



Australian
Competition &
Consumer
Commission

Merger review process guidelines

JULY 2006





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Australian Competition and Consumer Commission
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Important notice

This publication has been updated to refer to the *Competition and Consumer Act 2010* which replaces the *Trade Practices Act 1974* on 1 January 2011. For more information on the Australian Consumer Law changes see www.consumerlaw.gov.au

The information in this publication is for general guidance only. It does not constitute legal advice and should not be relied on as a statement of the law relating to the *Trade Practices Act 1974*. You should obtain legal advice if there is doubt about whether any conduct may breach the Act, or whether laws in your state or territory impose other requirements or responsibilities on you.

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Foreword

These *Merger review process guidelines* (process guidelines) are a revised version of the *Guideline for informal merger review* originally issued in October 2004 (the 2004 guidelines). The process guidelines refine and expand on the processes followed by the ACCC when considering mergers and acquisitions.

Guidelines issued by the ACCC on its merger review processes are not intended to be static. They will continue to evolve as we, business and its advisers, and the community at large, learn from experience and international best practice.

Consistent with this approach, the 2004 guidelines were reviewed after their first year of operation. This led to the guidelines being refined to remove ambiguities on the extent of application of the guideline and the inclusion of more detailed guidance on the processes.

Key changes to the guidelines include expansion of the types of mergers (including confidential proposals) for which processes are detailed in the guideline, clarification of the processes applied to different types of mergers that the ACCC will review and clearer indicative timelines for informal reviews.

Like the 2004 guidelines before it, the process guidelines continue to draw on the International Competition Network's (ICN) eight guiding principles for merger review: sovereignty, transparency, non-discrimination, procedural fairness, efficient, timely and effective review, coordination, convergence, and protection of confidential information. The ACCC remains committed to these principles and associated recommended best practices and considers that these principles and practices underpin strong and effective merger laws.

The process guidelines are designed to be a reliable, comprehensive and detailed guide to merger parties, the business community, their advisers and the public that they can draw on to predict the processes that will be applied by the ACCC to merger reviews. It reflects the ACCC's commitment to the timely, consistent and transparent assessment of mergers on an informal basis. The processes allow the ACCC to be flexible in how it responds to practical business issues and to deal with competition concerns efficiently and effectively. The guidelines also highlight the importance and benefits of an informal merger review process in which merger parties can, and are encouraged to, discuss merger proposals at an early stage with the ACCC—this may be on a preliminary or substantive basis and may involve confidential or non-confidential merger proposals.

The key to an effective merger review regime in Australia is the establishment of processes that recognise both the importance of speedy and efficient clearances of the many mergers that do not breach the statutory prohibition on anti-competitive mergers and the timely and effective resolution or challenge of those that do.

These guidelines outline the processes that achieve this in line with the ICN's guiding principles and recommended practices.



Graeme Samuel

CHAIRMAN

Australian Competition and Consumer Commission

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Glossary

ACCC	Australian Competition and Consumer Commission
Act	<i>Competition and Consumer Act 2010</i> (Cwlth), formerly the <i>Trade Practices Act 1974</i>
ASIC	Australian Securities and Investment Commission
ASX	Australian Stock Exchange
Bill	Trade Practices Legislation Amendment Bill (No. 1) 2005
Confidential review	A merger review when a proposed acquisition is considered confidentially by the ACCC
Dawson review	<i>Review of the competition provisions of the Trade Practices Act 1974</i> , Trade Practices Act Review Committee (2003)
Federal Court	The Federal Court of Australia
ICN	International Competition Network
2004 guidelines	<i>Guideline for informal merger reviews</i> , Australian Competition and Consumer Commission (2004)
Merger factors	The non-exhaustive list of factors set out in subs. 50(3) of the <i>Competition and Consumer Act 2010</i> (Cwlth) that a court must take into account when assessing whether a proposed merger or acquisition will contravene the Act
1999 Merger guidelines	<i>Merger guidelines</i> , Australian Competition and Consumer Commission (1999)

Public competition assessment	A public competition assessment outlines the basis for the ACCC reaching its final conclusion on a transaction proposal when: a merger is rejected; a merger is subject to enforceable undertakings; the merger parties seek such disclosure; or a merger is approved but raises important issues that the ACCC considers should be made public
Public merger review	A merger review of a non-confidential proposed or completed merger—notice of which will be placed on the ACCC website. The review may involve the ACCC inviting a round of formal submissions from interested parties and/or making a series of targeted inquiries
Section 155	Section 155 of the <i>Competition and Consumer Act 2010</i> (Cwlth) gives the ACCC the power to require a person to provide information, documents and/or give evidence under oath or by way of affirmation, and limited powers to enter premises and inspect and/or copy documents
Statement of issues	A statement of issues outlines the basis and facts on which the ACCC has come to a preliminary decision, after completing a first round of market inquiries, that a proposed merger raises competition issues
Takeovers Panel	The Takeovers Panel is established under s. 171 of the <i>Australian Securities and Investments Commission Act 2001</i> , and is the primary forum for resolving disputes about a takeover bid until the bid period has ended. The panel's primary power is to declare circumstances for a takeover or the control of an Australian company to be unacceptable circumstances

1. Mergers, acquisitions and the Competition and Consumer Act

- 1.1 The ACCC recognises that mergers perform an important role in the efficient functioning of the economy.¹ They allow firms to achieve efficiencies such as economies of scale and/or scope, complementarities and risk spreading. They also provide a mechanism by which underperforming firms and managers are replaced by better performing ones.
- 1.2 However, some mergers may also have anti-competitive effects by altering the structure of markets and therefore the ability and/or incentives for firms to behave competitively. The Competition and Consumer Act prohibits mergers that have, or would be likely to have, anti-competitive effects. One of the ACCC's roles is to prevent such mergers.

Section 50 of the Act

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

¹ For the purposes of these guidelines, the terms 'merger' and 'acquisition' will be used interchangeably.

- 1.6 The application of s. 50 to mergers and acquisitions is discussed in more detail in the ACCC's 1999 merger guidelines², which outline the ACCC's administration and enforcement policies for mergers. It includes a discussion of the so-called 'merger factors'—the non-exhaustive list of factors set out in subs. 50(3) of the Act that a court must take into account when assessing whether an acquisition would contravene the Act. The ACCC has regard to these merger factors when considering the competitive impact of a merger proposal. The 1999 merger guidelines also set out matters relevant to merger authorisations³ and court enforceable undertakings. The 1999 merger guidelines do not have any legal force in determining whether a proposed merger is likely to breach the Act—final determination on the issues is a matter for the courts.
- 1.7 These process guidelines focus exclusively on processes and should be read in conjunction with the 1999 merger guidelines which deal with the analytical and evaluative framework applied to mergers by the ACCC. Parties wishing to make an acquisition will be aided both by the process guidelines and the 1999 merger guidelines. If any processes for review outlined in these two guidelines are inconsistent, the process guidelines will take precedence.

The commission

- 1.8 The commission consists of a chairperson and other full-time members (usually referred to as commissioners) appointed by the Governor-General. Most merger matters are considered by the Mergers Review Committee, comprising the chairperson and nominated commissioners, with the committee's views being reported to the full commission. Matters of greater significance, for example, decisions to institute legal proceedings, accept s. 87B undertakings or to grant authorisations, are made by the full commission. In some cases of less significance and when the decision made is one not to engage in further inquiries into a merger, that decision may be made by the Executive General Manager, Mergers and Acquisitions Group.

Mergers and Acquisitions Group

- 1.9 The Mergers and Acquisitions Group is responsible for assessing mergers and proposed mergers under s. 50 of the Act and making recommendations to the commission and/or Mergers Review Committee. The work of the group also includes assessing applications for merger authorisation.
- 1.10 Any inquiries about the ACCC's administration of merger reviews should be directed to:

Executive General Manager
Mergers and Acquisitions Group
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601
Email: mergers@acc.gov.au
Telephone: 02 6243 1368
Fax: 02 6243 1212

² The 1999 merger guidelines are available in electronic form free of charge on the ACCC's website at www.accc.gov.au. Hard copies are available for a small charge by contacting an ACCC office.

³ Authorisation is a process under which the ACCC, in response to an application made under Part VII of the Act, can grant immunity on public benefit grounds against legal action under the competition provisions of the Act.

2. Merger review process guidelines

- 2.1 The 2004 guidelines were designed to promote greater transparency and accountability, while preserving the benefits of the informal system that had evolved over the years. The 2004 guidelines resulted in:
- the introduction of indicative review timeframes
 - a new public register
 - identification of the circumstances in which the ACCC will publish:
 - a. statements of issues inviting comment on its stated concerns regarding a proposed merger
 - b. public competition assessments providing details of its reasons for a decision on a proposed merger of significant interest.
- 2.2 In response to the ACCC's internal review of the informal processes since the 2004 guidelines' inception, refinements have been made. The refinements that are incorporated in these process guidelines clarify the processes that will be adopted for all informal merger reviews undertaken by the ACCC.
- 2.3 The key refinements in the process guidelines include expansion of the types of mergers for which processes are detailed (including confidential proposals), clarification of the processes applied to the different types of mergers that the ACCC will review and clearer indicative timelines for informal reviews.
- 2.4 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 which will assist the ACCC in making an assessment. Additionally, the guidelines reflect the ACCC's commitment to the guiding principles and recommended practices developed by the ICN⁴, particularly to the timely, consistent and transparent assessment of mergers within Australia's informal regime, and are intended to provide greater predictability of the ACCC's approach to considering mergers and acquisitions.
- 2.5 Given the flexible nature of the ACCC's informal merger review process, and with the objective of continuing to enhance the effectiveness of the informal review process in mind, it is anticipated that the informal merger review processes outlined in these guidelines will be subject to ongoing review and further enhancement over time.

