



# Merger Authorisation Guidelines

For consultation

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

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# 1 Introduction

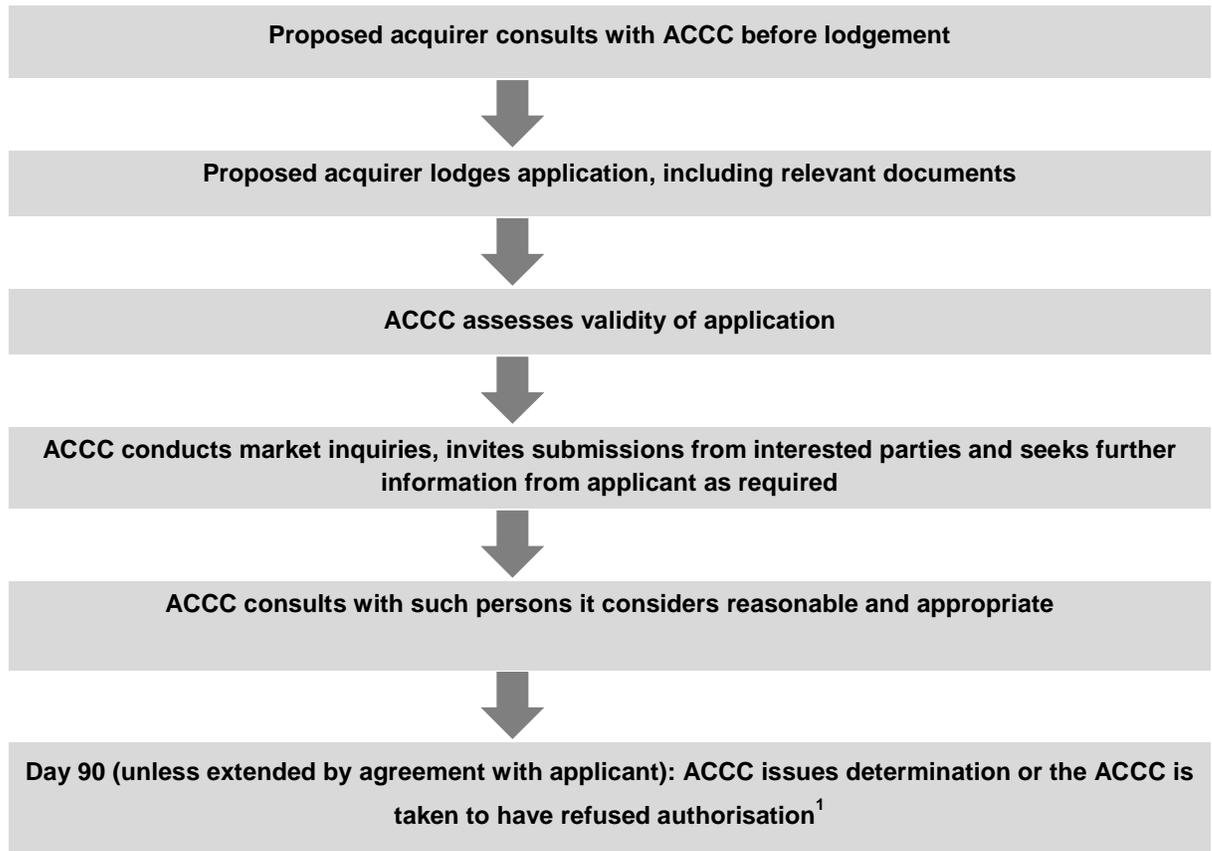
- 1.1 These *Merger Authorisation Guidelines* are for consultation and reflect the proposed approach of the Australian Competition and Consumer Commission (ACCC) to assessing applications for authorisation of proposed acquisitions under the *Competition and Consumer Act 2010* (Cth) (the Act).
- 1.2 Acquisitions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

## The authorisation framework

- 1.9 The authorisation process in the Act is an important feature of Australia's competition laws. It recognises that, in certain circumstances, particular conduct may give rise to

benefits to the public that outweigh the public detriments that result. The new merger authorisation provisions also permit authorisation where an acquisition would not otherwise breach the Act.

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



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<sup>1</sup> Section 90(10B).

## 2 What authorisation provides

### Why apply for merger authorisation?

- 2.1 A person who obtains merger authorisation from the ACCC obtains statutory protection from legal action under section 50 of the Act for the proposed acquisition. That is, while the merger authorisation is in force, the person to whom authorisation applies will be able to acquire the relevant shares or assets without risk of the ACCC or third parties taking legal action against them for a contravention of section 50 of the Act.
- 2.2 In some cases, a proposed acquisition may involve or be connected with conduct that would or might breach other provisions of the Act. Parties should ensure that they apply for authorisation in respect of any non-merger conduct, as well as applying for merger authorisation for the proposed acquisition itself. The process for doing so is set out in the ACCC's *Guidelines for authorisation of conduct (non-merger) 2017*, available at [www.accc.gov.au](http://www.accc.gov.au).

### Who can apply for merger authorisation?

- 2.3 Any person<sup>2</sup> proposing to acquire shares or assets where that acquisition would or might breach section 50 of the Act may apply for merger authorisation.
- 2.4 Parties may wish to obtain legal advice on whether a proposed acquisition would or might breach section 50 of the Act and whether they should consider applying for merger authorisation. The ACCC cannot provide legal advice, although it is able to provide general guidance on issues.

### Acquisitions that can be authorised

- 2.5 The ACCC's power to grant merger authorisation is limited to future acquisitions. The Act does not allow the ACCC to authorise completed mergers or acquisitions.<sup>3</sup>

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

3 Section 88(6).

## 3 How to apply for merger authorisation

### Pre-lodgement discussions with the ACCC

- 3.1 The ACCC expects 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, and to ensure they provide all relevant information and documents with their application.
- 3.3 The ACCC recommends that applicants provide a draft application (including relevant information and documents) before their pre-lodgement meeting so that the ACCC can provide more specific guidance during the meeting. The provision of a comprehensive and substantiated application upfront is important given the need to provide sufficient information for the ACCC to reach a decision and the timeframes involved in the merger authorisation process.
- 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 process.

