



# Merger process guidelines

27 March 2025

**Draft for public consultation**

## **Acknowledgement of country**

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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# Contents

Glossary.....	vi
1. Overview.....	2
Key features of the merger control regime .....	3
2. Acquisitions required to be notified.....	7
Acquisitions that can fall within the scope of the merger control regime.....	8
Notification thresholds, specific targeted classes of acquisition and exemptions to notification .....	9
When an acquisition should be notified .....	10
Failure to notify.....	11
3. Notification waivers .....	12
How to apply for a waiver .....	12
The ACCC’s process for considering waivers .....	13
The ACCC’s decision on waiver applications.....	13
4. Pre-notification engagement.....	15
Benefits of pre-notification engagement.....	15
Commencing pre-notification engagement.....	16
What happens during pre-notification engagement .....	16
5. Notifying an acquisition .....	18
Who may notify? .....	18
How to lodge a notification .....	18
The notification forms.....	19
Fees .....	19
What happens after lodgement?.....	19
Effective notification date .....	19
Confidential assessments in limited circumstances.....	20
Other notification issues.....	21

	Multi-jurisdictional mergers .....	21
	Foreign investment proposals .....	22
	Goodwill protection provisions .....	22
	Cumulative effects.....	23
6.	Phase 1 .....	24
	Phase 1 timeline.....	24
	Information gathering .....	25
	From parties to the acquisition.....	25
	From third parties.....	26
	Engagement with the parties to the acquisition .....	26
	Commitments or undertakings offered in Phase 1.....	27
	Phase 1 determination - approving the notified acquisition .....	28
	Approval with conditions.....	28
	Decision to move to Phase 2.....	29
7.	Phase 2 .....	30
	Phase 2 timeline.....	31
	Information gathering .....	31
	Notice of Competition Concerns.....	32
	Responses to the Notice of Competition Concerns.....	33
	Commitments or undertakings offered in Phase 2.....	34
	Phase 2 determination .....	34
	Approval with conditions.....	35
	After a Phase 2 determination .....	35
8.	Public benefit application .....	37
	Lodging a public benefit application.....	38
	Effective application date .....	39
	Information gathering .....	39
	Public Benefit Assessment.....	40
	Responses to the Public Benefit Assessment.....	40
	Commitments or undertakings offered in Public Benefit Phase .....	41

Public benefit determination .....	41
Approval with conditions.....	42
After a public benefit determination.....	42
9. Timeline extensions and adjustments.....	43
Extensions to the timeline for remedies.....	44
Other extensions to the timeline .....	45
Request for extension by notifying party.....	45
Information not provided by specified date.....	45
Section 155 notice issued to a party to the acquisition.....	45
Other types of extensions .....	46
ACCC may cease or stop a review .....	47
Effect of stopping or ceasing a review.....	47
10. Providing complete, accurate and up to date information to the ACCC .....	48
Incomplete notifications or public benefit applications.....	51
Notifications.....	51
Public benefit applications.....	51
False or misleading information .....	52
Providing additional information.....	53
Telling the ACCC about material changes of fact.....	53
11. Public and confidential information.....	55
The Acquisitions Register.....	55
Content of the Acquisitions Register.....	55
Confidential information.....	56
12. Review of ACCC decisions and determinations.....	57
Tribunal review of ACCC determinations .....	57
Review of ACCC process-related decisions .....	58
Internal review of a decision by an ACCC senior executive.....	59
Tribunal review of ACCC process-related decisions .....	60
Judicial review.....	60
Judicial review of ACCC decisions or determinations.....	60

Review of Tribunal determinations.....	60
13. Acquisitions below the thresholds.....	61
Voluntary notification of acquisitions.....	61

# Glossary

<b>Term</b>	<b>Meaning</b>
ACCC	Australian Competition and Consumer Commission
Acquisition	Acquisition has the meaning given in Part IVA of the Act, which includes an acquisition of shares or assets. In these guidelines, the term acquisition is used interchangeably with 'merger'.
Acquisitions Register	The section of the ACCC's website that has information about notified acquisitions. The Acquisitions Register is available at: <a href="#">[link to be inserted, when available]</a> .
Act	<i>Competition and Consumer Act 2010</i> (Cth)
Business Day	A Business Day has the meaning given in section 51ABK of the Act. A day that is not: a Saturday, a Sunday, a public holiday in the Australian Capital Territory, or a day occurring between 23 December in any year and the following 10 January (inclusive of those days).
Commitment or undertaking	A party to an acquisition may offer a commitment or undertaking to the ACCC. Typically, the commitment or undertaking will be seeking to address any competition concerns raised by an acquisition. These may also be referred to as 'remedies' in these guidelines.
Condition	An ACCC determination that an acquisition is approved may include one or more conditions. The ACCC may include conditions if it is satisfied that an acquisition could, in all the circumstances, have the effect of substantially lessening competition in a market.
Effective application date	This is the date a public benefit application is made in accordance with the requirements of section 51ABZP of the Act. To have an effective application date all the requirements, including payment of the applicable fee, must be met. The timeline runs from the effective application date.
Effective notification date	This is the date a notification is made in accordance with the requirements of section 51ABX of the Act. To have an effective notification date, all the requirements, including payment of the applicable fee, must be met. The timeline for the Phase 1 assessment runs from the effective notification date.
Mergers portal	The mergers portal provides a single online entry point for parties to an acquisition to lodge notifications, seek a waiver and request pre-notification engagement with the ACCC. It is important to the effective operation of the merger control regime including, for example, to capture important information that will be included on the Acquisitions Register and record the date notifications are received.
Notification waiver	A business can apply for a notification waiver. If a waiver is granted by the ACCC, the acquisition is not required to be notified.

Notice of Competition Concerns	The ACCC's preliminary assessment of whether an acquisition would be likely to substantially lessen competition in any market, and the grounds on which the ACCC makes the assessment, referring to the evidence or other material on which those grounds are based. It is usually issued 25 Business Days after the start of Phase 2.
Notified acquisition	An acquisition notified to the ACCC in accordance with section 51ABW of the Act.
Notifying party	The principal party or parties who lodge the notification. A notification can be lodged by a single principal party if there is only one, but if there is more than one principal party, it should be made jointly by all principal parties.
Parties	Refers to parties to a notified acquisition, as defined in section 51AB1. In most cases, parties are businesses.
Phase 1	Initial assessment period for a notified acquisition. The Phase 1 determination period is defined in section 51ABZI(4) of the Act and is 30 Business Days, subject to any extensions or other adjustments to the timeline. Before the end of Phase 1, the ACCC may determine that the acquisition may be put into effect, or, for acquisitions that could substantially lessen competition, the ACCC may decide that the notification will be subject to Phase 2 for further in-depth consideration of the competition issues.
Phase 2	More detailed assessment period following Phase 1, where the ACCC has decided that the notification will be subject to Phase 2 for a further in-depth consideration of the competition issues. The Phase 2 determination period is defined in section 51ABZI(5) of the Act and is 90 Business Days, subject to any extensions or other adjustments to the timeline. Before the end of Phase 2, the ACCC may determine that the acquisition may be put into effect (with or without conditions) or that it must not be put into effect.
Phase 2 Notice	Before the end of Phase 1, the ACCC may decide under section 51ABZJ of the Act that a notification is to be subject to Phase 2, if it is satisfied that the acquisition could, in all the circumstances, have the effect of substantially lessening competition in a market. If the ACCC makes that decision, it is required to give the notifying party a written notice. Under section 51ABZJ(3) of the Act, the Phase 2 Notice must include an explanation of the theory or theories of harm that form the basis for the ACCC's competition concerns and the matters the ACCC intends to investigate in Phase 2.
Pre-notification engagement	Engagement that businesses may have with the ACCC before notifying an acquisition. For example, businesses may want to explain their acquisition and proactively raise issues that are relevant to the ACCC's assessment. The ACCC can also identify and discuss the possible areas of focus and the information and data which may be relevant.
Principal party	The person (or persons) acquiring, for example, shares or assets (see section 51AB1(1)(a) of the Act). The principal party must lodge a notification, and may then be referred to as the notifying party (see section 51ABW(3) of the Act).



Public benefit application	Notifying parties may seek ACCC approval of an acquisition on public benefit grounds, if the ACCC has made a determination either that an acquisition must not be put into effect (at the end of Phase 2) or that it may be put into effect with conditions (in Phase 1 or 2).
Public Benefit Assessment	The ACCC's preliminary assessment of whether an acquisition would be likely to result in a net public benefit, and the grounds on which the ACCC makes that assessment. It is usually issued within 20 Business Days after the start of the public benefit phase.
Public Benefit Phase	Assessment period to consider whether the acquisition would be likely to result in a net public benefit. The determination period for the Public Benefit Phase is defined in section 51ABZZ(2) and is 50 Business Days, subject to any extensions or other adjustments to the timeline. Before the end of the Public Benefit Phase, the ACCC may determine that the acquisition would be of public benefit (with or without conditions) and therefore may be put into effect, or not grant the public benefit application applied for.
Section 87B	The section of the Act that empowers the ACCC to accept court enforceable undertakings.
Section 155	The section of the Act that empowers the ACCC in certain circumstances to require a person to provide information, documents and/or give evidence under oath or affirmation.
Third party	A third party refers to a party that has an interest in an acquisition that is not a party to the acquisition. It includes competitors, customers, suppliers and other parties that have an interest in the acquisition.
Tribunal	Australian Competition Tribunal

## **Draft merger process guidelines**

These draft merger process guidelines explain the ACCC's usual processes when it receives and assesses a notification of an acquisition. It also sets out how and when businesses, advisers and other stakeholders may engage in those processes, including pre-notification engagement.

The ACCC intends to apply these guidelines flexibly in its assessment of acquisitions.

These guidelines should be read together with the Act. These guidelines do not override the Act.

There are issues highlighted in these draft guidelines that the ACCC is giving ongoing consideration to. It is expected that these guidelines will be updated and further refined, including as legislative instruments are finalised.

### **Your views**

We are seeking feedback from businesses, advisers, consumers and other stakeholders about these draft guidelines.

Submissions can be made by 28 April 2025.

The 6 month voluntary notification period, commencing on 1 July 2025, will provide a valuable opportunity for the ACCC to assess whether refinements to the processes are required, before these draft guidelines are finalised. Your ongoing feedback on such updates to these guidelines will also be invited.

### **How to make a submission**

Submissions can be made via the ACCC's website - [Consultation on merger regime changes](#).

# 1. Overview

- 1.1 From 1 January 2026, a mandatory merger control regime will operate in Australia. The Australian Competition and Consumer Commission (ACCC) will administer this regime, set out in the Competition and Consumer Act 2010 (Cth) (the Act).
- 1.2 Under the regime, businesses must notify the ACCC of acquisitions or mergers<sup>1</sup> that meet certain thresholds and other requirements.<sup>2</sup> Businesses must also not complete notified acquisitions without approval from the ACCC (or the Australian Competition Tribunal). The requirement to notify and not complete an acquisition without first receiving approval reflects the mandatory and suspensory nature of the merger control regime.
- 1.3 Merger control is designed to identify and prevent anti-competitive acquisitions, while allowing those that do not raise competition concerns to proceed as quickly as possible. While most acquisitions are unlikely to raise competition concerns, some can harm competition and result in increased prices, as well as reduced choice and quality for consumers and business.
- 1.4 These merger process guidelines are intended to assist businesses, advisers and other parties understand how to engage with Australia's merger control regime. It outlines the ACCC's usual processes when assessing acquisitions and the ACCC's expectations for how relevant stakeholders may engage in those processes. The ACCC will have regard to these guidelines in assessing acquisitions, although it intends to apply them in a flexible manner. The ACCC may deviate from its usual processes in circumstances where it is reasonable and appropriate to do so.
- 1.5 A key role of the ACCC in the merger control regime is to assess notified acquisitions and consider whether they would have the effect, or likely effect, of substantially lessening competition in any market. The ACCC will determine whether an acquisition may be put into effect (that is, approved), or must not be put into effect (that is, not approved). The merger assessment guidelines detail the approach the ACCC takes in assessing the competition effects from acquisitions.<sup>3</sup>
- 1.6 The ACCC must make its assessment within the statutory timeframes, thereby providing businesses with greater certainty and enabling efficient decision making.
- 1.7 Separate to the merger control regime, the ACCC can investigate acquisitions that fall below the mandatory notification thresholds. The ACCC may take action under section 50 of the Act in the Federal Court for anti-competitive acquisitions that are

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<sup>1</sup> For ease of reading, these guidelines use the word 'acquisition' (as defined for the purposes of Part IVA of the Act) which encompasses all acquisitions of shares of a company, assets of a person or business, units in unit trusts, interests in managed investment schemes and anything determined by a Treasury Minister. Further information is available in chapter 2 of these guidelines.

<sup>2</sup> Parties may voluntarily notify the ACCC of acquisitions under the regime from 1 July 2025.

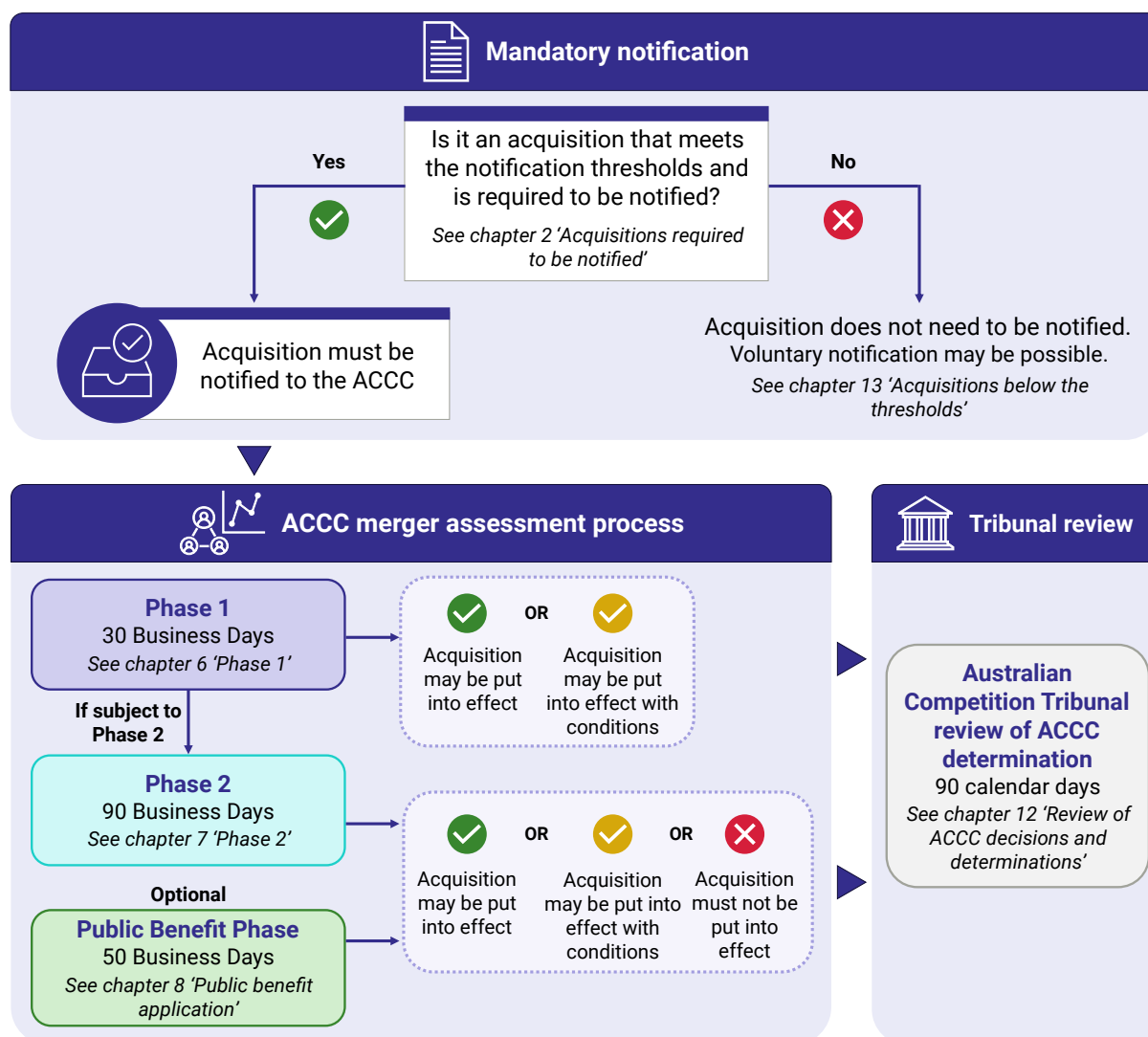
<sup>3</sup> The merger process guidelines should be read together with the merger assessment guidelines.

not notified under the merger control regime.<sup>4</sup> There is a short explanation of section 50 investigations in chapter 13, however the focus of these guidelines is on the merger control regime.

## Key features of the merger control regime

1.8 Figure 1 illustrates the key steps in the mandatory notification process.

**Figure 1: Key steps in the mandatory notification process**



<sup>4</sup> Section 50 of the Act prohibits acquisitions that would have the effect, or likely effect, of substantially lessening competition in any market.

- 1.9 Businesses must notify an acquisition if:
- it is an acquisition within the scope of the merger control regime<sup>5</sup>
  - the acquisition meets the notification thresholds
  - it does not fall into an exemption from the notification requirements.

These concepts are discussed in chapter 2.