4 For more information on the work of the International Competition Network go to www.internationalcompetitionnetwork.org/index.html. For more information on the ICN's *Guiding principles and recommended practices for merger notification and review procedures*, go to www.internationalcompetitionnetwork.org/guidingprinciples.html.

3. What is an informal merger review?

- 3.1 The ACCC investigates and 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 themselves request an informal clearance. Alternatively the ACCC may become aware⁵ of a proposal through media speculation, from complaints or from advice from other regulatory bodies. Whenever it reviews a public merger, it will make its decision publicly available on its website—regardless of how it originally became aware of the proposed acquisition. The ACCC also may review confidential proposals—however these decisions are not made public.
- 3.2 The ACCC will provide the merger parties with its informal view on whether a particular proposal is likely to breach s. 50 of the Act and therefore whether the ACCC would bring proceedings in the Federal Court to restrain the parties from consummating the merger.
- 3.3 An informal view by the ACCC not to oppose a merger or acquisition does not provide merger parties with immunity or exemption from legal action by the ACCC or other parties under s. 50. However, in practice, it is extremely rare for legal action to be taken under s. 50 for an acquisition that was the subject of an ACCC informal review and was not opposed.
- 3.4 The limited extent of third party private actions in relation to mergers can be attributed to several factors including:
- the available expertise, powers (including statutory information gathering powers) and resources of the ACCC to undertake the necessary analysis of mergers
 - the ACCC being the only body able to seek an injunction to prevent a merger proposal from proceeding
 - a continuing reliance by private parties on the ACCC to administer and enforce merger law.
- 3.5 If the ACCC considers that an acquisition contravenes s. 50 of the Act and the parties do not agree to modify or abandon the acquisition, the ACCC can apply to the Federal Court for an injunction, divestiture or penalties. Only the ACCC can apply for an injunction and/or penalties for merger matters. Third parties 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 apply for damages.

The test

- 3.6 As outlined above, s. 50 of the Act prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in a state, territory or region of Australia.

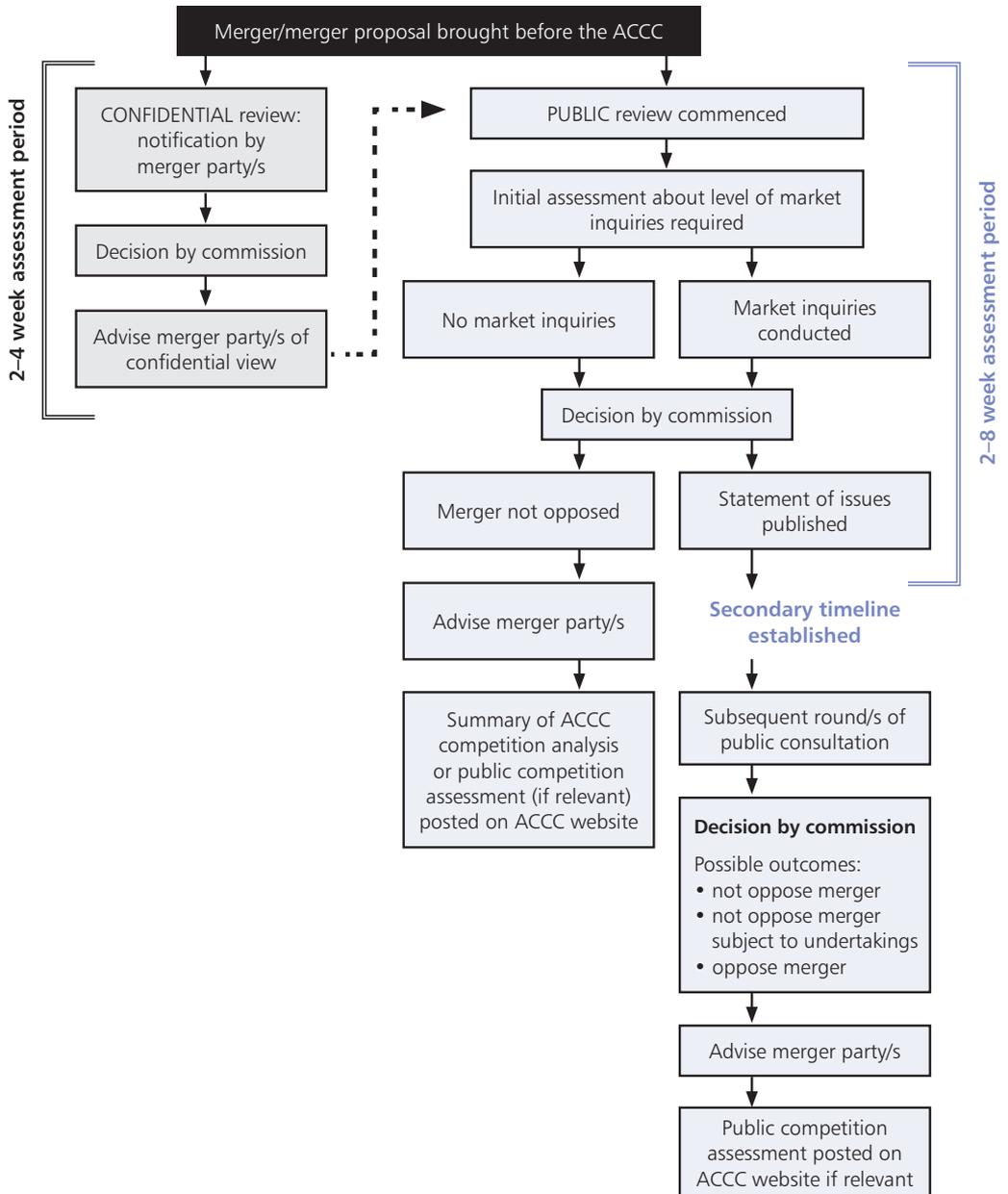
⁵ For the purposes of these guidelines, merger parties may refer to either the acquirer and target or acquirer only.

- 3.7 In assessing the likely effect on competition of proposed acquisitions, the ACCC will take into account the merger factors listed in subs. 50(3) of the Act including, among other things, the height of barriers to entry, market concentration and the level of imports. To provide greater certainty to merger parties on the information needed by the ACCC to assess an application, the assessment process and the merger factors are explained in detail in the 1999 merger guidelines (see, in particular, chapter 5).
- 3.8 The subs. 50(3) merger factors are not an exhaustive list. Other factors that may be relevant to the assessment can be taken into account, such as strategic or other behavioural considerations, the likelihood of coordinated conduct and, to the extent that they may be relevant, efficiency enhancing aspects of a merger that affect the competitiveness of the market. While the nature of the information required may vary with the type and complexity of the transaction, the ACCC will generally examine each of the merger factors in assessing a proposed acquisition.
- 3.9 Parties should note that for the purposes of the informal clearance process, the ACCC is concerned with the effect on competition of the proposed acquisition and not with possible public benefits resulting from an acquisition. Efficiency gains from a merger are primarily only relevant in the context of an authorisation consideration (consistent with the application of the public benefit test) rather than in an informal clearance assessment. Unlike authorisation analysis, informal clearance decisions are concerned only with competition issues. Only when efficiencies will be generated as a result of a proposed acquisition and these efficiencies affect the competitiveness of a market, will they be relevant to the consideration of an informal merger review. A more detailed discussion of the ACCC's treatment of efficiency gains can be found in the 1999 merger guidelines and, in the authorisation context, in the *Guide to authorisations*.

4. The merger review processes

- 4.1 The ACCC's informal merger review process aims to provide parties with decisions on merger proposals as promptly as possible. However, the time it takes to decide will vary according to the quality of information provided by merger parties, the type and complexity of the acquisition and whether market inquiries are considered necessary to form a view.
- 4.2 Although there is no compulsory pre-merger notification requirement in Australia, parties proposing to undertake a merger or acquisition are strongly encouraged to approach the ACCC when a merger is contemplated and certainly before a merger is completed, particularly if the merger or acquisition could affect competition. The sooner parties approach the ACCC to discuss a proposed merger, the sooner the ACCC will be able to provide its view. These discussions may be held either when the merger proposal is confidential and/or after the merger proposal becomes public.
- 4.3 Merger parties may choose not to advise the ACCC of a proposed merger or may proceed with a merger without any advance clearance. However, this will not prevent the ACCC from subsequently investigating the merger, including making public inquiries to assist its investigation, and, if necessary, taking legal action. The ACCC appreciates that opening a public investigation into a merger after it has been completed can provide a level of uncertainty for the merger parties. It is therefore in the interests of the merger parties to approach the ACCC and provide details of the transaction and information on any competitive effects before completing the transaction. The ACCC will endeavour to accommodate the commercial timeframes of merger parties by promptly clearing transactions it has no concerns with.
- 4.4 The processes that are undertaken by the ACCC in assessing merger proposals on an informal basis depend on whether the merger is confidential or brought to the ACCC's attention before completion. For non-confidential mergers, the level of review and consultation needed to assess a particular merger proposal and whether the matter raises competition concerns will affect the duration of an informal review.
- 4.5 There are two types of informal merger reviews conducted by the ACCC, namely confidential reviews of proposed mergers and public reviews of mergers and proposed mergers. Some mergers will be considered initially on a confidential basis and then subsequently on a non-confidential basis once the matter becomes public.
- 4.6 An ACCC investigation into either a proposed or completed merger does not mean that it raises competition concerns but rather that further consideration is needed for the ACCC to reach a view. This is expressly recognised on the ACCC website.
- 4.7 The following flowchart illustrates the various informal merger reviews and the stages involved in the assessment process.

