

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

AUSTRALIA

April 2010

IMPORTANT NOTE: This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. Reading the template is not a substitute for consulting the referenced statutes and regulations.

1. Merger notification and review materials (please provide title(s), popular name(s), and citation(s)/web address)

A. Notification provisions

Pre-merger notification is not mandatory in Australia. However, for any merger that has the potential to raise competition concerns, parties are encouraged to approach the Australian Competition and Consumer Commission (ACCC) as soon as there is any real likelihood that a proposed acquisition may proceed and certainly well before the completion of the acquisition.

There are a range of non-compulsory options available to parties to have a merger considered and assessed by the ACCC. These include:

- informal clearance which may be sought for confidential proposed mergers (providing an interim view), non-confidential proposed mergers and completed mergers
- formal clearance which may be sought for non-confidential proposed mergers.

Informal clearance is a process whereby merger parties seek the ACCC's view on whether a particular merger is likely to contravene s. 50 of the *Trade Practices Act 1974 (Trade Practices Act)* and whether the ACCC would bring legal action to stop the merger proceeding. Informal clearance, if granted, does not prevent third parties taking legal action for divestiture after the merger has occurred. Formal clearance, if granted, means that s. 50 of the *Trade Practices Act* does not prevent the acquisition proceeding in accordance with the clearance.

Parties may choose not to seek any clearance from the ACCC for merger

proposals. However, this may put merger parties at risk of the ACCC or other third parties taking legal action on the basis that the merger contravenes s. 50 of the *Trade Practices Act*.

The statutory test applied by the ACCC (pursuant to s. 50 of the *Trade Practices Act*) to assess whether to grant formal or informal clearance for an acquisition is whether the acquisition would have the effect, or would be likely to have the effect, of substantially lessening competition in a market. The ACCC makes its decision based on the information provided by the merger parties, other interested parties and other relevant material. In informal reviews, the ACCC reserves the right to reconsider its decision regarding the proposed acquisition, or completed acquisition, if it becomes aware that any information upon which it has based its view is in any way incorrect or incomplete. If formal clearance is granted on the basis of information that was false or misleading, the ACCC may revoke the clearance or revoke the clearance and substitute a new clearance. Alternatively, where certain conditions are satisfied, the ACCC may bring legal action for injunction, divestiture or pecuniary penalties.

Alternatively, if a proposed merger is likely to fail the substantial lessening of competition test, but the parties consider there are public benefits that outweigh any anti-competitive effects of the proposed acquisition, parties may apply to the Australian Competition Tribunal (Tribunal) (see Q.2A for a description of the Tribunal) for “authorisation”, which provides protection from legal action pursuant to s. 50 of the *Trade Practices Act*. In deciding whether to grant authorisation (pursuant to s. 95AT(1) of the *Trade Practices Act*) the Tribunal will consider any lessening of competition together with potential public benefits from the proposed acquisition.

The legislative provisions relevant to mergers are contained in the *Trade Practices Act*, which is available at:

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A>

B. Notification forms or information requirements

There is no prescribed form that parties must use when requesting informal merger clearance, nor is there any fee. The ACCC’s **Merger Review Process Guidelines** provide guidance as to the type of information that parties should provide in an informal clearance application. These guidelines are available at the following link:

<http://www.accc.gov.au/content/index.phtml/itemId/740765>

Applications for formal clearance lodged by merger parties must conform to Form O of the *Trade Practices Regulations 1974* (*Trade Practices*

	<p><i>Regulations</i>). A fee of \$25,000 AUD is payable to the ACCC upon application. The relevant requirements are contained in s. 95AE of the <i>Trade Practices Act</i>:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p> <p>Applications to the Tribunal for merger authorisation must conform to Form S of the <i>Trade Practices Regulations</i>. A fee of \$25,000 AUD is payable to the Tribunal. The relevant requirements are contained in s. 95AV of the <i>Trade Practices Act</i>:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
<p>C. Substantive merger review provisions</p>	<p>The relevant sections of the <i>Trade Practices Act</i> are:</p> <p>Section 50 – <i>Prohibition of acquisitions that would result in a substantial lessening of competition</i></p> <p>Section 50A – <i>Acquisitions that occur outside Australia</i></p> <p>Division 3, Part VII – <i>Merger clearances and authorisations</i></p> <p>The <i>Trade Practices Act</i> is available at:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
<p>D. Implementing regulations</p>	<p>The relevant statutory provisions in relation to mergers are contained in the <i>Trade Practices Regulations 1974</i>:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/all/search/C7E0FC2B869B222CCA2575FC00042A36</p>
<p>E. Interpretive guidelines and notices</p>	<p>The ACCC Merger Guidelines 2008 outline the general principles underpinning the ACCC’s merger analysis. The principles provide a framework within which mergers will be reviewed. The guidelines also discuss the ACCC’s approach to merger remedies.</p> <p>http://www.accc.gov.au/content/index.phtml/itemId/809866</p> <p>The Merger Review Process Guidelines (for informal clearance) and the Formal Merger Review Process Guidelines (for formal clearance and</p>

