



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Guidelines for Authorisation of Conduct (non-merger)

For consultation

November 2017

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

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# 1 Introduction

- 1.1 These Guidelines for Authorisation of Conduct (non-merger) are for consultation and reflect the proposed approach of the Australian Competition and Consumer Commission (ACCC) to assessing applications for non-merger authorisation under the *Competition and Consumer Act 2010* (Cth) (the Act).
- 1.2 Changes to the authorisation test, application process and the conduct that can be authorised came into effect on [Commencement Date] following recommendations by the Competition Policy Review, Chaired by Professor Ian Harper.
- 1.3 These guidelines replace the 2013 Guide to Authorisation and are intended to provide information to potential applicants, interested parties and legal, or other, advisers about the authorisation process and the analytical framework the ACCC uses to assess applications for authorisation of conduct that may otherwise breach the competition provisions of the Act (except for mergers and acquisitions which is in a separate guide).<sup>1</sup> This will assist parties to lodge valid applications for authorisation and/or provide submissions to the ACCC in relation to applications.
- 1.4 This Guide is not intended to be exhaustive on all the issues that may arise during an authorisation process. Parties are encouraged to contact the ACCC if they have any questions.
- 1.5 Inquiries about lodging an application for authorisation should be directed to the General Manager, Adjudication, Merger and Authorisation Review Division, ACCC at [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au).

## The authorisation framework

- 1.6 The authorisation process in the Act is an important feature of Australia's competition laws. It recognises that, in certain circumstances, particular conduct may not harm competition or may give rise to benefits to the public that outweigh the public detriment.
- 1.7 The legal test that the ACCC must apply when assessing an application for authorisation depends upon the conduct for which authorisation is sought. For conduct that is prohibited outright (i.e. prohibited *per se*), such as cartel conduct, the ACCC may grant authorisation only if it is satisfied that the likely public benefit from

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<sup>1</sup> See Merger Authorisation Guidelines

the conduct outweighs the likely public detriment. The relevant test for other conduct, has two limbs; the ACCC may grant authorisation if it is satisfied that either:

- (i) the conduct would not be likely to substantially lessen competition, or
- (ii) the likely public benefit from the conduct outweighs the likely public detriment.

1.8 If authorisation is sought for proposed conduct that may breach both the *per se* provisions and other competition provisions of the Act, the ACCC will apply the test for authorisation applicable to *per se* conduct to its assessment of the entire application for authorisation. That is, the ACCC may grant authorisation only if it is satisfied that the likely public benefit from the conduct outweighs the likely public detriment.

1.9 The following chart provides an overview of the steps in the non-merger authorisation process with indicative times for key milestones.





## 2 What authorisation provides

### Why apply for authorisation?

- 2.1 Applying for authorisation enables applicants to manage the potential risk of legal action under the Act.
- 2.2 If parties<sup>2</sup> obtain authorisation from the ACCC, they receive statutory protection from legal action under the Act for that conduct. That is, for the duration of the authorisation, the party or parties to whom authorisation applies will be able to engage in the proposed conduct without risk of the ACCC or third parties taking legal action against them for a contravention of the relevant competition provisions of the Act.
- 2.3 Any authorisation granted by the ACCC must specify the provisions of the Act that will not apply in relation to the specified conduct while the authorisation is in force. In some cases, conduct may risk breaching more than one of the competition provisions of the Act. When applying for authorisation, applicants should identify all the provisions of the Act for which protection is sought to ensure that any authorisation granted provides the protection required.
- 2.4 Applicants may wish to obtain legal advice on whether the conduct they propose to engage in might breach the Act and whether they should consider applying for authorisation. The ACCC cannot provide legal advice, although it is able to provide general guidance on issues.

### Who can apply?

- 2.5 Any party intending to engage in conduct that may be at risk of breaching the competition provisions of the Act may apply for authorisation.
- 2.6 An application for authorisation may also be made on behalf of other parties for conduct that the parties propose to engage in. For example an industry or professional association may apply on behalf of its members. Where an application is lodged on behalf of other parties the ACCC will usually assume that those parties have given consent unless advised otherwise.

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

## Conduct that can be authorised

- 2.7 The ACCC's power to grant authorisation is limited to future conduct. The Act does not allow the ACCC to grant authorisation for conduct engaged in before the ACCC makes a decision on the application for the authorisation.<sup>3</sup>
- 2.8 The ACCC may, if the authorisation test is met (see Chapter 6), grant authorisation to conduct to which one or more of the provisions in Part IV of the Act (i.e. the competition provisions) would or might apply, including:
- contracts, arrangements or understandings containing anti-competitive provisions (including cartel provisions) (section 45)
  - concerted practices (section 45)
  - secondary boycotts (sections 45D, 45DA, 45DB)
  - misuse of market power (section 46)
  - exclusive dealing (section 47)
  - resale price maintenance (section 48)
  - dual listed company arrangements (section 49)
  - mergers and acquisitions (section 50)<sup>4</sup>.
- 2.9 Some conduct is a breach of the Act regardless of its effect on competition (often referred to as a *per se* breach) (for example, resale price maintenance and cartel conduct such as price fixing or bid rigging), while other conduct is only a breach of the Act if it substantially lessens competition.
- 2.10 Examples of contracts, arrangements or understandings that the ACCC is commonly asked to authorise include:
- non-prescribed voluntary industry codes of conduct — for example where provisions of a code impose standards of behaviour on signatories that may reduce competition, require training from specific providers and exclude membership for Code breaches
  - collective bargaining arrangements — where two or more competitors come together to negotiate terms and conditions (which can include price) with a supplier or a customer

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3 Section 88(6)

4 See Merger Authorisation Guidelines 2017

- agreements to impose industry levies — for example an agreement among industry participants to impose a levy on the sale of particular goods/services, the proceeds of which may then be used to fund relevant research and development or a product stewardship scheme for the proper disposal of environmentally harmful products
- alliances between competitors — for example a supply agreement whereby one party agrees to cease supply of a good/service and to instead purchase that good/service from the other party and
- co-ordination of a logistics chain — for example buyers (e.g. producers) and sellers (e.g. terminal operators) cooperate by entering into vertical agreements such as long term contracts, to provide a level of commitment that provides sufficient certainty to undertake long term, specific investment.

### Conduct that would or might breach the Act

- 2.11 It is not necessary for an applicant to show that the proposed conduct for which authorisation is sought would breach the competition provisions of the Act in order to apply for authorisation. Authorisation is available where the conduct the parties intend to engage in would or **might** constitute a breach of the relevant provisions of the Act.
- 2.12 Accordingly, the ACCC is not required to satisfy itself that the proposed conduct would constitute a breach of the relevant provisions of the Act in order to consider an application.
- 2.13 The ACCC will consider an application for authorisation unless it is clear there is no risk that the conduct for which authorisation is sought will breach the relevant provisions of the Act.

### Who is protected by authorisation?

- 2.14 While an authorisation remains in force, the competition provisions specified in the authorisation do not apply in relation to the specified conduct to the extent that it is engaged in by:
- the applicant

- any other person named or referred to in the application as a person who is engaged in, or who is proposed to be engaged in, the conduct
- any particular persons or classes of person, as specified in the authorisation who become engaged in the conduct.<sup>5</sup>

### **Difference between authorisation and notification**

2.15 As an alternative to authorisation, the Act allows parties to obtain statutory protection from legal action under the notification regime in relation to:

- exclusive dealing
- certain collective bargaining and collective boycott arrangements, and
- resale price maintenance.

2.16 This Guide does not provide details about the notification regime. See the ACCC's website [www.accc.gov.au](http://www.accc.gov.au) for further information.

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5 Section 88(2)

## 3 How to apply for authorisation

### Before lodging an application — discussions with the ACCC

- 3.1 The ACCC encourages applicants to contact it for informal discussion and guidance before lodging their applications.
- 3.2 These discussions will enable applicants to outline their proposals to the ACCC, to ensure they provide all relevant information and documents with their application, and to obtain further information about the authorisation process.
- 3.3 The ACCC recommends that applicants provide a draft of their application before the pre-lodgement discussion so that the ACCC can provide more specific guidance.
- 3.4 The ACCC is not able to suggest arguments in support of an application or the likely outcome of an application. However the ACCC can assist by explaining in general terms the issues that applicants should address in their applications and the various steps in the ACCC's assessment.

### Lodging a valid application

- 3.5 The Act requires that for an application to be valid it must be:
- in a form approved in writing by the ACCC
  - accompanied by any other information or documents prescribed by the Regulations, and
  - accompanied by the fee (if any) prescribed by the Regulations.<sup>6</sup>
- 3.6 The ACCC is required to assess the validity of an application within five business days of receiving it.<sup>7</sup> See paragraphs 3.32 – 3.35 for further information about invalid applications.

### Form of application

- 3.7 An application for authorisation should follow the form approved by the ACCC ([www.accc.gov.au](http://www.accc.gov.au)) and be accompanied by any relevant information, documents and evidence.

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6 Section 89(1)

7 Section 89(1A)

3.8 Applicants must include:

- a public version of the application, which will be placed on the public register, and
- a signed declaration that the application is true, correct and complete.

3.9 An application for authorisation will be assessed more efficiently and effectively if the information and evidence provided in the application is comprehensive. The level of detail and the type of information required for an application to be valid will differ depending on the nature and complexity of the arrangements or conduct. Some questions on the form might not be relevant to a particular application and, where this is the case, applicants should provide a brief explanation of why this is so.

3.10 The information referred to in the form includes:

- the name and contact details of the applicant/s and if applicable other persons and/or classes of persons who also propose to engage in the conduct and on whose behalf authorisation is sought
- a clear and complete description of the proposed conduct; how it is likely to operate in practice; the rationale for the proposed conduct; term of authorisation sought and reasons why this term is appropriate
- the relevant provisions of the Act that may apply to the proposed conduct
- market information, including about market concentration
- the public benefits likely to result from the proposed conduct
- the public detriments likely to result from the proposed conduct, including those likely to result from any lessening of competition
- the contact details of parties who may be directly affected by the proposed conduct
- any information, data, documents or evidence relevant to the ACCC's assessment.

3.11 Applicants must describe the proposed conduct for which authorisation is sought in a sufficiently precise manner such that the ACCC can consult with interested parties and assess the conduct. Care should be taken to ensure the scope of the conduct is accurately described and that all provisions of the Act in respect of which authorisation is sought are specified.

3.12 The ACCC will give more weight to statements and submissions which are accompanied by evidence relevant to the ACCC's assessment, including

documents and data which the applicant may not regard as supportive of its application.

- 3.13 Before lodging the application with the ACCC, the declaration provided as part of the form must be signed by the applicant or a person appropriately authorised by the applicant. The declaration confirms that the information given in response to the questions on the form is true, correct and complete.
- 3.14 It is important at this stage for the applicant to check that all information provided is correct and accurate. Giving false or misleading information to the ACCC is a serious criminal offence.<sup>8</sup>

### **Fees**

- 3.15 Unless the applicant has been granted a fee waiver (see paragraphs 3.18 – 3.23), a valid application must be accompanied by the relevant lodgement fee. The fee for lodging all non-merger applications for authorisation is \$7500.<sup>9</sup>
- 3.16 The fee for lodging an application for the revocation of an existing authorisation and its substitution with a new one in its place is \$2500. No fee applies for applications for minor variation or applications to revoke an existing authorisation.
- 3.17 The lodgement fees can be paid by electronic funds transfer, credit card, cheque or in cash. See the ACCC's website at [www.accc.gov.au/lodgementfees](http://www.accc.gov.au/lodgementfees) for details.