Assessment process for informal merger reviews



Confidential merger reviews

- 4.8 There are two types of confidential reviews that the ACCC may conduct. The first is a confidential review which the ACCC may choose to conduct, in response to information provided by other regulators such as the Foreign Investment Review Board (FIRB)⁶ and the Australian Prudential Regulatory Authority (APRA)⁷, of proposals advised to those regulators under their own legislation. The second is a review resulting from requests made directly by merger parties that a proposed acquisition be considered confidentially by the ACCC.
- 4.9 Consistent with the ACCC's historical approach and the ICN's guiding principles, the ACCC will protect information provided to it in relation to confidential merger proposals.⁸

Notification by FIRB and APRA

- 4.10 FIRB examines proposals by foreign interests to undertake direct investment in Australia and makes recommendations to the Australian Government on whether those proposals are suitable for approval under the government's foreign investment policy. FIRB's governing legislation is the *Foreign Acquisitions and Takeovers Act 1975* (Cwlth). In examining acquisition and takeover proposals, FIRB regularly consults with the ACCC.
- 4.11 APRA is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry. Among other things, APRA has responsibilities relating to acquisitions of companies and assets within the financial system and, under the *Financial Sector (Transfers of Business) Act 1999* (Cwlth) and the *Life Insurance Act 1995* (Cwlth). The ACCC and APRA consult each other when considering a proposal for an acquisition of assets or companies involving regulated financial institutions.
- 4.12 The ACCC's assessment and response to FIRB and APRA is not made public or posted on the ACCC website—however if the merger is already public and under ACCC review, the ACCC will post details of its public review on the website. Ordinarily, the ACCC will conduct an internal assessment to see if it needs to make further inquiries of the merger parties before forming a view. Sometimes merger parties may notify other government regulators but not seek an informal merger review from the ACCC. If, in such instances, the ACCC considers it needs to hear from the parties before making a decision on whether to intervene (and thereby 'clear' or 'not clear' the proposal on an informal basis), the merger parties will be invited by the ACCC to provide a submission (beyond that prepared for FIRB or APRA) on the competitive effects of the proposal. As with any merger proposal, once it becomes public, the ACCC may make any market inquiries it considers necessary before reaching a final view.

⁶ For more information on the functions of FIRB, see www.firb.gov.au.

⁷ For more information on the functions of APRA, see www.apra.gov.au.

⁸ ICN *Guiding principles for merger notification and review*, Principle 8: Protection of confidential information, www.internationalcompetitionnetwork.org/guidingprinciples.html.

Notification by merger parties

- 4.13 It is common for merger parties to request the ACCC's indicative view on a proposed acquisition that is confidential. The onus is on the merger parties to notify the ACCC at the outset whether a merger proposal is confidential.
- 4.14 When merger parties ask the ACCC to confidentially review a proposal, the ACCC will endeavour to provide, on a confidential basis, an interim view as to whether the proposal is or is not likely to raise competition concerns. The advantages to merger parties in seeking a confidential review include:
- the potential for truncation of and, occasionally, elimination of the need for any significant subsequent assessment process once the matter becomes public
 - the pre-emptive identification by the ACCC of the key issues and potential competition concerns.
- 4.15 Confidential reviews will only be undertaken by the ACCC for proposed mergers and will not be undertaken for completed mergers, merger proposals that are in the public domain, or purely speculative merger proposals. When the ACCC is advised of a confidential merger after it has been completed, the ACCC will not provide a view on the merger to the merger parties. However, if the ACCC believes that a completed merger may raise competition concerns, it reserves the right to undertake any investigation or action it considers appropriate in those circumstances.
- 4.16 At the confidential stage of a proposal, an informal response can often be provided within four weeks of receiving a full submission from the parties. However, if the ACCC considers it cannot form a view based on the information provided, it may simply indicate this position to the merger parties (noting it needs to make market inquiries to form a view) or it may make further information requests of the merger parties (which may defer the ACCC's confidential response). The ACCC expects merger parties to provide sufficient written information to the ACCC, taking into account the merger factors contained in subs. 50(3) of the Act, when seeking a confidential view from the ACCC. The ACCC is available to discuss the matter with the merger parties before lodging a submission.
- 4.17 The ACCC is unlikely to be able to provide the parties with an unqualified final view about the acquisition on the strength of a confidential review alone and will, in many cases, not provide an unqualified view until the matter becomes public and market inquiries have been conducted. The range of responses to a confidential proposal that merger parties⁹ can expect from the ACCC may include the following:
- Based on the information available to it, the ACCC does not propose to oppose the merger, but reserves the right to conduct market inquiries once the matter becomes public.

⁹ In the circumstance where only one party to the merger seeks a confidential view from the ACCC, the ACCC will provide its view only to the merger party seeking the confidential review.

- The ACCC is unable to form a view on the competitive implications of the merger before making market inquiries. This response would usually identify the issues that the ACCC proposes to focus on in its market inquiries and, if possible, any concerns that have been identified on a preliminary basis.
 - The ACCC has formed the preliminary view, which is subject to market inquiries, that the proposed acquisition would appear likely to substantially lessen competition in the relevant market/s, in breach of s. 50. The reasons for this view will be provided in writing to the merger parties.
- 4.18 The ACCC aims to ensure that inappropriate comfort is not given to merger parties and then, upon undertaking market inquiries, decide the merger would be likely to substantially lessen competition. This will be of particular concern to the ACCC for proposals that affect markets in which it has little—or little recent—experience.
- 4.19 When the ACCC provides a view on a confidential proposal, the merger parties will be asked to keep the ACCC informed of the progress on the merger proposal and any change in status.
- 4.20 Details of confidential merger proposals and the ACCC's views on confidential merger proposals will not be included in the public register on the ACCC website.
- 4.21 If the merger parties request a confidential review from the ACCC and the proposed merger subsequently becomes public, the ACCC may publish on its website that it is reviewing/monitoring the potential merger proposal. However, it will not disclose the fact that the merger parties had sought a confidential review nor the outcome of its confidential review if one has been reached.
- 4.22 It is different when the ACCC has completed a preliminary review of a confidential merger and the merger parties publicly disclose, in whole or in part, the substance of the ACCC's preliminary view. Then, the ACCC reserves the right to confirm the fact that a confidential review had been requested by the merger parties and to make public statements confirming, clarifying or explaining aspects of the ACCC's preliminary view. In any such statements, the ACCC will not disclose confidential information provided to the ACCC in the course of its consideration of the request for a preliminary view.
- 4.23 When the ACCC has provided a confidential clearance of a merger and the matter subsequently becomes public, the ACCC will consider whether it needs to make market inquiries to confirm its initial confidential review. If it considers a formal round of market inquiries is not necessary, details of the matter will be posted on the website for a period of around two weeks. After this, if no information has been received that causes the ACCC to reconsider its view on the need for further inquiries, it will confirm its initial view to the parties and post its public decision on the website. If formal inquiries are considered necessary, the ACCC will conduct a public review in accordance with the processes outlined below.

Public merger reviews

- 4.24 The ACCC will begin reviews of non-confidential merger proposals and completed mergers that the ACCC considers may raise competition issues, when it becomes aware of these either as a result of:
- the merger parties seeking informal clearance of a merger or proposed merger
 - the merger parties advising the ACCC of a merger or proposed merger but not seeking informal clearance
 - complaints
 - information from other Australian and overseas regulators
 - media reports or speculation
 - other sources.
- 4.25 For most mergers considered by the ACCC, the merger parties will approach the ACCC before completing a merger either to obtain the ACCC's informal clearance on the proposal or on a 'for information/courtesy' basis.
- 4.26 When the ACCC becomes aware of a merger or merger proposal through channels other than the merger parties or their legal advisers, it will endeavour to advise the merger parties as soon as possible that a review is being undertaken and that details of the review will be posted on its website. Merger parties will be invited to make a submission to the ACCC on the merger or merger proposal.
- 4.27 As outlined below, the treatment of completed mergers that have not been notified to the ACCC before completion may differ from other reviews of public mergers in relation to the indicative timelines, disclosure of competition concerns and avenues for reply afforded to the merger parties.
- 4.28 The onus is on the merger parties to provide sufficient written information for the ACCC to analyse a merger clearance request, taking into account the merger factors contained in subs. 50(3) of the Act. Merger parties should make submissions in writing rather than relying on oral presentations to the ACCC. The ACCC is available, if requested, to discuss the matter with the merger parties before lodging a submission.
- 4.29 The review will not begin until sufficient information has been provided to the ACCC by the merger parties on the competitive effects of the proposal. For some mergers the ACCC will require additional information from the merger parties before beginning the review. A discussion of the information requirements for informal reviews can be found in paragraphs 4.94 to 4.99.
- 4.30 In cases in which the ACCC receives adequate information and cooperation from the merger parties, a decision on a merger review can generally be made promptly unless a further round/s of market inquiries is needed for the ACCC to decide on the merger.
- 4.31 However, if there is a lack of cooperation by merger parties in responding to requests for information by the ACCC, the timing and the ability of the ACCC to apply the processes outlined in these guidelines will be affected.