	<p>authorisation) supplement the Merger Guidelines 2008 and outline the processes involved in an ACCC merger clearance review. The Formal Merger Review Process Guidelines also outline the legislative requirements for parties wishing to apply to the Tribunal for authorisation of proposed mergers and acquisitions.</p> <p>The Merger Review Process Guidelines are available at:</p> <p>http://www.accc.gov.au/content/index.phtml/itemId/740765</p> <p>The Formal Merger Review Process Guidelines are available at:</p> <p>http://www.accc.gov.au/content/index.phtml?itemId=776055</p>
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2. Authority or authorities responsible for merger enforcement.

<p>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</p>	<p>The Australian Competition and Consumer Commission (ACCC) is responsible for the administration and enforcement of competition law in respect of all mergers, except for applications for merger authorisation. Merger authorisations are assessed by the Tribunal.</p> <p>The Tribunal is an independent statutory tribunal established under the <i>Trade Practices Act</i> and is administered within the Federal Court of Australia. The Tribunal is separate from the ACCC. It is constituted by a Presidential Member, who is a Federal Court Judge, and other members with substantial experience in, or knowledge of, industry, commerce, economics, law or public administration. In addition to its other functions, the Tribunal is responsible for assessing merger authorisation applications made under s. 95AT of the <i>Trade Practices Act</i>, and for reviewing ACCC merger clearance decisions upon application by the applicant under s. 111 of the <i>Trade Practices Act</i>.</p> <p>The following is a link to the Tribunal’s website:</p> <p>http://www.competitiontribunal.gov.au/</p>
<p>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</p>	<p>Australian Competition and Consumer Commission 23 Marcus Clarke Street Canberra ACT 2601</p> <p>Postal address: GPO Box 3131</p>

	<p>Canberra ACT 2601</p> <p>Tel: +61 2 6243 1111 Fax: +61 2 6243 1199</p> <p>Email: mergers@acc.gov.au</p> <p>Website: www.acc.gov.au</p> <p>Language: English</p>
<p>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</p>	<p>ACCC staff are available for consultation regarding both proposed and completed mergers prior to requesting clearance and can be contacted via:</p> <p>Executive General Manager Mergers and Acquisitions Group Australian Competition and Consumer Commission GPO Box 3131 Canberra ACT 2601</p> <p>Tel: +61 2 6243 1226 Fax: +61 2 6243 1212</p> <p>Email: mergers@acc.gov.au</p>

<h3>3. Covered transactions</h3>	
<p>A. Definitions of potentially covered transactions (i.e., concentration or merger)</p>	<p>Section 50 of the <i>Trade Practices Act</i> prohibits a corporation from directly or indirectly acquiring shares in the capital of a body corporate or any assets of a person where the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.</p> <p>Section 50 of the <i>Trade Practices Act</i> also prohibits a person from directly or indirectly acquiring shares in the capital of a corporation or any assets of a corporation if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.</p> <p>The reference to the acquisition of shares is defined as being a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares. The reference to the acquisition of assets of a person is defined as being a reference to an acquisition,</p>