### 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 *Competition and Consumer Regulations 2010* (the Regulations).<sup>4</sup>
- 3.6 The ACCC is required to assess the validity of an application within five business days of receiving it.<sup>5</sup> See paragraphs 3.22 to 3.24 for further information about invalid applications.

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4 Section 89(1).

5 Section 89(1A).

### Form of application

- 3.7 An application for merger authorisation should follow the form approved by the ACCC (available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au)) and be accompanied by electronic versions of any relevant information, documents and evidence.
- 3.8 Applicants must include:
- a public version of their application, which will be placed on the ACCC's public register
  - a signed declaration that their application is true, correct and complete, and
  - a section 87B undertaking not to complete the proposed acquisition while the ACCC is considering the merger authorisation application.
- 3.9 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, complete copies of documents required by the form have been produced, estimates provided are best estimates and opinions expressed are sincere. The applicant must advise the ACCC immediately of any material change in circumstances relating to the application.
- 3.10 An application for merger 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 issues raised by the proposed acquisition. Some questions on the form might not be relevant to a particular application and, where this is the case, applicants should provide a brief explanation of why this is so.
- 3.11 Subject to specific guidance during the pre-lodgement discussions, the information set out below is requested in the form.

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

Provide details for the applicant acquirer(s) and separately any other parties to the proposed acquisition such as the target company (together, the parties), including:

- name, address (registered office), telephone number, ACN or international equivalent
- contact person's name, position, telephone number, and email address
- a description of business activities
- email address for service in Australia

- for each party to the proposed acquisition, a company structure chart identifying each party, its respective subsidiaries, and all related bodies corporate and companies in which it holds minority shareholdings that are involved in a relevant business for purposes of assessing this application
- a current organisation chart for each party and for each of the party's relevant businesses, identifying the key personnel with their full name, title, and contact details.

### **The proposed acquisition**

Provide details of the proposed acquisition, including:

- the assets and/or shares to be acquired, and the structure of the proposed acquisition, including any proposed ancillary arrangements
- diagrams to show the change in ownership structure post acquisition
- the rationale for the proposed acquisition
- the expected completion date.

Provide the following documents:

- executed or most recent versions of the transaction documents, such as the sale and purchase agreement, heads of agreement, offer documents, and any related agreements
- final or most recent versions of documents governing or particularising the sale process for the proposed acquisition, such as information memoranda or documents required for schemes of arrangement, takeover bids or trust schemes
- documents submitted to the applicant's board or prepared by or for the applicant's senior management for purposes of assessing or making a decision in relation to the proposed acquisition, and any minutes or record of the decision made. Provide the same documents from other parties to the proposed acquisition, to the extent available.

### **Market information and concentration**

Describe the products and/or services and the geographic areas supplied by the parties.

Describe the industry or industries affected by the proposed acquisition. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.

Describe any upstream or downstream activities currently undertaken by the parties (including their related bodies corporate).

Identify all products and services in the relevant areas in which they overlap or have a vertical relationship.

For each relevant product or service in respect of which the parties overlap or have a vertical relationship, provide (for each party):

- the geographic locations in which the product or service is manufactured, distributed, or supplied

- the sales revenues and volumes and, where relevant, current capacity and capacity utilisation
- gross revenue earned from each of its top ten customers
- an estimate of the total market size (by sales in dollars and units and, where relevant, capacity or an alternative measure if more appropriate) and the current market shares for each of the parties and each competitor (including via imports). Identify the source of the data used to prepare this information, and any assumptions used.

Provide each party's most recent annual report, audited financial statements, business and strategic plans, and management accounts for the company as a whole and for each relevant division or business unit.

### **Competition effects**

Describe the constraints on the parties to the proposed acquisition in the relevant industry or industries, including any likely change to those constraints should authorisation be granted and the proposed acquisition proceed. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the competition effects. You should address:

- existing or potential competitors, including via imports, to the parties
- the likelihood, sufficiency and timeliness of entry and expansion by existing and potential competitors (including costs)
- the countervailing power of customers
- any other relevant factors.

### **Public benefits and detriments**

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

### **Contact details of relevant market participants**

For each area of overlap, provide contact details (email addresses and phone numbers) for:

- actual or potential competitors
- each party's top 10 to 30 customers (depending on the total number of customers)
- each party's top five to ten suppliers (depending on the total number of suppliers)
- trade or industry associations in which one or more of the parties are members.

### **Additional information**

Provide any other information or documents you consider relevant to the ACCC's assessment of the proposed acquisition. This may include proposed conditions to the authorisation.

- 3.12 In addition to providing a copy of the relevant transaction documents with their application, the form requires applicants to describe the proposed acquisition for which merger authorisation is sought in a sufficiently precise manner for the purposes of the public register so that the ACCC can consult with interested parties and assess the proposed acquisition.
- 3.13 Submissions which are supported by evidence are likely to be given greater weight than submissions alone.

#### **Fees**

- 3.14 A valid merger authorisation application must be accompanied by the relevant lodgement fee of \$25,000,<sup>6</sup> or evidence that the fees have been paid (for example, evidence that an electronic transfer has been made).
- 3.15 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.

#### **Confidential information**

- 3.16 The Act requires that applications for merger authorisation be placed on a public register. Accordingly, if the application (including the supporting documents) contains confidential information, the applicant must provide both a confidential version and a public version of the application for merger authorisation. The public version of the application will be placed on the public register and must include sufficient information to enable public consultation.
- 3.17 If the applicant provides a confidential version of the application and supporting submission, all confidential 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 from paragraph 5.9 onwards.)
- 3.18 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.