Mergers public register

- 4.32 The ACCC will post on its website details on all public mergers and proposed mergers being reviewed and the resulting decisions. Submissions from merger parties or interested parties will not be posted on the ACCC website except when made in response to a statement of issues (see paragraphs 4.60 to 4.76).
- 4.33 At the start of a public review, ordinarily the following details of the review will be posted on the ACCC website:
- the names of the parties to the transaction
 - the relevant industry involved
 - ACCC staff contact details
 - the commencement date of the review
 - an indicative timeline of the ACCC's review
 - market inquiry details (if applicable). This may include a market inquiries letter outlining the key issues on which comment is invited. No details will be posted on the identity of market participants from whom comments are sought.
- 4.34 As the review progresses, the following details may also be posted on the ACCC website:
- statement of issues (where indicated)—a statement of issues outlines the basis and facts on which the ACCC has come to a preliminary decision, after a first round of market inquiries, that a proposed merger raises competition issues
 - public competition assessment (where indicated)—a public competition assessment outlines the ACCC's completed competition analysis for specific mergers and merger proposals
 - section 87B undertakings (when these are being considered as proposed resolutions and are subject to market inquiries, and later, any that have been accepted by the ACCC in a final resolution of the matter).
- 4.35 At the completion of a public review, the ACCC's decision, a summary of its competition and market definition analysis (when a public competition assessment has not been published) and the decision date will also be posted on the mergers public register on the ACCC's website.

Initial assessment—need for market inquiries?

- 4.36 Before the ACCC is able to determine if a public merger raises competition issues, it will first decide whether it needs to seek formal submissions from interested parties (referred to as 'market inquiries' in the context of informal reviews in these guidelines) to complete the review. This initial assessment will be made within one week of receiving notification of the proposed merger.

- 4.37 Public mergers for which the ACCC decides it needs to make only limited, or no, market inquiries usually include those with no or minimal competitive overlap or those for which it becomes clear there are no likely competition concerns (as a result of, for example, low barriers to entry, high levels of imports or sufficient viable alternative competitors). However, a decision by the ACCC not to invite formal submissions from interested parties does not preclude it from having regard to any unsolicited submissions received from interested parties, or conducting targeted inquiries, before deciding.
- 4.38 All other public informal reviews will undergo market inquiries before being considered by the ACCC.
- 4.39 In some cases the ACCC may initially decide that no market inquiries are necessary and then, because of issues that arise during its assessment, decide that market inquiries are needed to reach a view on a merger. The ACCC will advise the merger parties of the decision to undertake market inquiries before posting the revised timeline on its website.
- 4.40 The decision on whether market inquiries will be conducted is at the discretion of the ACCC and will be made after taking into consideration information provided by the merger parties and other sources as well as the extent of recent ACCC merger investigations in the relevant industry.
- 4.41 When a merger is subject to media speculation, whether or not the ACCC has been informed by the merger parties of a proposal, the ACCC may choose to conduct market inquiries based on publicly available information. Given the limitations on the ACCC's ability to reach a definitive view based on speculation, it will generally provide a qualified view to the merger parties in which it reserves the right to conduct further market inquiries once the matter is made public by the parties and a firm proposal is identified.

Indicative timelines

- 4.42 The ACCC's indicative timelines are just that—indicators of when the ACCC expects to make its decisions on non-confidential merger/merger proposals and the relevant steps in the assessment process. By publishing these timelines, merger parties and third parties are kept informed of the key dates in the process including the due date for submissions and the ACCC's target decision date. However, the informal process is founded on the need to be sufficiently flexible to accommodate the commercial practicalities that may arise in a merger review, and the need for the ACCC to reach a properly informed and correct decision. Indicative timelines may need to be adjusted: sometimes the ACCC will be able to make a decision faster than planned and other times there will be a need to delay decision or submission dates to ensure the ACCC has the information it needs.
- 4.43 Indicative timelines will, if appropriate, include:
- details of the key assessment milestones
 - an outline of the timing for market inquiries
 - the expected decision date.

- 4.44 The indicative timelines outlined below apply only to merger proposals that are notified directly to the ACCC by the merger parties or when the ACCC receives cooperation from the merger parties on a proposed merger for which the ACCC has initiated a review. All other merger proposals and completed mergers may be subject to timelines set at the discretion of the ACCC. Regardless of whether the ACCC is notified of a particular merger or merger proposal, the indicative assessment timelines and details of each merger will be posted on its website.
- 4.45 Matters will be dealt with as expeditiously as possible by the ACCC and it is expected that, in a number of cases, reviews will be completed before the decision date indicated in the timeline. Each indicative timeline will be included in the public register on its website.
- 4.46 The indicative timeline will begin when the ACCC receives sufficient details of a proposed acquisition from the merger parties to start the review.
- 4.47 If the ACCC decides that no market inquiries are needed, the indicative timelines will be based on these reviews being considered and decided upon within two to three weeks.
- 4.48 Merger reviews that require market inquiries will necessitate longer indicative timelines to allow time for the ACCC to consult market participants, seek more information from the acquirer and/or target and analyse the competitive impacts of the proposal.
- 4.49 Market inquiries will generally begin shortly after receipt of the substantive submission from the merger parties and will generally include a two-week period for market participants to make submissions to the ACCC. Further information requests may follow if the ACCC considers it has insufficient information from the merger parties on which to make a considered assessment. For instance, submissions from interested parties may also be supplemented by responses from the merger parties to particular issues identified in those submissions. For more complex matters, the ACCC may also need to seek advice from industry and/or economic experts.
- 4.50 Once submissions are received from market participants, the ACCC will assess that information and information received from the merger parties and other sources. The period of internal assessment following market inquiries will depend on the competition issues raised and the complexity of the matter but generally it will be conducted within two to three weeks.
- 4.51 The ACCC will make a decision and advise the merger parties accordingly after assessing the market inquiry results and all other relevant market information. It will make a clearance decision as early as possible, when it is apparent there are no significant competition issues. Two possible outcomes are likely to result from the ACCC's deliberations:
- No substantial competition concerns are raised by the transaction and informal clearance is granted. In this case, a review may take up to six to eight weeks but may be much shorter, and the merger parties will be advised that as far as the ACCC is concerned, they are free to proceed with the transaction.

- Competition issues are identified arising from the transaction that have not been resolved based on the assessment to date or that appear incapable of being resolved without further information from the marketplace. When the ACCC decides that identified competition concerns are sufficient to publish a statement of issues, the ACCC will endeavour to do so quickly to enable the matter to proceed quickly to the subsequent round/s of public consultation on the statement of issues before a final decision is made by the ACCC. The statement of issues will be published on the website.
- 4.52 When subsequent rounds of market inquiries are required during a review, for example, to consult on a statement of issues or if undertakings are proffered by the merger parties in response to the statement of issues, the indicative timeline will need to be extended and a secondary timeline established to finalise the matter. The merger parties will be advised of the secondary timeline before posting it on the website.
- 4.53 The length and scope of the secondary timeline will depend on:
- the nature and complexity of the merger or merger proposal
 - the results of market inquiries in response to the ACCC's statement of issues
 - the completeness of information provided by the merger parties throughout the process
 - the potential for the merger parties to address outstanding competition issues through amendments to the proposed acquisition, suitable s. 87B undertakings or providing the ACCC with additional information.

However, matters that undergo secondary market inquiries are generally expected to be completed within 12 weeks of the start of the public review process.

- 4.54 If, at any stage during the review process, it becomes clear that the timeline needs to be changed, the ACCC will advise the merger parties, update the timeline on the website, and briefly explain why the timeline is being amended.
- 4.55 At the conclusion of the review process, the ACCC will advise the merger parties of its final decision. The ACCC will publish a public competition assessment outlining its completed competition analysis for mergers and merger proposals which meet the criteria outlined in paragraph 4.84. For those matters where a public competition assessment is not issued, a shorter summary of the ACCC's market definition and competition analysis will be posted on the website.
- 4.56 When merger parties can demonstrate in writing to the ACCC that a decision is required in shorter timeframes due to genuine commercial considerations or deadlines, the ACCC will endeavour to accommodate these in its decision-making process, subject to the level of cooperation from the merger parties throughout the process and whether competition issues arise during the review process. The onus is on the merger parties to raise any commercial timing considerations with the ACCC before the review process begins.

- 4.57 When the ACCC considers there is insufficient time to reach a properly informed and correct decision by the date on which the merger parties request a decision, the ACCC will not make a decision on the request for informal clearance by that date. In these circumstances the ACCC will advise the merger parties that it has not been able to form a concluded view and therefore will continue with its investigations. Should the parties pursue the proposed acquisition without a clearance, the ACCC may, depending on the level of potential competition concerns, advise the parties that they proceed at their own risk, request that they not proceed with the transaction or start legal action.
- 4.58 In cases where merger parties do not cooperate with the ACCC in response to its requests for information and the ACCC has reason to believe that a person has information, documents or evidence relating to the merger and whether the merger constitutes or may constitute a contravention of the Act, the ACCC may use its formal information gathering powers under s.155. Section 155 notices are discussed in more detail in paragraphs 4.101 to 4.102.
- 4.59 The published timeline may subsequently be amended or the clock stopped to take account of factors or events that arise during the assessment process and affect the indicative timeline. These factors or 'clock stoppers' include:
- requests by the ACCC for further information from the merger parties (this includes both informal information requests and s. 155 notices) and the time taken by the merger parties to respond to such requests
 - requests from the merger parties for further time to respond to issues raised during the assessment process
 - when an s. 87B undertaking is proposed by the merger parties that needs further public consultation and subsequent agreement with the ACCC of the terms
 - when the ACCC is restrained from undertaking market inquiries due to confidential elements of, or facts regarding, the merger proposal (as distinct from where the merger proposal is itself confidential).