### **Fee waivers**

- 3.18 The ACCC has the discretion to waive, in whole or in part, the lodgement fee for applications for non-merger authorisations. Under the Regulations the ACCC may waive a lodgement fee if it is satisfied that the imposition of the entire fee would impose an unduly onerous burden on an applicant.<sup>10</sup>
- 3.19 Requests for a fee waiver should be made in writing to the ACCC before an application for authorisation is lodged. The request must include information about the nature of the proposed application for authorisation and provide arguments supporting the waiving of fees.
- 3.20 In considering a request for a fee waiver, the ACCC will take into account all relevant information, including:

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8 See section 137 of the *Criminal Code Act 1995* (Cth)

9 Competition and Consumer Regulations 2010 (Regulations) Schedule 1B

10 Regulation 75



- Having regard to the applicant's income, liabilities and assets, will the payment of the fee cause the applicant financial hardship?
  - Is the applicant a not-for-profit organisation?
  - If the application is to be lodged on behalf of a number of parties, is it possible for each of these parties to contribute towards the fee?
- 3.21 If the ACCC decides to waive the lodgement fee (in whole or in part), it will advise the applicant in writing. The applicant has three months from the date of the ACCC's written advice to lodge the application together with the reduced fee. The ACCC's written advice should also accompany the application for authorisation when it is lodged.
- 3.22 The full lodgement fee will apply if an application for authorisation is not accompanied by a copy of the ACCC's written advice that it will waive (in whole or in part) the lodgement fee.
- 3.23 The full lodgement fee will apply if an application for authorisation is accompanied by advice from the ACCC that has expired, unless a subsequent request for a fee waiver is made and ultimately approved by the ACCC.

### **Confidential information**

- 3.24 The Act requires that applications for authorisation be placed on a public register. Accordingly, if the application (including the supporting documents) contains confidential information, the applicant must provide a confidential version of the application and a public version of the application for the public register. The public version of the application must include sufficient information to enable public consultation.
- 3.25 If the applicant provides information as part of the application that is confidential this information must be clearly identified. The applicant must also make a request that the identified information be excluded from the public register and provide reasons for the request. This process is discussed in paragraphs 5.3 – 5.14 (for more information see [www.accc.gov.au/publications/guide-to-excluding-information-from-the-public-register](http://www.accc.gov.au/publications/guide-to-excluding-information-from-the-public-register)).
- 3.26 The exclusion of information from the public register may limit the ACCC's ability to test that information publicly which, in turn, may limit the weight that the ACCC can give to such information.

### **Where to lodge a valid application for authorisation**

- 3.27 The ACCC prefers applications to be lodged by email to the General Manager, Adjudication, at [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au).

- 3.28 Applications for authorisation may also be lodged by mail or in person at an ACCC office (see [www.accc.gov.au/contact-us](http://www.accc.gov.au/contact-us)).
- 3.29 As noted, unless waived, an application must be accompanied by the correct fees or evidence that the fees have been paid. For example, evidence that an electronic transfer has been made. If waived, a copy of the ACCC's advice waiving the fee (in whole or in part) must accompany the application.
- 3.30 Assuming the application is otherwise valid, it is considered to be lodged on the business day the fee is received or, when the fee is received on a weekend or a public holiday in the Australian Capital Territory (the A.C.T), the next business day in the A.C.T.
- 3.31 Once an application is lodged and it has been assessed as a valid application, it will be placed on the public register that is available on the ACCC's website at [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

#### Key points for lodging your application

- Contact the ACCC before you lodge your application for a pre-lodgement discussion.
- Your application should include all relevant information and evidence.
- Failure to provide sufficient information may render the application invalid or otherwise impact the ACCC's ability to assess your application.
- Less weight will likely be given to a statement or submission that is not supported with corroborating evidence.
- A valid application **must** contain the following:
  - A public version of your application for publication on the public register. You may provide a clearly marked confidential version if you wish to claim confidentiality for parts of your application. All confidentiality claims must be substantiated. The public version must contain sufficient information to enable public consultation on your application.
  - A declaration signed by the applicant.
  - Payment of the \$7500 lodgement fee, unless a fee waiver applies.
  - Contact/service details for the applicant.

#### Invalid applications

- 3.32 If the ACCC considers a purported application to be invalid, it will notify the party that lodged the application and provide written reasons for its decision. In most cases, the party will be provided with an opportunity to rectify the matters that resulted in invalidity and re-submit the application (with no additional fee provided

the correct fee was paid initially). The date of lodgement in this situation will be the date the rectified or corrected application is received by the ACCC (assuming the corrected application is valid).

- 3.33 If the party decides not to submit a corrected application, the application fees paid to the ACCC will be refunded.
- 3.34 If the ACCC considers the corrected application is valid it will place the application on the public register, commence public consultation and the matter will be listed on the ACCC's website as being under consideration.
- 3.35 If, after the five business day period, the ACCC becomes aware that the validity requirements have not been met, the ACCC will notify the relevant party at that time that the application is invalid and will follow the procedure set out in paragraphs 3.32 – 3.34.

### **Amending applications**

- 3.36 There are no provisions in the Act that expressly allow applicants to amend an application once it is validly lodged with the ACCC. The ability for the ACCC to accept amendments is constrained by the six-month time period for considering applications. Once the six-month time period has begun, the ACCC may be limited in its ability to accept amendments to an application. Any substantial change needing additional consultation may not be accepted by the ACCC.
- 3.37 The ACCC will consider a request to amend an application for authorisation having regard to the nature of the amendment, whether it would require further consultation with interested parties, and the timing of the amendment in the context of the process. The six-month time period can be extended in limited circumstances, which may enable the ACCC to consider requests from applicants for amendments (see paragraph 4.37).
- 3.38 If the ACCC does not accept a request to amend an application, depending on the nature of the amendment, the applicant may withdraw the application and re-lodge a new application incorporating the amended conduct (which would start the authorisation process again and reset the statutory timeframe). Alternatively the applicant could proceed with its original application and if authorisation is granted then seek a minor variation or a revocation and substitution depending on the nature of the amendment (see Chapter 11 for further information).

## Withdrawing applications

- 3.39 Applicants may withdraw their application by advising the ACCC in writing at any time before the ACCC makes its final determination.<sup>11</sup>
- 3.40 There is no provision for the ACCC to refund fees if an application is withdrawn.
- 3.41 The ACCC is required to keep a record of withdrawn applications on the public register.<sup>12</sup>

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11 Section 88(7)

12 Section 89(3)

## 4 Steps in the authorisation process

- 4.1 Once a valid application is received, the usual steps in the authorisation process involve the ACCC:
- inviting interested parties to lodge written (or oral) submissions commenting on the application and supporting submission (paragraphs 4.3 – 4.8)
  - meeting with the applicant and interested parties as required
  - inviting the applicant to lodge a written submission in response to interested party submissions
  - conducting market inquiries and research
  - issuing a draft determination (paragraph 4.14)
  - inviting written submissions in response to the draft determination, and providing the opportunity for the applicant and interested parties to call a conference so that oral submissions can be made to a Commissioner (paragraphs 4.16 – 4.17)
  - holding a conference, if one is called (paragraphs 4.18 – 4.32), and inviting the applicant and interested parties to lodge a written submission in response to issues raised at the conference
  - issuing a final determination (paragraph 4.33).
- 4.2 The ACCC is required to finalise the process and issue a determination either granting or dismissing an application for authorisation within six months of receiving a valid application. This time limit can be extended in certain circumstances (see paragraph 4.37). A chart providing an overview of the steps in the ACCC's assessment process with indicative times for key milestones is at paragraph 1.8.

### Interested party consultation

- 4.3 The ACCC will generally commence a public consultation process within one to two weeks of receiving a valid application. A copy of the application and supporting

submission will be placed on the public register

[www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).<sup>13</sup>

- 4.4 During the initial round of consultation the ACCC aims to consult broadly with a range of parties likely to be directly affected by the proposed conduct. In the application, the applicant should provide a list of potentially interested parties, including major customers, competitors and suppliers, relevant industry associations or peak bodies, consumer groups, State and Commonwealth Government Departments and relevant regulatory bodies. The ACCC will use this information to contact the interested parties.
- 4.5 Where proposed conduct is likely to impact large numbers of parties (such as consumers or businesses), the ACCC will identify appropriate representative bodies such as consumer or business groups or a subset of the potentially impacted parties. Generally, the ACCC's letter to potentially interested parties will:
- include a copy of the application and supporting submission or a link to the ACCC's website where the application and supporting submission can be accessed
  - invite interested parties to comment on the proposed conduct and the application
  - often identify specific issues that the ACCC wants interested parties to address
  - provide an indicative timetable for the ACCC's assessment of the application
  - nominate an ACCC contact officer for the application
  - request submissions by a specified date, usually between two and four weeks from the date of the letter.
- 4.6 A copy of the letter to potentially interested parties will be placed on the public register and provided to the applicant for information.
- 4.7 Any other person who becomes aware of an application, but who was not contacted by the ACCC, may lodge a submission.
- 4.8 The ACCC must take into account any submissions or information received from interested parties and the applicant within the specified period.<sup>14</sup> The ACCC may,

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<sup>13</sup> Section 89(2) requires the ACCC to publicise the receipt of an application 'in such manner as it thinks fit'.

but need not, take into account any submissions or information received after the end of the specified period. If a party cannot make a submission within the specified time they should contact the ACCC to determine whether it is possible to provide the submission at a later date.

#### How to lodge a submission

- 4.9 Interested parties who wish to lodge a submission with the ACCC should provide it in writing and address it to the General Manager, Adjudication, ACCC and send it by email to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au) and if possible copied to the nominated ACCC contact officer.
- 4.10 Alternatively submissions may be posted or delivered in person to one of the ACCC's offices. See [www.acc.gov.au/contactus](http://www.acc.gov.au/contactus) for details.
- 4.11 Some parties may prefer to make a submission orally to an ACCC staff member in person or by telephone. Interested parties who wish to set up a time to make an oral submission should contact the nominated ACCC contact officer for the application (as advised in the ACCC's consultation letter — see paragraph 4.5) or send an email to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au). Particulars of oral submissions will be placed on the public register subject to any claims for confidentiality.
- 4.12 Interested parties may ask that confidential information provided in a written or oral submission be excluded from the public register (see paragraphs 5.7 – **Error! Reference source not found.**). The exclusion of information from the public register may limit the ACCC's ability to test that information publicly which, in turn, may limit the weight that the ACCC can give to such information.

#### Further information from the applicant

- 4.13 Public submissions from interested parties, or a link to the relevant public register on the ACCC's website, will be forwarded to the applicant. In addition, a summary of key points raised in confidential submissions will be provided to the applicant. The applicant will be invited to provide a response to the issues raised in the submissions by a specified date, usually between one and two weeks after the deadline for interested party submissions. The ACCC may be limited in its ability to take into account responses received from the applicant after the specified date because of the six-month statutory deadline. If the applicant cannot provide a

response within the specified time they should contact the ACCC as soon as possible to determine whether an extension of time can be granted.

### Draft determination

- 4.14 Before determining an application for authorisation the ACCC is required to issue a draft determination.<sup>15</sup> The draft determination is in writing and states whether the ACCC proposes to grant or dismiss the application for authorisation, whether the proposed grant of authorisation is subject to conditions and the reasons for the ACCC's proposed decision.
- 4.15 A copy of the draft determination, including the ACCC's reasons, is placed on the public register on the ACCC's website.
- 4.16 A copy of the draft determination (or a link to the draft determination on the ACCC's website) is also provided to the applicant and interested parties. A letter accompanying the draft determination will invite the applicant and interested parties to lodge a submission responding to the draft determination and provide an opportunity for the applicant and interested parties to call a conference (see paragraph 4.18 - 4.20).
- 4.17 Written submissions responding to the draft determination are requested by a specified date usually between two and four weeks after the draft determination is issued. This date may be extended if a conference is called.

### Conference

- 4.18 A conference provides the opportunity for applicants and interested parties to make oral submissions to the ACCC about the draft determination.
- 4.19 Conferences are chaired by a Commissioner of the ACCC.<sup>16</sup> A conference can provide a useful opportunity for the ACCC, the applicant and interested parties to discuss the operation and effect of the proposed conduct and the ACCC's draft determination. While the Commissioner may question attendees to test their submissions, he or she will not engage in debate about the merits of the draft determination.

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15 Section 90A(1)

16 This Commissioner must have participated in the preparation of the draft determination—see s. 90A(7)(a)



### Calling a conference

4.20 The ACCC will invite the applicant and interested parties to call a conference<sup>17</sup> by a nominated date. For the purpose of calling and attending a conference, an interested person is a person who has a real and substantial interest in the application.<sup>18</sup> Requests for a conference must be made in writing by that date. The Act does not allow the ACCC to extend this deadline.<sup>19</sup>

### Holding a conference

4.21 The Act requires a conference, if called, to be held no later than 30 days after the date nominated for calling the conference.<sup>20</sup> When the ACCC receives a request to hold a conference it will contact the applicant and interested parties to:

- inform them of the date, time and location of the conference
- outline the conference procedures
- ask that they notify the ACCC if they wish to attend the conference
- ask that a business or organisation nominates a chief spokesperson if it is to be represented by more than one person
- ask for contact details to allow notification of any late changes to conference arrangements.