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<sup>6</sup> Regulations Schedule 1B. The fee for lodging an application for revocation and substitution of a merger authorisation is also \$25,000. No fee applies for applications for minor variation or applications to revoke an existing authorisation.

## Where to lodge a valid application for authorisation

- 3.19 The ACCC prefers applications for merger authorisation to be lodged by email to the General Manager, Merger Investigations Branch, at [mergers@acc.gov.au](mailto:mergers@acc.gov.au).<sup>7</sup>
- 3.20 A complete application is considered to be lodged on the business day when the fee and application have been received or, when this occurs on a weekend or a public holiday in the Australian Capital Territory (the ACT), the next business day in the ACT.
- 3.21 Once an application is lodged and it has been assessed as a valid application, it will be placed on the public register, which is available on the ACCC's website at [www.acc.gov.au/public-registers](http://www.acc.gov.au/public-registers).

## Invalid applications

- 3.22 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).
- 3.23 If the party decides not to submit a corrected application, the application fees paid to the ACCC will be refunded.
- 3.24 If the ACCC considers the corrected application is valid it will place the application on the public register, commence public consultation and list the matter on the ACCC's website ([www.acc.gov.au](http://www.acc.gov.au)) as being under consideration.

## Amending applications

- 3.25 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 90-day time period for considering merger authorisation applications.
- 3.26 The ACCC will consider a request to amend an application for merger authorisation having regard to the nature of the amendment, whether it would require further

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<sup>7</sup> Applications for authorisation may also be lodged by mail or in person at an ACCC office (see [www.acc.gov.au/contact-us](http://www.acc.gov.au/contact-us)).

consultation with interested parties, and the timing of the amendment in the context of the process. The ACCC will be unlikely to accept any substantial change needing additional consultation without an appropriate extension to the time period.

- 3.27 If the ACCC does not accept a request to amend an application, depending on the nature of the amendment, the applicant may withdraw the application and re-lodge a new application incorporating the amended proposal (which would start the merger authorisation process again and reset the statutory timeframe). Alternatively, the applicant could proceed with its original application and, if merger authorisation is granted, then seek a minor variation or a revocation and substitution, depending on the nature of the amendment (see Chapter 11 for further information).

### Withdrawing applications

- 3.28 Applicants may withdraw their application by advising the ACCC in writing at any time before the ACCC makes its final determination.<sup>8</sup>
- 3.29 There is no provision for the ACCC to refund fees if an application is withdrawn.
- 3.30 The ACCC is required to keep a record of withdrawn applications on the public register.<sup>9</sup>

### Providing false or misleading information

- 3.31 Providing false or misleading information to the ACCC in relation to a merger authorisation application may have serious consequences.
- 3.32 Knowingly giving the ACCC false or misleading information, or omitting any matter or thing without which the information is misleading, is a serious offence under the *Criminal Code Act 1995* (Cth) and criminal penalties may apply.<sup>10</sup>
- 3.33 Section 92 of the Act specifically prohibits a person from giving information to the ACCC in connection with an application for merger authorisation or related applications<sup>11</sup> if the person knows, or is reckless or otherwise negligent as to whether, the information given is false or misleading in a material particular. Breaches of section 92 may attract pecuniary penalties.<sup>12</sup>

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8 Section 88(7).

9 Section 89(3).

10 *Criminal Code* (Cth), section 137.1.

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

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

3.34 In addition to taking steps to revoke a merger authorisation granted on the basis of information that was false or misleading in a material particular, in appropriate circumstances, the ACCC may seek orders from the Federal Court including an injunction to stop the proposed acquisition from proceeding,<sup>13</sup> or divestiture if the acquisition has already completed.<sup>14</sup>

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13 Section 80AC.

14 Section 81A.

## 4 Steps in the merger authorisation review process

- 4.1 Once a valid application is received, the merger authorisation process involves the ACCC:
- conducting market inquiries, including inviting interested parties to lodge written (or oral) submissions commenting on the application,
  - engaging with the applicant, including seeking further information and evidence as needed and inviting the applicant to lodge a written submission in response to interested party submissions, and
  - issuing a final determination.
- 4.2 A chart depicting the ACCC's consideration of an application for merger authorisation is provided at paragraph 1.10.

### 90-day time limit for merger authorisations

- 4.3 If the ACCC has not made a decision in respect of an application for merger authorisation within 90 days of the application being validly lodged (unless extended), the ACCC is taken to have refused to grant the authorisation sought.<sup>15</sup> The 90-day limit also applies to an application for revocation, revocation and substitution, or minor variation of a merger (see Chapter 11).
- 4.4 The 90-day period begins on the date the ACCC receives a valid application for merger authorisation.<sup>16</sup>
- 4.5 The 90-day period can be extended if the applicant for an authorisation informs the ACCC in writing before the expiration of the 90-day period that the applicant agrees to the ACCC taking a specified longer period for the determination of the application.<sup>17</sup>
- 4.6 The applicant may agree to multiple subsequent extensions of the period for the ACCC to make a determination, provided in each case the applicant advises the ACCC in writing before the expiration of the existing time period.<sup>18</sup>

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15 Section 90(10B).

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

17 Section 90(12).

18 Section 90(13).

- 4.7 The ACCC will publish on the public register an indicative timeline for the assessment of the application, including the closing date for market consultations and the proposed date for its final determination and, where relevant, any extensions agreed to by the applicant.
- 4.8 As the 90-day period is based on calendar days, it is possible for it to expire on a weekend or public holiday. In these cases, the ACCC will endeavour to release its final determination before the end of the last business day in the ACT before the conclusion of the 90-day period.