Statement of issues

- 4.60 The ACCC has developed a process whereby it publicly releases a statement of issues outlining the basis and facts on which the ACCC has come to a preliminary view that a proposed merger raises competition concerns that require further investigation. This process is aimed at increasing the transparency of the informal review process and allows for obtaining further information that may either alleviate or reinforce the concerns of the ACCC and/ or provide an opportunity to consider any undertakings submitted by the merger parties to resolve competition concerns. This practice is consistent with the ICN's guiding principles for transparency and procedural fairness.¹⁰

¹⁰ ICN *Guiding principles for merger notification and review*, principle 2: transparency and principle 4: procedural fairness, www.internationalcompetitionnetwork.org/guidingprinciples.html.

- 4.61 If competition issues are identified after consideration of the market inquiry findings and other material, and these competition issues have not already been raised with the merger parties, the parties will be advised of these issues and will generally be invited to provide a response within a limited time (usually one week) on those issues to which they have not previously responded. If concerns have been raised by third parties that require, in the ACCC's view, a response by the merger parties, they will be outlined without disclosing the identity of the relevant third parties. This will give the merger parties an opportunity to address these issues as part of the process of discussing the transaction.
- 4.62 When competition issues remain or appear incapable of being resolved without further information from the marketplace, the ACCC will publish these issues in the form of a statement of issues. In some cases certain details will be omitted from the statement of issues due to commercial-in-confidence or legal restrictions. Whether particular details are omitted from the statement of issues will depend on the details and circumstances of the transaction and will be decided by the ACCC on a case-by-case basis.
- 4.63 When mergers are not notified to the ACCC before completion the ACCC will not ordinarily issue a statement of issues when competition issues are raised. The ACCC reserves the right to proceed directly to legal action against the merger parties under s. 50 if it considers that, on the information before it, there has been a likely contravention of the Act.
- 4.64 A statement of issues will generally cover the following three categories of possible concerns:
- Issues unlikely to pose competition concerns (sometimes referred to as green-light issues)—that is, those issues that, based on the current information, appear unlikely to support a finding that the transaction would be likely to result in a substantial lessening of competition.
 - Issues that may raise concerns requiring further analysis (sometimes referred to as amber-light issues)—that is, those issues the ACCC identifies as potential concerns but is unable to form a preliminary view whether these issues are likely to support a finding that the transaction would be likely to result in a substantial lessening of competition based on the information currently before it. The ACCC will seek to explore these issues further to either verify or dismiss the concern.
 - Issues of concern (sometimes referred to as red-light issues) that is, those issues that, based on current information available, support a finding that the transaction could represent a significant threat to competition and as such is likely to breach s. 50 of the Act.
- 4.65 The issues highlighted in a statement of issues may subsequently move from one level (for example, amber-light) to a lower or higher level (for example, green or red-light) based on the information in responses to the statement of issues and the results of secondary market inquiries. Alternatively, the level of concerns highlighted in the statement of issues may be reinforced.

- 4.66 The ACCC will publish statements of issues on its website to allow all parties interested in a merger proposal (including the merger parties themselves, shareholders, the investing public, competitors, customers, suppliers and other stakeholders) the opportunity to ascertain and consider the primary issues identified by the ACCC. This is intended to provide the merger parties and other interested parties with the basis for making further submissions (or remedial solutions) if necessary. However, this does not preclude the parties from making further submissions or proffering s. 87B undertakings before the release of a statement of issues.
- 4.67 A statement of issues published by the ACCC is not a final decision on a proposed acquisition. It does, however outline the competition concerns arising from the transaction that have not yet been resolved. A statement of issues may perform a spectrum of functions, such as indicating the ACCC's unresolved concerns, the type of further information it would like, and in some cases may go so far as to provide the ACCC's preliminary view as to whether a merger is likely to substantially lessen competition. This will give the merger parties an opportunity to explore avenues (for example by giving s. 87B undertakings) to resolve the ACCC's concerns before it makes a final decision.
- 4.68 The merger parties will, in most cases, be provided with a copy of the statement of issues as a courtesy shortly before posting it on the ACCC's website which will prepare them to respond to any inquiries that might follow its publication. As a general rule, merger parties will be provided with an embargoed copy one hour before its public release. The ACCC will review this practice should it transpire that advance notice of such highly sensitive market information is misused on any occasion. Advance provision to the merger parties of the statement of issues is also subject to continuous disclosure requirements applicable to publicly listed companies, and so in certain instances parties may not receive this information before public announcement.
- 4.69 Merger parties will not be given the opportunity to provide editorial comment on the statement of issues. However, merger parties will subsequently be given the opportunity to submit a public reply to the published statement of issues which may be placed on the ACCC website alongside the statement of issues. Other interested parties who are directly named in the statement of issues (for example, the target) will also be given the opportunity to respond to the statement of issues and the merger parties' response. Responses should be provided to the ACCC as soon as possible after release of the statement of issues. The ACCC will not publish counter-responses.
- 4.70 In deciding whether to publish a response to a statement of issues on its website, the ACCC will consider whether the response:
- details information that is commercially sensitive to another party
 - contains information or statements that are considered by the ACCC to be potentially defamatory
 - contains language that is offensive or inappropriate
 - raises other factors that do not warrant publishing.

- 4.71 The ACCC retains the discretion not to publish on its website responses to statements of issues. When the ACCC decides that a reply should not be posted on its website, the party lodging the response will be advised of this decision and invited to submit a new response. There is, of course, nothing to stop merger parties or other interested parties from publishing elsewhere any responses they wish to make.
- 4.72 The ACCC will not alter its indicative review timeline or the proposed date of publication of a decision if the merger parties or other interested parties have not yet provided a response or a revised response to the statement of issues.
- 4.73 Responses to a statement of issues:
- should address the issues outlined in and follow the same structure of the statement of issues
 - may include additional relevant information but should only deal with issues raised in the statement of issues directly relevant to an analysis under s. 50 of the Act
 - should clearly identify any commercially confidential information and, where necessary, also include a non-confidential version to be posted on the ACCC website
 - should be concise and precise, stating facts relevant to the response.
- 4.74 While it is expected that responses may be critical of the ACCC's concerns or arguments, the responses should not be seen as a vehicle to criticise the ACCC.
- 4.75 The ACCC is aware that, after a statement of issues has been published, more information may become available or further discussions with the parties may reduce or remove some or all of the ACCC's initial concerns. In some cases, new information may come to light which raises new issues. The ACCC may then make this known on its website. However, the ACCC does not envisage that it will make progressive changes to the statement of issues as issues are potentially addressed by the merger parties.
- 4.76 As outlined above, once a review proceeds to the stage of publishing and consulting on a statement of issues, a secondary timeline will be established. This timeline can be truncated or extended depending on how, or to what extent, competition issues are subsequently addressed.

Section 87B undertakings

- 4.77 When a merger raises competition issues, these can potentially be overcome by the merger parties giving the ACCC a court enforceable undertaking under s. 87B of the Act. The 1999 merger guidelines discuss in detail the nature and purpose of s. 87B undertakings and the ACCC's approach to accepting them for mergers.¹¹

11 See *Merger guidelines (1999)*, chapter 7.

- 4.78 If an undertaking is offered by the merger parties during a review and the ACCC concludes at the end of its inquiries and assessment that the undertaking or part of it is not necessary to approve the merger, it may accept a lesser commitment than the undertaking offers, or clear the merger without accepting the undertaking at all. When merger parties consider there are potential competition concerns that they can resolve with an undertaking, the undertaking should contain their best resolution in the first instance, on the basis that the ACCC will clear the merger without it or accept only part of the undertaking, if it finds ultimately there are no or few competition concerns to resolve.
- 4.79 Merger parties are free to propose s. 87B undertakings to the ACCC at any time throughout the review process. In the case of an undertaking proposed under s. 87B, the ACCC will in most cases seek comment from market participants. This may include placing the proposed undertaking on the ACCC's website and revising the indicative timeline. In some situations (for example, when commercial expediency is critical or when issues within the undertaking have already been subject to market inquiries) the ACCC may not consult on a proposed undertaking.
- 4.80 When merger parties give undertakings at the outset of an informal review to address what they perceive as obvious competition concerns, these will be available for public consultation in the initial round of market inquiries. Alternatively, when undertakings are given sometime during the first or subsequent rounds of market inquiries, a new timeline will usually be established to allow the ACCC to conduct additional market inquiries on the undertakings and assess their effectiveness in dealing with its concerns.
- 4.81 While merger parties are encouraged to begin discussions about possible undertakings with the ACCC as early in the process as is possible, it is important that any undertakings submitted are comprehensive. Proposed undertakings should clearly address all competition issues raised rather than proposing progressive piecemeal changes which are unlikely to resolve concerns and would unduly delay the process. The tendering of iterative versions of undertakings to the ACCC will in most cases necessitate additional public consultation and internal assessment to be conducted on each version of the undertakings submitted by the merger parties before a decision can be made by the ACCC.
- 4.82 When concerns are raised by interested parties during consultation, the ACCC cannot guarantee that changes will be made to the proposed undertaking, as undertakings must be given by the merger parties. However, the ACCC will take these comments into consideration in deciding whether to accept the proposed undertaking. If the ACCC expresses concerns with the form of a particular undertaking, an amended version can be submitted. The ACCC may or may not consult on a subsequent version, taking into consideration whether it has already received the information required from the market to inform it of the extent to which an undertaking is likely to resolve competition issues.
- 4.83 Once finalised and accepted, s. 87B undertakings will be made available on the merger public register, subject to commercial confidentiality considerations.