- 1.10 In some circumstances, businesses may apply to the ACCC for a notification 'waiver'. If granted, the waiver removes the obligation to notify an acquisition. This is discussed further in chapter 3.
- 1.11 The ACCC encourages businesses to discuss their acquisition with us before formally lodging the notification. This is referred to as pre-notification engagement and it provides a valuable opportunity for businesses to talk to the ACCC about matters relating to their acquisition. For example, businesses can explain their acquisition and proactively raise issues that are likely to be relevant to the ACCC's assessment. The ACCC can identify and discuss the possible areas of focus and the information, and any data, which is likely to be relevant to the ACCC's assessment. It will also assist the ACCC prepare to assess your notification as efficiently and promptly as possible. Pre-notification engagement is discussed in chapter 4.
- 1.12 Once an acquisition has been notified to the ACCC, we will undertake a competition assessment and ultimately publish a written decision (referred to as a determination in the Act) to approve (with or without conditions) or not approve the acquisition.
- 1.13 The first stage of the ACCC's assessment is referred to as Phase 1 and is up to 30 Business Days, subject to timeline extensions or other adjustments.<sup>6</sup> We expect that most notified acquisitions will be approved in this initial phase. Phase 1 is discussed further in chapter 6.
- 1.14 Before the end of Phase 1, the ACCC may decide that the notified acquisition is to be subject to a more in-depth competition assessment. This is referred to as Phase 2, and is up to 90 additional Business Days, subject to timeline extensions or other adjustments.<sup>7</sup> Phase 2 is discussed in chapter 7.
- 1.15 Parties to the acquisition may apply for an assessment of the acquisition on net public benefit grounds in certain circumstances, including if the ACCC does not approve in Phase 2.<sup>8</sup> This is referred to as a Public Benefit Application. The Public Benefit Phase is up to 50 Business Days<sup>9</sup> and the process is discussed in chapter 8.

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<sup>5</sup> That is, an acquisition within the meaning of Part IVA of the Act.

<sup>6</sup> See section 51ABZI(4) of the Act: in circumstances where the ACCC extends the timeline, Phase 1 may be longer than 30 Business Days.

<sup>7</sup> See section 51ABZI(5) of the Act: as with Phase 1, in circumstances where the ACCC extends the timeline, Phase 2 may be longer than 90 Business Days.

<sup>8</sup> Or approves the acquisition with conditions in either Phase 1 or Phase 2.

<sup>9</sup> See section 51ABZZ(2) of the Act: Similar to Phase 1 and Phase 2, in circumstances where the ACCC extends the timeline, the Public Benefit Assessment period may be longer than 50 Business Days.

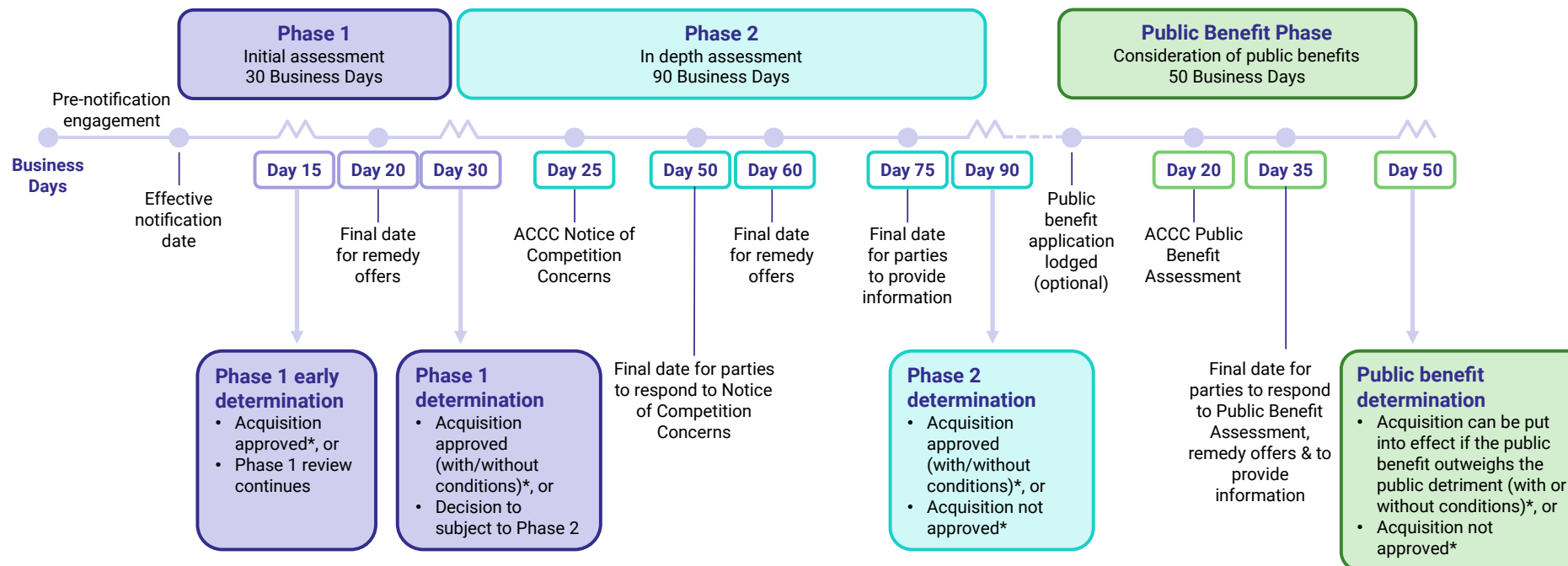
- 1.16 The Act allows for timeline extensions and other adjustments in limited circumstances, and sets out deadlines for parties to the acquisition and third parties to provide information to the ACCC. The circumstances in which timeline extensions and other adjustments may apply are discussed in chapters 9 and 10.
- 1.17 To provide transparency and predictability, details of notified acquisitions are published on the Acquisitions Register, with limited exceptions provided by the Act. ACCC determinations and reasons are also published. The Acquisitions Register and confidential information are discussed in chapter 11.
- 1.18 If the notifying party or a third party<sup>10</sup> is dissatisfied with an ACCC determination, they may apply to the Tribunal for a review of the ACCC's determination. The Tribunal review process is discussed in chapter 12.

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<sup>10</sup> Under section 100C(4) of the Act, third parties can only apply for review of an ACCC determination if they are allowed to do so by the Tribunal.

1.19 Figure 2 provides an overview of the key processes and timeframes for the ACCC's merger control regime.

**Figure 2: Overview of key timeframes and processes**



\*A person dissatisfied with an ACCC determination may apply to the Australian Competition Tribunal for review.

## 2. Acquisitions required to be notified

- 2.1 Businesses must notify certain acquisitions to the ACCC before they can be put into effect. This requirement is referred to in these guidelines as mandatory notification.
- 2.2 In order to assess whether an acquisition *must* be notified, a business will need to consider a number of matters, including:
- whether the acquisition is one that can fall within the scope of the merger control regime<sup>11</sup>
  - whether the acquisition would meet the monetary thresholds or fall within a specific targeted class of acquisition<sup>12</sup>
  - whether any exemptions to mandatory notification apply.<sup>13</sup>
- 2.3 As shown in Figure 3, if a business determines that the acquisition can fall within the scope of the merger control regime, the relevant notification or other thresholds are met, and no exemption to notification applies, then the acquisition must be notified to the ACCC.
- 2.4 In certain circumstances, a business may apply to the ACCC for a notification waiver (see chapter 3).<sup>14</sup> If granted, a notification waiver removes the obligation to notify an acquisition.

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<sup>11</sup> That is, whether the acquisition is an acquisition within the meaning of Part IVA of the Act.

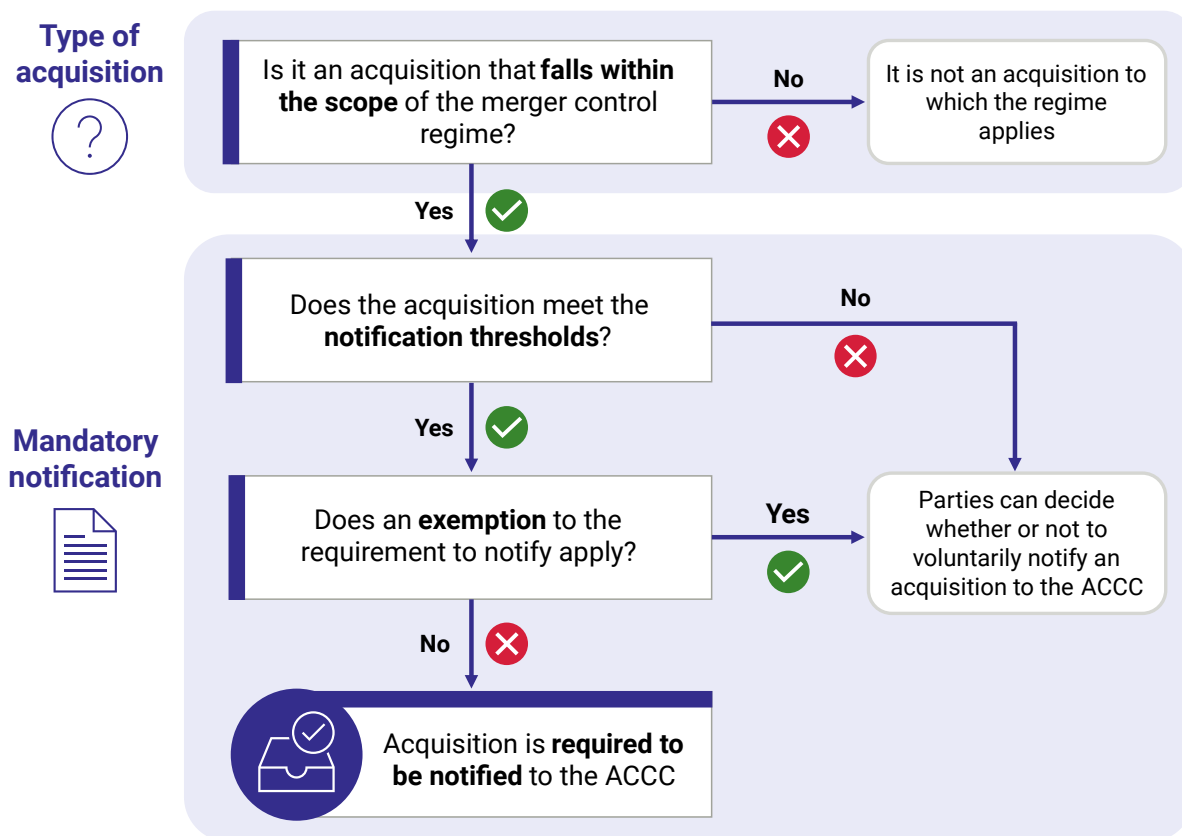
<sup>12</sup> See sections 51ABO, 51ABP and 51ABQ of the Act.

<sup>13</sup> Certain acquisitions are not required to be notified. See for example sections 51ABS and 51ABT of the Act.

<sup>14</sup> From 1 January 2026.



**Figure 3: When acquisitions are required to be notified to the ACCC**



## Acquisitions that can fall within the scope of the merger control regime

- 2.5 In general, acquisitions that can fall within the scope of the merger control regime in the Act are acquisitions of shares or assets.<sup>15</sup>
- 2.6 The box below provides further detail on the types of acquisitions outlined in the Act that either fall within the scope of the merger control regime or are expressly excluded. If an acquisition falling within the scope meets the notification thresholds, it will need to be notified.<sup>16</sup> Although, there are some exemptions which means the acquisition is not required to be notified, even if it meets the notification thresholds. These issues are discussed further in paragraphs 2.7 - 2.12 below.<sup>17</sup>

<sup>15</sup> In addition, other acquisitions that can fall within the scope of the merger control regime are acquisitions determined by a Treasury Minister in a legislative instrument.

<sup>16</sup> See Division 1 of Part IVA of the Act, in particular section 51ABB. See also section 150C and Schedule 1 of the Act.

<sup>17</sup> Acquisitions that fall within the scope of the regime may be voluntarily notified, even where they are not required to be notified.

## Acquisitions that may be within the scope of the merger control regime under the Act\*

### Assets

Acquisitions of assets within the scope of the merger control regime include legal or equitable interests in tangible or intangible assets, property, land, goodwill, intellectual property rights or partial interests in assets.<sup>18</sup>

Acquisitions of assets in the ordinary course of business are generally not subject to the merger control regime, other than where they involve interests in land or patents.<sup>19</sup>

### Shares

A change in joint ownership of shares in a company (for example, if a joint shareholder becomes the sole shareholder) is an acquisition within the scope of the merger control regime.<sup>20</sup>

### Unit trusts and managed investment schemes

Acquisitions of units in a unit trust or of an interest in a managed investment scheme are treated as if they were an acquisition of shares in a body corporate and therefore fall within the scope of the merger control regime. That is, the trust or scheme are treated as a body corporate, and the units in the trust or interests in the scheme are treated as shares in the capital of the body corporate.<sup>21</sup>

### Internal restructures and reorganisations

Internal restructures and reorganisations are not considered acquisitions within the meaning of Part IVA of the Act.<sup>22</sup>

\* whether acquisitions falling within the scope of the merger control regime must be notified is discussed immediately below.

## Notification thresholds, specific targeted classes of acquisition and exemptions to notification

- 2.7 Whether acquisitions falling within the scope of the regime *must* be notified to the ACCC depends on whether they meet the monetary thresholds or fall within a specific targeted class of acquisition, and whether any exemptions apply. In circumstances where there is an acquisition that falls within the scope of the regime and the monetary thresholds are *not* met and/or an exemption applies, this acquisition will not be subject to the mandatory notification requirements.

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<sup>18</sup> Section 51ABN of the Act. In some cases, certain transactions may also be deemed to be an acquisition of assets for the purposes of the merger control regime, see for example section 68A and other provisions of the *Radiocommunications Act 1992* (Cth).

<sup>19</sup> Section 4(4)(b) of the Act.

<sup>20</sup> Section 51ABM of the Act.

<sup>21</sup> Section 51ABC of the Act.

<sup>22</sup> Section 51ABD of the Act.

- 2.8 Monetary thresholds will be set by the Minister in a legislative instrument.<sup>23</sup> Thresholds will typically reflect turnover and transaction value.
- 2.9 In addition, the Minister may determine specific targeted classes of acquisitions that must be notified, regardless of whether they meet the monetary notification thresholds.<sup>24</sup>
- 2.10 There are some limited exemptions to the requirement to notify. That is, there are circumstances where an acquisition will fall within the scope of the merger control regime and will meet the relevant monetary thresholds but will not need to be notified to the ACCC. These include, for example, certain acquisitions that do not result in control or meet other criteria.<sup>25</sup>
- 2.11 It should be noted that the Government has announced proposed exemptions for specific kinds of acquisitions, such as certain land acquisitions. Details about what will be included in the exemptions will be provided in a legislative instrument to be issued by a Treasury Minister.
- 2.12 Like the monetary thresholds, targeted thresholds and the exemptions to notification are made by legislative instrument and may change over time, they are not reproduced in these guidelines.

The ACCC intends to update these guidelines to include links to the thresholds, targeted classes and exemptions once they are finalised.

## When an acquisition should be notified

- 2.13 If you are a party to an acquisition that is required to be notified, you must lodge your notification before the acquisition is put into effect and wait for the ACCC's determination.<sup>26</sup>
- 2.14 In considering whether an acquisition has been put into effect will depend on the circumstances of each matter, however, it does not require legal ownership to have been transferred. Examples of putting an acquisition into effect may include terminating the employment of key employees, closing key facilities or integrating IT systems.<sup>27</sup> If a business enters an acquisition agreement, which is not binding until one or more conditions are met, the business is taken not to acquire the relevant shares or assets under the agreement unless and until it becomes binding.<sup>28</sup>

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<sup>23</sup> Under section 51ABP of the Act, monetary thresholds can be determined by the Minister by legislative instrument.

<sup>24</sup> Section 51ABQ of the Act.

<sup>25</sup> For example, section 51ABS of the Act applies to certain acquisitions of shares that do not result in control, although the scope of this exemption can be altered through legislative instrument (see s 51ABS(5)-(7)). See also section 51ABT which exempts certain minority acquisitions of shares in listed companies and registered schemes, and large unlisted companies (as defined in s 51ABJ).

<sup>26</sup> See for example sections 45AW, 45AY of the Act. The ACCC may investigate and commence enforcement action in relation to acquisitions that are not notified.

<sup>27</sup> [Explanatory Memorandum](#) paragraph 3.73.

<sup>28</sup> Section 51ABL of the Act.

Examples of such conditions precedent may include obtaining regulatory approvals or financing.<sup>29</sup>

- 2.15 A proposal that is merely speculative cannot be notified under the ACCC's merger control regime. You can only lodge a notification of an acquisition if at least one of the following applies:<sup>30</sup>
- a contract, arrangement or understanding that has been entered into
  - the proposed contract, arrangement or understanding has not been entered into, but all of the proposed parties intend to enter into it
  - the acquisition is to be a takeover bid and meets certain conditions,<sup>31</sup> or
  - the acquisition is to take place via a scheme of arrangement under Part 5.1 of the *Corporations Act 2001* (Cth) and the arrangement has been publicly proposed.
- 2.16 Whether an acquisition meets these requirements is fact specific. Businesses may commence pre-notification engagement with the ACCC (discussed in chapter 4) before their acquisition meets these requirements.

## Failure to notify

- 2.17 If you do not lodge a notification for an acquisition that is required to be notified, the acquisition will be stayed – that is, it cannot be put into effect.<sup>32</sup> If an acquisition is put into effect while stayed, this is a contravention of the Act and significant penalties may apply, including that the acquisition is automatically void.<sup>33</sup>
- 2.18 If there is doubt about whether an acquisition needs to be notified, parties to an acquisition may be able to request a notification waiver in certain circumstances (see chapter 3) or notify the ACCC voluntarily (see chapter 13).
- 2.19 The ACCC will take an active monitoring and surveillance role to ensure compliance with the mandatory requirements.

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<sup>29</sup> [Explanatory Memorandum](#) paragraph 2.27.

<sup>30</sup> Section 51ABX(1)(d) of the Act.

<sup>31</sup> Sections 51ABX(1)(d)(iii), 51ABX(4) of the Act

<sup>32</sup> Section 51ABE of the Act.

<sup>33</sup> Sections 45AY and 45AZA of the Act.

## 3. Notification waivers

From 1 January 2026, parties to an acquisition can apply to the ACCC for a notification waiver. If the ACCC grants a waiver in relation to an acquisition, it removes the obligation to notify. The ACCC is continuing to consider its approach and will provide further guidance in relation to waivers in due course.