	<p>whether alone or jointly with another person, of any legal or equitable interest in such assets but does not include a reference to an acquisition by way of charge only or an acquisition in the ordinary course of business (s. 4(4) of the <i>Trade Practices Act</i>)</p> <p>Section 50 is available at the following link:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p> <p>The Merger Guidelines 2008 provide guidance regarding the types of acquisitions which are likely to be subject to the <i>Trade Practices Act</i>. These guidelines are available at the following link:</p> <p>http://www.accc.gov.au/content/index.phtml/itemId/809866</p>
<p>B. If change of control is a determining factor, how is control defined?</p>	<p>There is no minimum legislated shareholding (or “control”) necessary to invoke s. 50 of the <i>Trade Practices Act</i> (see Q.3C below).</p>
<p>C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?</p>	<p>There is no threshold shareholding at which transactions are covered by s. 50 of the <i>Trade Practices Act</i>. Section 50 applies to any acquisition of shares or assets which would have the effect, or be likely to have the effect, of substantially lessening competition in a market.</p> <p>While questions of control or influence will be important, anti-competitive effects may arise from shareholdings which do not necessarily confer such control or influence. The following are examples of potential anti-competitive effects which may arise in circumstances where the proposed merger involves the acquisition of shareholdings below a level which would confer control of the target firm:</p> <ul style="list-style-type: none"> ▪ some horizontal acquisitions may reduce competitive tension between rivals and/or increase the incentive and ability to coordinate conduct; ▪ acquisitions in one market by parties that are rivals in another market may facilitate coordinated conduct in the other market; and ▪ some vertical acquisitions may result in anti-competitive foreclosure of rival suppliers.
<p>D. Do the notification requirements cover joint ventures? If so, what types (e.g., production joint ventures)?</p>	<p>There are no mandatory notification requirements under Australian merger competition law. However, s. 50 of the <i>Trade Practices Act</i> covers all joint ventures where the formation of the joint venture involves the acquisition of shares or assets.</p> <p>Section 50 is available at the following link:</p>

4. Thresholds for notification

A. What are the general thresholds for notification?

Merger notification is not mandatory in Australia for either informal or formal merger clearances. Accordingly there are no prescribed merger notification thresholds. However, the **Merger Guidelines 2008** provide some general direction on the circumstances under which merger parties are strongly recommended to notify their merger activity to the ACCC.

Merger parties are encouraged to notify the ACCC well in advance of completing a merger where both of the following apply:

- the products of the merger parties are either substitutes or complements
- the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s.

The notification threshold is indicative only. A merger that does not meet the notification threshold may still raise competition issues – the ACCC may investigate such mergers, even if they have not been notified to it.

<http://www.accc.gov.au/content/index.phtml/itemId/809866>

B. To which entities do the merger notification thresholds apply, i.e. which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?

N/A

C. Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.

N/A

<p>D. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?</p>	<p>N/A</p>
<p>E. Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets?</p>	<p>N/A.</p>
<p>F. Describe methodology for calculating exchange rates.</p>	<p>N/A</p>
<p>G. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?</p>	<p>N/A</p>
<p>H. Can a single party trigger the notification threshold (e.g., one party's sales, assets, or market share)?</p>	<p>N/A</p>
<p>I. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based</p>	<p>A merger will only contravene Australian merger law if the merger substantially lessens competition in a market in Australia (s. 50; s. 50A; s. 4E of the <i>Trade Practices Act</i>).</p> <p>Section 50 of the <i>Trade Practices Act</i> applies to:</p>

<p>on an “effects doctrine”, please describe how this is applied. Is there a requirement of local presence (local assets/affiliates/subsidiaries) or are import sales into the jurisdiction sufficient to meet an “effects” test?</p>	<p>(a) acquisitions of shares or assets within Australia; and (b) acquisitions of shares or assets wherever situated if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen or ordinarily resides in Australia (s. 5(1) of the <i>Trade Practices Act</i>).</p> <p>Section 5(1) is available at: http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p> <p>In the event that s. 50 does not apply to a merger for lack of jurisdictional nexus, s. 50A of the <i>Trade Practices Act</i> may apply.</p> <p>Section 50A of the <i>Trade Practices Act</i> applies where a person acquires outside Australia a controlling interest in any body corporate (the first controlling interest) and, by reason of the first controlling interest, obtains a controlling interest in another corporation (the second controlling interest) which carries on business in a market in Australia.</p> <p>If the obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market and would not, in all the circumstances, result, or be likely to result, in such a benefit to the public, the Tribunal may make a declaration to that effect.</p> <p>If the Tribunal makes a declaration, the corporation in which the person has obtained the second controlling interest must not, while the declaration remains in force, carry on business in the market to which the declaration relates.</p> <p>Section 50A is available at: http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
<p>J. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?</p>	<p>N/A</p>
<p>K. If market share tests are used, are there guidelines for</p>	<p>N/A</p>