4.22 The conference may be attended by the applicant, interested parties and any other person whose attendance is considered appropriate by the ACCC.<sup>21</sup> Attendees may have the assistance of outside legal or other professional advisers, however, such persons are not entitled to participate in the discussion at the conference.<sup>22</sup>

4.23 A conference is not a public hearing and the Act limits the right to attend to interested parties who the ACCC considers are appropriate to attend. In some cases, members of the media may wish to attend a conference to report on the proceedings. In these instances, the Commissioner chairing the conference will

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17 A conference may be requested by an interested party that was sent the Draft Determination (and conference notice) by the ACCC – see s. 90A(5)

18 Section 90A(12) defines 'interested persons' as those who have notified the ACCC in writing that they (or an unincorporated association of which they are members) claim to have an interest in the application, and the ACCC considers that this interest is real and substantial.

19 Section 90A(2) requires the ACCC to nominate a date (not being a date before the date the ACCC wrote to interested parties and the applicant). This date will usually be the date of the letter to interested parties. A conference must be called within 14 days of this date.

20 Section 90A(6)

21 Section 90A(7)(b)

22 Sections 90A(7)(b) and 90A(7)(c). Corporations may be represented by directors, officers or employees— see s 90A(7)(b)

seek the views of the attendees about whether the presence of media representatives would restrict them from freely expressing their views. The Commissioner may ask the members of the media not to attend or to leave the conference if objections are raised.

- 4.24 Conferences are conducted as informally as possible. After a short introduction from the Commissioner, the party who called the conference is usually invited to provide an opening statement. Other interested parties are then invited to speak. Finally, the applicant is invited to respond to the comments of interested parties.
- 4.25 During the conference the Commissioner or ACCC staff may identify specific issues on which it would be useful to obtain further comment. The Commissioner will generally ask attendees if they wish to make any final statements.
- 4.26 The Commissioner will end the conference when all attendees have had a reasonable opportunity to express their views.<sup>23</sup> In practice, most conferences are concluded within half a day.
- 4.27 Persons who use insulting language or otherwise disrupt the conference may be excluded from the conference.<sup>24</sup>
- 4.28 The ACCC must take all matters raised at a conference into account.<sup>25</sup> To facilitate this, the ACCC prepares a written summary of the matters raised (the conference record).<sup>26</sup> The conference record is not a verbatim account of attendees' statements. Rather, it summarises the issues raised.
- 4.29 The conference record is sent to attendees and other interested parties and is placed on the public register available on the ACCC's website. The ACCC does not generally circulate a draft record to attendees for comment. The ACCC will not generally amend a conference record at the request of an attendee, although factual errors may be corrected, and submissions from attendees who consider that the record is inaccurate may be placed on the public register.
- 4.30 The applicant and interested parties will not be permitted to make an audio or video recording of the conference and any person found to be making a recording of the conference through any recording device (such as an iPod, mobile telephone or dictaphone) may be asked to delete the recording and leave the conference.

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23 Section 90A(9)(b)

24 Section 90A(9)(a)

25 Section 90A(11)

26 Section 90A(8)

### **Final written submissions following a conference**

- 4.31 The ACCC may issue a final determination at any time after a conference finishes.<sup>27</sup> However, in practice, subject to the six-month statutory deadline as extended,<sup>28</sup> the ACCC usually provides the opportunity for the applicant and interested parties to lodge final written submissions on the application shortly after the conference.

### **If a conference is not called**

- 4.32 If a conference is not called by the date specified, the ACCC will proceed to issue a final determination.<sup>29</sup> The ACCC will take account of all submissions made in response to the draft determination.

### **Final determination**

- 4.33 The ACCC will send a copy of the final determination (or a link to the final determination on the ACCC's website) to the applicant and interested parties who received a copy of the draft determination or who provided a submission in response to the draft determination. A copy of the final determination is placed on the public register.

### **Commencement of statutory protection**

- 4.34 The statutory protection from legal action provided by the authorisation, if granted, comes into force on the day specified in the determination. This date may not be earlier than 21 days after the determination is issued. Should an application to review the determination be made to the Tribunal before the 21-day period expires, the commencement of the statutory protection is deferred pending a decision of the Tribunal.<sup>30</sup> If the application to the Tribunal is subsequently withdrawn, the ACCC determination takes effect on the day the application is withdrawn.<sup>31</sup> The Tribunal review process is outlined in Chapter 12.

### **Six-month time limit<sup>32</sup>**

- 4.35 The ACCC must make a determination in relation to an application for authorisation within six-months of the application being validly lodged.<sup>33</sup> The six-month statutory

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27 Section 90A(11)

28 See paragraph 4.39

29 Section 90A(5)

30 Regulation 20(1)(b)

31 Section 91(1A)

32 The six-month time limit applies to the ACCC's consideration of applications for authorisation lodged after 1 January 2007.

deadline does not apply to applications for revocation, revocation and substitution, or minor variation. However, the ACCC endeavours to consider applications for revocation and applications for revocation and substitution within six months and applications for a minor variation within two months.

- 4.36 The six-month period begins on the date the ACCC receives a valid application for authorisation.<sup>34</sup>
- 4.37 The six-month period can be extended by up to a further six months if:
- the ACCC has issued a draft determination and
  - the applicant agrees to the extension.<sup>35</sup>
- 4.38 As the six-month period is based on calendar days, it is possible for it to expire on a weekend or public holiday. In these cases, the ACCC will endeavour to release its final determination before the end of the last business day in the ACT before the conclusion of the six month period.
- 4.39 If a conference is called following the draft determination, the six-month period is increased by the number of days between the ACCC receiving the request to hold a conference and seven days after the conference has finished.<sup>36</sup>

#### **Assessing applications within six months**

- 4.40 The six-month statutory deadline on the ACCC's consideration of authorisation applications imposes a discipline on all those involved in the authorisation process.
- 4.41 To avoid delaying the start of the six-month period, applicants should ensure that their application is valid and includes all information and documents which may be relevant to the ACCC's assessment at the time of lodgement.
- 4.42 The ACCC encourages potential applicants to contact the ACCC before lodging an application so that the requirements for a valid application can be discussed.
- 4.43 Once the six-month time period has begun, the ACCC may only accept minor amendments to an application. Any substantial change needing additional consultation may not be accepted by the ACCC. See paragraphs 3.36 – 3.38 for further information about amending applications.

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33 Section 90(10) and 90(10A)

34 The six-month period is based on calendar days. This period is counted inclusive of the date of lodgement.

35 Section 90(10A)

36 Section 90(14)

- 4.44 Interested parties will be asked to provide submissions by a specified date. The ACCC may, but need not, take into account any submissions or information received after the end of the specified period, and in practice the ACCC may be limited in its ability to take into account information provided late, including because the ability of applicants to respond to late information will also be limited.
- 4.45 The ACCC aims to assess applications for authorisation as quickly as possible. Where conduct is straightforward and the issues raised are not complex the ACCC may be able to issue a final determination within three to four months. For example, for some collective bargaining arrangements by small businesses the ACCC aims to issue a draft determination within 28 days and a final determination within three months.<sup>37</sup>

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37 See [www.accc.gov.au/publications/streamlined-collective-bargaining-for-small-business](http://www.accc.gov.au/publications/streamlined-collective-bargaining-for-small-business) for more information.

## 5 Public register

- 5.1 Under the Act the ACCC is required to keep a public register containing the following documents:
- applications for authorisation, minor variation, revocation and revocation and substitution, including applications that have been withdrawn
  - documents provided to the ACCC in relation to any application
  - particulars of any oral submissions made to the ACCC in relation to an application
  - draft determinations
  - ACCC proposals for the revocation and revocation and substitution of authorisations including proposals that have been abandoned
  - records of conferences
  - final determinations.<sup>38</sup>
- 5.2 Since 1 July 2012 the authorisation public register has been made available on the ACCC's website ([www.accc.gov.au/public-registers](http://www.accc.gov.au/public-registers)).

### Dealing with confidential information

- 5.3 Applicants and interested parties may, when providing documents or making oral submissions in relation to an application for authorisation, request that the submission, or parts of it, be excluded from the public register by reason of the confidential nature of any of the matters contained in the submission. Confidentiality claims must be made at the time of providing the material to the ACCC and all claims must be substantiated.
- 5.4 Confidential information provided as part of the application should be clearly identified and the applicant should provide a confidential version in addition to the public version with the confidential information redacted. The applicant must also make a request that the identified information be excluded from the public register and provide reasons for the request.
- 5.5 When a request is made to exclude information from the public register, the ACCC must exclude the following information:

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38 Section 89(4).

- a secret formula or process
- the cash consideration offered for the acquisition of shares or assets
- the current costs of manufacturing, producing or marketing goods or services.<sup>39</sup>

5.6 The ACCC will consider requests for confidentiality on a case by case basis. Where the ACCC accepts confidential information, it does so on the following basis:

- There is no restriction on the internal use, including future use, the ACCC may make of the information consistent with its statutory functions.
- Information provided to the ACCC on a confidential basis may be viewed by the ACCC's external consultants (for example legal, economic and industry advisers) on the condition that each consultant will be informed of the obligation to treat the information as confidential.
- The ACCC will not disclose confidential information to any third parties (other than its external consultants) without first obtaining written consent from the party who provided the confidential information, unless it is otherwise compelled to do so by law or in accordance with s 155AAA of the Act.<sup>40</sup>

#### **How to request exclusion of confidential information from the public register**

5.7 Any request to exclude a document or oral submission, or parts of it, from the public register must be made at the time the document or oral submission is provided to the ACCC.<sup>41</sup> Reasons must be provided in support of a request for exclusion.

5.8 The Regulations prescribe how a request for excluding a confidential document, or parts of it, from the public register can be made. Specifically:

- When a request is made for a whole document or parts of a document to be excluded from the public register, the words 'Restriction of

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39 Section 89(5A)(a).

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

41 Section 89(5).

Publication Claimed' should appear in red writing near the top of each page.<sup>42</sup>

- When a request is made to exclude part of a document, the Regulations state that the words 'Restriction of Publication of Part Claimed' should appear in red near the top of the first page (and where the document is more than five pages, a description of where in the document that part of the document is to be found) and by clearly marking in red that part of the document.<sup>43</sup>

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

5.10 Where parties are providing documents to the ACCC that have been created previously and contain confidentiality markings (for example standard headers claiming 'confidential communication'), parties should remove those markings from the documents unless they contain information the applicant wants excluded from the public register. If the information is not confidential and the header cannot be removed, parties should clearly state at the beginning of the correspondence provided to the ACCC that the document can be placed on the public register.

**Checklist for requesting confidential information be excluded from the public register**

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

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42 Regulation 24(1A)(a).

43 Regulation 24(1A)(b).



### How the ACCC assesses requests for exclusion of confidential information

- 5.11 Confidential information subject to a request for exclusion from the public register will not be placed on the public register while the ACCC assesses the request.<sup>44</sup>
- 5.12 The ACCC aims to respond to requests in an appropriate timeframe. The ACCC's ability to provide a prompt response is greatly enhanced if requests are limited to information that is genuinely confidential, if confidential information is clearly marked and if claims are accompanied by a detailed explanation of why it should be excluded.
- 5.13 When the ACCC decides to exclude information from the public register, this information may still be used by the ACCC in its consideration of the application for authorisation and otherwise consistent with its statutory functions under the Act.
- 5.14 If the ACCC decides not to exclude information from the public register, either because the claim is not accompanied by sufficient justification or because it considers that the information is not confidential in nature, the ACCC will inform the relevant party of its decision. The party who provided the document, or made the oral submission, can ask the ACCC to return the document, or part of it.<sup>45</sup> Alternatively, the party may advise the ACCC that it wishes to withdraw or amend the request for exclusion from the public register.
- 5.15 For more information see <https://www.accc.gov.au/publications/guidelines-for-excluding-information-from-the-public-register-for-authorisation-and-notification-processes>.