Public competition assessments

- 4.84 To improve the handling of matters and provide an enhanced level of transparency and procedural fairness in its decision-making process, the ACCC issues a public competition assessment when:
- a merger is rejected
 - 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.
- 4.85 Public competition assessments aim to provide the market with a better understanding of the ACCC's analysis of various markets and associated merger and competition issues. It will also alert the market if the ACCC's assessment of the competitive conditions in particular markets is changing, or is likely to change, because of developments—for example—in technology or previous mergers in those particular markets.
- 4.86 While the publication of public competition assessments enhances the transparency and accountability of the ACCC's actions, it has an additional benefit. Over time, a body of detailed reasons for decisions will be established, providing merger parties, their advisors and investors with a reasonable understanding of the ACCC's approach to merger proposals.
- 4.87 The ACCC will endeavour to provide public competition assessments within two weeks of a decision by the ACCC. When matters are more complex and the competition issues raised are significant, additional time may be needed to ensure the reasons are in a publishable form, taking into account any legal or commercial sensitivity. As a courtesy, the merger parties will be provided with copies of any public competition assessments at the time of publication or shortly after.
- 4.88 The ACCC has established processes to protect confidential information provided by the merger parties and information arising from market inquiries. This includes protecting the identity of market participants who provide sensitive market intelligence. The ACCC believes that in most cases it will be possible to provide an appropriately detailed explanation for its finalised view while protecting confidential information and its sources. When this is not possible, maintaining confidentiality will be the ACCC's paramount concern.

International mergers

- 4.89 Increasingly the ACCC must deal with acquisitions in a global context. This may involve consideration of global competition, or even global markets, and the role of mergers in enhancing efficiency and international competitiveness. When these mergers affect a market in Australia they will generally be subject to the Act. Parties involved in these mergers will often have to deal with multiple competition agencies around the world. The ACCC is therefore increasingly involved in discourse and cooperation with these overseas competition agencies.

- 4.90 Merger parties should be aware that the ACCC and other regulators may share information of a non-confidential nature about particular mergers. The ACCC and other overseas regulators may also seek a confidentiality waiver from the merger parties to enable them to exchange confidential information on a particular merger when it is considered appropriate (the confidentiality waiver still restricts agencies from disclosing as far as the law permits confidential information to a third party). Refusals by merger parties to grant confidentiality waivers may cause delays in the ACCC's and overseas regulators' assessment processes. The sharing of non-confidential information and, where possible, confidential information between regulators is consistent with the ICN's guiding principles for coordination between regulators on merger reviews.¹²
- 4.91 While Australia does not have any formal pre-merger notification, there is benefit for both the ACCC and the merger parties in streamlining the process of informal consideration. The ACCC expects to be given the same notice of mergers as overseas agencies, therefore lodgment of clearance applications should be simultaneous where possible. The ACCC requires adequate time to make market inquiries before it can respond to any proposed acquisitions. It also expects all relevant information relating to the international transaction including, for example, full details of international agreements relating to any Australian aspects of the transaction and the proposed timeline for obtaining regulatory approval in other jurisdictions.

Initiating an informal merger review

- 4.92 Depending on the nature and the stage of the proposed merger or acquisition, parties may approach the ACCC on a confidential basis or on the basis that the proposed acquisition is in the public domain. Parties may initially request a meeting with the ACCC to discuss a proposed acquisition. However, before the ACCC will provide merger parties with an informal view, a written submission should be lodged with the ACCC, along with a request for the ACCC to conduct an informal review.
- 4.93 When possible, the ACCC encourages both the acquirer and target to approach it to discuss a proposed acquisition and jointly provide a submission to the ACCC outlining the nature and extent of the proposed acquisition.

¹² ICN *Guiding principles for merger notification and review*, principle 6: coordination, www.internationalcompetitionnetwork.org/guidingprinciples.html.

Information requirements

- 4.94 There are no prescribed information requirements imposed on merger parties when seeking an informal merger review from the ACCC, nor is there any application fee. However, merger parties are encouraged to provide written submissions outlining:
- background information about the parties
 - the structure of the market, including any relevant information about other major market participants
 - the commercial rationale for the merger
 - an analysis of the proposed acquisition in terms of the merger factors set out in subs. 50(3) of the Act
 - an analysis of any other relevant factors relating to the competitive implications of the merger.
- 4.95 A non-exhaustive list of the factors to be taken into account by the ACCC is clearly expressed in subs. 50(3) of the Act and its analytical approach to those factors is discussed in detail in the 1999 merger guidelines. All information relevant to assessing the impact of a proposed acquisition in terms of these merger factors is considered important to the ACCC.
- 4.96 An outline of the information that the ACCC would ordinarily require to conduct its competition assessment is included in appendix A: Information requirements—informal merger assessments. This is not a list of mandatory information requirements and is intended only as a guide. It is understood that not all issues or information will be relevant to every proposed merger and therefore submissions should be tailored accordingly. When clarification of any of the issues is needed, merger parties should refer to the 1999 merger guidelines, which address in more detail each of the merger factors, or speak with a member of the Mergers and Acquisitions Group (for contact details see paragraph 1.10).
- 4.97 Merger parties should note that an assessment of a proposed merger by the ACCC and any subsequent decision not to oppose a proposed transaction is largely based on the information provided by the merger parties and the terms of the transaction identified by the merger parties. If the information is found to be inaccurate or incomplete, the ACCC reserves the right to reconsider the merger and will not be bound by its prior decision not to intervene.
- 4.98 Information provided in relation to a request for informal review will not be published on the ACCC's website, nor will it be made publicly available without the agreement of the party who provided the information (except undertakings given to the ACCC and responses to statements of issues, subject to the exclusion of commercially sensitive information). The ACCC will retain all relevant documents on its files when such documents relate to the making of a decision by the ACCC.
- 4.99 The ACCC will not accept any requirement imposed by the merger parties or others that has the effect of limiting the use of information provided to the ACCC in performing its functions and duties under the Act. To do so would, among other things, place an unacceptable restriction on the operations of the ACCC.

Undertakings

4.100 The ACCC will in some cases, where it has preliminary competition concerns, request a merger party to provide it with a written undertaking not to proceed with the acquisition during the merger review process or to provide a certain period of notice before doing so. The specific terms of the undertaking sought will vary with the circumstances of each case. The ACCC views the provision of such an undertaking as an act of good faith on the part of the relevant merger parties.

Statutory information gathering powers

- 4.101 The ACCC, under s. 155 of the Act, has the power to obtain information, documents and evidence when the commissioner, chairperson or deputy chairperson has reason to believe that the person to whom the notice is issued is capable of furnishing information, producing documents or giving evidence on a matter that constitutes or may constitute a contravention of the Act.
- 4.102 While s. 155 notices are not generally issued in merger matters, the use of this statutory power is a well recognised and accepted tool often used in pursuit of the ACCC's enforcement activities. If the ACCC believes it is necessary to seek information or documents which relate to a merger or proposed merger it will usually approach the relevant party first, seeking voluntary provision of information and documents. However, from time to time, the ACCC may determine that issuing s. 155 notices to a merger party is appropriate. In considering this option, the ACCC will have regard to factors including time pressures and any inability, refusal or failure to comply fully with a voluntary request.

Third parties

- 4.103 While third parties are not directly involved in a merger, they play an important role in the review process. They provide the ACCC with relevant market information and their views on the likely effect of a proposed merger and act as a sounding board to test the views and information provided by the merger parties to the ACCC. In recognition of this indirect but important role, the ACCC commits to approaching third parties with sensitivity and courtesy when requesting assistance, particularly when making information requests.
- 4.104 The ACCC recognises that information requests may place a significant burden on third parties in terms of the real resources they may expend in collecting, collating and presenting relevant information to the ACCC. Accordingly, the ACCC will endeavour to limit third party information requests to those matters, which in the view of the ACCC, are necessary for it to properly carry out its assessment of a proposed merger. The ACCC commits to work with third parties to enable the provision of relevant information in a manner that minimises the burden on third parties.

4.105 If the ACCC believes it is necessary to seek information or documents from a third party, it will usually approach the party first, seeking voluntary provision of information and documents. However, from time to time, the ACCC may determine that issuing s. 155 notices to a third party is appropriate. In considering this option, the ACCC will have regard to factors including time pressures and any inability, refusal or failure to comply fully with a voluntary request.

Communication between ACCC and merger parties

- 4.106 The development of indicative timelines, the expansion of the mergers public register and the provision of additional guidance on the ACCC's information requirements are only part of the process to improve transparency and accountability. The ACCC has also established a more specific communication policy for dealing with merger parties. The ICN's *Guiding principles for merger notification and review* note that merger investigation procedures should include opportunities for meetings or discussions between the regulator and the merger parties at key points in the assessment.
- 4.107 The ACCC is conscious of the importance of having clear and direct lines of communication with merger parties and ensuring that the correct people (whether commissioners or staff) are involved to the appropriate degree. To assist merger parties in their communication with the ACCC, outlined below are the circumstances in which commissioners and staff would be available to meet with the merger parties or other interested parties.
- 4.108 It should be noted that, due to their significant work commitments, attendance by a commissioner at meetings is generally reserved for major matters or when the issues to be discussed are of significance. This would be the case at all stages of the merger assessment, but particularly during the initial stages of a merger review. An assessment of whether a commissioner should attend any meetings will normally be undertaken by staff and the Executive General Manager of the Mergers and Acquisitions Group.