- 3.1 A business may apply for a notification waiver in respect of an acquisition. If the ACCC makes a determination to grant a waiver, the acquisition is not required to be notified. However, the acquisition remains subject to section 50 of the Act.
- 3.2 Waiver applications are voluntary, and the ACCC does not envisage that businesses will routinely apply for waivers as a precursor to progressing to notification. Rather, waivers are intended to provide a flexible mechanism for businesses to seek relief from the notification requirement where acquisitions should not need to be notified including because, on the information provided, they are unlikely to meet the monetary thresholds or do not raise competition risks that need further investigation.

### How to apply for a waiver

- 3.3 A waiver application must be made in writing and be accompanied by any prescribed fee determined by the Minister.<sup>34</sup>
- 3.4 Waiver applications and the payment of the fee, as applicable, should be done via the mergers portal on the ACCC's website [[live link to be inserted, when available](#)].
- 3.5 While businesses may elect to contact the ACCC prior to applying for a waiver, the ACCC recognises that in many cases, it will be appropriate to lodge a waiver application without prior engagement. Should the ACCC determine not to grant a waiver, businesses will have the opportunity to engage with the ACCC prior to lodging any notification.
- 3.6 The ACCC's updated guidance will contain further detail about the information that should accompany waiver applications. The information requirements will reflect the ACCC's intention that the waiver process be an efficient means of considering straightforward matters quickly and with a low burden on business.

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<sup>34</sup> Section 51ABU(1)-(4) of the Act.

## The ACCC's process for considering waivers

- 3.7 The waiver process is intended to be an efficient, streamlined process with clear expectations on timing, while also providing transparency to third parties about waiver applications that are under consideration.
- 3.8 Details of each waiver application will be placed on the Acquisitions Register prior to the ACCC making a determination. The ACCC will not make confidential determinations about whether to grant waivers.
- 3.9 The ACCC expects in the vast majority of cases to make waiver determinations within 20 Business Days of receiving an application. However, the ACCC will not make a determination until an application has been on the Acquisitions Register for 10 Business Days. This will provide an opportunity for third parties who wish to make submissions about the potential waiver to do so.
- 3.10 The waiver process is not intended as an alternative to notification where competition issues may warrant further assessment.

## The ACCC's decision on waiver applications

- 3.11 If a notification waiver application is made, the ACCC may determine:<sup>35</sup>
- that the acquisition is not required to be notified, or
  - not to grant the waiver that was applied for.
- 3.12 In making its determination the ACCC must have regard to:
- the object of the Act, that is, to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection
  - the interests of consumers
  - the likelihood that, if the acquisition were put into effect, the notification thresholds would apply
  - the likelihood that the acquisition would, if put into effect, have the effect, or be likely to have the effect, of substantially lessening competition in any market.<sup>36</sup>

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<sup>35</sup> Section 51ABV(1) of the Act.

<sup>36</sup> Section 51ABV(2)(b) of the Act.

3.13 The ACCC will give the Parties to the acquisition written notice of its determination and an explanation of why it made it.<sup>37</sup> The ACCC will publish its determination and explanation on the Acquisitions Register.

In these draft guidelines, the ACCC has set out its current position on how it will implement the notification waiver power in the Act, from 1 January 2026. We envisage making further updates to the draft guidelines based on experience with the legislative framework, including if the Minister makes legislative instruments relating to notification waivers.

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<sup>37</sup> Section 51ABV(5) of the Act.

## 4. Pre-notification engagement

- 4.1 While it is not a legal requirement, the ACCC encourages parties to a notifiable acquisition to engage with it before formally lodging a notification (this is referred to as pre-notification engagement). Businesses can commence pre-notification engagement by lodging a request via the mergers portal [[live link to be inserted, when available](#)]. Upon receiving a request, the ACCC will engage promptly and meaningfully with businesses.
- 4.2 Pre-notification engagement provides a valuable opportunity for businesses to engage with the ACCC about matters relating to their acquisition. For example, businesses can explain their acquisition and proactively raise issues that are likely to be relevant to the ACCC's assessment. The ACCC can also identify and discuss the possible areas of focus and the information, and any data, which is likely to be relevant to the ACCC's assessment. It will assist the ACCC to prepare to assess a notification as efficiently and promptly as possible.
- 4.3 When to contact the ACCC, the information to provide, and how long pre-notification engagement will take depends on the likely complexity of the acquisition. Following initial contact with the ACCC about the acquisition, pre-notification engagement could take a number of different forms – it could involve sending a draft notification followed by a single brief discussion with the ACCC, or it could involve a series of more detailed discussions about information requirements and possible areas of focus. The nature and extent of pre-notification engagement will differ for each acquisition.
- 4.4 Pre-notification engagement is generally confidential, and businesses may decide to contact the ACCC regardless of whether the acquisition has been publicly announced.<sup>38</sup>

### Benefits of pre-notification engagement

- 4.5 A benefit of early and constructive pre-notification engagement is that businesses can proactively raise issues that are likely to be relevant to the ACCC's assessment, and the ACCC can discuss the information, and any data, which is likely to be relevant to its assessment. Businesses are then able to collate the information and provide it upfront, which helps to ensure the notification can be assessed as quickly as possible within the assessment timelines.
- 4.6 Pre-notification engagement can also reduce the likelihood that the ACCC will need to issue an extensive information request shortly after the assessment timeline commences or make a decision that a notification is materially incomplete.<sup>39</sup> An ACCC decision that a notification is materially incomplete impacts the assessment timelines. Further information on this is in chapter 10.

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<sup>38</sup> In certain circumstances, business may consent to early engagement by the ACCC with third parties.

<sup>39</sup> Where the ACCC decides that a notification is materially incomplete, there is no effective notification date, which means the ACCC cannot continue to consider the notification and the parties to the acquisition will need to lodge a new notification and pay a new fee. See chapter 5 for further information.



## Commencing pre-notification engagement

- 4.7 Businesses can commence pre-notification engagement with the ACCC by completing a pre-notification engagement request in the mergers portal [[live link to be inserted, when available](#)]. To assist pre-notification discussions, businesses can provide an early draft of the notification and other relevant information and documents.
- 4.8 The ACCC encourages businesses to initiate pre-notification engagement at least two weeks before the proposed date for formal notification.
- 4.9 For acquisitions where competition concerns may be identified, it may be appropriate, and in the interest of the parties to the acquisition, to contact the ACCC much earlier. For example, this may be where the acquisition:
- involves concentrated markets
  - is part of a global transaction subject to assessment by other competition agencies overseas, or
  - raises potential competition concerns that might be addressed through a commitment or undertaking.

## What happens during pre-notification engagement

- 4.10 Following receipt of a pre-notification engagement request, a member of the ACCC team will aim to contact you as soon as possible, typically within 5 Business Days. During this period, the ACCC team will start to consider a range of factors relevant to the acquisition, including the complexity of the competition issues, the ACCC's existing level of knowledge about the industry or market/s, and the type of information (including data) and documents that may be relevant to the ACCC's assessment.
- 4.11 In some cases, it may be sufficient for the parties to the acquisition to provide basic information and simply let the ACCC know the approximate timing for lodgement.
- 4.12 In other cases, it may be more useful to start pre-notification engagement after a draft notification has been provided. This facilitates a more meaningful discussion about the acquisition and may put the ACCC team in a better position to give guidance on any issues. Depending on the complexity of the acquisition, it may be appropriate for there to be subsequent meetings or engagement with the ACCC team, prior to the notification being formally lodged.
- 4.13 During pre-notification discussions with the ACCC, parties to the acquisition may be able to:
- provide further context and background to the acquisition and the operation of the relevant market/s

- clarify the information and evidence (including data) the ACCC is likely to require when undertaking its assessment
- raise queries regarding how to respond to questions in the notification form, for example where the question is difficult to answer in the context of the proposed acquisition, or to seek guidance for when the simpler or longer notification form may be appropriate
- commence discussions about the competition issues that may be raised by the proposed acquisition, including any potential commitments or undertakings they might consider offering.

4.14 The ACCC may still request further information once a notification is formally lodged, including information not identified in pre-notification engagement – for example, information may be required to test issues raised in third party submissions.

# 5. Notifying an acquisition

## Who may notify?

- 5.1 Notifications are lodged by the 'principal party' to the acquisition, which is generally the business acquiring the shares or assets.<sup>40</sup>
- 5.2 A notification can be lodged by a single acquirer if there is only one, but if there is more than one acquirer, it should be made jointly by all acquirers. The legislation refers to each of them as a 'notifying party'.<sup>41</sup>
- 5.3 Where a proposed acquisition includes a proposal to undertake another related acquisition or acquisitions, the notifying parties may be able to lodge a single combined notification for the relevant acquisitions. This can facilitate streamlined consideration of acquisitions that are related to each other, as the regime will apply to those acquisitions as if they formed a single acquisition.<sup>42</sup>
- 5.4 Notifying parties should consider whether they satisfy all the relevant legislative criteria (see chapter 2) before lodging a notification.

## How to lodge a notification

- 5.5 Notifications must be made in writing and accompanied by the relevant fee (as applicable).<sup>43</sup>
- 5.6 Notifications and the payment of the fee should be done via the mergers portal on the ACCC's website [[live link to be inserted, when available](#)].

The ACCC's mergers portal is currently under development and guidance materials to assist using the portal will be provided in due course.

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<sup>40</sup> Sections 51AB1 and 51ABX(1)(c) of the Act.

<sup>41</sup> Section 51ABW(3) of the Act. References to a 'notifying party' in these guidelines should be taken to also refer to multiple notifying parties where relevant.

<sup>42</sup> Section 51ABX(5) of the Act. The acquisition provisions apply in relation to such a notification as if those acquisitions together constituted a single acquisition, as if each party to those acquisitions were a party to that single acquisition, and as if each principal party to those acquisitions were a principal party to that single acquisition.

<sup>43</sup> Sections 51ABX(1)(a) and 51ABX(1)(b) of the Act.

## The notification forms

The Minister may determine by legislative instrument the notification forms and requirements for information and documents to be provided to the ACCC.

For the majority of notifications, the ACCC envisages that businesses will be able to complete a short form providing key information upfront. For acquisitions which are more likely to raise significant competition concerns a longer notification form will be required. The ACCC will provide guidance for when the simpler or longer form may be appropriate.

- 5.7 While the final design of the notification form and fees will ultimately be set by a Treasury Minister in a legislative instrument, it is expected that the form will require information about:
- business activities of the parties to the acquisition,
  - financial information, such as turnover, and
  - relevant market, and details such as competitors and customers.

## Fees

- 5.8 Notifications must be accompanied by the relevant fee (as specified by the Minister in a legislative instrument).<sup>44</sup>
- 5.9 The ACCC requests that the payment of fees (as specified) is made via the mergers portal [[live link to be inserted, when available](#)].

Further information about the process for paying the fees will be available on the ACCC's website in due course.

## What happens after lodgement?

### Effective notification date

- 5.10 Once the notification form and the relevant fee is paid, the ACCC will provide the notifying party with written confirmation that the notification was received and the effective notification date.<sup>45</sup>
- 5.11 The effective notification date is the date the notification is made, meaning that it has been provided to the ACCC in accordance with the requirements set out in the Act.<sup>46</sup> The relevant fee must be paid before there can be an effective notification date.<sup>47</sup>

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<sup>44</sup> Section 51ABX(1)(b) of the Act.

<sup>45</sup> Section 51ABW(5) of the Act.

<sup>46</sup> Section 51ABX of the Act.

<sup>47</sup> Section 51ABX(3) of the Act.

- 5.12 The effective notification date is the starting point to calculate the assessment timeline for the ACCC to make its determination. The available assessment period for Phase 1 starts on the effective notification date and generally ends 30 Business Days later, although decisions to approve a notified acquisition can be made as early as 15 Business Days after the effective notification date.
- 5.13 If the effective notification date falls on a weekend, a public holiday<sup>48</sup> or a day between 23 December and the following 10 January, the first day in the assessment timeline is the next Business Day.<sup>49</sup>

### Example 1

If a notification is lodged on a Saturday, the effective notification date is the Saturday. The first Business Day in Phase 1 is the following Monday.<sup>50</sup>

If a notification is lodged on 23 December, the effective notification date is 23 December. The first Business Day in the (Phase 1) 30 Business Day determination period is 11 January of the following year.<sup>51</sup>

- 5.14 Further information about the assessment timeline in Phase 1 is set out in chapter 6 and the Phase 2 timeline is set out in chapter 7.
- 5.15 Within 1 Business Day after the effective notification date the ACCC will publish details of the notification on the ACCC's Acquisitions Register (with limited exceptions, discussed below). The Acquisition Register is discussed in chapter 11.

## Confidential assessments in limited circumstances

- 5.16 Generally, the ACCC will publish details about a notification on the Acquisitions Register within 1 Business Day of the effective notification date. However, in order to avoid undue disruption to capital markets or the financial sector, there are 2 circumstances where notifications will not be published on the Acquisitions Register in that time frame and the ACCC may assess them confidentially. These are:
- certain surprise hostile takeovers<sup>52</sup>
  - certain voluntary transfers of authorised deposit-taking institutions and other regulated entities under the Financial Sector (Transfer and Restructure) Act 1999 (Cth) (FSTR Act).<sup>53</sup>

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<sup>48</sup> In the Australian Capital Territory.

<sup>49</sup> This recognises the difficulty consulting with the notifying parties and third parties during this period.

<sup>50</sup> As long as it is not a public holiday in the Australian Capital Territory, or a day occurring between 23 December in any year and the following 10 January.

<sup>51</sup> Except when 11 January falls on a weekend.

<sup>52</sup> Section 51ABZZL of the Act.

<sup>53</sup> Section 51ABZZQ of the Act.

### Surprise hostile takeovers – what the Act says

For a surprise hostile takeover bid, the notifying party must make a written request for confidentiality at the time the notification is lodged with the ACCC.<sup>54</sup>

The request for a confidential review must meet certain requirements, including that the intended bid is a full bid (that is, a bid for all the voting shares in the bid class) and either unconditional or subject only to certain prescribed conditions.<sup>55</sup>

In most cases, the ACCC will not include information in relation to a notification that is a surprise hostile takeover on the Acquisitions Register before 17 Business Days after the effective notification date.<sup>56</sup>

- 5.17 Businesses intending to request a confidential assessment of a surprise hostile takeover bid are encouraged to engage with the ACCC prior to formally notifying. The ACCC understands the sensitivities around surprise hostile takeovers and intends to engage constructively with businesses about timing.
- 5.18 Authorised deposit-taking institutions and life insurance companies are also encouraged to engage with the ACCC and the Australian Prudential Regulation Authority (**APRA**) prior to formally notifying if they are contemplating a voluntary transfer of business that may be eligible for a confidential assessment.
- 5.19 Apart from the situations identified above, the ACCC is unable to accommodate other requests for a confidential assessment of a notified acquisition.

## Other notification issues

### Multi-jurisdictional mergers

- 5.20 Some acquisitions may be part of a global transaction where multiple competition agencies in overseas jurisdictions are also reviewing, or are expected to review, the same acquisition. Parties to an acquisition should inform the ACCC if a notified acquisition is subject to review in other jurisdictions.
- 5.21 Where appropriate, the ACCC may consult with overseas agencies in relation to the notified acquisition. Businesses may use the pre-notification engagement period to discuss aligning the timing for the ACCC's assessment with overseas agencies where appropriate.
- 5.22 International cooperation amongst reviewing agencies can benefit businesses particularly where the acquisition raises similar competition issues, including by:
- assisting in the consideration of remedies that are consistent across jurisdictions where appropriate, to reduce complexity for businesses and affected third parties in the implementation of any remedies

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<sup>54</sup> Section 51ABZZL(1) of the Act.

<sup>55</sup> Section 51ABZZL(2) of the Act.

<sup>56</sup> Section 51ABZZL(3)-(6) of the Act.

- increasing investigative efficiency and ensuring accurate and up-to-date information is available.

## Confidentiality waivers in multi-jurisdictional acquisitions

- 5.23 In some cases, the ACCC may be able to have discussions about a notified acquisition with other agencies based on publicly available information. However, notifying parties will often be asked to provide a bilateral confidentiality waiver which enables the ACCC to receive and disclose their protected information, to facilitate the exchange of confidential information with overseas agencies.
- 5.24 The confidentiality waivers provided by the parties should also enable other agencies to disclose information with the ACCC. These must also be in an acceptable form, and should not seek to limit the ACCC's ability to use information received during merger reviews to perform its other statutory functions or duties.

## Foreign investment proposals

- 5.25 Some acquisitions involving foreign investors are referred to the ACCC by the Treasury for screening under the *Foreign Acquisitions and Takeovers Act 1975*, as competition is a factor relevant to the national interest test in Australia's foreign investment framework.
- 5.26 The Treasury may refer an acquisition to the ACCC, even if the acquisition is not required to be notified under the ACCC's merger control regime. Upon referral, the ACCC will provide a view on the competition effects to the Treasury.
- 5.27 As the foreign investment framework is independent of the ACCC's merger control regime, a business may be required to notify the ACCC directly if the acquisition is notifiable and meets the notification thresholds.
- 5.28 Businesses can decide which application to submit first (that is, whether to notify their acquisition to the ACCC and then submit a foreign investment application, or vice versa).

The ACCC is currently working with the Treasury on the interaction between the foreign investment framework and ACCC's merger regime. We will provide further guidance on how the two regimes operate together in due course.

## Goodwill protection provisions

- 5.29 The Act provides a number of what are, in effect, statutory exceptions from the application of certain provisions of Part IV of the Act, including the cartel provisions. These include an exception that provides protection to parties to business sale contracts to the extent that the contract includes a provision that is solely for the

protection of the purchaser in respect of the goodwill of a business (a goodwill protection provision).<sup>57</sup>

- 5.30 The ACCC may in certain circumstances include in its determination of a notified acquisition, a declaration that this statutory exception does not apply to a goodwill protection provision.<sup>58</sup>
- 5.31 To facilitate the ACCC's consideration of this issue, notifying parties should provide appropriate details about any goodwill protection provisions at the time of lodging the notification. Further guidance on this issue will be provided in the separate forms guidance published by the ACCC.
- 5.32 If the ACCC does not make a declaration in respect of a goodwill provision this does not preclude the ACCC from commencing action for a potential breach of the anti-competitive conduct provisions in Part IV of the Act in relation to the relevant goodwill protection provision at a later stage.