### Disclosure of confidential information when legally required

- 5.16 Parties should be aware that a decision by the ACCC to exclude confidential information from the public register does not provide any broader 'confidentiality' protection.
- 5.17 In some circumstances the ACCC may be legally required to produce confidential information, for example under the *Freedom of Information Act 1982* or as part of Court or Tribunal processes. The ACCC is committed to treating confidential information responsibly and in accordance with the law. The ACCC will endeavour to notify and consult the person who provided confidential information about the proposed release of that information. A guideline on the ACCC's general policy on the collection, use and disclosure of information is available on the ACCC's website.

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44 Section 89(5E).

45 Section 89(5B).

- 5.18 Under the *Administrative Decisions (Judicial Review) Act 1977*, when the ACCC receives a request for a statement of reasons for a decision, it is not required to disclose business information supplied to it in confidence.<sup>46</sup>

#### **Exclusion of information for other reasons**

- 5.19 Where it is satisfied that it is desirable to do so, the ACCC may exclude a document or submission, or parts of a document or submission, from the public register for any reason other than the confidential nature of the matters contained in the document or submission.<sup>47</sup>

#### **Provision of documents to applicants**

- 5.20 All public submissions received by the ACCC in connection with an application will be placed on the public register available on the ACCC's website ([www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister)). The ACCC will also provide the applicant with a copy of public submissions or a link to the relevant public register page on the ACCC's website.
- 5.21 In addition, the applicant can request the ACCC to provide it with a copy of all documents that tend to establish the applicant's case. There are a number of exceptions to this potential disclosure. For example, the ACCC may not disclose documents pursuant to such a request if they were prepared by an officer or professional adviser of the ACCC<sup>48</sup> or if the disclosure would prejudice any person — such as where information has been excluded from the public register.

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46 *Administrative Decisions (Judicial Review) Act 1977*, section 13A.

47 Section 89(5D).

48 Section 157(1AB)

## 6 The authorisation test

### The test – cartel conduct, secondary boycotts and resale price maintenance

- 6.1 The ACCC may grant authorisation for conduct that would or might breach a *per se* provision of the Act (i.e. the cartel conduct, secondary boycott and resale price maintenance provisions) only if it is satisfied that the conduct will meet the net public benefit limb of the authorisation test. Specifically, the ACCC may grant authorisation if it is satisfied in all the circumstances that the proposed conduct would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed conduct.<sup>49</sup>
- 6.2 If proposed conduct would or might breach one or more of the *per se* provisions, as well as other competition provisions of the Act, the ACCC will apply the test for authorisation applicable to *per se* conduct to its assessment of the entire application for authorisation. That is, only the net public benefit test.

### The test –anti-competitive agreements, misuse of market power, exclusive dealing

- 6.3 The ACCC may grant authorisation for proposed conduct that would not raise concerns under the *per se* provisions of the Act, but that would or might contravene other competition provisions of the Act (e.g. sections 45 –anti-competitive agreements, 46 – misuse of market power or 47 – exclusive dealing), if it is satisfied in all the circumstances that:
- the proposed conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
  - the proposed conduct would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed conduct.<sup>50</sup>
- 6.4 The ACCC needs to be satisfied that at least one limb of the test has been met.
- 6.5 The applicant may wish to indicate in its application which limb of the test it believes is most readily met in the circumstances of the proposed conduct.

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<sup>49</sup> Section 90(7)(b) and 90(8)

<sup>50</sup> Section 90(7)

### Onus on the applicants to satisfy the ACCC

6.6 It is for applicants to satisfy the ACCC that authorisation should be granted.<sup>51</sup> In particular, an applicant must satisfy the ACCC that there is sufficiently substantial public benefit to outweigh the detriment and so justify the authorisation, or (where the relevant test includes a second limb) that the conduct is not likely to substantially lessen competition.

### Discretionary nature of ACCC power to authorise

6.7 The ACCC's power to grant authorisation is discretionary. Therefore, the ACCC is not required to grant authorisation even where the authorisation test is satisfied.<sup>52</sup>

6.8 The ACCC's discretion to grant authorisation is not narrowly defined, but is limited by the subject matter, scope and purpose of the Act.<sup>53</sup>

6.9 In particular cases, the ACCC may consider it appropriate to grant authorisation subject to conditions specified in the authorisation rather than make a determination not to grant authorisation<sup>54</sup> (see Chapter 9).

### Forward looking nature of analysis

6.10 The ACCC adopts a forward looking approach when applying the authorisation test. That is, the analysis focuses on assessing the likely effect of the proposed conduct on competition and/or the public benefits and detriments that would be likely to result from the proposed conduct within the period for which authorisation is sought.

### With and without

6.11 In applying the authorisation test, the ACCC compares the likely future **with** the conduct that is the subject of the authorisation to the likely future **without** the conduct.<sup>55</sup> In particular, the ACCC will compare the state of competition and the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur. This approach enables the ACCC to focus its assessment on the impact of the conduct rather than other effects that would occur irrespective of whether the conduct occurs.

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

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

53 *Ibid* at [126].

54 Section 88(3).

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

- 6.12 For example, a comparison with the future without the conduct can assist in the public benefit assessment in the following ways:
- If the claimed public benefits are unlikely to exist without the proposal they can be described as benefits flowing from the proposal.
  - If the claimed public benefits exist, in part, in the future without the proposal, the weight accorded to them may be reduced appropriately.
  - If, in the future without the proposal, there are public detriments which are removed or mitigated in the future with the proposal, this may be considered as an element of the claimed public benefit flowing from the proposal.<sup>56</sup>
- 6.13 In practice, comparing the future with and without the conduct usually equates to a comparison of the likely future with the authorisation to the likely future without the authorisation. This is because in most cases, it is unlikely that parties will proceed with the relevant conduct without authorisation due to the risk of breaching the Act. However, where authorisation is sought for a broader arrangement (for example, an arrangement that also involves conduct not likely to breach the Act), such as a code of conduct, there may be aspects of the arrangement which are likely to continue without authorisation.
- 6.14 The ACCC determines the likely future ‘with and without’ position on a case-by-case basis. In identifying what is likely, the ACCC does not take into account mere possibilities. There must be a real chance that the future scenario (or event or effect) will eventuate, but it is not necessary to show certainty, or that a particular scenario is “more probable than not”. Applicants should state what they consider to be the most likely future scenarios ‘with and without’ the proposed conduct and provide reasons as part of the supporting submission.

### **Role of market definition in ACCC’s assessment**

- 6.15 As a preliminary step in its assessment of an application for authorisation the ACCC identifies the areas of competition that may be affected by the proposed conduct. This establishes the broad “field of inquiry” relevant to the ACCC’s consideration of an application.

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56 See *Application by Medicines Australia Inc* [2007] ACompT 4 at [119].

### **ACCC's approach to identifying relevant markets/areas of competition**

- 6.16 Market definition is a tool which may be helpful in assessing an authorisation application.
- 6.17 However, it is rarely possible to draw a clear line around the market and it is often sufficient to identify the relevant areas of competition in which the proposed conduct or its effects will occur, without precisely defining the boundaries of the relevant market.<sup>57</sup>
- 6.18 Defining the relevant areas of competition identifies the range of buyers and sellers that could be affected by the proposed conduct, and the nature of the competitive environment in which the proposed conduct will occur. It assists in identifying the likely competitive effects, benefits and detriments, and the extent to which other factors might constrain such effects.
- 6.19 If the ACCC considers it is necessary to more precisely define a relevant market for the purpose of assessing an application for authorisation, it will adopt a similar approach to that set out in the ACCC's Merger Guidelines.

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

## 7 Substantial lessening of competition

- 7.1 This sections sets out the ACCC's approach to assessing whether a substantial lessening of competition is likely, for those applications where this forms part of the applicable legal test.
- 7.2 Competition is a state of ongoing rivalry between firms – rivalry in terms of price, service, technology and quality. Where there is competition, market participants are constrained in their pricing, output and related commercial decisions by the activity of other market participants (or potential market participants). The greater the degree of competition in a market, the less market power each market participant will possess.
- 7.3 For this reason the Act contains provisions directed at preventing conduct that is likely to have the purpose or effect of substantially lessening competition in a market.
- 7.4 There is no definition in the Act of 'substantially lessen competition'. The ACCC generally takes it to mean where the competitive process has been damaged in a meaningful way, usually by deterring, hindering or preventing competition.
- 7.5 'Substantially' refers to the competitive process and it is interpreted as a relative concept and does not require an impact on the whole market.
- 7.6 'Lessening competition' means that the field of rivalry is diminished or lessened, or the competitive process is compromised or impacted, and extends to 'preventing or hindering competition'.<sup>58</sup> The effect is a weakening of competitive constraints or reduced incentives to engage in competitive rivalry.
- 7.7 The precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and will depend on the facts. Generally, the ACCC takes the view that a lessening of competition is substantial if the proposed conduct for which authorisation is sought confers an increase in market power that is significant and sustained.

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<sup>58</sup> Section 4G

### Market power and increases in price

The most obvious and direct manifestation of an increase in market power is the ability of one or more firms to profitably raise prices for a sustained period. Market power can, however, be exercised in other ways. For example, a firm with market power may:

- lower the quality of its products without a compensating reduction in price
- reduce the range or variety of its products
- lower customer service standards, and/or
- change any other parameter relevant to how it competes in the market.

The exact nature of the effect on competition from increased market power will vary depending on the particular circumstances.

- 7.8 The effect on competition will depend on the type of agreement, including whether it is horizontal, vertical or conglomerate.
- 7.9 Agreements among competitors or unilateral conduct by a firm with substantial market power can weaken competition and create, strengthen or protect market power – where a firm finds it profitable to raise prices, reduce output or otherwise exercise market power. If this effect is substantial and sustained then the conduct is likely to substantially lessen competition.
- 7.10 Agreements among competitors may also enhance the potential for coordinated (rather than competitive) responses across the market more generally (the coordinated effects of the agreement). Where firms are able to coordinate their conduct, substantial detriment or inefficiency can arise through higher prices, reduced output and reduced quality.
- 7.11 Vertical agreements between firms at different stages of a supply chain can also have competitive effects in upstream or downstream markets if the agreements weaken competitive constraints in a relevant market. One way in which this can occur is through the foreclosure of rivals by limiting their access to customers (for rivals in upstream markets) or inputs (for rivals in downstream markets).
- 7.12 Conglomerate agreements between firms that operate in a number of different markets and supply products that are inter-related in some way can also have competitive effects if they enable the bundling or tying of products in ways that foreclose rival suppliers access to customers or inputs.
- 7.13 When assessing the competitive effects of vertical and conglomerate agreements between firms, the ACCC will consider how the agreement changes the ability and incentives for firms to foreclose rivals, and the effect of any such foreclosure on competition and market power.



## Relevant factors to an assessment of substantial lessening of competition

7.14 The ACCC will take into account a broad range of factors to assess whether there is likely to be a substantial lessening of competition from the proposed conduct for which authorisation is sought. These factors provide insight into the likely impact of the conduct on competitive constraints and market power.

7.15 Section 50(3) of the Act sets out a number of factors that the ACCC must take into account when determining whether an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The ACCC is not required to take account of these ‘merger’ factors when considering whether the conduct for which authorisation is sought is likely to substantially lessen competition. However, the factors are a useful guide to the types of issues that the ACCC is likely to consider when making such an assessment and are summarised as follows:

- market share of the applicants and other firms in the market
- degree of concentration in the market
- height of any barriers to entry and expansion
- actual and potential import competition
- availability of substitutes
- extent of any countervailing power held by customers or suppliers
- dynamic characteristics of the market, including growth, innovation and product differentiation
- presence of a vigorous and effective competitor, and
- degree of vertical integration.

7.16 Detailed information on the ACCC’s approach to assessing the likely competition effects from particular conduct is set out in the following guidelines:

- Guideline on Misuse of Market Power 2017
- Guideline on Concerted Practices 2017
- Merger Guidelines 2008

## Public benefits and detriments

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

... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices

legislation) the achievement of the economic goals of efficiency and progress". Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.<sup>59</sup>

7.18 Public detriment is also not defined in the Act but the Tribunal has defined it as:

... any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...<sup>60</sup>

### **Economic efficiency**

The promotion of competition is not an end in itself; rather competitive markets are generally viewed as the best way to enhance the welfare of Australians through ensuring that the goods and services that consumers want are developed and supplied at the lowest possible cost. A market which does this is said to be economically efficient.