Initial communication

- 4.109 Consultation before a proposed transaction is undertaken is critical to the success of the informal system. This consultation can be in the form of a submission providing relevant information, or through direct meetings and discussions with staff.
- 4.110 When merger parties approach the ACCC seeking consultation before making a submission, a meeting with staff and in some cases the Executive General Manager of the Mergers and Acquisitions Group may be possible. However, the ACCC is not inclined to engage in discussions regarding speculative transactions.

- 4.111 If merger parties have prepared a comprehensive submission before an initial meeting with the ACCC, the ACCC would benefit from receiving that submission before the meeting. When a comprehensive submission has not been prepared, the ACCC requires at least a minimum level of information before any initial meeting. This information should include:
- details of the parties involved
 - an outline of the proposed transaction, including the current status of negotiations
 - an assessment of the market/s likely to be affected
 - the initial views of the merger parties as to any possible competition issues.
- 4.112 When the initial approach to the ACCC on a proposed acquisition is by way of a submission, a subsequent meeting may be required. A director of the Mergers and Acquisitions Group will be assigned responsibility for managing the review, usually together with a case officer/s. The ACCC will advise the merger parties of the relevant designated staff member/s and their contact details. The case officer/s or director should be the first point of contact for inquiries by the merger parties. Staff will try to make themselves available to help merger parties or to discuss any issues relating to a merger assessment. However, the Executive General Manager of the Mergers and Acquisitions Group may be involved and contacted about matters of significance.
- 4.113 Following any initial consultation and the submission of information to the ACCC, there may be other key milestones during the ACCC's consideration when it would be appropriate to meet with the merger parties for further discussion. The sequence of these milestones is consistent across the assessment of all non-confidential proposed acquisitions.

Following preliminary assessment before market inquiries

- 4.114 As already noted, the ACCC is not able to assess whether competition issues are likely without access to reasonable information. Such information is expected to be provided by the merger parties in the first instance. A preliminary assessment of the transaction will then be conducted and a decision made on whether market inquiries are required before the ACCC can reach a view.
- 4.115 Once a preliminary assessment has been made, it is possible that some obvious competition issues will be identified. Whether these issues are significant or not, advising the merger parties as early as possible facilitates a quick assessment of the matter. The competition issues may also become the subject of focused market inquiries if they are not resolved by the parties (for example by providing additional information, or through consultation on a proposed undertaking).

Following market inquiries

- 4.116 The ACCC will generally consult industry participants, including customers, suppliers and competitors of the merger parties. The purpose of market inquiries is to seek input from all relevant stakeholders on the possible implications of the proposed transaction, confirm and clarify the information provided by the merger parties, and identify any additional issues.
- 4.117 The ACCC considers it beneficial to undertake further consultation with the merger parties on issues raised through market inquiries before the Mergers Review Committee makes its decision. Depending on the seriousness of the issues or the method of resolution proposed by the merger parties, the Executive General Manager of the Mergers and Acquisitions Group may participate in these discussions.
- 4.118 Having obtained all relevant information from the merger parties and market participants, the ACCC is then able to undertake its assessment. If the ACCC has not identified any likely competition issues after market inquiries, it is unlikely that further consultation would be undertaken. Further, if the ACCC is not likely to intervene in a proposed transaction, consultation with the merger parties is unlikely before the final decision is made. The ACCC will, however, generally advise the merger parties of the decision shortly before any public announcement, subject to continuous disclosure requirements applicable to publicly listed companies.
- 4.119 When competition issues are identified which require a response from the merger parties and these competition issues have not already been raised with them, the merger parties will be advised of these issues. Merger parties will generally be invited to provide a response within a limited time (usually one week) on those issues to which they have not previously responded.
- 4.120 When competition issues remain or appear incapable of being resolved without further information from the marketplace, the ACCC will publish these issues in the form of a statement of issues on the public register. Statements of issues are discussed in detail in paragraphs 4.60 to 4.76. Merger parties will generally be provided with an embargoed copy one hour before public release, subject to continuous disclosure requirements applicable to publicly listed companies.

Following the release of a statement of issues

- 4.121 Merger parties will be given the opportunity, if they wish, to submit a public reply to the published statement of issues which may be placed on the ACCC website alongside the statement of issues.
- 4.122 In the situation where, following the publication of a statement of issues, the merger parties take steps to address the ACCC's concerns and/or provide additional information, a further assessment will be undertaken to examine the competitive effects of the proposed acquisition in light of any changes. This will often involve further public consultation. It is anticipated that regular consultation between the ACCC and the merger parties may be required at this time. These consultations are likely to involve at least the relevant staff members and the Executive General Manager of the Mergers and Acquisitions Group and, in some cases, a commissioner.

Following an ACCC decision

- 4.123 Regardless of whether the ACCC decides to oppose or not oppose the merger proposal, the merger parties will generally be informed of the ACCC's final decision before a public statement is made. This allows parties an opportunity to respond quickly to any media inquiries about the decision announcement. Merger parties will not be given the opportunity to provide editorial comment on any ACCC announcement. As discussed above, advance provision to the merger parties of the ACCC's final decision is subject to continuous disclosure requirements applicable to publicly listed companies, and so in certain instances parties may not receive this information before public announcement.
- 4.124 The ACCC will review this courtesy it extends to merger parties if it transpires that advance notice of such highly sensitive market information is abused on any occasion.
- 4.125 Although a public competition assessment will not be issued in all cases, in those matters where it is appropriate the ACCC will endeavour to make the document public within two weeks of it making the decision. (See paragraphs 4.84 to 4.88 for a more detailed discussion about when it is appropriate to issue public competition assessment). When matters are more complex and the competition issues raised are significant, additional time may be needed to ensure the reasons are in a publishable form, taking into account any legal or commercial sensitivity. As a courtesy, the merger parties will be provided with copies of any public competition assessments at the time of publication or shortly after.
- 4.126 A public register entry will be prepared for all public matters considered by the ACCC providing a brief description of the ACCC's assessment and decision. The public register entry will be publicly available on the ACCC's website.

Public disclosure of misleading information

- 4.127 When merger parties are engaged in discussions or negotiations with the ACCC about a merger, and information relating to these discussions or negotiations becomes publicly available which the ACCC considers may be potentially misleading to the market (including by omission), the ACCC will notify the merger parties of its concerns and provide them with a short period to clarify/correct the information. When the ACCC's concerns are not resolved by clarifying statements, it reserves the right to advise the relevant regulatory authorities (ASIC/ Takeovers Panel/ASX) of its concerns if appropriate and/or make its own public statements. The ACCC will not disclose confidential information provided to it, but may disclose the existence of such information to the relevant regulator.
- 4.128 Accordingly, merger parties should exercise caution when making information publicly available about the likely outcome of an expected ACCC merger decision and/or discussions with the ACCC to ensure that the information is an accurate reflection of the views and position expressed to the merger parties by the ACCC.

Appendix A:

Information requirements—informal merger assessments

This section is a guide to the issues the ACCC will examine as part of its merger assessment and the information it will require. It is understood that not all issues/information will be relevant to every proposed merger and therefore submissions should be tailored accordingly. For further explanation of any of the issues identified, please refer to the ACCC's 1999 merger guidelines which cover each of the merger assessment factors in detail.

Merger parties should note that any consideration by the ACCC and any subsequent decision not to intervene in a proposed transaction can be given only on the basis of the information available and in terms of the transaction identified.

Relevant company details

It is important for the ACCC to be fully aware of which parties intend to participate in the proposed transaction. The ACCC will require relevant information including:

- the names of the individuals and/or companies involved in the transaction
- the business operations undertaken by each of those parties, including products and services that the parties supply
- relevant contact details in Australia for those parties (address, telephone, facsimile and email)
- the details of any relevant website/s
- details of all related companies of the acquirer and the target.

What is to be acquired?

Even for an initial assessment, the ACCC will require details of the proposed transaction, in particular, what assets are included, how the transaction is to take place and which other parties it is likely to affect. For the ACCC to fully understand the nature of the transaction, the following information would be required:

- a detailed description of any contract, arrangement, understanding or proposal for the acquisition and copies of relevant documents
- details of the commercial rationale for the acquisition
- the date on which the agreement is to be concluded and/or the date of the transaction becoming public
- whether the transaction is subject to ACCC approval and/or the approval of an overseas competition authority, identifying the relevant jurisdiction/s and the progress of the parties' application/s for approval
- if the transaction is subject to review by overseas regulators, a confidentiality waiver for both jurisdictions allowing the ACCC to exchange information on a confidential basis with that agency

- whether the acquisition involves proposed ancillary arrangements and a description of any proposed arrangements
- an outline of any access regimes or other regulatory arrangements under which the parties operate
- a description of the goods or services supplied by each party to the transaction in Australia and internationally.