#### **Assessing applications within 90 days**

- 4.9 The 90-day period for the ACCC's consideration of merger authorisation applications imposes a discipline on all those involved in the merger authorisation process.
- 4.10 Once the 90-day 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 3.25 to 3.27 for further information about amending applications.
- 4.11 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 specified date.<sup>19</sup> The ability of an applicant to respond to late information will also be limited.
- 4.12 If the ACCC does not determine an application for a merger authorisation within the 90-day period (or if extended, the extended period), the ACCC is taken to have refused, at the end of that period, to grant the merger authorisation applied for.<sup>20</sup>

#### **Public consultation**

- 4.13 The ACCC will generally commence its market inquiries 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 available at [www.accc.gov.au/public-registers](http://www.accc.gov.au/public-registers).<sup>21</sup>
- 4.14 During its consultation process the ACCC aims to consult broadly with a range of parties likely to be directly affected by the proposed acquisition. In the application,

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19 Section 90(6A).

20 Section 90(10B).

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

applicants should provide contact details 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.

- 4.15 Where a proposed acquisition is likely to affect large numbers of parties (such as consumers or businesses), the ACCC will seek to identify appropriate representative bodies such as consumer or business groups or a subset of the potentially impacted parties.
- 4.16 Generally, the ACCC's notice to potentially interested parties will:
- include a copy of the application or a link to the ACCC's website where the application can be accessed
  - invite interested parties to comment on the application and the proposed acquisition
  - where appropriate, identify specific issues that the ACCC wants interested parties to address
  - nominate an ACCC contact officer for the application
  - request submissions by a specified date.
- 4.17 A copy of the notice to potentially interested parties will be placed on the public register.
- 4.18 Any other person who becomes aware of an application, but who was not contacted by the ACCC, may lodge a submission.
- 4.19 The ACCC may also consult with such persons it considers reasonable and appropriate for the purposes of making its determination.<sup>22</sup>
- 4.20 The ACCC takes all submissions received by the specified date into account.<sup>23</sup> However, because of the 90 day assessment period, the ACCC may be unable to extend deadlines for lodging submissions. The ACCC may, but need not, take into account any submissions or information received after the specified date.<sup>24</sup>

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22 Section 90(6)(d).

23 Section 90(6A).

24 Section 90(6A).

### How to lodge a submission

- 4.21 Interested parties who wish to lodge a submission with the ACCC are encouraged to provide it in writing, addressed to the General Manager, Merger Investigations Branch, and send it by email to [mergers@acc.gov.au](mailto:mergers@acc.gov.au) and, if possible, copied to the nominated ACCC contact officer.
- 4.22 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.
- 4.23 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 4.16) or send an email to [mergers@acc.gov.au](mailto:mergers@acc.gov.au). Particulars of oral submissions will be placed on the public register, subject to any claims for confidentiality.
- 4.24 Interested parties may ask that confidential information provided in a written or oral submission be excluded from the public register (see paragraphs 5.5 to 5.12). 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.

### Engagement with the applicant

- 4.25 As noted above, applicants should provide a comprehensive application, accompanied by the information, data and documents specified in the form as well as any additional material which is likely to be relevant to the ACCC's assessment of the proposed acquisition (see paragraph 3.11).
- 4.26 If the ACCC requires further information from the applicant, it may either write to the applicant requesting additional information to be given within a specified period,<sup>25</sup> or issue the applicant with a written notice under its compulsory powers under section 155 to obtain information, documents or evidence.<sup>26</sup>
- 4.27 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 90-day assessment period means that

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25 Section 90(6)(b).

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

the ACCC may be limited in its ability to take into account responses received from the applicant after the specified date.

- 4.28 While the ACCC is not required to publish a draft determination in the merger authorisation process, the ACCC expects to engage with the applicant prior to the final determination to provide feedback in relation to the application. This may include indicating outstanding concerns or identifying areas of less concern to the ACCC. This engagement may include a summary of concerns the ACCC has received on a confidential basis (without identifying any confidential information).
- 4.29 The ACCC will send a copy of its final determination to the applicant and place a copy on the public register, available at [www.accc.gov.au](http://www.accc.gov.au).

### Commencement of statutory protection

- 4.30 A merger authorisation will come into force on the day specified in the determination. This date may not be earlier than 21 days after the determination is issued.<sup>27</sup> 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>28</sup> If the application to the Tribunal is subsequently withdrawn, the ACCC determination takes effect on the day the application is withdrawn.<sup>29</sup> The role of the Tribunal is outlined in Chapter 10.
- 4.31 An authorisation remains in force for the period specified by the ACCC in the authorisation.<sup>30</sup> The ACCC will generally grant a merger authorisation for a period of no longer than twelve months from the date of the determination. In order to have the legal protection conferred by the merger authorisation, the authorised party will need to complete the relevant acquisition during this twelve month period.
- 4.32 Applicants will be requested to notify the ACCC when they have completed the acquisition which is the subject of a merger authorisation.

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27 Section 91(1A); regulation 29\*1(b).

28 Section 91(1A).

29 Section 91(1A)(c).

30 Section 91(1).

## 5 Public register

- 5.1 Under the Act the ACCC is required to keep a public register containing the following documents:
- applications for merger authorisation, minor variation, revocation and revocation and substitution, including applications that have been withdrawn or abandoned
  - documents provided to the ACCC in relation to any application
  - particulars of any oral submissions made to the ACCC in relation to an application
  - final determinations.<sup>31</sup>
- 5.2 The ACCC will also publish an indicative timeline for its review on the public register.
- 5.3 The merger authorisation public register is available on the ACCC's website ([www.accc.gov.au/public-registers](http://www.accc.gov.au/public-registers)).
- 5.4 The ACCC usually includes a copy of key ACCC correspondence with the applicant and interested parties (such as inviting submissions from interested parties).

### Dealing with confidential information

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

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31 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>32</sup>

5.8 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 section 155AAA of the Act.<sup>33</sup>

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

5.9 Any request to exclude a confidential document or oral submission, or parts of it, from the public register must be made at the time the document or oral submission is provided to the ACCC.<sup>34</sup> Reasons must be provided in support of a request for exclusion.

5.10 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 to be excluded from the public register, the words 'Restriction of Publication Claimed' should appear in red writing near the top of each page.<sup>35</sup>
- When a request is made to exclude part of a document, the words 'Restriction of Publication of Part Claimed' should appear in red writing near

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32 Section 89(5A)(a).