<p>calculating market shares?</p>	
<p>L. Are there special threshold calculations for particular sectors (e.g., banking, airlines) or particular types of transactions (e.g. joint ventures, partnerships, financial investments)?</p>	<p>N/A</p>
<p>M. Are any sectors excluded from notification requirements? If so, which sectors?</p>	<p>N/A</p>
<p>N. Are there special rules regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign?</p>	<p>Where global mergers impact on a market in Australia they will generally be subject to the <i>Trade Practices Act</i>.</p> <p>To the extent that the acquirer is incorporated or carrying on business within Australia and the merger involves the acquisition of shares or assets situated in Australia, the <i>Trade Practices Act</i> applies without any extraterritorial scope.</p> <p>In the specific context of s. 50, s. 5(1) extends the operation of Pt IV of the <i>Trade Practices Act</i>, by providing s. 50 with some limited extraterritorial operation. Under s. 5(1), if the acquisition of shares or assets occurs outside Australia, the acquiring corporation must be either:</p> <ul style="list-style-type: none"> • incorporated within Australia, or • carrying on business within Australia. <p>In the event that s. 50 does not apply to a merger for lack of jurisdictional nexus, s. 50A of the <i>Trade Practices Act</i> may apply. For the operation of s. 50A, see Q.4I above.</p>
<p>O. Does the agency have the authority to review transactions that fall below the thresholds?</p>	<p>N/A</p>

5. Notification requirements and timing of notification

<p>A. Is notification mandatory pre-merger?</p>	<p>No.</p>
<p>B. Is notification mandatory post-merger?</p>	<p>No.</p>
<p>C. Can parties make a voluntary merger filing even if filing is not mandatory? If so, when?</p>	<p>Yes. The voluntary filing of merger applications is the usual practice in Australia. The ACCC encourages parties to approach it as soon as there is any real likelihood that a proposed acquisition may proceed and certainly well before the completion of the relevant acquisition.</p> <p>Merger parties may voluntarily submit a merger application for informal clearance to the ACCC at any time pre or post-merger. Formal clearance applications can only be lodged for mergers that have not been completed.</p>
<p>D. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)?</p>	<p>As stated at Q.5C above, merger parties may make an application for informal merger clearance at any time and applications for formal clearance can only be made for mergers that have not been completed. While there is no restriction on the earliest time that clearance can be sought, the ACCC may decline to provide informal clearance to a proposal which is considered purely speculative.</p>
<p>E. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there</p>	<p>No. Should an acquisition proceed without prior clearance from the ACCC, the merger parties face the risk that the ACCC or third parties may take legal action on the basis that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in one or more markets in contravention of s. 50 of the <i>Trade Practices Act</i>.</p>

special rules for public takeover bids?

6. Simplified procedures

Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain responses, etc.).

There is no mandatory merger notification requirement in Australia and transactions that are not likely to raise competition concerns are not ordinarily notified. Should any such transactions be notified to the ACCC, the ACCC adopts a process to expedite informal clearance decisions for mergers that it considers clearly do not raise competition concerns. These decisions require only a basic level of information and involve a confined public consultation process which is typically completed within 2 or 3 weeks of notification.

For formal merger clearance applications, the full application and accompanying information must be submitted to the ACCC before the review can be commenced.

7. Documents to be submitted

A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).

In the case of informal merger clearance reviews, providing a basic level of information to the ACCC in non-controversial cases will usually be sufficient to satisfy the ACCC of whether or not a substantial lessening of competition is likely. Whether a wider range of information is required by the ACCC is assessed on a case-by-case basis and depends on the complexity of the matter and the potential competition issues raised.

The following are examples of the types of information the ACCC may require in the initial notification:

- background information about the parties;
- the structure of the market, including any relevant information about other major market participants;
- the commercial rationale for the merger; and
- an analysis of the proposed acquisition in terms of the factors referred to in s. 50(3) of the *Trade Practices Act*.

For more details regarding information requirements for informal merger reviews, refer to the **Merger Guidelines 2008** and the **Merger Review Process Guidelines**.