## Cumulative effects

- 5.33 In assessing the effect on competition, particularly for those matters involving serial acquisitions, the ACCC may treat the effect of the acquisition as being the cumulative effect of the current acquisition and any prior acquisitions that:
- were put into effect in the past 3 years
  - involve any of the parties to the current acquisition
  - the targets of which are involved (directly or indirectly) in the supply or acquisition of the same goods or services or goods or services that are substitutable for, or otherwise competitive with, each other (disregarding any geographical factors or limitation).<sup>59</sup>
- 5.34 In order to assist the ACCC in assessing the cumulative effect of the current acquisition and any prior acquisitions, the ACCC will ask for information relating to these prior acquisitions, such as target name, acquirer name, shares or assets acquired, date the acquisition was put into effect, and turnover.

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<sup>57</sup> Section 51(2)(e) of the Act.

<sup>58</sup> Section 51ABZG of the Act.



# 6. Phase 1

6.1 The key steps in a typical Phase 1 assessment for a notified acquisition are set out in Figure 4. There may be some flexibility in the timing of the steps followed in a given assessment depending on the circumstances, and Figure 4 does not cover all steps that may arise within Phase 1.<sup>60</sup>

**Figure 4: Key steps in a typical Phase 1 assessment<sup>61</sup>**



## Phase 1 timeline

6.2 The Phase 1 period is up to 30 Business Days. This is subject to any extensions to the timeline,<sup>62</sup> or other circumstances that might adjust the timeline (see chapters 9 and 10 for further details).

6.3 The earliest the ACCC can approve an acquisition is 15 Business Days after the effective notification date.<sup>63</sup> This is to provide an opportunity for third parties to engage with the ACCC in relation to notified acquisitions on the public Acquisitions Register.

<sup>60</sup> Figure 4 does not include any adjustments that may be made to the Phase 1 timeline (see chapters 9 and 10 for further information on extensions and other adjustments to the timeline).

<sup>61</sup> The events captured in Figure 4 are subject to change if there are extensions or adjustments made to the timeline.

<sup>62</sup> Section 51ABZ(4) of the Act.

<sup>63</sup> Section 51ABZ(1) of the Act.

- 6.4 Before the end of Phase 1, the ACCC may do one of the following:<sup>64</sup>
- **Approve the acquisition:** The ACCC could determine that the acquisition may be put into effect, with or without conditions. This will conclude the ACCC's assessment.
  - **Issue a Phase 2 Notice:** For acquisitions that *could* substantially lessen competition, the ACCC may decide that the notification will be subject to a further in-depth assessment in a Phase 2 review (see chapter 7 for more information).
- 6.5 If the ACCC does not take either of these steps before the end of Phase 1, the ACCC is deemed to have determined that the acquisition may be put into effect.<sup>65</sup> This means that the parties may proceed with the acquisition, once the 14 calendar day period for Tribunal review has expired.<sup>66</sup>

## Information gathering

### From parties to the acquisition

- 6.6 The ACCC may require further information from the parties to the acquisition in addition to what they initially provide in their notification.
- 6.7 Pre-notification engagement provides an early opportunity for the ACCC and businesses to identify and discuss the information, data and documents likely to be relevant to the ACCC's assessment. In many cases, the initial information provided in response to the notification form will be sufficient for the ACCC's assessment. However, where appropriate the ACCC may request additional information and data.
- 6.8 There are 2 main ways the ACCC may request further information from the parties to the acquisition. The ACCC can write to them requesting that further information be provided within a specified period (this is often referred to as a request for information).
- 6.9 In addition, the ACCC may issue a compulsory information gathering notice under section 155 of the Act requiring information, documents or evidence to be produced.<sup>67</sup> Further information about compulsory information gathering notices is available in the [ACCC's guidelines on the use of section 155 powers](#).
- 6.10 The ACCC will consider which type of request is appropriate on a case-by-case basis and the method used will depend on the specifics of the acquisition including the nature of the material being sought, and the timing of the request. In both cases, if the response to the information request is provided later than the relevant date (for example, a specified day set out in the request), it may result in an extension to the timeline (see chapter 9).<sup>68</sup>

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<sup>64</sup> Section 51ABZE(1) of the Act.

<sup>65</sup> Section 51ABZI(2) of the Act. A determination under this subsection does not include any conditions under subsection 51ABZF(1) or declarations under subsection 51ABZG(1).

<sup>66</sup> Sections 51ABE(3), 51ABF and 100C(1) of the Act.

<sup>67</sup> Sections 155(1) and 155(2)(b)(iia) of the Act.

<sup>68</sup> Section 51ABZZE(2)(b), (c) of the Act.

6.11 As Phase 1 is relatively short, the time for Parties to provide responses to information requests may not be extensive. However, any information request will be confined as much as possible to the issues the ACCC requires information to make its determination. If Parties require more time to gather information and provide a response to the ACCC's information request, the ACCC will consider extending Phase 1 in response to a request by the Parties.

## From third parties

6.12 The ACCC may undertake market inquiries with third parties, including customers, suppliers or competitors, in order to inform its assessment of the acquisition. Other stakeholders that the ACCC may contact include relevant industry associations or peak bodies, consumer groups, Commonwealth and State government departments, and relevant regulatory bodies.<sup>69</sup>

6.13 The ACCC may request information directly from third parties, either via voluntary requests<sup>70</sup> (for example a questionnaire or targeted consultation) or through its compulsory information gathering powers.

6.14 Third parties who are not directly contacted by the ACCC can still provide information on a notified acquisition when the consultation process is open. Details about how to provide information are on the Acquisitions Register for each notification.

6.15 When the ACCC requests submissions or other information from third parties, it will consider information received within the deadline specified in the request. The ACCC may, but is not required to, consider information received after those dates.<sup>71</sup>

6.16 The ACCC will not publish third party submissions on the Acquisitions Register. Parties to the acquisition will be given an appropriate opportunity to respond to material issues raised by third parties prior to the ACCC making a determination, for example through the Notice of Competition Concerns process discussed in chapter 7. Further detail about how the ACCC deals with confidential information is provided in chapter 11.

## Engagement with the parties to the acquisition

6.17 The level of engagement the ACCC has with notifying parties through its assessment will depend on the circumstances, particularly the complexity of the competition issues arising from the acquisition.

6.18 For instance, in circumstances where the assessment is straightforward, or the acquisition is in a specific sector that the ACCC has existing knowledge about, engagement between the ACCC and the parties to the acquisition may be confined to clarifying and confirming information.

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<sup>69</sup> Section 51ABZZD(2)(d) of the Act provides that the ACCC may consult with such persons the ACCC believes to be reasonable and appropriate for the purposes of making the determination.

<sup>70</sup> Sections 51ABZZD(2)(c) and (d) of the Act.

<sup>71</sup> Sections 51ABZZD(4) of the Act.

6.19 In other cases, for example where material competition issues have been raised by third parties, or the acquisition is in a sector that the ACCC does not have existing knowledge, more extensive engagement may be appropriate. This engagement will depend on the circumstances and may be in the form of a meeting or in writing or both.

## Commitments or undertakings offered in Phase 1

6.20 The ACCC encourages notifying parties to proactively consider whether offering commitments or undertakings (also referred to as remedies in these guidelines) would address the competition concerns that may be raised by an acquisition rather than waiting for the ACCC to raise competition concerns. Parties to the acquisition are encouraged to discuss potential remedy proposals with the ACCC in pre-notification discussions.

6.21 The ACCC expects that a commitment or undertaking offered during Phase 1 will be clearly defined and will effectively address the competition concerns raised by the acquisition. It is very unlikely that there will be time for the ACCC and the Parties to engage in an extended, iterative process around remedies. Instead, the ACCC expects Parties choosing to offer a commitment or undertaking will put their best offer forward as early as possible in Phase 1.

6.22 Parties may offer a remedy up until Business Day 20.<sup>72</sup> The ACCC is unable to have regard to a commitment or undertaking offered after Business Day 20, subject to applicable timeline extensions.

6.23 In some cases, offering a commitment or undertaking in Phase 1 may address the ACCC's competition concerns such that the notification does not need to be subject to a more in-depth competition review in Phase 2.

6.24 If remedies are offered in Phase 1, the ACCC may extend the assessment timeline by up to 15 Business Days.<sup>73</sup> If there is an extension of Phase 1 for a different reason, the deadline for the parties to offer a commitment or undertaking in Phase 1 can also be extended by the same number of days (see chapter 9).

6.25 Parties may offer commitments or undertakings via the mergers portal. Parties may, and are encouraged to, engage with the ACCC regarding any draft commitment or undertaking prior to its offer.

6.26 In considering a commitment or undertaking, the ACCC may seek submissions from third parties. The ACCC may also seek further information from the parties to the acquisition, including in response to third party submissions.

The ACCC is continuing to consider its approach to commitments and undertakings offered in the merger control regime and will provide updated guidance in due course.

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<sup>72</sup> Section 51ABZZC(1)(a) of the Act.

<sup>73</sup> Section 51ABZZE(2)(a) of the Act.

## Phase 1 determination - approving the notified acquisition

- 6.27 The ACCC may determine that a notified acquisition may be put into effect.<sup>74</sup> This means that the acquisition is approved and the ACCC's assessment is concluded. Information about how the ACCC assesses acquisitions is available in the ACCC's merger assessment guidelines.
- 6.28 The ACCC's approval can be with or without conditions, which the parties to the acquisition must comply with.<sup>75</sup> A failure to comply with any of the conditions is a contravention of the Act.<sup>76</sup>
- 6.29 The ACCC will provide the determination to the notifying party<sup>77</sup> and will publish the determination on the Acquisitions Register.<sup>78</sup>
- 6.30 If the ACCC approves the acquisition, the Parties have up to 12 months after the ACCC's determination to put the acquisition into effect.<sup>79</sup> If the acquisition is not put into effect within this 12 month period, the notification becomes stale<sup>80</sup> and the parties to the acquisition will need to re-notify the ACCC.
- 6.31 If the notifying party or a third party<sup>81</sup> is dissatisfied with an ACCC determination, they may apply to the Tribunal for a review of the ACCC's determination. (see chapter 12 for further information about Tribunal review processes).

### Approval with conditions

- 6.32 In approving an acquisition, the ACCC may include conditions which must be complied with.<sup>82</sup> The ACCC may determine the nature, form and scope of the conditions. The conditions may include, for example, a requirement that a specified person give a court enforceable undertaking to the ACCC pursuant to section 87B.
- 6.33 The ACCC must not include conditions unless it is satisfied that, disregarding any conditions the ACCC could include, the proposed acquisition, if put into effect, could, in all the circumstances, have the effect of substantially lessening competition in any market.<sup>83</sup>

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<sup>74</sup> Section 51ABZE(1)(a) of the Act. Under section 51ABZE(3), in considering whether to determine the acquisition may be put into effect or must not be put into effect, the ACCC must have regard to the object of this Act, and all relevant matters, including the interests of consumers.

<sup>75</sup> Sections 45AZ; 51ABH; 51ABZF of the Act.

<sup>76</sup> Section 45AZ of the Act.

<sup>77</sup> Section 51ABZE(4) of the Act.

<sup>78</sup> Sections 51ABZZI(1)(b) and 51ABZZI(4) of the Act.

<sup>79</sup> Section 51ABG of the Act.

<sup>80</sup> Section 51ABG of the Act.

<sup>81</sup> Under section 100C(4) of the Act, third parties can only apply for a review of the ACCC's determination if they are allowed to do so by the Tribunal.

<sup>82</sup> Section 51ABZF(1) of the Act.

<sup>83</sup> Section 51ABZF(2) of the Act.

- 6.34 In considering whether to include conditions in the determination, the ACCC must have regard to all relevant matters, and may have regard to:<sup>84</sup>
- the effect that compliance with the conditions would likely have on the interests of consumers
  - any consumer benefits that would likely result from compliance with the conditions.

The ACCC is continuing to consider its approach to conditions in the merger control regime and will provide updated guidance in due course.

## Decision to move to Phase 2

- 6.35 Before the end of Phase 1, the ACCC may decide that the notification is to be subject to a further in-depth assessment in Phase 2.
- 6.36 To move a notification to Phase 2 for further consideration, the ACCC must be satisfied that the acquisition, if put into effect, *could* in all the circumstances have the effect, or be likely to have the effect, of substantially lessening competition in any market.<sup>85</sup> The ACCC's decision is based on all the relevant information before it.
- 6.37 In this context, '*could*' means:
- ... a possibility. This is intended to recognise that by the end of Phase 1, the Commission may have identified possible competition concerns which require further investigation.<sup>86</sup>
- 6.38 The ACCC will issue a Phase 2 Notice which among other things must:<sup>87</sup>
- identify the parties to the acquisition and describe the economic activities in which they engage
  - explain why the ACCC is satisfied that the acquisition, if put into effect, *could* substantially lessen competition including specifying:
    - the nature of the theory of harm that is the basis for the ACCC's satisfaction
    - the matters the ACCC intends to investigate before making its determination
  - set out the date by which the Phase 2 fee (if any) must be paid.
- 6.39 The ACCC's Phase 2 Notice must be provided to the parties to the acquisition and placed on the Acquisitions Register.<sup>88</sup>

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<sup>84</sup> Section 51ABZF(3) of the Act.

<sup>85</sup> Section 51ABZJ(1)(a) of the Act.

<sup>86</sup> [Explanatory Memorandum](#) paragraph 4.65.

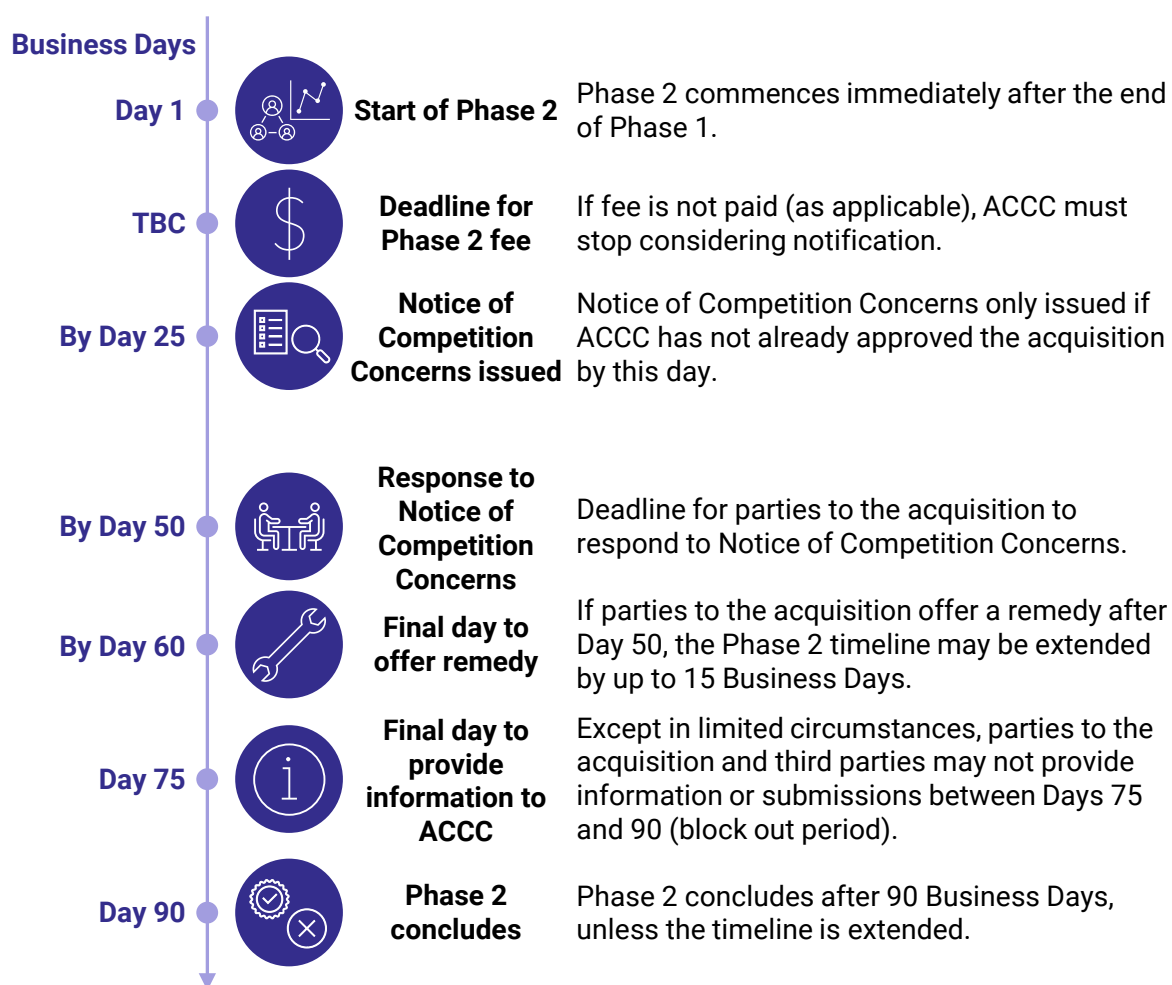
<sup>87</sup> Section 51ABZJ(3) of the Act.

<sup>88</sup> Section 51ABZZI(1)(c) of the Act.

# 7. Phase 2

- 7.1 In Phase 2, the ACCC conducts a more in-depth economic and legal analysis of acquisitions in circumstances where, following an initial Phase 1 assessment, the ACCC is satisfied an acquisition *could* be likely to have the effect of substantially lessening competition in any market.
- 7.2 The key steps in a typical Phase 2 assessment are set out in Figure 5. There may be some flexibility in the timing of the steps followed in a given assessment depending on the circumstances, and Figure 5 does not cover all steps that may arise within Phase 2.<sup>89</sup>

**Figure 5: Key steps in typical Phase 2 assessment**



<sup>89</sup> For example, Figure 5 does not include any adjustments that may be made to the timeline (see chapters 9 and 10 for further details).