33 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 at [www.accc.gov.au](http://www.accc.gov.au).

34 Section 89(5).

35 Regulation 24(1A)(a).

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>36</sup>

- 5.11 The ACCC will consider requests for exclusion that do not comply with this process provided it is clear which information is confidential and the reasons why such information is confidential.
- 5.12 Parties should not include standard headers claiming confidential communication in documents unless they contain information the applicant wants excluded from the public register. If the information is not confidential and the header cannot be removed, parties should clearly state at the beginning of correspondence provided to the ACCC that exclusion from the public register is not requested.

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

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

#### **How the ACCC assesses requests for the exclusion**

- 5.13 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>37</sup>
- 5.14 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.
- 5.15 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

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<sup>36</sup> Regulation 24(1A)(b).

<sup>37</sup> Section 89(5E).

merger authorisation and otherwise consistently with its statutory functions under the Act.

- 5.16 If the ACCC decides not to exclude information from the public register, either because the claim is not accompanied by sufficient justification or because it considers that the information is not confidential in nature, the ACCC will inform the relevant party of its decision. If the party provided the document or submission on a voluntary basis and the ACCC refuses to exclude the material from the public register, the party may ask the ACCC to return the document or part of the document.<sup>38</sup> Alternatively, the party may advise the ACCC that it wishes to withdraw or amend the request for exclusion from the public register.
- 5.17 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**

- 5.18 Parties should be aware that a decision by the ACCC to exclude information from the public register does not provide any broader confidentiality protection.
- 5.19 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 at [www.accc.gov.au](http://www.accc.gov.au).
- 5.20 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>39</sup>

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

- 5.21 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

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<sup>38</sup> Section 89(5B).

<sup>39</sup> *Administrative Decisions (Judicial Review) Act 1977*, section 13A.

reason other than the confidential nature of the matters contained in the document or submission.<sup>40</sup>

### Provision of documents to applicants

- 5.22 All public submissions received by the ACCC in connection with an application for merger authorisation will be placed on the public register available on the ACCC's website ([www.accc.gov.au/public-registers](http://www.accc.gov.au/public-registers)).
- 5.23 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>41</sup> or if disclosure would prejudice any person (such as where information has been excluded from the public register).

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40 Section 89(5D).

41 Section 157(1AB).

## 6 The authorisation test

### The test

- 6.1 The ACCC may grant authorisation for a proposed acquisition if it is satisfied in all the circumstances that:
- the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
  - the proposed acquisition would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition.<sup>42</sup>
- 6.2 The ACCC's power to grant authorisation is discretionary. Therefore, the ACCC is not required to grant authorisation even where the relevant authorisation test is satisfied.<sup>43</sup>
- 6.3 However, to grant authorisation, the ACCC needs to be satisfied that at least one limb of the test has been met.
- 6.4 The applicant may wish to indicate in its application which limb of the test it believes is most readily met in the circumstances of the merger.
- 6.5 The ACCC's views on what constitutes a public benefit, public detriment and a lessening of competition are set out in more detail in Chapters 7 and 8.

### Onus on the applicant to satisfy the ACCC

- 6.6 It is for the applicant to satisfy the ACCC that authorisation should be granted.<sup>44</sup> In particular, an applicant must satisfy the ACCC that the proposed acquisition is not likely to substantially lessen competition, or that there is a sufficiently substantial public benefit to outweigh the detriment and so justify the authorisation.

### Forward looking nature of analysis

- 6.7 The ACCC adopts a forward looking approach when applying the authorisation tests. That is, the analysis focuses on assessing the likely competition effects, and public

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42 Section 90(7).

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

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

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

#### **Future with and without**

6.8 In applying the authorisation test, the ACCC generally compares the likely future with the proposed acquisition that is the subject of the authorisation application to the likely future without the proposed acquisition.<sup>45</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 acquisition occurs against the future in which the acquisition does not occur. This approach enables the ACCC to focus its assessment on the impact of the acquisition rather than other effects that would occur irrespective of whether the acquisition occurs. For most merger matters, the likely future without the acquisition, for purposes of analysis, will be the status quo.

6.9 For example, a comparison with the future without the acquisition 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 some of the claimed public benefits will likely exist regardless of the proposed acquisition, they will be given little, if any, weight.

6.10 The ACCC determines the likely future with and without position on a case-by-case basis. In identifying what is likely, the ACCC does not take into account mere possibilities. The ACCC is concerned with whether there is a real chance of an outcome occurring.

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

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

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

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

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

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

- 6.13 However, it is rarely possible to draw a clear line around the market, and it is often sufficient to identify the relevant areas of competition in which the proposed acquisition or its effects will occur, without precisely defining the boundaries of the relevant market.<sup>46</sup>
- 6.14 A more detailed explanation of the ACCC's approach to market definition is set out in the ACCC's *Merger Guidelines*.<sup>47</sup>

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

47 ACCC *Merger Guidelines* at [4.1] – [4.27] available from the ACCC's website at [www.accc.gov.au/mergerguidelines](http://www.accc.gov.au/mergerguidelines)