However, there are circumstances where competitive markets may not work to deliver the most efficient outcome and may fail to maximise welfare. For example, where there is a market failure (or market imperfection broadly construed) it may be the case that restrictions on competition could achieve a more efficient outcome, and thus higher welfare, than would be the case if the market was left unfettered. Thus the public interest may be served by allowing certain restrictions on competition to enhance efficiency and welfare.

Economic efficiency has three aspects:

- allocative efficiency — refers to the allocation of society's scarce resources to their most valuable use. Allocative efficiency is achieved when the price paid for an extra unit of a product (which reflects consumers' willingness to pay or marginal utility) equals the cost of the resources used to produce that product (marginal cost). Allocative efficiency can only be achieved if all the costs and benefits, including externalities, are fully brought into account. Furthermore, allocative efficiency will not be achieved if prices are distorted by market power (which drives a wedge between price and marginal cost).
- productive efficiency — refers to the production of goods and services using the most cost-effective means.

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59 *Re 7-Eleven* (1994), ATPR 41-357 at [42,777]. See also *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,242 and *VFF Chicken Meat Growers' Boycott Authorisation* (2006) AcompT 9 at [75].

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

- dynamic efficiency — refers to the economically efficient use of resources over time - incorporating process and product innovation in response to changes in the market. For example, arrangements that provide incentives for efficient investment in research and development will promote dynamic efficiency.

### Public benefit

- 7.19 The Act does not expressly limit the range of public benefits which may be taken into account by the ACCC to those that address market failure or improve economic efficiency.
- 7.20 However, in the ACCC's experience most public benefits accepted by the ACCC (including, for example, those initially framed by applicants as being social and/or environmental benefits) can be attributed to improvements in economic efficiency through addressing a source of market failure or market imperfection (see the examples in paragraph 7.22).
- 7.21 Given the link between efficient markets and the maximisation of productivity and welfare, it is appropriate that improvements in economic efficiency are a key public benefit focus for the ACCC.
- 7.22 Some of the more common public benefits resulting from efficiency improvements through addressing a market failure or market imperfection considered by the ACCC are:
- **Reducing transaction costs** — transaction costs are the costs of buying and selling. Common types of transaction costs are search, negotiation, approval, monitoring and enforcement. High transaction costs may lead to standard form contracts which do not reflect individual circumstances and may therefore lead to inefficiencies.

Collective bargaining arrangements, for example, can be a way to reduce the costs of negotiating contracts relative to undertaking a series of separate individual negotiations. Also parties in the bargaining group may be able to share the costs of obtaining professional advice. Overall this may result in contract terms and conditions that better reflect the group's circumstances and therefore deliver improved incentives for innovation and efficiency.

- **Addressing an externality** — an externality is when some of the benefits or costs from an activity are incurred by third parties and hence are not taken into account by individuals when making production and consumption decisions. Where there are externalities, prices do not fully reflect all the costs and benefits of production and consumption and can

result in too little or too much of the goods and services being produced and consumed.

Often parties that propose to engage in conduct that may address an environmental externality claim that the proposed conduct will provide environmental benefits. For example, manufacturers, importers and/or retailers set up a product stewardship arrangement to ensure that particular products or materials are managed in a way that reduces their impact, throughout their lifecycle, on the environment and on human health and safety.

An industry levy on sales of the products may be used to fund the recycling and disposal activities which reduce the environmental costs of those products. The levy may result in prices that better signal the true costs of production and consumption thus improving efficiency and welfare.

- **Reducing information asymmetry** — when one side of the transaction has less information about the price and quality of the good or service than the other. In such cases the buyer (or seller) is not fully informed and is unable to make rational decisions on price, quantity and quality.

Industry codes of conduct can address information asymmetries by ensuring consumers are better informed about the quality of products before they make purchases. For example, a code may impose minimum standards on the way products are promoted and/or the way in which sellers deal with buyers by setting minimum information requirements and/or setting licensing requirements to signal appropriately qualified sellers.

- **Achieving economies of scale, scope and/or density** — economies of scale exist if the average cost of production falls as output increases. Economies of scope exist where it is cheaper to produce two or more products together rather than separately. Economies of density occur where the average cost of production falls as the number of customers utilising a network increases.

The ability of firms to take advantage of economies of scale, scope and/or density sometimes may be enhanced through horizontal or vertical joint ventures or alliances. For example, an alliance may allow two airlines to:  
– commence services on a route that has too few passengers to be viable for

an individual airline (exploit economies of scale);  
– spread head office, marketing, IT and distribution costs over a greater number of destinations served (exploit economies of scope); and/or  
– increase feeder traffic connecting to trunk routes, allowing airlines to operate large, more efficient aircraft on trunk routes and spread flight-specific costs over a larger number of passengers (exploit economies of density).

- **Facilitating the provision of public goods** — public goods are typically ones where consumption by one person does not reduce the availability of the good or service for others and no one can be excluded from consuming the good or service. Public goods are at risk of being underprovided because consumption is open to everyone but not everyone contributes to the costs of providing the good or service (free-riding).

For example, a single firm, or a few firms, is unlikely to invest in research and development activities that are aimed at improving the viability and competitiveness of an industry as a whole if other participants in the industry can benefit without having to contribute to the cost. However, an industry wide levy may enable the funding of efficient levels of R&D activities that would not occur in the absence of a collective arrangement.

- **Addressing the principal/agent problem** — the principal agent problem arises from a disconnection between the objectives and incentives of the principal and those of the agent who has been contracted to act on the principal's behalf. It can be difficult for the principal to observe whether the agent is acting in the principal's best interests because of incomplete and asymmetric information.

Codes of conduct can help to reduce information asymmetry between the principal and agent, for example, by specifying how the agent is expected to perform and/or requiring public reporting of the types of incentives received by the agent.

- **Avoiding the hold up problem** — where assets are specific to a particular commercial relationship and have little value outside the relationship, the investor in the asset may be at risk. Hold-up occurs if the other party to the transaction is able to change the terms on which the parties transact after the investment has been made and the

investor is not able to earn an appropriate return. This may lead to less investment than is required for the efficient operation of the market.

To avoid the hold-up problem it may be necessary for the buyer and seller to cooperate for example through long term contracts and/or exclusive dealing arrangements. Such arrangements can limit competition from third parties but they give the parties to the transaction a level of commitment and certainty that provides sufficient incentive to undertake the specific investment.

- **Reducing search and switching costs** — where it is difficult for buyers to obtain information about the prices and quality of products they are not able to make fully informed rational consumption decisions. Similarly buyers who are locked into a particular supplier and find it difficult, for example in terms of cost and time, to switch to other suppliers are not able to respond to price signals. High search and switching costs reduce competition between suppliers because consumers are not easily able to respond to offers from competing suppliers.

One way to address high search and switching costs is for suppliers to make information more readily available to assist consumers in making comparisons. However an agreement to exchange certain information and provide it in a particular format involves collaboration between competitors.

#### *Attaching weight to public benefit*

- 7.23 When considering whether there is a public benefit from proposed conduct the ACCC considers whether benefits are of value to the community generally and how much weight society attaches to those benefits. Of particular interest will be the number and identity of the proposed beneficiaries. The ACCC assesses community views by referring to the applicant's submission, interested party submissions, and any other relevant evidence.
- 7.24 The ACCC considers that cost savings accruing to one or few firms arising from increases in productive efficiency can constitute public benefits and it is not

necessary for the savings to be passed on to end consumers in the form of lower prices. The community at large has an interest in resource savings because these resources are released for use elsewhere in the economy.

- 7.25 However, the ACCC will give more weight to benefits which flow through to the broader community and are sustained over time.<sup>61</sup>

### Public detriment

- 7.26 All public detriments likely to arise from the proposed conduct for which authorisation is sought can be taken into account. In some circumstances, it may be appropriate for the ACCC to assess detriments that occur outside of the market or markets in which a lessening of competition has been identified. For example, if the proposed conduct was likely to increase pollution or reduce public health and safety the ACCC would take this into account in balancing the public benefits and detriments.

- 7.27 In most cases the only identifiable detriments will be those constituted by a lessening of competition. The ACCC's approach to assessing the likely effects on competition is outlined in Chapter 6. However, a lessening of competition does not have to be substantial to comprise a detriment to the public.

### Quantifying public benefit and detriment

- 7.28 The Act does not require the ACCC to quantify the level of public benefits and detriments likely to result from proposed conduct. However, where possible, and particularly with complex applications, the ACCC encourages applicants to quantify the size of claimed benefits and detriments.

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61 This approach by the ACCC is most closely reflected in the Tribunal's reasoning in *Qantas Airways Limited* (2005), AcomPT 9. The Tribunal described its reasoning to identify and assess the public benefit from the conduct as a 'form of the total welfare standard'. The ACCC notes that the total welfare standard has a variety of uses and meanings in economic and legal literature. To avoid any potential confusion, the ACCC proposes to refer to the approach taken by the Tribunal in *Qantas Airways* as the application of a 'public benefit standard'. In particular the Tribunal noted at [185] that:

... whilst the Tribunal does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, it may be that, in some circumstances, gains that flow through only to a limited number of members in the community will carry less weight.

Also at [188] to [189] the Tribunal stated that the question of whether a benefit is a public benefit should be directed towards:

... the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of "anything of value to the community generally"? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?

It follows that cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account ... where they result in pass through which reduces prices to final consumers, or in other benefits, for example, by way of dividends to a range of shareholders or being returned to the firm for future investment. However, the weight that should be accorded to such cost savings may vary depending upon who takes advantage of them and the time period over which the benefits are received.

- 7.29 Quantification can provide guidance on the relative weight to be attributed to particular benefits and detriments in the ACCC's overall assessment. Where applicants are able to provide monetary estimates of the value of the benefits or detriments from proposed conduct they should also provide the ACCC with the assumptions and reasoning upon which the data relies. Without the detail and transparency behind the modelling used in the calculations the ACCC may place little weight on the size of the claims.
- 7.30 The ACCC recognises that in many cases it will not be possible to credibly quantify public benefits and detriments. Consequently, claims of this nature will usually need to be qualitatively assessed and there must be a sufficient basis for concluding that the benefits and detriments are likely to result.

### **Balancing public benefit and detriment**

- 7.31 The ACCC will balance the benefits to the public from the proposed conduct with the detriments to the public and determine which is the greater. Consistent with the net public benefit limb of the authorisation test, the ACCC may grant authorisation if the likely public benefit from the proposed conduct outweighs the likely public detriment from the proposed conduct (see paragraph 6.1).
- 7.32 In weighing the benefits and detriments the ACCC places less weight on those that are less likely to occur, those for which the evidence is less strong, and those which may not be realised for some time.



## 8 Imposing conditions and time limits

### Imposing conditions

- 8.1 The Act permits the ACCC to specify conditions in an authorisation.<sup>62</sup>
- 8.2 The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>63</sup>
- 8.3 The ACCC decides on the form and scope of any conditions that are imposed in granting authorisation.<sup>64</sup> While there is no express limit on the types of conditions which may be imposed on the grant of an authorisation, the power to impose conditions is constrained by the subject matter, scope and purpose of the Act.<sup>65</sup>
- 8.4 Where possible, the ACCC will provide the applicant and interested parties with the ability to comment on proposed conditions, for example at the draft determination stage.
- 8.5 It is not for the ACCC to use its power to impose conditions in order to substantially redraft or redesign proposed conduct simply to make the conduct better. For example, in considering industry codes of conduct the ACCC is often requested to impose conditions to try to create an ideal or preferred code. The imposition of a condition designed to enhance or increase the likelihood of benefits, or similarly to reduce or limit the likelihood of detriments that result from a voluntary code is not the same as redrafting the code.<sup>66</sup>

### Types of conditions

- 8.6 Broadly, a condition specified by the ACCC in an authorisation will likely take the form of either a condition precedent or a continuing condition:
- a condition precedent requires something to be done before the authorisation comes into effect.<sup>67</sup> For example, a condition that requires the terms of proposed conduct to be varied. Once the variation is effected, the authorisation can take effect; and

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62 Section 88(3).