## Phase 2 timeline

- 7.3 The timeline for Phase 2 is up to 90 Business Days. This is subject to timeline extensions and other adjustments to the timeline (see chapters 9 and 10 for more detail).<sup>90</sup>
- 7.4 Phase 2 commences immediately after Phase 1 concludes.<sup>91</sup>
- 7.5 While the steps in Phase 2 will vary according to the competition issues raised by the acquisition, the ACCC will typically:
- seek further information and documents as needed, and when required conduct oral examinations of the parties to the acquisition and relevant third parties
  - issue a Notice of Competition Concerns, which sets out the ACCC's preliminary assessment on whether the acquisition would be likely to substantially lessen competition and the grounds for its assessment<sup>92</sup>
  - provide an opportunity for the parties to the acquisition<sup>93</sup> and third parties to respond to the Notice of Competition Concerns
  - if additional issues arise, conduct further consultation with the parties to the acquisition and third parties as relevant.
- 7.6 Before the end of Phase 2, the ACCC may make a determination that the acquisition:<sup>94</sup>
- may be put into effect with or without conditions (approving the acquisition), or
  - must not be put into effect (not approving the acquisition).
- 7.7 If the ACCC does not make a determination before the end of Phase 2, the ACCC is deemed to have determined that the acquisition may be put into effect.<sup>95</sup>

## Information gathering

- 7.8 In Phase 2, the ACCC may issue additional and targeted information requests to further inform its assessment of the acquisition. For example, the ACCC may gather information via:
- compulsory or voluntary information and document requests from the notifying parties and third parties
  - submissions from the parties to the acquisition– including through their response to the Notice of Competition Concerns

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<sup>90</sup> The 90 Business Days commences immediately after the end of the Phase 1 determination period. If the Phase 2 fee is not paid by the day determined by the Minister in a legislative instrument, section 51ABZJ(2)(d) of the Act provides that the ACCC is taken to have ceased considering the notified acquisition.

<sup>91</sup> Section 51ABZI(5)(a) of the Act.

<sup>92</sup> Section 51ABZK of the Act.

<sup>93</sup> Section 51ABZL of the Act.

<sup>94</sup> Section 51ABZE(1) of the Act.

<sup>95</sup> Section 51ABZI(2) of the Act.



- submissions from third parties, including in response to the Notice of Competition Concerns
- oral evidence via section 155(1)(c) examinations, or voluntary interviews.

- 7.9 To ensure the ACCC is able to complete its assessment within the timeline and facilitate an efficient assessment, all parties, including third parties, will need to comply with set deadlines for making submissions to ensure the information can be taken into account by the ACCC. The ACCC may, but is not required to, take into account submissions or information received after a specified deadline, excluding the block out period referred to below.<sup>96</sup>
- 7.10 Where a large volume of information is received by the ACCC towards the end of Phase 2, it will be difficult for the ACCC to fully consider and test this information. It is strongly recommended that the parties to the acquisition and third parties provide any additional information that they would like the ACCC to consider as early as possible in Phase 2.
- 7.11 The last date by which any party can provide information to the ACCC is 15 Business Days before the end of Phase 2 (the **block out period**),<sup>97</sup> unless it is provided in response to an ACCC request for information and either:
- the request relates to information the ACCC received before the 'block out period',<sup>98</sup> or
  - the notifying party agrees in writing to ACCC's request.<sup>99</sup>

## Notice of Competition Concerns

- 7.12 Within 25 Business Days after the start of Phase 2, or as soon as practicable after, the ACCC must give the notifying party a Notice of Competition Concerns.<sup>100</sup> A Notice of Competition Concerns is not required if the ACCC makes a determination approving the acquisition on or before this day.<sup>101</sup>
- 7.13 The Notice of Competition Concerns sets out:
- the ACCC's preliminary assessment of whether the acquisition, if put into effect, would have the effect, or be likely to have the effect, of substantially lessening competition in any market
  - the grounds on which the ACCC makes the assessment, referring to the evidence or other material on which those grounds are based.<sup>102</sup>

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<sup>96</sup> Section 51ABZZD(4) of the Act.

<sup>97</sup> Section 51ABZZD(3), (5)(a) and (6) of the Act. There is no block out period in Phase 1: see section 51ABZZD(3)(c) of the Act and the note in section 51ABZZD(5) of the Act.

<sup>98</sup> Section 51ABZZD(3)(b) of the Act.

<sup>99</sup> Section 51ABZZD(3)(a) of the Act.

<sup>100</sup> Section 51ABZK(4) of the Act.

<sup>101</sup> Section 51ABZK(2) of the Act.

<sup>102</sup> Section 51ABZK(3) of the Act.

7.14 The Notice of Competition Concerns is:<sup>103</sup>

...an important step in the process and ensures the notifying party is informed of the Commission's preliminary assessment of whether the notified acquisition would be likely to have the effect of substantially lessening competition in any market. It is intended to complement and provide further particulars of any issues identified by the Commission during the Phase 1 process as well as any other relevant matters.

7.15 The Notice of Competition Concerns provides a key point for parties to the acquisition to provide submissions in response to the ACCC's issues of concern. It also provides an opportunity for the ACCC to outline the ongoing areas of inquiry and focus, and to seek comment from the parties to the acquisition and potentially third parties, to inform robust decision-making.

7.16 In the Notice of Competition Concerns, the ACCC is required to refer to the evidence or other material it has relied upon in reaching its preliminary view.<sup>104</sup> However, the ACCC is not required to provide access to its case file or disclose confidential third party information.<sup>105</sup> Where the ACCC has received confidential information during its assessment that raises a material issue of concern, that issue will be described in the Notice of Competition Concerns in sufficient detail to enable the parties to the acquisition to understand the issue.

7.17 The ACCC must provide the Notice of Competition Concerns to the notifying party. The ACCC may also publish the Notice of Competition Concerns on the Acquisitions Register.

## Responses to the Notice of Competition Concerns

7.18 The notifying party has 25 Business Days to make a written or oral submission<sup>106</sup> in response to the Notice of Competition Concerns. The notifying party may request an extension within the 25 Business Day period.<sup>107</sup> The ACCC may agree to more than one extension.<sup>108</sup> If the ACCC extends the submission period, this will also extend Phase 2 by the same number of days.<sup>109</sup>

7.19 The ACCC may provide the parties to the acquisition with additional opportunities to provide submissions in some circumstances, for example if new information or issues that are material to the ACCC's ongoing assessment are raised after the Notice of Competition Concerns is issued.

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<sup>103</sup> [Explanatory Memorandum](#) paragraph 4.80.

<sup>104</sup> Section 51ABZK(3)(b) of the Act.

<sup>105</sup> [Explanatory Memorandum](#) paragraph 4.81.

<sup>106</sup> Section 51ABZL(1) of the Act.

<sup>107</sup> Section 51ABZL(2), (3) of the Act.

<sup>108</sup> Section 51ABZL(3) of the Act. If the ACCC provides the Notice of Competition Concerns after 25 Business Days from the start of Phase 2 and the deadline for the parties to respond to the Notice of Competition Concerns falls within the 15 Business Day 'block out period' before the end of Phase 2, the parties may still provide submissions to the ACCC: see section 51ABZZD(7)(a) of the Act.

<sup>109</sup> Section 51ABZL(4) of the Act. This will also extend the period during which remedy offers may be made under s 51ABZZE(3)(b) of the Act.

- 7.20 Third parties will generally be given an opportunity to respond to the Notice of Competition Concerns within a specified time.
- 7.21 Information and submissions received in response to the Notice of Competition Concerns will not be published on the Acquisitions Register. Information about how the ACCC deals with confidential information is discussed in chapter 11.

## Commitments or undertakings offered in Phase 2

- 7.22 There are limitations on when parties to the acquisition may offer commitments or undertakings in Phase 2. Remedies may be offered to address competition concerns identified by the ACCC. Depending on when the remedy is offered in Phase 2 there may be an extension to the assessment timeline.
- 7.23 Parties to the acquisition may offer remedies to the ACCC using the mergers portal [[live link to be inserted, when available](#)].
- 7.24 Parties to the acquisition are able to offer remedies up to, and including, Business Day 60 (from the start of Phase 2). The ACCC must *not* have regard to a remedy offered after this time.<sup>110</sup> If the ACCC has agreed to extend the Phase 2 assessment period for another reason, the deadline for the Parties to offer, and for the ACCC to consider, a remedy in Phase 2 is extended by the same number of days.<sup>111</sup>
- 7.25 If a remedy is offered by a party to the acquisition between Business Day 50 and Business Day 60 of Phase 2, the ACCC may extend the assessment timeline by up to 15 Business Days.<sup>112</sup>

The ACCC is continuing to consider its approach to commitments and undertakings offered in the merger control regime and will provide updated guidance in due course.

## Phase 2 determination

- 7.26 Before the end of Phase 2, the ACCC may make a determination that the acquisition:
- may be put into effect (with or without conditions), or
  - must not be put into effect.<sup>113</sup>
- 7.27 The ACCC must not determine that an acquisition must not be put into effect unless certain requirements are met, including that it must be satisfied that the acquisition, if put into effect, would have the effect, or be likely to have the effect of substantially

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<sup>110</sup> Section 51ABZZC(1)(b) of the Act.

<sup>111</sup> Section 51ABZZE(4) of the Act.

<sup>112</sup> Sections 51ABZZE(2)(a) and 51ABZZE(3)(b) of the Act.

<sup>113</sup> Section 51ABZE(1) of the Act. Under section 51ABZE(3) of the Act, in considering whether to determine the acquisition may be put into effect or must not be put into effect, the ACCC must have regard to the object of this Act, and all relevant matters, including the interests of consumers.

lessening competition in any market.<sup>114</sup> Information about how the ACCC assesses acquisitions is available in the ACCC's merger assessment guidelines.

- 7.28 The ACCC will provide the determination to the notifying party<sup>115</sup> and will publish a copy on the Acquisitions Register.<sup>116</sup>

## Approval with conditions

- 7.29 In approving an acquisition, the ACCC may include conditions which must be complied with. The ACCC may determine the nature, form and scope of conditions.
- 7.30 The ACCC must not include conditions in its determination unless it is satisfied that, disregarding any conditions the ACCC could include, the proposed acquisition, if put into effect, could, in all the circumstances, have the effect of substantially lessening competition in any market.
- 7.31 In considering whether to include conditions in the determination, the ACCC must have regard to all relevant matters, and may have regard to:
- the effect that compliance with the conditions would likely have on the interests of consumers
  - any consumer benefits that would likely result from compliance with the conditions.
- 7.32 If the ACCC approves the acquisition with conditions, the parties to the acquisition must comply with those conditions when putting the acquisition into effect. A failure to comply with any of the conditions is a contravention of the Act.

The ACCC is continuing to consider its approach to conditions in the merger control regime and will provide updated guidance in due course.

## After a Phase 2 determination

- 7.33 If the ACCC approves an acquisition (with or without conditions), Parties may put it into effect after the 14 calendar day period to request a Tribunal review<sup>117</sup> has passed. The notification becomes stale 12 months after the ACCC makes its determination.<sup>118</sup> This means that Parties must put the notified acquisition into effect within 12 months from the date of the ACCC's determination to avoid needing to re-notify.

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<sup>114</sup> Section 51ABZE(2) of the Act. The notification must also have been subject to phase 2 review, and the ACCC must have given a notice of competition concerns in accordance with section 51ABZK of the Act.

<sup>115</sup> Section 51ABZE(4) of the Act.

<sup>116</sup> Section 51ABZZI(1)(b) and 51ABZZI(4) of the Act.

<sup>117</sup> Sections 45AY, 51ABE(3), 51ABF and 100C(1) of the Act. Applications may be made to the Tribunal before the end of 14 calendar days after the ACCC's statement of reasons is included on the Acquisitions Register. If a Tribunal review is brought during that period, it will affect when the Parties may put the acquisition into effect.

<sup>118</sup> Section 51ABG of the Act.

- 7.34 If the ACCC makes a determination that an acquisition may be put into effect with conditions, or that an acquisition must not be put into effect, but the parties to the acquisition consider that the acquisition is likely to result in net public benefits they may apply to the ACCC for a public benefit assessment.<sup>119</sup> See chapter 8 for further information.
- 7.35 If the notifying party or a third party is dissatisfied with an ACCC determination, they may apply to the Tribunal for a review of the ACCC's determination.<sup>120</sup> The Tribunal review process is discussed in chapter 12.

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<sup>119</sup> Section 51ABZP of the Act.

<sup>120</sup> Under section 100C(4) of the Act, third parties can only apply for a review of the ACCC's determination if they are allowed to do so by the Tribunal.

## 8. Public benefit application

- 8.1 The notifying party may apply for ACCC approval of an acquisition that raises competition issues if they consider the acquisition may nonetheless result in a net public benefit.<sup>121</sup>
- 8.2 It is only possible to make a public benefit application following an ACCC determination that either an acquisition must not be put into effect (at the end of Phase 2) or it may be put into effect subject to conditions (in Phase 1 or 2).<sup>122</sup>
- 8.3 The Act establishes a sequential approach to the consideration of public benefits, requiring the ACCC to first assess the competitive effects of an acquisition before the notifying party may make a public benefit application.
- 8.4 The Public Benefit Phase is 50 Business Days starting from the effective application date,<sup>123</sup> which is when the ACCC receives an application made in accordance with the requirements of the Act (including payment of any relevant fee).<sup>124</sup> This is subject to any extensions or other circumstances that might adjust the timeline (see chapters 9 and 10).
- 8.5 When assessing a public benefit application, the ACCC must not make a determination that an acquisition may be put into effect (with or without conditions) unless it is satisfied that:
- the acquisition would, in all the circumstances, result, or be likely to result, in a benefit to the public
  - the benefit would, in all the circumstances, outweigh the detriment to the public that would result, or be likely to result, from the acquisition.<sup>125</sup>
- 8.6 There cannot be an active Tribunal review of an ACCC competition determination<sup>126</sup> and an ACCC consideration of a public benefit application occurring simultaneously.<sup>127</sup> If an application for Tribunal review of an ACCC competition determination has been made, and the notifying party lodges a public benefit application with the ACCC, the Tribunal must cease its review until either:<sup>128</sup>
- the ACCC ceases considering the public benefit application, or
  - the ACCC makes a determination in relation to the public benefit application.
- 8.7 Figure 6 sets out the key steps in a typical assessment of a public benefit application. There may be some flexibility in the timing of the steps, depending on

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<sup>121</sup> Section 51ABZP of the Act.

<sup>122</sup> Section 51ABZP of the Act.

<sup>123</sup> Section 51ABZZ(2) of the Act.

<sup>124</sup> Section 51ABZP of the Act.

<sup>125</sup> Section 51ABZW(2) of the Act.

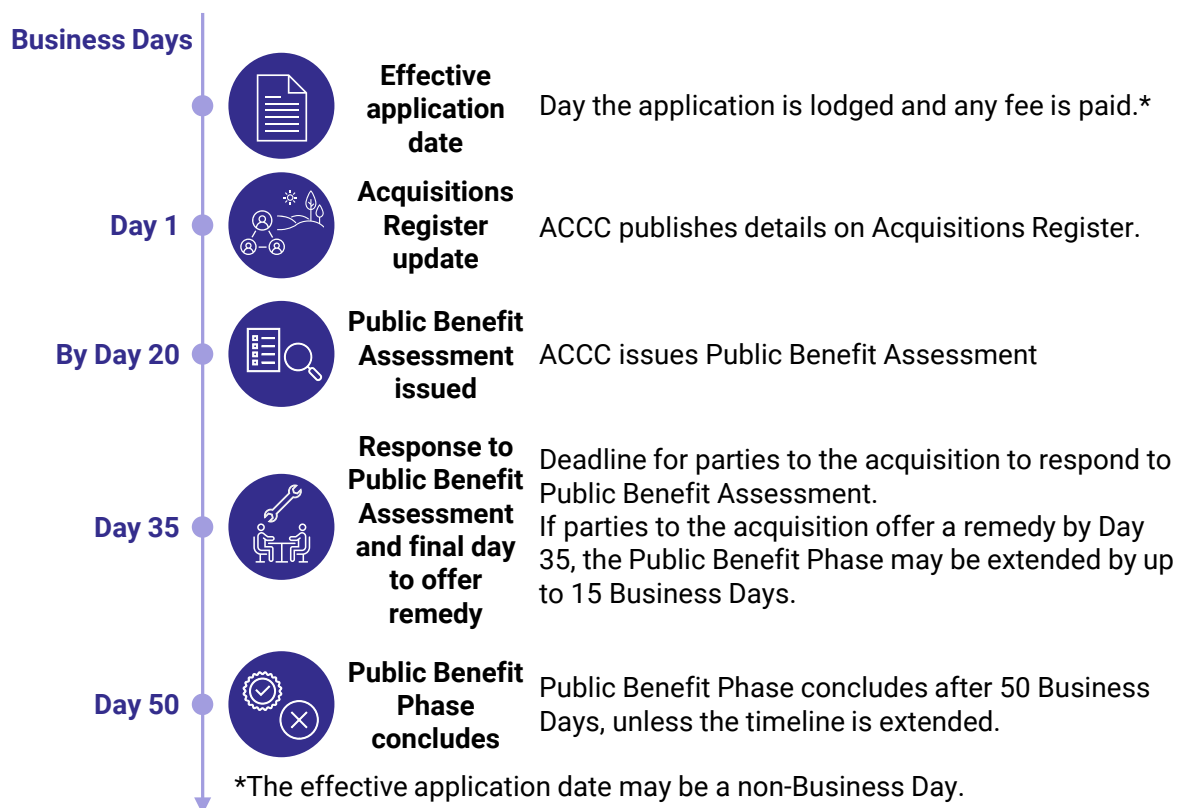
<sup>126</sup> Being an ACCC determination made under section 51ABZE(1) of the Act.

<sup>127</sup> Sections 100M(1) and (3) of the Act.