## 7 Substantial lessening of competition

- 7.1 The ACCC may authorise a proposed acquisition if it is satisfied, in all the circumstances, that the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition.<sup>48</sup> This requires the ACCC to conduct a competition analysis of the proposed acquisition if authorisation is to be granted on this basis.
- 7.2 Competition is a state of ongoing rivalry between firms – rivalry in terms of price, service, technology and quality. Market participants are mutually constrained in their pricing, output and related commercial decisions to some extent by the activity of other market participants (or potential market participants). In other words, the greater the degree of competition in a market, the less market power each market participant will possess.
- 7.3 Acquisitions can alter the level of competition in a market. Some acquisitions enable the merged firm to meet customer demand in a way that facilitates more intense competition. Many acquisitions do not affect the level of competition at all because there are sufficient substitution possibilities to effectively constrain the merged firm.
- 7.4 Other acquisitions, however, lessen competition by reducing or weakening the competitive constraints or reducing the incentives for competitive rivalry. Mergers that increase the market power of one or more market participants may be detrimental to consumers because they may lead to an increase in price, or deterioration in some other aspect of the service offering – the level of market power will be dependent on whether alternative actual or potential supply options are available post-acquisition to effectively constrain the merged firm. If market structure and circumstances mean that there is limited potential for alternative supply options or substitution possibilities to constrain the merged firm, then it will be profitable for the merged firm to raise prices or decrease its service offering, despite the potential for lost sales to alternative suppliers.
- 7.5 The ACCC's approach to assessing the likely competition effects of a proposed acquisition is set out in detail in the ACCC's *Merger Guidelines*, the key points from which are outlined below. The ACCC encourages applicants to consider the *Merger Guidelines* prior to submitting their application for merger authorisation.

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48 Section 90(7)(a).

- 7.6 Broadly speaking, the ACCC's assessment of competitive effects is based on the theories of competitive harm – namely, unilateral and coordinated effects. Mergers result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on firms in a market. In cases where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged firm and/or other firms in a market, the merger is likely to substantially lessen competition.
- 7.7 The ACCC will consider a broad range of factors relating to actual and potential competitive constraints faced by the merged firm, including:
- the level of concentration in the market
  - the height of any barriers to entry and expansion
  - actual and potential import competition
  - the availability of substitutes
  - the extent of any countervailing power
  - the dynamic characteristics of the market
  - the ability to increase prices or profit margins
  - the presence of a vigorous and effective competitor, and
  - the degree of vertical integration.<sup>49</sup>
- 7.8 Some of these factors assist in identifying the presence of direct constraints while others provide insight into less direct forms of constraint relating either to the structure and characteristics of the market or the behaviour of actual and potential participants in a market. The ACCC recognises that competitive constraints are not static and strategic behaviour by market participants can affect competition.
- 7.9 The significance of the merger factors, and the weight that is placed on them, will depend on the actual matter under consideration. The likely presence of effective competitive constraints post-acquisition is a key indicator that a proposed acquisition is unlikely to result in a substantial lessening of competition. In some cases a single effective constraint can be sufficient to prevent a significant and sustained increase in the market power of the merged firm, while in other cases the collective effect of several constraints may be required. Conversely, the absence of a single particular

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<sup>49</sup> Section 50(3).

constraint is unlikely to be conclusive of an increase in market power as a result of a proposed acquisition.

## 8 Public benefits and detriments

8.1 The ACCC may also authorise a proposed acquisition if it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in a benefit to the public, and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition.<sup>50</sup> This requires the ACCC to conduct a net public benefit analysis of the proposed acquisition.

### Public benefits

8.2 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>51</sup>

8.3 The Act does not expressly limit the range of public benefits which may be taken into account by the ACCC. In assessing the benefits that are likely to flow from a proposed acquisition, the ACCC will be guided by the underlying object of the Act to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.<sup>52</sup>

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

- whether the anticipated benefit is transaction specific
- who the benefit accrues to and how widely it is shared in the community
- whether the benefit is ongoing or a one-off
- how the benefit will arise

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50 Section 90(7)(b).

51 *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].

52 Section 2.

- when the benefit is likely to arise
- the likelihood that the benefit will be realised
- the magnitude of the benefit.

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

### **Types of benefits**

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

#### *Productive efficiency*

8.7 A proposed acquisition may improve productive efficiency by making the merged entity more cost effective by increasing economies of scale or scope, allowing better use of existing capacity, reducing cost through asset rationalisation, or through combining complementary production capabilities.

8.8 Not all of the merger parties' anticipated cost savings from the proposed acquisition would necessarily arise from an increase in productive efficiency. Some cost savings may arise simply as a result of a transfer from one producer to another. Cost savings of this nature would not constitute a public benefit.

#### *Dynamic efficiency*

8.9 A proposed acquisition may result in innovation that may not have occurred without the acquisition. For example, a merger may give rise to increased research and development activity.<sup>53</sup>

#### *Other benefits*

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

- (i) a significant increase in the real value of exports
- (ii) a significant substitution of domestic products for imported goods,  
and

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

- (iii) all other relevant matters that relate to the international competitiveness of any Australian industry.<sup>54</sup>

- 8.11 Examples of these types of benefits include a likely increase in exports, an increase in production to satisfy demand that would otherwise be satisfied by imports, or the creation of a strong and efficient Australian business operating in an international market.<sup>55</sup>
- 8.12 Other benefits have also been recognised, for instance, an improvement in health and safety standards,<sup>56</sup> and environmental benefits.<sup>57</sup>

#### *Attaching weight to public benefits*

- 8.13 When considering whether there is a public benefit from the proposed acquisition, the ACCC generally considers whether benefits are of value to the community generally and how much weight society attaches to those benefits. Of particular relevance will be the number and identity of the proposed beneficiaries.
- 8.14 The ACCC considers that cost savings accruing to one or few firms arising from increases in productive efficiency can constitute public benefits and it is not necessary for the savings to be passed on to end consumers in the form of lower prices. The community at large has an interest in resource savings because these resources are released for use elsewhere in the economy.
- 8.15 However, the ACCC may give more weight to benefits which flow through to consumers or the broader community than if they are retained by the merged firm.<sup>58</sup>

#### **Public detriments**

- 8.16 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>59</sup>

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54 Section 90(9A).

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

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

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

58 Qantas Airways Limited (2005), AcompT 9.

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

- 8.17 The ACCC considers that in applying the public benefit test to a merger authorisation, all public detriments likely to arise from the proposed acquisition for which authorisation is sought can be taken into account.<sup>60</sup>
- 8.18 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 acquisition was likely to increase pollution or reduce public health and safety the ACCC would take this into account in balancing the public benefits and detriments.
- 8.19 In most cases the likely identifiable detriments will be those constituted by a lessening of competition. The ACCC's approach to assessing the likely effects on competition is outlined in Chapter 7. However, a lessening of competition does not have to be substantial to comprise a detriment to the public.