63 Section 88(3).

64 This contrasts with the acceptance of undertakings by the ACCC under s 87B of the Act, where the form and scope of the undertaking offered to the ACCC are determined by the party giving the undertaking.

65 See *Re Medicines Australia Inc* [2007] ACompT 4 at [129].

66 *Ibid.*, at [134].

67 *Ibid.* at [131].

- a continuing condition requires something to be done for the authorisation to continue.<sup>68</sup> For example a condition that requires a party to carry out certain things, either continuously or periodically, during the term of the authorisation. A continuing condition would usually be accompanied by a condition requiring periodic reporting over the term of the authorisation to demonstrate compliance with the condition.

8.7 The ACCC may grant authorisation subject to a condition precedent, a continuing condition, or both.

#### **Tribunal decision in Medicines Australia<sup>69</sup>**

In most cases the types of conditions imposed by the ACCC are to ensure that the authorisation test is met, or continues to be met, over the term of the authorisation.

The conditions imposed by the Tribunal following a review of the ACCC's decision in Medicines Australia provide an example of conditions imposed where the authorisation test was met but without the conditions the Tribunal was not prepared to exercise its discretion in favour of authorisation.

Medicines Australia is the national association representing the prescription medicines industry in Australia. In 2005, Medicines Australia sought authorisation for Edition 15 of its Code of Conduct, which regulates certain activities of pharmaceutical companies, including the provision of information about prescription medicines, and the provision of benefits to healthcare professionals. The Tribunal concluded that the public benefit to be derived from the Code outweighed the anti-competitive detriment. Nevertheless, the Tribunal decided to grant authorisation subject to a condition requiring members of Medicines Australia to publicly disclose the benefits they provide to healthcare professionals.

In making its decision, the Tribunal stated that:

The Tribunal is satisfied that the public benefit derived from the Code, allowing for its identified deficiencies and weaknesses, outweighs the low level of anti-competitive detriment, if any, flowing from the Code. ... The question remains whether [a] condition should be imposed as an incident of the Tribunal's discretion to authorise or refuse authorisation notwithstanding that the public benefit tests are satisfied. ...

The Tribunal considers that this is a case in which it is appropriate, if the authorisations are to be granted, to impose conditions to provide an incentive to compliance with the Code provisions relating to the conferring of benefits on doctors. ...

Authorisation without the proposed condition could all too readily be viewed as an official approval given to a less

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68 Ibid.

69 *Re Medicines Australia Inc* [2007] ACompT 4.

than rigorous approach to enforcement in this important area.<sup>70</sup>

### *Amending applications for authorisation to avoid the imposition of conditions*

- 8.8 In some cases, rather than have the ACCC specify conditions in an authorisation, an applicant may consider it preferable to amend their application to address any concerns before the final determination is issued to avoid the need for conditions.

### **Non-compliance with conditions**

- 8.9 The ACCC may revoke an authorisation, after consultation, if a condition to which the authorisation was expressed to be subject has not been complied with (see paragraph 10.46).<sup>71</sup> Failure to comply with a condition by a person to which an authorisation is expressed to be subject also means that the conduct being engaged in by that person falls outside the terms of the authorisation and the participant risks not being covered by the statutory protection afforded by the authorisation.<sup>72</sup>

### **Length of authorisation**

- 8.10 The ACCC may grant authorisation for a limited period of time<sup>73</sup> and, in practice, will only grant authorisations without a time limit in exceptional circumstances. This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 8.11 The ACCC considers the duration of an authorisation on a case-by-case basis. Most authorisations are granted for periods of up to five years, although the ACCC has granted authorisation for longer periods (up to 20 years) when supported by the facts. For example, an arrangement that requires significant investments that would only be likely if the proposed conduct is authorised for a longer period. By default the ACCC will assume applicants are seeking authorisation for five years. If a different period is sought, applicants should specify the alternate period and provide reasons.
- 8.12 The ACCC is also likely to be more inclined to grant authorisation for longer periods of time if parties seek re-authorisation of the same or similar conduct at the

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70 *ibid.*, at [359]–[360] and [365].

71 Section 91B(3)

72 Section 88(3)

73 Section 91(1)

conclusion of the initial authorisation period. This is more likely where there is evidence that the conduct delivered the anticipated benefits, relevant parties continue to support the arrangements and the market conditions are stable.

- 8.13 An authorisation for less than five years might be appropriate if market conditions, regulation or other relevant factors are likely to change in a way that affects whether the proposed conduct would continue to generate a net public benefit. Similarly, a shorter authorisation may be appropriate if market conditions are too uncertain for the ACCC to be satisfied that proposed conduct would be likely to continue to generate a net public benefit over a longer term.
- 8.14 Parties who wish to continue to engage in authorised conduct beyond the term of authorisation can lodge a new application for authorisation or an application for revocation and substitution (provided the existing term of authorisation has not expired) (see paragraphs 10.20 – 10.24). Applications for revocation and substitution should ideally be lodged at least six months before the expiry of the existing authorisation.
- 8.15 In either case, the ACCC will consider the application afresh. That is, undertake an assessment of the public benefits and detriments that are likely to flow from the proposed conduct for which 're-authorisation' is sought. Often the ACCC's assessment can be informed by whether the claimed public benefits and potential detriments were realised during the term of the previous authorisation. Parties that are likely to seek re-authorisation for conduct beyond the initial term should keep relevant data so that they are in a position to better substantiate their public benefit and detriment claims for the re-authorisation (see paragraph 10.24).

## 9 Interim authorisation

### What is an interim authorisation?

9.1 Under the Act the ACCC may grant interim authorisation:

- to allow parties to engage in the proposed conduct while due consideration is given to the application for authorisation
- for the 21-day period during which applicants or interested parties may apply to the Tribunal for a review of an ACCC determination
- during the period while the Tribunal considers an application for review of an ACCC determination
- for any other reason.<sup>74</sup>

9.2 The ACCC may grant an interim authorisation for:

- new applications
- applications for minor variation (see Chapter 11). Interim authorisation protects the conduct the subject of the proposed variation<sup>75</sup>
- applications for revocation and substitution (see Chapter 11). The interim authorisation protects the conduct the subject of the substitute authorisation. To grant interim authorisation, the ACCC must first suspend the authorisation proposed for revocation.<sup>76</sup>

### When will the ACCC grant interim authorisation?

9.3 The ACCC will determine whether to grant interim authorisation on a case by case basis taking into account relevant factors including:<sup>77</sup>

- The object of the Act, which includes enhancing the welfare of Australians through the promotion of competition. The ACCC is therefore unlikely to grant interim authorisation to proposed conduct that

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74 Sections 91(2)(a) to 91(2)(c).

75 Section 91(2)(e).

76 Section 91(2)(f).

77 A number of these factors were described by the Tribunal in *Re Queensland Timber Board (1975)*, ATPR 40-005 at 17,122–123.

has the potential to be significantly anti-competitive unless compelling reasons are provided.

- The extent to which the relevant market will change if interim authorisation is granted. Interim authorisation is more likely to be granted when it will maintain the market status quo. Interim authorisation is unlikely to be granted if doing so would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied.
- The urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether an application could have been lodged sufficiently early to have made the request for interim authorisation unnecessary.
- The possible harm, if any, to the applicant if a grant of interim authorisation is denied.
- The possible harm to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied.
- Any possible public benefits or detriments that the ACCC can assess at the time of considering the request for interim authorisation. However, granting interim authorisation does not require the ACCC to determine whether the relevant authorisation test is, or is likely to be, satisfied.

## Applying for interim authorisation

- 9.4 A request for interim authorisation may only be made if an application for authorisation has also been lodged for the same conduct.<sup>78</sup>
- 9.5 Requests for interim authorisation are usually considered:
- shortly after an application for authorisation is lodged
  - when the ACCC issues a draft determination proposing to grant authorisation
  - when the ACCC issues a final determination granting authorisation.
- 9.6 However, the particular facts of a matter may result in a request for interim authorisation being considered at other times during the authorisation process.
- 9.7 There is no application form for interim authorisation. Applicants should make a request for interim authorisation in writing and provide reasons in support of their request for interim authorisation (taking into account the factors identified at paragraph 9.3) and the date from which interim authorisation is sought. No additional fee is payable.

## Process for assessing applications for interim authorisation

- 9.8 While the Act does not require it, the ACCC will generally make inquiries and/or seek submissions from interested parties about the effect of granting interim authorisation (except in particularly urgent matters). Market inquiries about requests for interim authorisation are generally conducted over a shorter timeframe than market inquiries for the substantive application for authorisation.
- 9.9 When requested to do so, the ACCC aims to make a decision on interim authorisation within 28 days of the request.
- 9.10 Although the Act does not require the ACCC to provide reasons for a decision on interim authorisation, the ACCC will ordinarily provide a summary of its reasons which will be placed on the ACCC's public register available on the ACCC's website.
- 9.11 In granting interim authorisation, the ACCC can specify the date on which the interim authorisation will come into effect (although this date cannot be before the

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<sup>78</sup> Or at least conduct including the conduct for which interim authorisation is sought.

date on which interim authorisation is granted) and also the period for which the interim authorisation will apply (e.g. until a specified date or until the ACCC's final determination comes into effect).

- 9.12 The ACCC can revoke interim authorisation at any time but will usually consult with the applicant and interested parties if it contemplates doing so.

### **Implications of interim authorisation decisions for the substantive authorisation application**

- 9.13 The ACCC's decision to grant (or not grant) an interim authorisation should not be taken to indicate that it is likely to grant (or dismiss) the substantive application for authorisation. For example, the ACCC may grant interim authorisation but subsequently dismiss the application for authorisation following public consultation and detailed analysis of the public benefits and detriments of the proposed conduct. Conversely, a request for interim authorisation may be denied (based on an assessment of the factors at paragraph 9.3) but final authorisation may be subsequently granted.

### **Australian Competition Tribunal's power on interim authorisation decisions**

- 9.14 The Tribunal cannot review a decision by the ACCC to grant or not grant an interim authorisation.
- 9.15 However, if the Tribunal reviews an ACCC decision on an authorisation application (i.e. a final decision), the Tribunal has the power to grant an interim authorisation while it conducts this review. See paragraphs 11.24 – 11.25 for more information about the Tribunal's ability to grant interim authorisation.



## 10 Varying, revoking and substituting authorisations

### Minor variation

- 10.1 When assessing applications for minor variation, the ACCC must:
- be satisfied that the proposed variation satisfies the definition of a 'minor variation', and
  - if the proposed variation is minor, assess whether it satisfies the relevant limb of the authorisation test.

#### What is a minor variation?

- 10.2 The Act limits applications for minor variation to applications for:
- ... a single variation that does not involve a material change in the effect of the authorisation.<sup>79</sup>
- 10.3 A variation can only be considered 'minor' if it changes the conduct or the nature of the authorisation which has been granted in a way that is not substantial or significant. In determining whether this is the case the ACCC will typically consider both a quantitative and a qualitative element.
- 10.4 The quantitative element considers the extent of the change to the conduct that is authorised. The greater the extent of the change, the more likely that the change will be material. The qualitative element considers the nature of the change. A change that relates to conduct that is likely to contravene the competition provisions of the Act or which is central to generating a public benefit or a detriment is more likely to be material than one which is ancillary or peripheral to such matters.

#### When will the ACCC grant a minor variation?

- 10.5 The test to be applied by the ACCC when deciding whether to grant a minor variation to an authorisation will depend upon the basis on which the ACCC originally decided to grant the authorisation.
- 10.6 If the ACCC originally granted the authorisation because it was satisfied that the conduct would not have the effect or likely effect of substantially lessening competition, the ACCC must not vary the authorisation unless it is satisfied, in all

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79 Section 87ZP(1)

the circumstances, that the variation would not have the effect, or would not be likely to have the effect, of increasing the extent to which the conduct lessens competition.<sup>80</sup>

- 10.7 If the ACCC originally granted the authorisation because it was satisfied that the conduct would result, or be likely to result, in a net public benefit, the ACCC must not vary the authorisation unless it is satisfied, in all the circumstances, that the variation would not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.<sup>81</sup>
- 10.8 In deciding whether to vary an authorisation in accordance with the tests outlined above, the ACCC does not need to have regard to conduct that is unaffected by the variation.<sup>82</sup>

*Process for assessing applications for minor variation*

- 10.9 The ACCC will undertake an initial assessment of the application to determine if it is satisfied that the application is capable of being a minor variation. If the ACCC is not satisfied that a proposed variation is minor, the application will be invalid and the ACCC will inform the applicant and provide reasons. The applicant may consider whether to apply for a revocation of the authorisation and substitution of a new authorisation (see paragraphs 10.20 – 10.30).
- 10.10 If the application is valid and the ACCC is satisfied that a proposed variation is capable of being minor, it will write to potentially interested parties:
- indicating the nature of the application for minor variation
  - inviting them to lodge submissions by a specified date.<sup>83</sup>
- 10.11 The application for minor variation will be placed on the ACCC's public register on the ACCC's website.<sup>84</sup>
- 10.12 After considering the application, any submissions received within the specified period, and any other information received the ACCC will issue a written determination varying the authorisation or dismissing the application<sup>85</sup> and give reasons for its decision. The determination will detail whether the minor variation

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<sup>80</sup> Section 91A(4)(a)

<sup>81</sup> Section 91A(4)(b).