For formal merger clearance reviews, parties must complete and lodge

	<p>Form O of the <i>Trade Practices Regulations</i> with the ACCC. Form O requires the applicant to provide all the prescribed information for the application to be considered valid.</p> <p>Form O is available from the ACCC's website at:</p> <p>http://www.accc.gov.au/content/index.phtml?itemId=774406</p>
<p>B. Are there any document legalization requirements (e.g., notarization or apostille)?</p>	<p>In the case of informal merger clearance reviews, there are no document legalisation requirements.</p> <p>In the case of formal merger clearance reviews, Form O must be signed by an authorised person. Form O must be accompanied by a court-enforceable undertaking (see Q.10A below) and this must be executed by the applicant.</p>
<p>C. Are there special rules for exemptions from information requirements (e.g. information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign?</p>	<p>No</p>

<p>8. Translation</p>	
<p>A. In what language(s) can the notification forms be submitted?</p>	<p>English</p>
<p>B. Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for</p>	<p>If documents are not written in English, English translations should be provided if they are to be considered by the ACCC in its review.</p>

information, including the categories or types of documents for which translation is required, requirements for certification of the translation, language(s) accepted, and whether summaries or excerpts are allowed in lieu of complete translations.

9. Review periods

A. Describe any applicable review periods following notification.

Informal merger clearance reviews are flexible with respect to timing and may be conducted in as little as two to three weeks. Formal merger clearance reviews and merger authorisation reviews are subject to prescribed review periods.

In informal reviews of public mergers where the ACCC considers that a merger proposal would be unlikely to raise competition concerns, the ACCC may decide that it is unnecessary to undertake formal market inquiries – such reviews can generally be completed within a few weeks of voluntary notification.

All other public informal merger reviews are subject to market inquiries. These informal merger reviews are generally completed within six to eight weeks. The ACCC's investigation may take longer than six to eight weeks for more complex and contentious merger proposals which require more detailed investigation. For example, if merger parties propose remedies (usually in the form of an undertaking given to the ACCC under s. 87B of the *Trade Practices Act*) to resolve the ACCC's competition concerns, the ACCC may extend the timeline to consult market participants and assess the undertaking.

The ACCC publishes an indicative timeline on its website for all non-confidential informal merger reviews:

<http://www.accc.gov.au/content/index.phtml?itemId=750991>

Formal merger clearance reviews are subject to prescribed review periods. The *Trade Practices Act* requires that the ACCC must issue a determination on a formal clearance application within 40 business days of receiving a valid application. If no decision is made within this period,

	and the review period has not been extended (see Q.9C below), the ACCC is taken to have refused the application.
B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?	No.
C. What are the procedures for an extension of the review periods, if any (e.g., suspended by requests for additional information, suspended at the authority's discretion or with the parties' consent)? Is there a statutory maximum for extensions?	<p>The review period for the informal merger assessment process may be extended due to the complexity of the issues, the nature of the concerns, the need to further consult the market or merger parties, or the likely resolutions required. The merger parties will be advised of extensions to indicative timelines before they are posted on the ACCC website. For instance if the merger parties propose remedies to resolve the ACCC's expressed competition concerns, it is the ACCC's practice to consult publicly on those proposed remedies, and the timeframes for a final assessment may need to be extended to allow for the necessary consultation process.</p> <p>The review period for formal merger clearance applications may be extended if the applicant agrees to the ACCC taking a specified longer period to make its decision. More than one extension may be sought by the ACCC and granted by the applicant. Additionally, if before the end of the prescribed 40-day period (or an extended period that has been agreed to by the applicant), the ACCC decides that it cannot make a determination on the application because of its complexity or because of other special circumstances, the ACCC may extend the period to make a determination by a further 20 days.</p>
D. What are the procedures for accelerated review of non-problematic transactions, if any?	<p>The ACCC operates an informal review regime that is well-suited to timely consideration of non-problematic transactions. If the ACCC considers a merger is non-problematic, it may truncate its consultation process and reach a decision within 2–3 weeks.</p> <p>There is no provision in the <i>Trade Practices Act</i> for accelerated reviews of formal merger clearance applications.</p>