### **Quantifying public benefits and detriments**

- 8.20 The Act does not require the ACCC to quantify the level of public benefits and detriments likely to result from a proposed acquisition. However, where possible, and particularly with complex applications, the ACCC encourages applicants to quantify the size of claimed benefits and detriments.
- 8.21 Quantification can provide guidance on the relative weight to be attributed to particular benefits and detriments in the ACCC's overall assessment. Where applicants are able to provide monetary estimates of the value of the benefits or detriments from the proposed acquisition they should also provide the ACCC with the assumptions and reasoning upon which the data relies. Without the detail and transparency behind the modelling used in the calculations, the ACCC may place little weight on the size of the claims.
- 8.22 The ACCC recognises that in many cases it will not be possible to precisely quantify public benefits and detriments. Consequently, claims of this nature will also usually need to be qualitatively assessed and must have a sufficient basis for concluding that the benefits and detriments are likely to result from a proposed acquisition.
- 8.23 In practice, a qualitative assessment involves making a judgment about the existence and size of the public benefit and detriment, having regard to all of the information the ACCC has before it.

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

- 8.24 In all cases, the ACCC expects applicants to provide robust evidence of benefits and detriments when submitting an authorisation application. Where an applicant considers its efficiency will improve, it should provide evidence to substantiate these claims wherever possible. Such evidence could include accounting statements, internal studies, strategic plans, integration plans, management consulting studies, consumer surveys or research, and other available data.

### **Balancing public benefits and detriments**

- 8.25 The ACCC will balance the benefits to the public from the proposed acquisition against the detriments to the public from the acquisition and determine which is the greater. Consistent with the authorisation test, the ACCC may grant merger authorisation if the likely public benefits from the proposed acquisition outweigh the likely public detriment from the proposed acquisition (see paragraph 8.1).
- 8.26 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.

## 9 Imposing conditions and section 87B undertakings

### Imposing conditions

- 9.1 The ACCC may grant merger authorisation subject to conditions specified in the authorisation<sup>61</sup> including, but not limited to, a condition that a person must give and comply with an undertaking under section 87B of the Act.<sup>62</sup> Granting an authorisation subject to conditions may be appropriate to ensure that the claimed public benefits are likely to eventuate or to lessen any detriment that may result from the acquisition.
- 9.2 The ACCC decides on the form and scope of any conditions that are imposed in granting authorisation.<sup>63</sup> Where possible, the ACCC will provide the applicant and interested parties with the ability to comment on proposed conditions and undertakings.

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

- 9.3 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.
- 9.4 However, an applicant may not be able to make amendments to an application, particularly if they are significant, without an extension to the time period that the ACCC has to consider applications.

### Section 87B undertakings

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

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61 Section 88(3).

62 Section 88(4).

63 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.

ACCC), behavioural or other measures intended to address competition concerns identified by the ACCC under section 50 of the Act.

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

**Non-compliance with conditions or section 87B undertakings required as a condition of merger authorisation**

- 9.11 The legal protection from the operation of section 50 of the Act conferred by a merger authorisation does not apply if any of the conditions specified in a merger authorisation are not complied with.<sup>64</sup>
- 9.12 The ACCC may take legal action under section 87B to seek an order from the court directing the person to comply with a term of the undertaking or any such order that the court considers appropriate if the court is satisfied that the person has breached a term of the undertaking.<sup>65</sup>
- 9.13 The ACCC may also revoke a merger authorisation, after consultation, if a condition to which the authorisation was expressed to apply has not been complied with.<sup>66</sup>

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64 Section 88(3).

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

66 Section 91B(3).

## 10 Reviewing ACCC merger authorisation decisions

### Review by the Australian Competition Tribunal

- 10.1 An applicant, or other person who the Tribunal is satisfied has a sufficient interest,<sup>67</sup> who is dissatisfied with an ACCC determination on an application for merger authorisation, minor variation, revocation, or the revocation of a merger authorisation and substitution of a new merger authorisation (together, for the purposes of this chapter, merger authorisation), may apply to the Tribunal for a review of the determination.<sup>68</sup>
- 10.2 A review by the Tribunal of an ACCC determination relating to a merger authorisation is not a re-hearing of the matter.<sup>69</sup>
- 10.3 For the purposes of the review, the Tribunal must not have regard to any information, documents, or evidence other than:
- information referred to in the ACCC's reasons for making the determination
  - information or reports the Tribunal has required the ACCC provide to the Tribunal
  - information given to the ACCC in connection with the making of the determination
  - information given to the Tribunal at the request of the Tribunal for the sole purpose of the Tribunal clarifying the information given to the ACCC in connection with the making of the determination. The Tribunal may consult with such persons and seek such relevant information as it considers reasonable and appropriate for this purpose
  - with leave of the Tribunal, information, documents, or evidence that the Tribunal is satisfied was not in existence at the time the ACCC made its determination.<sup>70</sup>

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67 Section 101(1AA).

68 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.

69 Section 101(2).

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

- 10.4 The limitations on the material that may be considered by the Tribunal for the purposes of the review are intended to balance the interests of all parties to a review of a merger authorisation matter in the context where the Tribunal must make a determination within a defined period (90 to 120 days, as applicable, unless extended). The limitations are also to ensure that an applicant for merger authorisation provides the ACCC with all relevant material at the time of the application.
- 10.5 Ultimately the Tribunal must affirm, vary or set aside the ACCC's determination.<sup>71</sup> If the Tribunal does not make a determination within the required timeframe, the Tribunal is taken to have made a determination affirming the ACCC's determination.<sup>72</sup>

### Applying for a review

#### *How to apply*

- 10.6 A person may apply for a review by the Tribunal of an ACCC determination by completing and lodging *Form I Application to Tribunal for Review* with the Tribunal's registry. The Form I must be lodged with the Tribunal within 21 days from the date of the ACCC's determination.<sup>73</sup>
- 10.7 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).
- 10.8 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. In doing so, the applicant must

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71 Section 102(1).