<sup>82</sup> Section 91A(4A)

<sup>83</sup> Sections 91A(3).

<sup>84</sup> Section 89(3)(b).

<sup>85</sup> Section 91A(3).

applied for was, in the ACCC's view, minor and the nature of any change in the net benefits of the authorisation.

- 10.13 Unlike applications for authorisation, the ACCC does not issue a draft determination when considering a minor variation and there is no entitlement for interested parties to call a conference to make oral submissions about the application to a Commissioner.
- 10.14 The ACCC endeavours to complete its assessment of an application for minor variation within two months, however, the ACCC's assessment may take longer in certain circumstances, for example, where the applicant fails to make clear the nature of the variation or where interested parties raise significant concerns.
- 10.15 If the ACCC dismisses an application for minor variation, the statutory protection provided by the authorisation remains limited to the conduct as originally authorised.
- 10.16 If the ACCC varies the authorisation, the conduct as amended receives the protection of authorisation. The minor variation comes into effect either:
- on the day specified in the determination which cannot be earlier than 21 days after it is issued
  - if an application is made to the Tribunal to review the ACCC's determination but is later withdrawn, when that application for review is withdrawn or
  - if an application is made to the Tribunal to review the ACCC's determination but is not withdrawn, the Tribunal's determination comes into force on the day it is made.<sup>86</sup>

#### **Applying for a minor variation**

- 10.17 An application for minor variation should follow the form approved by the ACCC (available on the ACCC's website). No lodgement fee is payable.
- 10.18 The ACCC may assess more than one application for minor variation at the same time if:
- the applications are lodged at the same time, or in such close succession that the ACCC can conveniently deal with the variations at the same time and

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86 Section 91(1B).

- the ACCC is satisfied that the combined effect of the variations, if all were granted, would not involve a material change in the effect of the authorisation.<sup>87</sup>

10.19 An application for minor variation may be withdrawn by writing to the ACCC at any time during its consideration of the application.<sup>88</sup>

### **Revocation and substitution (re-authorisation)**

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

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

##### *Applying for revocation and substitution*

- 10.21 An application for revocation and substitution should follow the form approved by the ACCC. A lodgement fee of \$2500 is payable. Applicants may request that the ACCC waive the lodgement fee. (For more information about fee waivers see paragraphs 3.18 – 3.23).
- 10.22 Applications for revocation and substitution must be lodged before the current authorisation expires. It is not possible to apply for revocation and substitution after an authorisation has expired.
- 10.23 In practice, applications for revocation and substitution (often referred to as ‘re-authorisation’) should be lodged at least six months before an authorisation expires.
- 10.24 Parties seeking re-authorisation are expected to provide relevant factual information to substantiate their claims. For example, when an authorisation has been in force for a number of years, the public benefits and detriments flowing from the conduct the subject of the authorisation may be more apparent than when authorisation was originally sought. The ACCC expects that parties seeking re-authorisation of arrangements will be able to provide evidence to support, and perhaps quantify, the benefits and anti-competitive detriments that have resulted from the authorised conduct.

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87 Sections 91A(6) and 91A(7).

88 Section 91A(8).

### *Process for assessing applications for revocation and substitution*

10.25 When an application for revocation and substitution is received, the ACCC will place the application on the public register on the ACCC's website.<sup>89</sup> The ACCC will also write to potentially interested parties:

- informing them that it has received an application for revocation and substitution
- indicating the basis on which revocation and substitution has been applied for, and the nature of the proposed substitute authorisation and
- inviting them to make submissions about the proposed revocation and substitution within a specified period.<sup>90</sup>

10.26 The process then mirrors that for considering an application for authorisation.<sup>91</sup> In particular, the ACCC:

- issues a written draft determination stating whether it proposes to grant the application for revocation and substitution and
- invites the applicant and interested parties to lodge written submissions in response to the draft determination. In addition, the applicant or any interested party may call a pre-decision conference to make oral submissions in response to the draft determination.

10.27 The ACCC then issues a written final determination revoking the authorisation and granting an authorisation in substitution for it, or deciding not to revoke the authorisation.

10.28 These processes—and the timelines involved—are set out in more detail in Chapter 4.

10.29 The ACCC may only grant an application for revocation and substitution if it is satisfied that the proposed substitute authorisation satisfies the authorisation test (see Chapter 6).<sup>92</sup>

### *Withdrawing an application*

10.30 An application for revocation and substitution may be withdrawn by writing to the ACCC at any time during its consideration of the application.<sup>93</sup>

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89 Section 89(3)(d).

90 Section 91C(2).

91 Sections 91C(3A) to 91C(6).

92 Section 91C(7).

## Revocation and substitution at the initiative of the ACCC

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

### *Starting a review of an authorisation*

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

- the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular
- a condition to which the authorisation was expressed to be subject has not been complied with, or
- there has been a material change of circumstances since the authorisation was granted.<sup>94</sup>

10.33 A 'material' change of circumstances is one that has 'an impact or likely impact upon public benefit and/or detriment'.<sup>95</sup>

10.34 The depth of analysis required before the ACCC may conclude that a material change of circumstances has occurred is low.<sup>96</sup> To determine whether there has been a material change of circumstances since the authorisation was granted, the ACCC will examine the circumstances that existed at the time authorisation was granted and compare them with the circumstances that exist at the time of the review.<sup>97</sup>

10.35 When initiating a review, the ACCC will write to potentially interested parties:

- informing them that it is considering revoking the authorisation and substituting a new authorisation
- indicating the basis on which the revocation is being proposed and the nature of the proposed substitute authorisation and

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93 Section 91C(8).

94 Section 91C(3).

95 *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,212. See also *re 7-Eleven Stores Pty Ltd* (1998), ATPR 41-666 at 41,462.

96 *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,214; see also 44,213.

97 *Re Media Council of Australia* (1996), ATPR 41-497 at 42,240.

- inviting submissions about the proposed revocation and substitution within a specified period.<sup>98</sup>
- 10.36 The process then mirrors that for considering an application for authorisation (see paragraph 10.26).<sup>99</sup> Following this review process, the ACCC will issue a written final determination revoking the authorisation and granting an authorisation in substitution for it, or deciding not to revoke the authorisation. These processes—and the timelines involved—are set out in more detail in Chapter 4.
- 10.37 The ACCC may only revoke the authorisation and grant a substitute authorisation if it is satisfied that the proposed substitute authorisation satisfies the relevant test for granting authorisation.<sup>100</sup>
- 10.38 If the ACCC revokes the authorisation and grants a substitute authorisation, the conduct identified in the substitute authorisation receives the protection of authorisation. The substitute authorisation comes into effect either:
- on the day specified in the determination, which cannot be earlier than 21 days after it is issued, or
  - if an application is made to the Tribunal to review the ACCC's decision but is later withdrawn, when that application for review is withdrawn<sup>101</sup>
  - alternatively, if an application is made to the Tribunal to review the ACCC's decision but not withdrawn, the Tribunal's determination comes into force on the day it is made.<sup>102</sup>

## Revocation

- 10.39 A person to whom an authorisation has been granted may apply to the ACCC for a revocation of the authorisation. The ACCC may also initiate a review of an authorisation with a view to revoking it in certain circumstances (see paragraph 10.32). Once revoked, parties no longer have statutory protection from legal action under the Act to engage in the conduct that was the subject of the authorisation.

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98 Section 91C(3).

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

100 Section 91C(7).

101 Section 91(1C).

102 Section 91(1C).

## Revocation at the request of the holder of an authorisation

### *Applying for revocation*

- 10.40 An application for revocation must be in the form approved by the ACCC. No lodgement fee is payable.

### *Process for assessing applications for revocation*

- 10.41 When an application for revocation is received, the ACCC will place the application on the public register on the ACCC's website.<sup>103</sup> The ACCC will also consult potentially interested parties on the application (see paragraph 10.35).<sup>104</sup>
- 10.42 If no interested party objects to the revocation, and there are no other concerns about revoking the authorisation, the ACCC can be expected to issue a written determination revoking the authorisation<sup>105</sup> and giving its reasons. The ACCC may disregard any objection it considers is vexatious or frivolous.<sup>106</sup>
- 10.43 However, if an interested party objects to the revocation, the ACCC may only grant the revocation if it is satisfied that the authorised conduct no longer satisfies the relevant test for granting authorisation.<sup>107</sup>
- 10.44 An application for revocation may be withdrawn by writing to the ACCC at any time during its consideration of the application.<sup>108</sup>

## Revocation at the initiative of the ACCC

- 10.45 The ACCC may, in certain circumstances, initiate a process to review an authorisation and make a determination revoking the authorisation or deciding not to revoke the authorisation.

### *Commencing a review of an authorisation*

- 10.46 The ACCC may start a review of an authorisation for the same reasons that are provided in paragraph 10.32.<sup>109</sup> When initiating a review the ACCC will follow the same process as outlined in paragraph 10.35.<sup>110</sup>

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103 Section 89(3)(c).

104 Section 91B(2).

105 Section 91B(4).

106 Section 91B(7).

107 Section 91B(5).

108 Section 91B(6).

109 Section 91B(3).

110 Section 91B(3).



- 10.47 If there are no concerns about revoking the authorisation the ACCC will issue a written determination revoking the authorisation<sup>111</sup> and giving its reasons.<sup>112</sup> The ACCC may disregard any objection it considers is vexatious or frivolous.<sup>113</sup>
- 10.48 However, if the ACCC receives an objection to the revocation, the ACCC may only revoke the authorisation if it is satisfied that the authorised conduct no longer satisfies the relevant test for granting authorisation.<sup>114</sup>
- 10.49 When considering whether to revoke an authorisation, either at the request of the holder of an authorisation, or at its own initiation, the ACCC is not required to issue a draft determination and there is no opportunity for interested parties or the applicant to request a pre-decision conference.

### Information gathering

- 10.50 The ACCC generally prefers to obtain information from applicants and interested parties through cooperation. However, section 155 of the Act specifically empowers the ACCC to require the provision of information, documents or evidence from a person that is relevant to the making of a decision on the revocation of an authorisation and the revocation of an authorisation and substitution of a replacement.<sup>115</sup>

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111 Section 91B(4).

112 Section 90(4).

113 Section 91B(7).

114 Section 91B(5).

115 Section 155(1)

# 11 Reviewing ACCC authorisation decisions

## Review by the Australian Competition Tribunal

- 11.1 If an applicant, or a person who the Tribunal is satisfied has a sufficient interest, is dissatisfied with an ACCC determination on an application for authorisation or a minor variation of an authorisation, or in relation to the revocation of an authorisation or the revocation of an authorisation and substitution of a new authorisation may ask the Tribunal for a review of the determination.<sup>116</sup>
- 11.2 A review by the Tribunal of an ACCC determination of (non-merger)\_ conduct is a re-hearing of the application and for the purposes of the review the Tribunal may perform all the functions and exercise all the powers of the ACCC<sup>117</sup> and must apply the same authorisation test as the ACCC.<sup>118</sup>
- 11.3 During the review the Tribunal may require the ACCC to furnish such information, make such reports and provide such assistance as the Tribunal requires<sup>119</sup> and it may have regard to any information furnished, documents produced or evidence given to the ACCC in connection with the making of the determination.<sup>120</sup> It is open for parties to put material before the Tribunal which was not before the ACCC as part of its consideration; this includes material which may not have been in existence at the time of the ACCC's determination.<sup>121</sup>
- 11.4 While ultimately the Tribunal must affirm, vary or set aside the ACCC's decision,<sup>122</sup> the Tribunal has stated that the Act does not require it:

... to consider the Commission's detailed findings and reach conclusions upon them.