<sup>128</sup> Section 100M(3) of the Act.

the circumstances of each application. Figure 6 does not cover all steps that may arise in different public benefit applications.<sup>129</sup>

**Figure 6: Key steps in typical Public Benefit Phase**



## Lodging a public benefit application

- 8.8 The notifying party may lodge a public benefit application within 21 calendar days after the ACCC has made a determination in Phase 1 or Phase 2.<sup>130</sup>
- 8.9 Applications must be made in writing and accompanied by the relevant fee (if any is specified).
- 8.10 Public benefit applications and the payment of the fee should be done via the mergers portal on the ACCC’s website [[live link to be inserted, when available](#)].

The ACCC’s mergers portal is currently under development. The ACCC will publish instructions for lodging public benefit applications and paying the fee via the portal in due course.

<sup>129</sup> For example, Figure 6 does not include any extensions or other adjustments to the timeline.

<sup>130</sup> Sections 51ABZP(1) and (2) of the Act.

The Minister may determine by legislative instrument the public benefit application form and requirements for information and documents to be provided to the ACCC.

The ACCC will provide guidance to assist parties complete the forms in due course.

## Effective application date

- 8.11 Once the requirements under the Act have been met, including the provision of the application form, and payment of the relevant fee, the ACCC will provide the parties to the acquisition with written confirmation that the application was received and the effective application date.<sup>131</sup>
- 8.12 The effective application date is the date the application is made, meaning that it has been provided to the ACCC in accordance with the requirements set out in the Act. The relevant fee must be paid before there can be an effective application date.<sup>132</sup>
- 8.13 The effective application date is the starting point to calculate the assessment timeline for the ACCC to make its determination. The available assessment period for public benefit applications is 50 Business days.
- 8.14 The ACCC will update the Acquisitions Register with details of the application within 1 Business Day of the effective application date. The Acquisition Register is discussed in chapter 11.

## Information gathering

- 8.15 Upon receipt of the application, the ACCC will generally commence a consultation process to inform its assessment of the likely benefits and detriments resulting from the acquisition.
- 8.16 The ACCC will already have information about the likely competition effects of the acquisition. The ACCC will consider this information, where relevant, in assessing the likely public benefits and detriments. The ACCC will focus on testing the claimed public benefits and any other public detriments in its consultation process.
- 8.17 The ACCC may issue requests for information and section 155 compulsory information gathering notices to the parties to the acquisition and third parties to inform its assessment (similar to Phase 1 and Phase 2).
- 8.18 The latest point at which any party can provide information to the ACCC is 15 Business Days before the end of the Public Benefit Phase,<sup>133</sup> unless it is provided in response to an ACCC request for information and either:

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<sup>131</sup> Section 51ABZP(7) of the Act.

<sup>132</sup> Section 51ABZP(4) of the Act.

<sup>133</sup> Sections 51ABZZD(3), (5)(b) and (6) of the Act.



- the request relates to information the ACCC received before the 'block out period',<sup>134</sup> or
- the notifying party agrees in writing to the ACCC's request.<sup>135</sup>

## Public Benefit Assessment

- 8.19 Within 20 Business Days after the start of the Public Benefit Phase, or as soon as practicable after, the ACCC must issue a Public Benefit Assessment setting out its preliminary assessment.<sup>136</sup>
- 8.20 The Public Benefit Assessment sets out:
- the ACCC's preliminary assessment of the benefits and detriments to the public that the ACCC has identified could result, or be likely to result, from the acquisition, including an assessment of the significance of those benefits and detriments
  - the grounds on which the ACCC makes the assessment, referring to the evidence or other material on which those grounds are based.<sup>137</sup>
- 8.21 The ACCC will refer to the evidence or other material it has relied upon in reaching its preliminary view but is not required to provide access to its case file or disclose confidential third party information.
- 8.22 The ACCC must provide the Public Benefit Assessment to the notifying party and may also publish a copy on the Acquisitions Register.

## Responses to the Public Benefit Assessment

- 8.23 The notifying party has 15 Business Days to make written or oral submissions in response to the Public Benefit Assessment.<sup>138</sup> The Notifying party may request an extension within this period.<sup>139</sup> The ACCC may agree to more than one extension.<sup>140</sup> If the ACCC extends the submission period, this will also extend the Public Benefit Phase by the same number of days.<sup>141</sup>
- 8.24 The ACCC may provide the parties to the acquisition with additional opportunities to provide submissions in some circumstances, for example if new information or issues that are material to the ACCC's ongoing assessment are raised after the Public Benefit Assessment is issued.

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<sup>134</sup> Section 51ABZZD(3)(b) of the Act.

<sup>135</sup> Section 51ABZZD(3)(a) of the Act.

<sup>136</sup> Section 51ABZZA(3) of the Act.

<sup>137</sup> Section 51ABZZA(2) of the Act.

<sup>138</sup> Section 51ABZZB(1)(a) of the Act.

<sup>139</sup> Sections 51ABZZB(1) and (2) of the Act. If the ACCC provides the Public Benefit Assessment after 15 Business Days from the start of the public benefits determination period and the deadline for the Parties to respond to the Public Benefit Assessment falls within the 15 Business Day 'block out period' before the end of the determination period, the Parties may still provide submissions to the ACCC: see section 51ABZZD(7)(b).

<sup>140</sup> Section 51ABZZB(3) of the Act.

<sup>141</sup> Section 51ABZZB(4) of the Act.

- 8.25 Third parties will generally be given an opportunity to respond to the Public Benefit Assessment.

## Commitments or undertakings offered in Public Benefit Phase

- 8.26 Parties to the acquisition may offer commitments or undertakings using the mergers portal [[live link to be inserted, when available](#)].
- 8.27 Parties to the acquisition may offer the ACCC commitments and undertakings up to 35 Business Days after the effective application date.<sup>142</sup> If there has been an extension to the timeline for another reason, the time for the Parties to offer a commitment or undertaking is extended by the same number of days.<sup>143</sup>
- 8.28 If commitments or undertakings are offered within the first 35 Business Days in the Public Benefit Phase, the ACCC may extend the assessment period by up to 15 Business Days.<sup>144</sup>

The ACCC is continuing to consider its approach to commitments and undertakings offered in the merger control regime and will provide updated guidance in due course.

## Public benefit determination

- 8.29 Before the end of the Public Benefit Phase, the ACCC may make a determination:<sup>145</sup>
- that the acquisition would be of public benefit (with or without conditions) and may be put into effect, or
  - not grant the public benefit application applied for.
- 8.30 The ACCC must not make a determination that the acquisition would be of public benefit unless it is satisfied that, were the acquisition to be put into effect (and any conditions are complied with):
- the acquisition would, in all the circumstances, be likely to result in a benefit to the public
  - the benefit would, in all the circumstances, outweigh the detriment to the public that would be likely to result from the proposed acquisition.<sup>146</sup>
- 8.31 The ACCC will provide the determination to the notifying party and publish the determination on the Acquisitions Register.

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<sup>142</sup> Section 51ABZZC(2) and 51ABZZE(3)(c) of the Act.

<sup>143</sup> Section 51ABZZE(4) of the Act.

<sup>144</sup> Section 51ABZZE(2)(a) and 51ABZZE(3)(c) of the Act.

<sup>145</sup> Sections 51ABZW(1) and 51ABZX(1) of the Act. Under section 51ABZW(3), in considering whether to determine the acquisition would be of public benefit or not to make the determination applied for, the ACCC must have regard to the object of this Act, and all relevant matters, including the interests of consumers.

<sup>146</sup> Section 51ABZW(2) of the Act.

8.32 A determination that the acquisition would be of public benefit means the acquisition may be put into effect, subject to the 14-day period in which a person may apply to the Tribunal for review of the ACCC's determination has expired.<sup>147</sup>

## Approval with conditions

8.33 In approving an acquisition, the ACCC may include conditions which must be complied with.<sup>148</sup> The ACCC may determine the nature, form and scope of conditions.

8.34 In considering whether to include conditions in the public benefit determination, the ACCC must have regard to all relevant matters, and may have regard to:<sup>149</sup>

- the effect that compliance with the conditions would likely have on the interests of consumers; and
- any consumer benefits that would likely result from compliance with the conditions.

The ACCC is continuing to consider its approach to conditions in the merger control regime and will provide updated guidance in due course.

## After a public benefit determination

8.35 If the notifying party or a third party<sup>150</sup> is dissatisfied with an ACCC determination, they may apply to the Tribunal for a review of the ACCC's determination. The Tribunal review process is discussed in chapter 12.

8.36 If the ACCC does not make a determination within the statutory timeline, subject to any timeline extensions, the ACCC is deemed to have **not** made the public benefit determination applied for.<sup>151</sup> This means the relevant Phase 1 or Phase 2 determination stands.

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<sup>147</sup> Sections 51ABE(3), 51ABF and 100C(1) of the Act. Applications may be made to the Tribunal before the end of 14 calendar days after the ACCC's statement of reasons is included on the Acquisitions Register. If a Tribunal review is brought during that period, it will affect when the Parties may put the acquisition into effect.

<sup>148</sup> Section 51ABZX(1) of the Act.

<sup>149</sup> Section 51ABZX(2) of the Act.

<sup>150</sup> Under section 100C(4) of the Act, third parties can only apply for a review of the ACCC's determination if they are allowed to do so by the Tribunal.

<sup>151</sup> Section 51ABZZ(1) of the Act.

# 9. Timeline extensions and adjustments

- 9.1 The ACCC is committed to assessing notified acquisitions in a timely manner and in accordance with statutory timelines. However, there will be some circumstances, where it will be necessary for the timeline to be adjusted as the ACCC's assessment progresses.
- 9.2 The Act sets out certain circumstances in which timelines may be *extended* during the ACCC's assessment of an acquisition. If there is an extension, the ACCC will give the notifying party notice in writing.<sup>152</sup> Changes to the timeline will also be reflected on the Acquisitions Register.
- 9.3 The circumstances in which an extension may be more likely to occur in practice include when the notifying party:
- offers a commitment or undertaking,
  - requests an extension to the timeline
  - does not provide information to the ACCC by the specified date, or
  - takes longer than 10 days to respond to a section 155 notice.<sup>153</sup>
- 9.4 Other circumstances that may lead to timeline extensions, although which may occur rarely, include when a material change of fact occurs, the ACCC identifies false or misleading information during Phase 2, the Notice of Competition Concerns/Public Benefit Assessment is issued later in the timeline or the notifying party requests more time to respond to the Notice of Competition Concerns/Public Benefit Assessment.<sup>154</sup>
- 9.5 The ACCC can also *cease* its assessment of a notified acquisition (or public benefit application) in some circumstances. The ACCC may cease its assessment after receiving a request from the notifying party to cease the assessment and the request is received prior to the ACCC making a determination.<sup>155</sup> The ACCC may also decide to cease its consideration of a notified acquisition (or public benefit application) if it is satisfied that the parties to the acquisition no longer intend to put the acquisition into effect.<sup>156</sup> These circumstances are discussed further below.
- 9.6 In addition, there are other circumstances that may impact the timeline, for example when a notification does not have an effective notification date because the notification is materially incomplete, materially misleading or false in a material particular. These are addressed in chapter 10.

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<sup>152</sup> This notice is known as an 'extension notice': see section 51ABZZE(2) of the Act.

<sup>153</sup> Section 51ABZZE(2)(a)-(d) of the Act.

<sup>154</sup> See sections 51ABZB(2)(a)-(b), 51ABZB(7), 51ABZT(2)(a)-(b), 51ABZT(6)(b), 51ABZN(2), 51ABZN (6)(a)-(b), 51ABZK(5)(a) and 51ABZZA(4)(a) of the Act.

<sup>155</sup> Sections 51ABZD(2) and 51ABZV(2) of the Act.

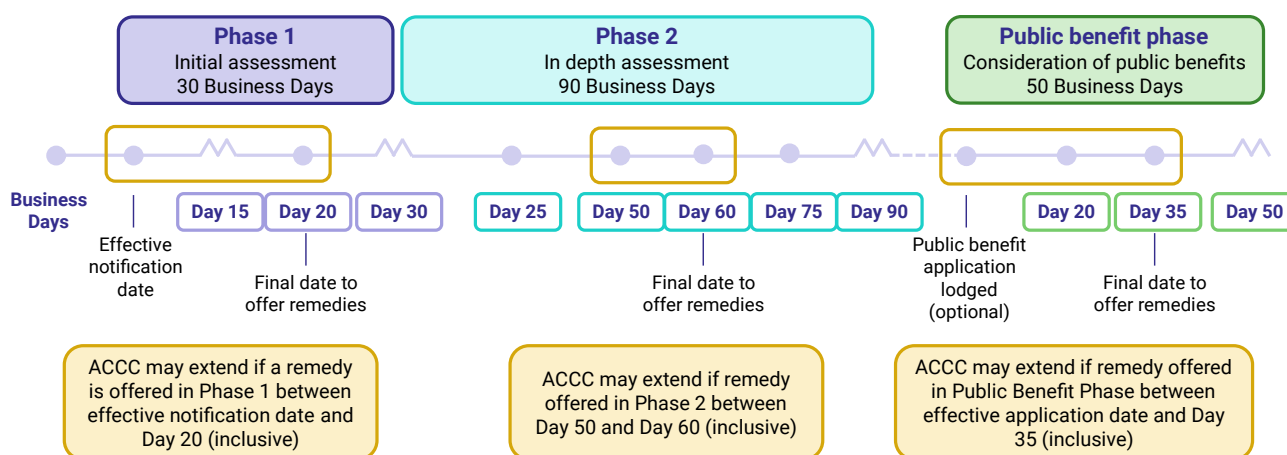
<sup>156</sup> Section 51ABZD(3) and 51ABZV(3) of the Act.

## Extensions to the timeline for remedies

9.7 The ACCC may only extend the timeline when a party to an acquisition offers a commitment or undertaking within the following certain statutory timeframes (illustrated in Figure 7):

- **Phase 1:** from the effective notification date up to 20 Business Days after the start of Phase 1.<sup>157</sup>
- **Phase 2:** from 50 Business Days after the start of Phase 2 up to 60 Business Days after the start of Phase 2.<sup>158</sup> If a commitment or undertaking is offered within the first 50 Business Days of Phase 2, the ACCC may not extend the Determination Period on this basis.<sup>159</sup>
- **Public Benefit Phase:** from the start of the public benefit determination period up to 35 Business Days after the start of the public benefit determination period.<sup>160</sup>

**Figure 7: Timeframes apply for extensions relating to the offer of a commitment or undertaking**



Note: This figure focuses on key dates related to remedies. See chapters 6, 7 and 8 for information about other key dates and steps.

9.8 When timeline extensions are made by the ACCC for other reasons,<sup>161</sup> the timeframes relating to the offer of commitments or undertakings outlined in paragraph 9.7 and Figure 7 can also be extended by the same number of days.<sup>162</sup>

<sup>157</sup> Section 51ABZZE(3)(a) of the Act.

<sup>158</sup> Section 51ABZZE(3)(b) of the Act.

<sup>159</sup> However, as is the case during any phase, the notifying party may separately request an extension (section 51ABZZE(2)(d) of the Act.

<sup>160</sup> Section 51ABZZE(3)(c) of the Act.

<sup>161</sup> For example where notifying party requests an extension, where a notifying party is late in responding to a request for information, or where a party takes longer than 10 Business Days to respond to a section 155 notice.

<sup>162</sup> Sections 51ABZZE(4), 51ABZB(6), 51ABZB(7)(b), 51ABZK(5)(c), 51ABZL(4)(b), 51ABZN(6)(b), 51ABZT(6)(b) and 51ABZZA(4)(c), 51ABZZB(4)(b) of the Act. See also section 51ABZZC of the Act.

## Example 2

Company A has requested that the ACCC extend the timeline by 10 Business Days on Business Day 15 of Phase 1.

If the extension is granted by the ACCC, instead of the usual deadline of 20 Business Days in Phase 1 to offer a remedy, the deadline will shift forward by 10 Business Days.

This means that Company A may offer a remedy to the ACCC in Phase 1 up to 30 Business Days after the effective notification date. If a remedy is offered within that 30 Business Day timeframe, the ACCC may then extend Phase 1 by 15 Business Days.

## Other extensions to the timeline

### Request for extension by notifying party

- 9.9 A notifying party can request that the ACCC extend the timeline at any stage within each phase.<sup>163</sup> The request must be in writing and specify the number of Business Days the extension is requested for. The ACCC cannot extend the determination period longer than the number of Business Days requested.
- 9.10 While a notifying party can make an extension request at any stage, to facilitate the ACCC's efficient assessment of a request, notifying parties should request an extension as soon as possible and well in advance of the end of the relevant phase.

### Information not provided by specified date

- 9.11 Where the notifying party does not respond fully to a request for information by the specified date, the ACCC can extend the determination period of the relevant phase by the number of days between the specified date and the date the requested information is received.<sup>164</sup>

### Section 155 notice issued to a party to the acquisition

- 9.12 The ACCC can extend the determination period of a particular phase after 10 Business Days have elapsed following a section 155 notice being issued by the ACCC.<sup>165</sup>
- 9.13 The length of the extension (in Business Days) can be up to the period starting 10 Business Days after a section 155 notice is issued and ending when the party provides the information or documents, or appears before the ACCC.<sup>166</sup>

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<sup>163</sup> Section 51ABZZE(2)(d) of the Act.

<sup>164</sup> Section 51ABZZE(2)(b) of the Act. If the notifying party is late responding to an information request and it is nearing the end of the relevant phase, the ACCC will take necessary and reasonable steps to manage that situation and may engage closely with the parties in relation to this issue. This may include extending the timeline prior to the requested information being received.

<sup>165</sup> Section 51ABZZE(2)(c) of the Act.

<sup>166</sup> For example: if the due date for response to the section 155 notice is 15 Business Days after it is issued, and a party to the acquisition takes the full 15 Business Days to fully respond, the ACCC may extend the timeline by 5 Business Days.