Background information

The following information will provide the ACCC with a better understanding of the relationship (if any) between the merger parties and the industry in which they operate:

- a description of the industry sector/s to which the acquisition relates
- a description of the area/s of overlap in the operations of the merger parties and any related companies of the merger parties
- details of any acquisitions made by the merger parties and any other acquisitions made in the industry sector/s during the past five years
- details of any existing vertical or horizontal relationships between the merger parties
- a description of any other cooperative agreements to which any of the merger parties is a party
- the names and contact details of the 10 (or less when 10 are not available) largest competitors, customers and suppliers for each of the merger parties and an indication of the relevant distribution, supply and purchasing arrangements.

Relevant market definition

Defining markets is an integral part of competition analysis and is the first step in the ACCC's assessment process. The following is an outline of the type of information required for the ACCC to identify the relevant markets:

- a description of the relevant chain/s of production, including the positioning of the parties to the transaction in their respective production chain/s, both in relation to other firms and to end users of the relevant goods or services
- a description of the inputs into the production of goods or services by each of the merger parties in the relevant market/s and an indication as to the value of those inputs as a proportion of total production—where alternative inputs are available, a list of those substitutes
- the goods or services produced, supplied or distributed by each party that may be considered broadly substitutable
- the goods or services produced, supplied or distributed by each party (and their subsidiaries) when one or more parties to the transaction is either a supplier or customer
- a list of those businesses (whether or not they are a party to the transaction) that each party to the transaction considers to be strong competitors, moderate competitors or weak competitors for their business, together with a brief statement outlining the basis for this classification

- an estimate of the ability and likelihood of other parties to alter their production or supply processes to compete directly with the merger parties
- a description of what the merger parties consider to be the relevant product market/s
- a description of what the merger parties consider to be the relevant geographic market/s.

Related markets and substitutes

The ACCC examines both demand and supply-side substitution in determining the appropriate market definition. The ACCC will require information concerning:

- the actual extent to which substitutes are available, taking into account relative capacities, cost structures and the cost of expansion
- the extent to which the substitutes identified are or could be offered to customers as a product range through bundling or tying
- the competitive constraints that would, or would be likely to, prevent such bundling or tying from significantly foreclosing the ability of the merged entity's competitors to compete, including foreclosure of access to distribution by the merged entity's competitors.

Market shares

Once the relevant market is defined, the ACCC can undertake its competition analysis by examining the market shares of the merger parties and the respective market concentration. To determine market shares and concentration, the ACCC would generally require:

- an estimate of the market shares of each party to the transaction and their competitors in the market/s identified
- an outline of the extent to which the merged entity would be constrained in its actions by existing suppliers, customers and competitors in the relevant market/s.

Imports

In an open economy such as Australia's, the importance of giving special consideration to the role of actual and potential import competition in considering the likely effect of a merger on competition is widely recognised. The ACCC will require the following information to determine the competitive constraint provided by imports:

- which products are imported into the relevant market/s, who undertakes the importation and their relative share of the market/s
- estimates of the actual and potential level of import competition in the market/s
- historical importation figures
- details of any barriers to entry to importing, including access to distribution facilities, transport costs and customs restrictions
- details of the price of imports as opposed to domestic production in the relevant market/s and an explanation of any divergence in these prices
- the extent to which imports provide a constraint on domestic suppliers, including the merger parties, in the relevant market/s post-acquisition.

Exports

- details of the actual and potential level of exports in the relevant market/s
- a description of the export barriers faced by suppliers of inputs to the merger parties in the relevant market/s
- details of the sale price of exports as opposed to domestic sales in the relevant market/s and an explanation of any divergence in these prices
- a description of whether the suppliers of inputs to the merger parties are or are likely to be able to export such inputs post-acquisition and, if so, a description of the extent of constraint this would be likely to provide on the merger parties post-acquisition.

Barriers to entry

The relative ease for a business to enter any particular market can significantly influence the level of competitive constraint on a merged entity. In identifying the height of any barriers to entry the ACCC would require information relating to:

- the ability of producers that are not current competitors to switch production to competing products or services
- the market conditions that may affect the ability of existing firms to expand
- the size and extent of any investment that producers would need to make to either enter the relevant market/s or to expand production significantly in these market/s
- the extent of brand loyalty in the relevant market/s
- the existence and nature of any long-term supply contracts in the relevant market/s
- any relevant 'switching costs' (such as product compatibility issues, product bundling, contract termination charges) that may prevent buyers in the relevant market/s from changing suppliers or sellers in the relevant market/s from changing buyers, in the short to medium term
- evidence of any growth or decline in the relevant market/s.

Dynamic characteristics

The dynamic characteristics of a market will influence how quickly it changes or evolves and subsequently the extent to which a merged entity may be constrained by changing market conditions. Merger parties should include information on dynamic characteristics such as growth, innovation and product and/or service differentiation.

Vigorous and effective competitor

Examining separately the actual conduct of the merger parties before the merger and estimating the likely future conduct with and without the merger provides an insight into the likely impact on the competitiveness of the relevant market/s following the transaction.

To ascertain the extent to which each party to the transaction would separately be considered as a vigorous and effective competitor in the relevant market/s, the ACCC will require information such as the respective price, quality, and after sales service of the merger parties.

Vertical integration

The extent of vertical integration can significantly influence the likely competitive affect of both horizontal and vertical mergers. The relevant information required by the ACCC would include:

- whether the proposed transaction is likely to result in vertical integration between firms involved at different functional levels of the relevant market/s
- whether the proposed transaction would be likely to increase the risk of limiting the supply of inputs or access to distribution such that downstream or upstream rivals face higher costs post-acquisition or full or partial foreclosure of key inputs or distribution channels
- the extent to which vertical integration currently exists, noting in particular where either merger party currently operates as a customer or supplier to competitors in the relevant market/s.

Countervailing power

Customers and suppliers can also provide a constraint on the activity of a merged entity. To ascertain the degree of countervailing power in the relevant market/s, the ACCC will need to know:

- the relative strength of bargaining power possessed by customers of the products in the identified market/s
- to what extent it is possible for customers to bypass the merger parties by either importing or producing the product or service themselves, vertically integrating, or using an alternative supplier
- the ability of customers to identify and switch to alternative suppliers.

Prices and profit margins

The ability of a merged entity to significantly and sustainably raise prices and/or profit margins is an indication of a reduction of competition in the relevant market/s. To determine the extent to which merger parties may be able to increase prices or profit margins, the ACCC will require the following information:

- details of recent and current levels of pricing in the relevant market/s including the use of rebates and discounts
- details of supply costs of goods and services supplied by the merger parties including manufacturing, marketing and distribution costs in the relevant market/s
- a description of any competitive constraints that would be likely to prevent the merger parties from significantly and sustainably increasing the prices paid by their customers, or lower the prices paid to their suppliers, post-acquisition in the relevant market/s
- a description of the likely affect of the acquisition on the profit margins of the merger parties post-acquisition and the expected cause of any change.

Other factors

While the above addresses the merger factors identified in subs. 50(3) of the Competition and Consumer Act, this is a non-exhaustive list. Accordingly, the ACCC will examine any other information the merger parties consider to be relevant. Other factors may include the extent to which the market/s is characterised by conditions conducive to coordinated conduct and the extent to which any efficiency enhancing aspect of a merger may impact on the competitiveness of the market/s.

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Australian
Competition &
Consumer
Commission

Merger review process guidelines

Addendum

May 2011

Foreword

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

Since its initial publication, the process guidelines have been updated in order to reflect the renaming of the *Trade Practices Act 1974* as the *Competition and Consumer Act 2010* (the **Act**) on 1 January 2011 and to reflect updated contact information for the Mergers and Acquisitions Group.

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

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

The ACCC is also currently considering further refinements to the process guidelines. Once this is completed, a revised version of the process guidelines will be published. The ACCC anticipates releasing the revised process guidelines later this year.

Addendum to the Merger review process guidelines – May 2011

Information requirements

< After paragraph 4.99, the terms on which the ACCC accepts confidential information will be clarified with the following addition:

The ACCC will accept confidential information on the following terms:

- that there is no restriction on the internal use, including future use, that the ACCC may make of the information consistent with its statutory functions
- the confidential information may be disclosed to the ACCC's external advisors and consultants on the condition that each 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 otherwise in accordance with section 155AAA of the Act.

Public Competition Assessments

< In paragraph 4.87 replace the words “within two weeks of a decision by the ACCC”; and in paragraph 4.125 replace the words: “within two weeks of it making the decision” with:

as soon as possible after making the decision.

1999 Merger Guidelines

< References to the 1999 Merger Guidelines in the Glossary and at paragraphs 1.6; 1.7; 3.7; 3.9; 4.95, 4.96 and in the first paragraph of Appendix A will be deleted and replaced with a reference to:

- the 2008 merger guidelines.

< In paragraph 3.7, the words: “see, in particular chapter 5” will be deleted.

< FN 2 will be deleted and replaced with:

The 2008 merger guidelines are available on the ACCC's website at www.accc.gov.au

< In paragraph 4.77, the following sentence (and FN11) will be deleted:

The 1999 merger guidelines discuss in detail the nature and purpose of s. 87B undertakings and the ACCC's approach to accepting them for mergers.

< and replaced with:

The 2008 merger guidelines, at Appendix 3, provide further discussion on the nature and purpose of section 87B undertakings; the general principles behind the ACCC's approach; the types of undertakings and enforcement of undertakings.

Financial Sector Act

< In paragraph 4.11, the *Financial Sector (Transfers of Business Act) 1999* (Cwlth) will be replaced with:

Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cwlth)