It is the determination of the Commission which the Tribunal is called upon to 'review', not the reasons for that determination. It is specifically provided that the Tribunal's review is a re-hearing of the application for authorization, although the Tribunal may, in a proper case, have regard to information furnished to the Commission or to documents produced or evidence given to the Commission in the course of its consideration of the matter. It is easy to imagine cases, particularly where the Commission has conducted a public

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

117 Section 102(1)

118 Section 101(2)

119 Section 102(6)

120 Section 102(7)

121 Section 102(7).

122 Section 102(1).

hearing, where it would be sensible and proper to use some or all of the material before the Commission as a starting point for the Tribunal's inquiries. This might well be done by consent in some cases. ...

The main value of [the Commission's] reasons to the Tribunal is that they alert the Tribunal, at a very early stage in its proceedings, to the issues which are likely to arise before it in the particular case.

...

The reviewing body, in this case the Tribunal, must really do the task again from the beginning while using any short cuts provided by the earlier proceedings which may be appropriate in the particular case.<sup>123</sup>

11.5 The Tribunal has also stated that:

There is, in my opinion, no presumption that any particular finding by the Commission is correct. There is no onus on an applicant to show that the Commission is in error. Indeed the Tribunal could have no interest in investigating any alleged procedural defect in the Commission's proceedings. It is concerned only to determine the right answer to the question posed by the applicant's request for authorisation, and to do so by a fresh hearing.<sup>124</sup>

## Applying for a review

### *Who can apply*

11.6 If a person is dissatisfied with the ACCC determination, the person may apply to the Tribunal for review of the determination. The person may be:

- the applicant for authorisation; or
- a person that the Tribunal is satisfied has a sufficient interest in the subject matter of the authorisation.<sup>125</sup>

11.7 There can be multiple applicants for a review by the Tribunal. Where this is the case, and provided each applicant has a sufficient interest, the Tribunal will usually hear them together and grant each applicant leave to intervene in the other applications and the evidence in one application will be treated as evidence in all applications.<sup>126</sup> Ultimately this is a matter for the Tribunal.

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123 *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,226–17,227.

124 *Ibid* at 17,226.

125 Section 101(1AA).

126 *Re Rural Traders Co-operative (WA) Ltd* (1979), ATPR 40-110 at 18,113.

### *How to apply*

- 11.8 A person may apply for a review by the Tribunal of an ACCC determination by completing and lodging *Form I Application to Tribunal for Review* with the Federal Court's registry. The Form I must be lodged with the Tribunal within 21 days after the date of the ACCC's determination.<sup>127</sup>
- 11.9 A copy of Form I is contained in the Regulations and is also available on the Tribunal's website at [www.competitiontribunal.gov.au](http://www.competitiontribunal.gov.au).
- 11.10 The information requested by Form I requires the applicant for review to set out:
- the name of the applicant requesting the review
  - the ACCC's determination for which the review is requested
  - the applicant's interest in the determination (if not the original applicant for authorisation)
  - the reasons why the applicant for review is dissatisfied with the ACCC's determination
  - the determination sought from the Tribunal
  - the facts and contentions on which the applicant for review relies and the issues the applicant for review considers relevant.
- 11.11 The applicant for review is also required to provide a copy of the application for review to the ACCC. If the applicant for review is not the original applicant for authorisation, a copy must also be provided to the original applicant for authorisation.<sup>128</sup>

### **Participation in Tribunal proceedings**

- 11.12 The original applicant for authorisation is entitled to participate in proceedings before the Tribunal.<sup>129</sup> Any other parties must apply for 'leave to intervene' in proceedings before the Tribunal.<sup>130</sup> For example, if an applicant for review seeks the Tribunal's reconsideration of an ACCC decision to deny authorisation, interested parties who support the ACCC's decision may wish to intervene to put their case to the Tribunal.

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

128 Regulation 20(3).

129 Section 109(1).

130 Any person seeking leave to intervene before the Tribunal must establish their interest under s.109(2) of the Act and in accordance with r 21.

### *The Tribunal hearing*

- 11.13 The Tribunal hearing will be conducted as informally as possible, and the Tribunal is not bound by the rules of evidence.<sup>131</sup> The Tribunal has power to take evidence on oath and may summon a person to give evidence or produce documents before the Tribunal.<sup>132</sup>
- 11.14 During the hearing, the original applicant for authorisation must satisfy the Tribunal that authorisation should be granted. This remains the case even though:
- an interested party other than the original applicant for authorisation applied to the Tribunal for a review of the ACCC's decision
  - the concerns that led to the Tribunal application (either by the original applicant for authorisation or an interested party) relate only to part of the ACCC's decision rather than the decision overall. For example, an applicant may be dissatisfied with a particular condition of authorisation imposed by the ACCC.
- 11.15 If an interested party other than the original applicant for authorisation has requested the review by the Tribunal, they are also expected to present a full case in support of their application for review of the ACCC's decision.
- 11.16 Therefore parties appearing in proceedings typically need to present the views and supporting information provided to the ACCC to the Tribunal, although new information may be presented to the Tribunal.
- 11.17 The Tribunal does not just have to rely on the information that is put before it by the parties to the proceedings. It may request information from other parties on matters about which it wishes to be informed.
- 11.18 Tribunal hearings are held in public.<sup>133</sup> However, to protect confidential information, the Tribunal can conduct a hearing or part of a hearing in private, or can prevent or limit the publication of information provided during the hearing.<sup>134</sup>

### *The Tribunal decision*

- 11.19 After the hearing, the Tribunal will adjourn to consider its decision. There is no timeframe within which the Tribunal is required to make its decision for conduct authorisation applications.

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131 Sections 103(1)(b) and 103(1)(c).

132 Section 105.

133 Section 106(1).

134 Sections 106(2)(a) and 106(2)(b).

- 11.20 The Tribunal may affirm, set aside or vary the ACCC's determination and perform all of the ACCC's functions and powers in so doing, including imposing conditions, setting time limits and granting interim authorisation.
- 11.21 Like the ACCC, the Tribunal publishes reasons for its decisions and these are available from the Tribunal's website ([www.competitiontribunal.gov.au](http://www.competitiontribunal.gov.au)) or Federal Court website ([www.fedcourt.gov.au](http://www.fedcourt.gov.au)). Occasionally the reasons for the Tribunal's decision may be issued after the date on which its decision is made.<sup>135</sup>

#### *Consent determinations*

- 11.22 In appropriate circumstances, the Tribunal may make a determination by consent of all parties permitted to intervene in the proceedings, so avoiding the need for a full hearing.<sup>136</sup> In such circumstances, the Tribunal does not need to be satisfied on the statutory test for authorisation.<sup>137</sup>
- 11.23 For example, in March 2002 the ACCC granted conditional authorisation to the Australian Dairy Farmers Federation to allow members to bargain collectively with dairy processing companies. National Foods, a major dairy processor, sought the Tribunal's review of some of the conditions of authorisation. In a hearing in August 2002 the Tribunal granted a consent determination after National Foods, the Australian Dairy Farmers and the ACCC agreed to altered conditions of authorisation.

#### *Interim authorisation*

- 11.24 As is the case with the ACCC, the Tribunal may grant interim authorisation while it is reviewing an authorisation.
- 11.25 The Tribunal has previously identified several non-exhaustive guiding principles as relevant when considering an application for interim authorisation:
- The Act is clearly opposed to anti-competitive practices, and an applicant for authorisation has to make a strong case for authorisation.
  - A person appealing in good faith against the refusal of authorisation by the ACCC should not be effectively denied their right of appeal by the refusal of an interim authorisation. This may happen if, for example, the

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135 For example, see *Qantas Airways Ltd* (2005), ACompT 9; the Tribunal announced on 12 October 2004 that it would grant authorisation and issued its reasons on 16 May 2005.

136 Section 101(1A).

137 Section 101(1A).

conduct that had been denied authorisation by the ACCC could not be put in place if authorisation was later granted by the Tribunal.

- Any possible harm to the person seeking review will be relevant, as will any possible harm to other parties.
- As the Tribunal's ultimate concern is the public benefit, any possible benefit or detriment to the public will be given full weight.
- In some cases it may be preferable to maintain the existing position while the Tribunal considers its decision.
- The length of time likely to elapse between the granting of interim authorisation and the final hearing may be important.<sup>138</sup>

### Withdrawal of applications for review

11.26 There is no explicit provision in the Act providing for the withdrawal of an application for review by the Tribunal. The applicant for review must seek leave of the Tribunal to do so. Generally, if the applicant seeks to withdraw its application for review, they will be allowed to do so unless the Tribunal considers it in the public interest for the process to continue.<sup>139</sup> The effect of permitting the applicant to withdraw an application for review by the Tribunal is to treat the application as no longer on foot and the ACCC's determination remains.

### The role of the ACCC in Tribunal proceedings

11.27 The ACCC assists the Tribunal:

In proceedings before the Tribunal, the Commission's function is to assist the Tribunal to reach, in the public interest, the correct decision.<sup>140</sup>

11.28 Under the Act the Tribunal has the power to require the ACCC to provide documents relied on in its consideration of the application for authorisation and otherwise provide information, make reports or provide assistance to the Tribunal as it may direct.<sup>141</sup>

11.29 In addition to the Tribunal's power to require the ACCC's assistance, the ACCC as a rule will seek to participate as a substantive party to the proceeding. While the ACCC does not attend the hearing to try to uphold its determination, in many

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138 *Re Queensland Timber Board* (1975), ATPR 40-005 at 17,122-17,123.

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

140 *Re Herald & Weekly Times Ltd & Ors* (1978), ATPR 40-058 at 17,604.

141 Sections 102(6) and 102(7).

applications for review, the ACCC will be the contradictor to the applicant's case. In that context, the Tribunal has previously identified the ACCC's role in proceedings as being to:

- examine any statements of facts and contentions put before the Tribunal by a party to see if all material facts and considerations are fully and fairly presented, and to submit to the Tribunal the results of each such examination
- furnish the Tribunal with such additional information as the ACCC considers material to the issues before the Tribunal
- assist the Tribunal to evaluate the information by such means as appropriate, including the cross-examination of witnesses and production of additional information to correct, qualify or contradict information already supplied
- make submissions to the Tribunal on matters which the ACCC considers material to the hearing before the Tribunal.<sup>142</sup>

11.30 The Tribunal has confirmed this role:

The ACCC made submissions and adduced evidence for our assistance along the lines indicated by the Tribunal in *Queensland Co-operative Milling Association* (1976) 8 ALR 481 at 484. We have found the ACCC's submissions and evidence helpful although, as will be seen, we do not accept everything it has put before us. ... Not everything the ACCC has put has been couched in terms of anodyne neutrality, but its role cannot be so restricted.<sup>143</sup>

## The Federal Court of Australia

11.31 The Federal Court of Australia considers almost all civil matters arising under Australian federal law, including matters arising under the Act, and some summary and indictable criminal matters.

### Appealing ACCC determinations

11.32 ACCC determinations may be challenged in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* or in the original jurisdiction of the Federal Court under section 39B of the *Judiciary Act 1903* on a question of law (judicial review).

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142 *Re Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012 at 17,225.

143 *Re Eftpos Interchange Fees Agreement* (2004) ACompT 7 at [29].



- 11.33 As judicial review is concerned only with the legality of the decision (for example, whether the ACCC had the power to make the decision, whether it has taken into account an irrelevant consideration, failed to take into account a relevant consideration or whether the decision was so unreasonable that no reasonable decision maker could have made it), the Federal Court cannot decide whether the ACCC's determination was the correct one based on the merits of the case. The Tribunal is the avenue for review on the merits of an ACCC determination about an authorisation application.

#### **Appealing Tribunal determinations**

- 11.34 Tribunal determinations can be appealed to the Full Federal Court only on questions of law, not questions of fact or the merits of the decision.
- 11.35 Information about the Federal Court and the process of filing an application to appeal can be obtained from its website ([www.fedcourt.gov.au](http://www.fedcourt.gov.au)).