## Other types of extensions

9.14 In addition to the reasons for extensions outlined above, the Act provides that the timeline may be extended in other circumstances. These include:

- **Material change of fact**

If the ACCC becomes aware of a material change of fact during Phase 1, the ACCC may decide to extend the determination period while the notifying party provides additional information, or it may decide that the effective notification date is the date on which it becomes aware of the material change of fact.<sup>167</sup> Similar provisions apply if the ACCC becomes aware of a material change of fact during the Public Benefit Phase.<sup>168</sup>

If the ACCC becomes aware of a material change of fact during Phase 2, the ACCC can extend the relevant determination period.<sup>169</sup>

Further information regarding the need to notify the ACCC of material changes of fact and potential impacts on the timeline is set out in chapter 10.

- **False or misleading information**

During Phase 2, the ACCC can extend the Phase 2 timeline in certain circumstances where a notification is materially misleading or contains information that is false in a material particular, or where the notifying party gives the ACCC any information that is false in a material particular.<sup>170</sup>

Further information regarding the need to provide complete, accurate and up-to-date information to the ACCC and potential impacts on the timeline is set out in chapter 10.

- **Notice of Competition Concerns or Public Benefit Assessment**

Phase 2 can be extended if the notifying party requests more time to respond to a Notice of Competition Concerns.<sup>171</sup> Similarly, the Public Benefit Phase can be extended at the notifying party's request.<sup>172</sup>

If the notifying party agrees in writing, Phase 2 can be extended in circumstances where the ACCC does not provide the Notice of Competition Concerns by the usual time<sup>173</sup> (and similarly, the Public Benefits Phase can be extended where the ACCC does not provide the Public Benefit Assessment in time<sup>174</sup>).<sup>175</sup>

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<sup>167</sup> Section 51ABZB(2)(a) of the Act. The ACCC must be satisfied that the change is material to it making a determination under subsection 51ABZE(1) of the Act, and there are limits to how long it can extend the timeline set out in section 51ABZB(3) of the Act.

<sup>168</sup> Section 51ABZT of the Act. An extension to the timeline can also extend the time to issue the Public Benefit Assessment and the time for a party to offer a commitment or undertaking.

<sup>169</sup> Section 51ABZB(2)(b) of the Act. This extension will also extend the time to issue the Notice of Competition Concerns and the time for a party to offer a commitment or undertaking: sections 51ABZB(7) and 51ABZT(6)(b) of the Act.

<sup>170</sup> Section 51ABZN(2) of the Act. This extension will also extend the time to issue the Notice of Competition Concerns and the time for a party to offer a commitment or undertaking: sections 51ABZN(6)(a) and (b) of the Act.

<sup>171</sup> Section 51ABZL(2) of the Act.

<sup>172</sup> Sections 51ABZZB(2) of the Act.

<sup>173</sup> Being on a day before the 25th Business Day of Phase 2.

<sup>174</sup> Being on a day before the 20th Business Day of the Public Benefits Phase.

<sup>175</sup> Sections 51ABZK(5)(a) and 51ABZZA(4)(a) of the Act. The notifying party may consent to an extension up to the number of days the ACCC delays providing the Notice of Competition Concerns (see sections 51ABZK(5)(a) and (6) of the Act) and the Public Benefit Assessment (see sections 51ABZZA(4)(a) and (5) of the Act). The block out period prior to the end of Phase 2 or the Public Benefit Phase in which the ACCC cannot request or receive new information will also be shortened by the corresponding number of days of the ACCC's delay (see sections 51ABZK(5)(b) and 51ABZZA(4)(b) of the Act). The adjustment to the block out period occurs regardless of whether the notifying party consents to the extension.

## ACCC may cease or stop a review

- 9.15 The notifying party may request, in writing, that the ACCC cease its consideration of a notification (or public benefit application) at any time before the ACCC makes its determination.<sup>176</sup>
- 9.16 The ACCC may also decide to cease its consideration of a notified acquisition (or public benefit application) if it is satisfied that the Parties no longer intend to put the acquisition into effect.<sup>177</sup> The ACCC might form this view if, for example:<sup>178</sup>
- there is a public announcement by the Parties (for example, a media release that they are abandoning the acquisition), or
  - it receives other evidence of that the Parties no longer intend to proceed with the acquisition (for example, an agreement or deed of termination).
- 9.17 The ACCC may have regard to information provided by all parties to the acquisition when forming this view, but it will also consider whether appropriate information or input has been provided by the notifying party. In the case of a hostile takeover, for example, the ACCC will have regard to the facts, practical circumstances and commercial realities before deciding to cease its consideration of the notification.<sup>179</sup>
- 9.18 The ACCC will give the notifying party written notice of a decision to cease consideration of the notification (or public benefit application).<sup>180</sup>

### Effect of stopping or ceasing a review

- 9.19 If the ACCC makes a decision to cease its consideration of a notification, the Parties will continue to be subject to the legal obligation not to put the acquisition into effect<sup>181</sup> If the Parties subsequently intend to proceed with the acquisition, they must re-notify to the ACCC to avoid the consequence of their acquisition being rendered void and other potential penalties.
- 9.20 If the ACCC makes a decision to cease its consideration of a public benefit application, the ACCC's determination made in Phase 1 or 2 applies. This means that:
- if the ACCC determined that the acquisition may be put into effect subject to conditions, the acquisition may be put into effect in accordance with those conditions,<sup>182</sup> or
  - if the ACCC determined that the acquisition must not be put into effect, the Parties must not proceed with the acquisition.<sup>183</sup>

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<sup>176</sup> Sections 51ABZD(2) and 51ABZV(2) of the Act.

<sup>177</sup> Section 51ABZD(3) and 51ABZV(3) of the Act.

<sup>178</sup> [Explanatory Memorandum](#) paragraphs 3.58 and 5.29.

<sup>179</sup> [Explanatory Memorandum](#) paragraph 3.59.

<sup>180</sup> Sections 51ABZD(5) and 51ABZV(5) of the Act. The notifying party may seek a review by the Tribunal or internal ACCC review of the ACCC's decision to cease considering a notification or public benefit application: section 51ABZZG(1)(a)- (b) of the Act. Further information about reviewable decisions is in chapter 12.

<sup>181</sup> Sections 45AY, 51ABE(3) and 51ABF of the Act.

<sup>182</sup> Sections 45AZ and 51ABH of the Act.

<sup>183</sup> Sections 45AY, 45AZA, 51ABE(4) and 76 of the

Act.



# 10. Providing complete, accurate and up to date information to the ACCC

- 10.1 Notifying parties should provide accurate and comprehensive information to the ACCC with their notification or public benefit application in the first instance and throughout the ACCC's assessment of the acquisition.
- 10.2 There can be significant consequences if notifying parties do not meet the necessary requirements relating to the provision of information. Depending on the circumstances, the consequences could include an extension of the statutory timeline for the ACCC to make its determination, or the ACCC resetting the timeline for its assessment of the notified acquisition or public benefit application once further information is provided. In more serious cases where the Parties commit an offence or contravene the Act, significant penalties can apply.<sup>184</sup>
- 10.3 For example, different potential consequences for the timeline can arise if the ACCC makes a decision that:
- a notification (or public benefit application) is materially incomplete<sup>185</sup>
  - a notification (or public benefit application) is materially misleading or contains false information, or
  - the ACCC becomes aware of a material change of fact.<sup>186</sup>
- 10.4 Tables 4 and 5 respectively summarise the potential outcomes for notifications and public benefit applications when the notification or application is incomplete, when the notification or application contains misleading or false information, or when the ACCC becomes aware of a material change of fact.

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<sup>184</sup> Depending on the circumstances, there may be a contravention of the Act, for example if false information is provided in contravention of s 45AZB of the Act, or the ACCC becomes aware of a material change of fact in contravention of s 45AX of the Act. Enforcement of these contraventions is dealt with in Part VI of the Act. There are also relevant criminal offences that may apply, discussed further below.

<sup>185</sup> Section 51ABY of the Act provides that the ACCC can decide, in writing, that a notification is materially incomplete or misleading or contains false information if the notification is not subject to phase 2 review and a determination under section 51ABZE(1) of the Act has not been made.

<sup>186</sup> Section 45AX of the Act details that a notifying party must notify the ACCC of material changes of fact in relation to notified acquisitions.

**Table 4. Summary of potential outcomes for incomplete notifications, misleading or false information, or material changes of fact**

ACCC decision	Timing	Reason	Effect
<b>No effective notification date</b> <sup>187</sup>	Phase 1	Incomplete notification Misleading or false information	The ACCC cannot make a determination while there is no effective notification date.
<b>Setting a new effective notification date</b> <sup>188</sup>	Phase 1	Incomplete notification Misleading or false information Material change of fact	The ACCC may reset the effective notification date to the date it receives additional information, or to the date that it becomes aware of the material change of fact. The statutory timeline commences from the new effective notification date.
<b>Extension of the determination period</b> <sup>189</sup>	Phase 2 (misleading or false information) Phase 1 & Phase 2 (material change of fact)	Misleading or false information Material change of fact	The timeline is extended by the number of Business Days it takes for the notifying party to provide additional information.

<sup>187</sup> If the ACCC makes a decision that a notification is materially incomplete, or misleading or contains false information in Phase 1 under section 51ABY of the Act, then the consequences of that decision can include that the notification is taken to never have had an effective notification date (see section 51ABZ(1) of the Act).

<sup>188</sup> If the ACCC makes a decision that a notification is materially incomplete, or misleading or contains false information in Phase 1 under section 51ABY of the Act, a notifying party may then provide additional information and documents (see section 51ABZA) and the effective notification date will typically become the day the additional information and documents are given (see section 51ABZA(5) of the Act).

<sup>189</sup> If, during Phase 2, the ACCC is satisfied that the notification is materially misleading or contains false information, the ACCC may extend the timeline (see section 51ABZN(2) of the Act). In each of Phase 1 and Phase 2, the ACCC may extend the timeline if it becomes aware of a material change of fact (see sections 51ABZB(2)(a)(ii) and 51ABZB(2)(b) of the Act).

**Table 5. Summary of potential outcomes for incomplete public benefit applications, misleading or false information, or material changes of fact**

ACCC decision	Reason	Effect
<b>No effective application date</b> <sup>190</sup>	Incomplete application Misleading or false information	The ACCC cannot make a determination while there is no effective application date.
<b>Setting a new effective application date</b> <sup>191</sup>	Incomplete application Misleading or false information Material change of fact	The ACCC may set the effective application date to the date it receives additional information or the date on which the ACCC becomes aware of a material change in fact. The statutory timeline commences from the new effective application date.
<b>Extension of the determination period</b> <sup>192</sup>	Material change of fact	The timeline is extended by the number of Business Days it takes for the notifying party to provide additional information.

10.5 The ACCC decisions set out in Tables 4 and 5 must be made within a reasonable period after the ACCC begins to be satisfied that the notification (or public benefit application) is materially incomplete, materially misleading or false,<sup>193</sup> or becomes aware of a material change of fact.<sup>194</sup> The ACCC will provide a written notice of its decision to the notifying party, outlining the grounds for its decision.<sup>195</sup>

10.6 Notifying parties can seek review of an ACCC decision that there is no effective notification date (or effective application date), to set a new effective notification date (or effective application date) or to extend a determination period in this manner. See chapter 12 for further information about reviewable ACCC decisions.

<sup>190</sup> If the ACCC makes a decision that a public benefit application is materially incomplete, or misleading or contains false information under section 51ABZQ of the Act, then the consequences of that decision can include that the application is taken to never have had an effective application date (see section 51ABZR(1) of the Act).

<sup>191</sup> If the ACCC makes a decision that a public benefit application is materially incomplete, or misleading or contains false information under section 51ABZQ of the Act, a notifying party may then provide additional information and documents (see section 51ABZS of the Act) and the effective application date will become the day the additional information and documents are given (see section 51ABS(5) of the Act).

<sup>192</sup> If, during the Public Benefits Phase, the ACCC is satisfied that the application is materially misleading or contains false information, the ACCC may extend the timeline (see section s51ABZN of the Act). The ACCC may also extend the timeline if becomes aware of a material change of fact (see sections 51ABZT(2)(b) of the Act).

<sup>193</sup> Sections 51ABY(3) and 51ABZQ(3) of the Act.

<sup>194</sup> Sections 51ABZB(4) and 51ABZT(4) of the Act.

<sup>195</sup> Notifications: sections 51ABZ(1)(b) and 51ABZB(5) of the Act; Public benefit applications: sections 51ABZR(1)(b) and 51ABZT(5) of the Act.

# Incomplete notifications or public benefit applications

## Notifications

- 10.7 The ACCC can only make a decision during Phase 1 that a notification is materially incomplete, or materially misleading or false in a material particular. This results in there being no effective notification date for the notification.<sup>196</sup>
- 10.8 In considering whether the notification is materially incomplete, misleading or false the ACCC may have regard to matters including the extent to which the notification:<sup>197</sup>
- is in the form prescribed
  - is accompanied by any prescribed information or documents.
- 10.9 A notification could be materially incomplete, materially misleading or contain information that is false in a material particular at the outset (for example, because it does not include upfront information which may be required by the form) or it can become that way later because of a material change of fact.<sup>198</sup>
- 10.10 When preparing the notification, the notifying party should answer the questions required by the Notification Form comprehensively and accurately. Answering in this manner is likely to minimise the risk that the ACCC would later decide that a notification should be taken not to have an effective notification date. As noted above, Parties are encouraged to discuss what information is required for a notification before they lodge, as part of pre-notification engagement (discussed in Chapter 4).

## Public benefit applications

- 10.11 At any time during the Public Benefit Phase before the ACCC makes a determination, the ACCC may decide that an application is materially incomplete, or materially misleading or false in a material particular, and therefore does not have an effective application date.<sup>199</sup>
- 10.12 In deciding whether a public benefit application is materially incomplete, misleading or false, the ACCC may have regard to matters including the extent to which the application is in the form prescribed and is accompanied by any prescribed information or documents.<sup>200</sup>

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<sup>196</sup> Section 51ABY(1) of the Act.

<sup>197</sup> Section 51ABY(4) of the Act.

<sup>198</sup> Section 51ABY(8) of the Act.

<sup>199</sup> Sections 51ABZQ(1) and (2) of the Act.

<sup>200</sup> Section 51ABZQ(4) of the Act.

- 10.13 If there is no effective application date, the ACCC must not make a public benefit determination.<sup>201</sup>
- 10.14 An application could be materially incomplete, materially misleading or contain information that is false in a material particular at the outset (for example, because it does not include upfront information which may be required by the public benefit application form) or it can become that way later because of a change of fact.<sup>202</sup>

## False or misleading information

- 10.15 Providing false or misleading information to the ACCC in relation to a notification or a public benefit application has serious consequences. This applies to all parties (including third parties) when providing information to the ACCC in the merger control regime.
- 10.16 Knowingly giving false or misleading information to the ACCC is a serious criminal offence.<sup>203</sup>
- 10.17 Civil penalties may also apply if a person knowingly or recklessly gives information relating to an acquisition that is false or misleading in a material particular in contravention of the Act.<sup>204</sup>
- 10.18 Other potential consequences to providing false or misleading information include:
- In **Phase 1**, the ACCC may decide there is no effective notification date if the notifying parties provide a notification that is materially misleading or contains information that is false in a material particular.<sup>205</sup>
  - In **Phase 2**, the ACCC may extend the determination period if it becomes aware that information provided by the notifying parties in a notification is materially misleading or false in a material particular.<sup>206</sup> The ACCC may also extend the Phase 2 period if any information given by the notifying parties to the ACCC in relation to the notification is false.<sup>207</sup>
  - In the **Public Benefit Phase**, the ACCC may decide that there is no effective application date if an application is materially misleading or contains information that is false in a material particular.<sup>208</sup>
- See also Tables 4 and 5.
- 10.19 In circumstances where the ACCC has already made a determination that was based on false or misleading information that was material to its determination, the ACCC may seek appropriate orders in the Federal Court, such as an injunction to prevent an

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<sup>201</sup> Section 51ABZR(2) of the Act.

<sup>202</sup> Section 51ABZQ(7) of the Act.

<sup>203</sup> *Criminal Code 1995* (Cth) section 137.1.

<sup>204</sup> Section 45AZB of the Act.

<sup>205</sup> Sections 51ABY(1) and 51ABY(2) of the Act.

<sup>206</sup> Sections 51ABZN(2) and 51ABZN(3)(a) of the Act.

<sup>207</sup> Section 51ABZN(3)(b) of the Act.

<sup>208</sup> Sections 51ABZQ(1) and 51ABZQ(2) of the Act.

acquisition from being put into effect or orders for divestiture if the acquisition has completed.<sup>209</sup>

## Providing additional information

10.20 If the ACCC decides that a notification (or public benefit application) is materially incomplete or misleading, or the notifying party has provided false information about the notification (or public benefit application), the notifying party may provide additional information or documents in response to the ACCC's decision.

10.21 The effect of providing this additional information<sup>210</sup> is:

- If the ACCC has decided that there is no effective notification date (which it can only do in Phase 1) – the 30 Business Day statutory timeline will restart. The new effective notification date will be the day the additional information or documents are received.<sup>211</sup>
- If the notification is in Phase 2 – the determination period will be extended by the number of Business Days it takes for the notifying party to provide the additional information.<sup>212</sup>
- If the ACCC has decided that there is no effective application date during its assessment of a public benefit application – the 50 Business Day statutory timeline for the ACCC to make its determination will restart. The new effective application date becomes the day that the additional information or documents are received.<sup>213</sup>

10.22 The ACCC will provide the notifying party with written notice confirming the new effective notification date (or effective application date). The ACCC will also update the Acquisitions Register.

## Telling the ACCC about material changes of fact

10.23 To ensure that the ACCC makes its decision on correct and up-to-date information, notifying parties have an ongoing obligation to notify the ACCC of any material changes of fact until the ACCC makes its determination.<sup>214</sup> Civil penalties apply for failure to comply with this obligation.<sup>215</sup>

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<sup>209</sup> Sections 80AD and 81B(2) of the Act.

<sup>210</sup> And pay any applicable fee.

<sup>211</sup> Section 51ABZA(2) and (5) of the Act.

<sup>212</sup> Section 51ABZN(2) of the Act.