72 Section 102(1AB).

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

comply with the statutory limitations on information, documents and evidence to which the Tribunal can have regard in its review.<sup>74</sup>

- 10.9 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>75</sup>

#### **Withdrawal of applications for review**

- 10.10 There is no express provision in the Act providing for the withdrawal of an application for review by the Tribunal. The applicant for review must seek leave of the Tribunal to do so. Generally, if the applicant seeks to withdraw its application for review, the Tribunal is likely to grant leave for them to do so unless the Tribunal considers it in the public interest for the process to continue.<sup>76</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 will stand.

### **The Federal Court of Australia**

#### **Appealing ACCC determinations**

- 10.11 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).
- 10.12 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 determine the merits of the case. In the event an applicant seeks a review of the merits of an ACCC determination, the Tribunal is the appropriate avenue for review.

#### **Appealing Tribunal determination**

- 10.13 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.

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74 Section 102(10).

75 Regulation 20(3).

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

10.14 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)).

# 11 Varying, revoking and substituting authorisations

## Minor variation

- 11.1 A person to whom a merger authorisation has been granted may subsequently apply to the ACCC to vary the authorisation. The Act provides two mechanisms for varying merger authorisations, depending on the nature of the proposed variation. A person (or a person on their behalf) may apply to the ACCC for:
- a minor variation to the authorisation or
  - a revocation of the existing authorisation and its substitution with a new authorisation.
- 11.2 An application for minor variation must be lodged on the appropriate form, which is available on the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)). No lodgement fee is payable.
- 11.3 When assessing applications for minor variation, the ACCC must:
- be satisfied that the proposed variation satisfies the statutory definition of a 'minor variation'<sup>77</sup>, and
  - if the proposed variation is minor, assess whether it satisfies the relevant limb of the authorisation test.<sup>78</sup>
- 11.4 The ACCC is required to make a decision on a minor variation of a merger authorisation within 90 days from the date of the application for a minor variation, or as otherwise extended by the applicant, otherwise the minor variation is deemed to be denied.<sup>79</sup>
- 11.5 If the ACCC dismisses an application for minor variation, the statutory protection provided by the authorisation remains limited to the acquisition as originally authorised.
- 11.6 If the ACCC varies the authorisation, the acquisition as amended receives the protection of authorisation from the date the variation comes into force.<sup>80</sup>

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77 Section 87ZP(1) limits applications for minor variation to applications for "a single variation that does not involve a material change in the effect of the authorisation."

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

79 Section 91A(5).

80 Section 91(1B).

## Revocation and substitution of a new merger authorisation

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

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

11.8 Applications for revocation and substitution must be lodged on the appropriate form. A lodgement fee of \$25,000 is payable.

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

11.10 When an application for revocation and substitution is received, the ACCC will place the application on the public register on the ACCC's website ([www.accc.gov.au](http://www.accc.gov.au)).<sup>81</sup>

11.11 The process mirrors that for considering an application for merger authorisation<sup>82</sup> set out in Chapter 4.

11.12 The ACCC may only grant an application for revocation and substitution if it is satisfied that the proposed substitute authorisation satisfies the test for granting merger authorisation (see Chapters 6 and 7).<sup>83</sup>

### Revocation and substitution at the initiative of the ACCC

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

11.14 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>84</sup>

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81 Section 89(3)(d).

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

83 Section 91C(7).

- 11.15 A 'material' change of circumstances is one that has 'an impact or likely impact upon public benefit and/or detriment'.<sup>85</sup>
- 11.16 The process mirrors that for considering an application for merger authorisation (see Chapter 4).<sup>86</sup>
- 11.17 The ACCC may only revoke the authorisation and grant a substitute merger authorisation if it is satisfied that the proposed substitute authorisation satisfies the relevant test for granting authorisation.<sup>87</sup>

## Revocation

- 11.18 A person to whom a merger authorisation has been granted may apply to the ACCC for a revocation of the authorisation. The ACCC may also initiate a review of an authorisation with a view to revoking it in certain circumstances (see paragraph 11.23). Once revoked, parties no longer have statutory protection from legal action under the Act to give effect to the acquisition that was the subject of the merger authorisation.

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

- 11.19 Applications for revocation must be lodged on the appropriate form. No lodgement fee is payable.
- 11.20 When an application for revocation is received, the ACCC will place the application on the public register on the ACCC's website ([www.accc.gov.au](http://www.accc.gov.au)).<sup>88</sup> The ACCC will also consult potentially interested parties on the application.<sup>89</sup>
- 11.21 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>90</sup> and giving its reasons. The ACCC may disregard any objection it considers is vexatious or frivolous.<sup>91</sup>

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84 Section 91C(3).

85 *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.

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

87 Section 91C(7).

88 Section 89(3)(c).

89 Section 91B(2).

90 Section 91B(4).

91 Section 91B(7).

11.22 An application for revocation may be withdrawn by writing to the ACCC at any time during its consideration of the application.<sup>92</sup>

**Revocation at the initiative of the ACCC**

11.23 The ACCC may, for the reasons set out in paragraph 11.14,<sup>93</sup> initiate a process to review an authorisation and make a determination revoking the authorisation or deciding not to revoke the authorisation.

11.24 If there are no concerns about revoking the authorisation the ACCC will issue a written determination revoking the authorisation<sup>94</sup> and giving its reasons.<sup>95</sup> The ACCC may disregard any objection it considers is vexatious or frivolous.<sup>96</sup>

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92 Section 91B(6).

93 Section 91B(3).

94 Section 91B(4).

95 Section 90(4).

96 Section 91B(7).