a public review:
 - A list of key customer and supplier names and contact details (for a range of small, medium and large customers)

²⁵ Market shares should generally be calculated for the most recent financial or calendar year for each relevant market. The calculation of market shares depends critically on market definition. If there is uncertainty as to the relevant market, it is preferable that market shares be calculated on the basis of the market definition most likely to raise competition concerns.