<sup>213</sup> Sections 51ABZS(2) and (5) of the Act.

<sup>214</sup> Section 45AX of the Act. There are qualifications to this obligation, for example where an acquisition is in Phase 2 and the person only becomes aware of the change of fact during the block out period, ie at a time occurring less than 15 business days before the end of Phase 2: section 45AX(1)(d)(iv) of the Act. Section 51ABZZD(5) of the Act separately places limits on the extent to which the ACCC can take into account submissions or information received or obtained in the block out period.

<sup>215</sup> Pecuniary penalties under section 76 may apply for contraventions of section 45AX of the Act. These penalties can be up to the greater of \$50 million, 3 times the value of the benefit obtained, or 30% of adjusted turnover, for a body corporate, or \$2.5 million for a person.

10.24 While not exhaustive, examples of what may be a material change of fact may include:<sup>216</sup>

- significant changes in the relevant market (for example, immediate or impending exit of a key competitor)
- changes to the transaction (for example, changes in the legal structure of the acquisition, destruction of assets), or
- significant regulatory change.

10.25 If the ACCC becomes aware of a material change of fact:

- In **Phase 1** – it may decide that the effective notification date is the date on which it becomes aware of the change of fact or alternatively decide to extend the Phase 1 determination period by the number of days it takes for the notifying party to provide additional information in response.<sup>217</sup>
- In **Phase 2** – it may decide to extend the Phase 2 determination period by the number of days it takes for the notifying party to provide additional information in response.<sup>218</sup>
- In the **Public Benefit Phase** – it may decide that there is new effective application date (being the date the ACCC becomes aware of the change of fact),<sup>219</sup> or it may decide to extend the determination period for the public benefit application by the number of days it takes the Parties to provide additional information in response.<sup>220</sup>

10.26 The ACCC may set a new effective notification date (in Phase 1) or extend the determination period (in Phase 1 or Phase 2) once it becomes aware of a change in fact that is material to its decision-making, regardless of whether the notifying parties have notified the ACCC of the material change.<sup>221</sup> The same applies during the Public Benefit Phase.<sup>222</sup>

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<sup>216</sup> [Explanatory Memorandum](#) paragraph 3.52.

<sup>217</sup> Section 51ABZB(2)(a) of the Act.

<sup>218</sup> Section 51ABZB(2)(b) of the Act.

<sup>219</sup> Section 51ABZT(2)(a) of the Act.

<sup>220</sup> Sections 51ABZT(2)(b) and 51ABZT(3) of the Act.

<sup>221</sup> Sections 51ABZB(1) and 51ABZB(2) of the Act.

<sup>222</sup> Section 51ABZT(1) and 51ABZT(2) of the Act.

# 11. Public and confidential information

## The Acquisitions Register

11.1 The ACCC must maintain a public register of all notified acquisitions, determinations and reasons on the ACCC's website (referred to as the Acquisitions Register).<sup>223</sup> The Acquisitions Register is important for providing transparency, including by:

- providing key details of each notified acquisition and the stage in the assessment process to keep stakeholders informed of progress, including when consultation is open
- providing a record of past ACCC decisions and the reasons on which they were based.

### Content of the Acquisitions Register

11.2 The Acquisitions Register will generally include:

- details of the notified acquisition – for example, names of Parties, non-confidential description of the acquisition, effective notification date, end of determination period, relevant industry
- for public benefit applications, a description of the public benefit and detriment claims
- the ACCC's determination and reasons for making the determination
- the ACCC's decision (if any) that the notification is subject to Phase 2 review
- the Notice of Competition Concerns (if applicable)
- the Public Benefit Assessment (if applicable)
- any other information or documents prescribed in a legislative instrument (if any).

11.3 The ACCC does not intend to publish the notification application or public benefit application on the Acquisitions Register. Similarly, the ACCC does not intend to publish submissions from parties to the acquisition or third parties on the Acquisitions Register.

11.4 The ACCC will promptly update the content of the Acquisitions Register throughout the assessment,<sup>224</sup> including to update the expected date for the ACCC's determination if the timeline has been extended.

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<sup>223</sup> Section 51ABZZH of the Act.

<sup>224</sup> Section 51ABZZI(3) of the Act requires the ACCC to update the Acquisitions Register within 1 Business Day after the effective notification date, making a determination or a decision that a notification is to be subject to Phase 2.



## Confidential information

- 11.5 During the ACCC's assessment of a notified acquisition, the ACCC may receive information that is properly regarded as being confidential, and which is provided to the ACCC in confidence. The ACCC is committed to treating this information responsibly and in accordance with the law. The ACCC understands the importance of confidentiality to parties involved in a notified acquisition, as well as to third parties that provide information to the ACCC.
- 11.6 The ACCC's starting point will be not to disclose confidential information. However, as an administrative decision-maker under Australia's merger control regime, the ACCC must make robust, well-informed, and transparent decisions, supported by reasons as required under the merger control regime.
- 11.7 The ACCC will endeavour to maintain an appropriate balance in each case between minimising the disclosure of information that is confidential, whilst ensuring that the ACCC complies with its obligations as an administrative decision-maker. While there may be circumstances in which the ACCC will consider it appropriate to disclose some of the information that has been provided to it, the ACCC will generally disclose this information only to the most limited extent required, and will consider steps to mitigate any potential adverse impact on the party who provided the information.
- 11.8 In the Notice of Competition Concerns, the ACCC is required to refer to the evidence or other material it has relied upon in reaching its preliminary view (see paragraphs 7.12 – 7.17). However, the ACCC is not required to provide access to its case file or disclose confidential third party information. Where the ACCC has received confidential information during its assessment that raises a material issue of concern, that issue will be described in the Notice of Competition Concerns in sufficient detail to enable the parties to the acquisition (and third parties) to understand the issue.
- 11.9 The ACCC is developing, and will publish in due course, further guidance on the practical steps that it will take, and those that it will ask parties to acquisitions and other third parties to take, to ensure that the ACCC is able to administer the merger control regime effectively and within the timeframes that have been specified, whilst maintaining an appropriate approach to information that is confidential. This further guidance will include the ACCC's proposed approach to consultation.

The ACCC is giving ongoing consideration to the processes and procedures relating to the provision and disclosure of information that is confidential in the merger control regime. The ACCC will provide additional guidance on these issues in due course, although the ACCC will be unable to provide detailed guidance regarding specific factual scenarios, as each situation will need to be addressed on its facts.

# 12. Review of ACCC decisions and determinations

- 12.1 Certain ACCC decisions and determinations are subject to review. Who is eligible to apply for review, when a review can be sought, and whether the review is conducted by the ACCC or Tribunal will depend on the nature of the ACCC's decision or determination.

## Tribunal review of ACCC determinations

- 12.2 ACCC determinations that an acquisition may be put into effect (with or without conditions) or must not be put into effect are subject to limited merits review by the Tribunal. A review by the Tribunal of an ACCC determination is not a re-hearing of the matter.<sup>225</sup>
- 12.3 A notifying party dissatisfied with an ACCC determination may apply to the Tribunal for a review of the ACCC's determination.<sup>226</sup> Dissatisfied third parties, where allowed by the Tribunal, may also apply for a review of an ACCC determination.<sup>227</sup>
- 12.4 An application for review must be made within 14 calendar days after the ACCC's reasons for the determination are published on the Acquisitions Register.<sup>228</sup>
- 12.5 The Tribunal may affirm, set aside or vary the ACCC's determination and once the Tribunal's decision is made it is taken to be a determination of the ACCC.<sup>229</sup>
- 12.6 The Tribunal's review is largely based on the information which was before the ACCC when making its determination<sup>230</sup> (unless otherwise permitted in limited circumstances, for example where the Tribunal requests information from the ACCC,<sup>231</sup> where the information, documents or evidence was not in existence when the ACCC made its determination).<sup>232</sup> The Tribunal may also consult consumer associations or consumer interest groups<sup>233</sup> and ask questions or seek information from a technical expert<sup>234</sup> as part of the review.

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<sup>225</sup> Section 102A of the Act.

<sup>226</sup> Section 100C(1) of the Act.

<sup>227</sup> In considering whether to allow a third party to apply for review, among other things, the Tribunal must have regard to the person's interest in the matter, the efficient administration of the merger regime, and whether the application has any reasonable prospects of success: section 100C(4) of the Act.

<sup>228</sup> Section 100C(1)(b) of the Act.

<sup>229</sup> Section 100B(3) of the Act.

<sup>230</sup> Section 100T of the Act.

<sup>231</sup> Section 100R of the Act.

<sup>232</sup> Section 100S of the Act.

<sup>233</sup> Section 100S(1) of the Act.

<sup>234</sup> Section 100Q of the Act.

- 12.7 The Tribunal may, at any time, dismiss an application for review if it is satisfied that the application is frivolous, vexatious, misconceived, or is lacking in substance; has no reasonable prospects; or is otherwise an abuse of the process of the Tribunal.<sup>235</sup>
- 12.8 The Tribunal must not progress a review of a determination relating to a notified acquisition while the ACCC is still considering a public benefit application.<sup>236</sup>
- 12.9 The Tribunal must make its determination within 90 days after the later of the last day on which an application for review could have been made or the day the applicant gives the Tribunal further information.<sup>237</sup> The Tribunal may extend the review period in certain circumstances.<sup>238</sup>

## Review of ACCC process-related decisions

- 12.10 The notifying party may seek a review of certain ACCC process-related decisions as set out in Table 6. The avenue for review of these decisions is based on who made the decision, for example:
- If the decision was made by an ACCC senior executive (who is not a Commissioner), the notifying party can apply to the ACCC to seek internal review of the decision.<sup>239</sup>
  - If the decision was made by an individual ACCC Commissioner or the [ACCC Commission](#) (which would be a decision involving at least three Commissioners), the notifying party can apply to the Tribunal for review of the decision.<sup>240</sup>

**Table 6. Overview of process-related decisions by the ACCC that may be subject to review**

Phase 1	
<b>Type of decision</b>	<ul style="list-style-type: none"> <li>▪ Decision there is no effective notification date because a notification is materially incomplete, materially misleading or contains false information.<sup>241</sup></li> <li>▪ Decision the effective notification date is the date the ACCC becomes aware of a material change of fact.<sup>242</sup></li> <li>▪ Decision Phase 1 is extended because of a material change of fact.<sup>243</sup></li> <li>▪ Decision to cease considering the notification as the ACCC considers the acquisition is no longer intended to be put into effect.<sup>244</sup></li> </ul>

<sup>235</sup> Section 100J of the Act.

<sup>236</sup> Section 100M of the Act.

<sup>237</sup> Section 100P of the Act.

<sup>238</sup> The Tribunal may extend the period by 60 days once. The Tribunal may also extend the period by 90 days once, if it is satisfied that the matter cannot be dealt with properly in the existing period because of reasons such as its complexity or volume of information, or new information, or other special circumstances: section 100P(3)-(6) of the Act.

<sup>239</sup> Section 51ABZZG(2) of the Act. The ACCC's decision-making powers may be delegated to its senior executives under section 51ABZZR of the Act.

<sup>240</sup> Sections 18(6), 51ABZZG(7)(a) and 100A of the Act.

<sup>241</sup> Sections 51ABZZG(1)(a) and 51ABY(1) of the Act.

<sup>242</sup> Sections 51ABZZG(1)(a) and 51ABZB(2)(a)(i) of the Act.

<sup>243</sup> Sections 51ABZZG(1)(a) and 51ABZB(2)(a)(ii) of the Act.

<sup>244</sup> Sections 51ABZZG(1)(a) and 51ABZD(3) of the Act.

Phase 2	
<b>Type of decision</b>	<ul style="list-style-type: none"> <li>Decision Phase 2 is extended because of a material change of fact.<sup>245</sup></li> <li>Decision Phase 2 is extended because the notification is materially misleading or contains false information.<sup>246</sup></li> <li>Decision to cease considering the notification as the ACCC considers the acquisition is no longer intended to be put into effect<sup>247</sup></li> </ul>
Public Benefit Phase	
<b>Type of decision</b>	<ul style="list-style-type: none"> <li>Decision there is no effective application date because a public benefit application is materially incomplete, materially misleading or contains false information.<sup>248</sup></li> <li>Decision the effective application date is the date the ACCC becomes aware of a material change of fact.<sup>249</sup></li> <li>Decision the public benefit determination period is extended because of a material change of fact.<sup>250</sup></li> <li>Decision to cease considering the public benefit application as the ACCC considers the acquisition is no longer intended to be put into effect.<sup>251</sup></li> </ul>
All stages	
<b>Type of decision</b>	<ul style="list-style-type: none"> <li>Decision the determination period is to be extended where the Parties have not provided information in response to a section 155 compulsory information gathering notice within 10 Business Days after issue of such a notice.<sup>252</sup></li> </ul>

## Internal review of a decision by an ACCC senior executive

12.11 An application for internal review must be made within 7 days after the day on which the decision was made.<sup>253</sup> Applications for internal review must be made in writing and should be sent to [mergers@acc.gov.au](mailto:mergers@acc.gov.au).

12.12 The review will be conducted internally by either:

- another ACCC senior executive who was not involved in the making of the original decision and is of a higher level than the original decision-maker,
- a Commissioner of the ACCC, or
- the ACCC Commission.

12.13 The ACCC will affirm, vary or revoke the decision within 7 days after receiving an application for internal review.<sup>254</sup>

<sup>245</sup> Sections 51ABZZG(1)(a) and 51ABZB(2)(b) of the Act.

<sup>246</sup> Sections 51ABZZG(1)(a) and 51ABZN(2) of the Act.

<sup>247</sup> Sections 51ABZZG(1)(a) and 51ABZD(3) of the Act.

<sup>248</sup> Sections 51ABZZG(1)(b) and 51ABZQ(1) of the Act.

<sup>249</sup> Sections 51ABZZG(1)(b) and 51ABZT(2)(a) of the Act.

<sup>250</sup> Sections 51ABZZG(1)(b) and 51ABZT(2)(b) of the Act.

<sup>251</sup> Sections 51ABZZG(1)(b) and 51ABZV(3) of the Act.

<sup>252</sup> Sections 51ABZZG(1)(c) and 51ABZZE(2)(c) of the Act.

<sup>253</sup> Section 51ABZZG(3) of the Act.

<sup>254</sup> Section 51ABZZG(4) of the Act.

- 12.14 The ACCC will provide the notifying party with reasons for its decision within 1 Business Day after making the decision.<sup>255</sup>

## Tribunal review of ACCC process-related decisions

The details of the application process for Tribunal review of ACCC decisions will be established under a legislative instrument. The ACCC will update these draft guidelines in due course, once the legislative instrument has been made.

- 12.15 The Tribunal may have regard to any information given, documents produced or evidence given to the ACCC in connection with the making of the decision that is under review.<sup>256</sup>
- 12.16 The Tribunal may make a decision affirming, varying or revoking the decision of the ACCC within 14 days after receiving an application for review<sup>257</sup> and will provide the notifying party with reasons for its decision.<sup>258</sup>

## Judicial review

### Judicial review of ACCC decisions or determinations

- 12.17 Review of certain ACCC decisions or determinations may be available in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or in the original jurisdiction of the Federal Court under section 39B of the *Judiciary Act 1903* (Cth) on a question of law (judicial review).
- 12.18 Judicial review is concerned only with the legality of the decision. The Federal Court cannot determine the merits of the case. In the event an applicant wishes to obtain a review of the merits of an ACCC decision or determination, the Tribunal (or internal review for process-related decisions) is the appropriate avenue for review.
- 12.19 Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is not available for an ACCC decision that a notification is subject to Phase 2 review.

### Review of Tribunal determinations

- 12.20 The Full Federal Court can review Tribunal determinations only on questions of law, not questions of fact or the merits of the decision.
- 12.21 Information about the Federal Court and the process for filing an application for review can be obtained from the Federal Court website.

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<sup>255</sup> Section 51ABZZG(5) of the Act.

<sup>256</sup> Section 100B(5) of the Act.

<sup>257</sup> Sections 100B(1) and 100B(2)(a) of the Act.

<sup>258</sup> The Tribunal will provide reasons within 1 Business Day after making its decision. Section 100B(2)(b) of the Act.

# 13. Acquisitions below the thresholds

- 13.1 Section 50 of the Act prohibits the acquisition of shares or assets that have the effect, or likely effect, of substantially lessening competition in any market. Section 50 does not apply to notified acquisitions.
- 13.2 If an acquisition has not been notified, the ACCC may commence an investigation, and may take legal action in the Federal Court, for a breach of section 50. This may include seeking an injunction, depending on the circumstances.
- 13.3 The ACCC will monitor acquisitions and will take appropriate investigatory and enforcement actions in respect of anti-competitive acquisitions, even if they fall below the thresholds for mandatory notification. If an industry participant has competition concerns about an acquisition, they can email [[email address to be inserted in due course](#)].
- 13.4 Investigations into acquisitions below the thresholds that are not notified and that may breach section 50 will be run by the ACCC in a similar way to investigations by the ACCC of other potential breaches of Part IV of the Act.

## Voluntary notification of acquisitions

- 13.5 There may be circumstances where a business considers it appropriate to voluntarily notify an acquisition despite it falling below the thresholds for mandatory notification. Notifying a transaction even though it falls below the thresholds, or where there is uncertainty about whether the thresholds are met, provides certainty for Parties because it means that the ACCC or another third party will not be able to take legal action under section 50. Notification in these circumstances also removes the legal risks around the failure to notify. As noted in chapter 2, if an acquisition was required to be notified and was not notified, the acquisition will be stayed.<sup>259</sup> If an acquisition is put into effect while stayed, this is a contravention of the Act and significant penalties may apply, including that the acquisition is automatically void.<sup>260</sup>
- 13.6 Acquisitions that are voluntarily notified become subject to the requirements of the merger control regime. For example, the same notification forms, fees and timelines apply, and the acquisition will be stayed until it is approved. The ACCC will follow the same process as acquisitions that must be notified.

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<sup>259</sup> Section 51ABE of the Act.

<sup>260</sup> Sections 45AY and 45AZA of the Act.