10. Waiting periods / suspension obligations

A. Describe any waiting	Pre-merger notification is not mandatory in Australia.
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<p>periods/suspension obligations following notification, including whether closing is suspended or whether the implementation of the transaction is suspended during any initial review period and/or further review period.</p>	<p>In the event that merger parties notify the ACCC of a proposal or apply for informal merger clearance, there is no requirement that merger parties wait until the ACCC has completed its assessment of the acquisition before completing the merger. However, the risk in not waiting for the ACCC's assessment to conclude is the possibility of injunction, divestiture orders and/or significant pecuniary penalties if the merger is found to contravene s. 50 of the <i>Trade Practices Act</i> by the Federal Court of Australia. Although there is no requirement for merger parties to do so, for some more complex matters that are considered on an informal basis the ACCC may request an undertaking from the merger parties stating that they will not proceed with the acquisition until the ACCC has reached its decision, or at least without providing sufficient advance notice to the ACCC.</p> <p>Applications for formal merger clearance must be accompanied by a court-enforceable undertaking that is given under s. 87B of the <i>Trade Practices Act</i> to the ACCC that the applicant will not complete the proposed acquisition while the application is being considered by the ACCC.</p> <p>Section 87B is available at:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
<p>B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?</p>	<p>As to the informal process see Q.10A.</p> <p>For formal merger clearance reviews, there is no provision for parties to request a derogation from waiting periods.</p>
<p>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to</p>	<p>As to the informal process see Q.10A.</p> <p>For formal merger clearance reviews, there is no distinction made between those aspects of the transaction that occur within the jurisdiction and those that occur outside.</p>

<p>the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance (e.g. request for a derogation from the suspension obligations, commitment to hold separate the local business operations.)</p>	
<p>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</p>	<p>As to the informal process see Q.10A.</p> <p>For formal merger clearance applications, parties must provide the ACCC with a court-enforceable undertaking given under s. 87B of the <i>Trade Practices Act</i> that they will not complete the transaction while the application is being reviewed. However, if no decision is issued within the review period prescribed by the <i>Trade Practices Act</i>, and the review period has not been extended, the ACCC is taken to have refused the application. At this point the parties are able to proceed with the transaction but are exposed to the risk that the ACCC may take legal action to prevent the merger from occurring or, if the merger has occurred, take action to unwind the transaction or seek pecuniary penalties.</p> <p>Section 87B is available at:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
<p>E. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period/suspension</p>	<p>For formal merger clearance applications, the ACCC has until the 40th day after the application has been made to make a decision. It may before the end of that period, either because of the complexity of the matter or because of the presence of other special circumstances, extend the review period by a further 20 days.</p>

obligation.	
F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.	<p>There is no provision that allows for early termination of the waiting period for formal merger clearance reviews. For a formal merger clearance review, an application must be accompanied by a court-enforceable undertaking given under s. 87B of the <i>Trade Practices Act</i> that the applicant will not complete the transaction while the application is being reviewed.</p> <p>Section 87B is available at:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
G. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).	<p>Parties may close a transaction at their own risk at any time unless they have provided, and the ACCC has accepted, an undertaking given under s. 87B of the <i>Trade Practices Act</i> that the applicant will not complete the transaction while the application is being reviewed.</p> <p>Section 87B is available at:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>

11. Responsibility for notification / representation	
A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both? Does each party have to make its own filing?	<p>There is no statutory pre-merger notification requirement in Australia. Generally the acquiring person(s) will approach the ACCC to discuss, or request an informal clearance of, a proposed acquisition.</p> <p>Only the acquirer may apply for formal merger clearance or merger authorisation.</p>
B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile	No.

bids)?	
C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?	No.
D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?	See Q.7B above.

12. Filing fees

A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)?	<p>There is no fee associated with obtaining informal merger clearance from the ACCC.</p> <p>For formal merger clearance applications, a fee of \$25,000 AUD is payable to the ACCC. See s. 95AE of the <i>Trade Practices Act</i> for further details:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
B. Who is responsible for payment?	In relation to applications for formal merger clearance and merger authorisation, the party making the application (the acquirer) is responsible for payment.
C. When is payment	In respect of the fee payable upon application for formal merger clearance

required?	and merger authorisation, the correct fee must be paid at the time of lodging an application. Applications are not considered valid until the correct filing fee is received.
D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	The preferred method of payment is by cheque.

13. Confidentiality

A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?	<p>In relation to informal merger clearances, parties may approach the ACCC on either a confidential or public basis. If the parties require that the proposed acquisition remain confidential, the ACCC will undertake a confidential review – this review is unlikely to be able to provide the parties with an unqualified final view about the acquisition until the matter becomes public and market inquiries can be conducted. Based on the confidential review, the ACCC will, if possible, identify the issues that the ACCC proposes to focus on in its market inquiries, and, if possible, any concerns that have been identified on a preliminary basis.</p> <p>Once the acquisition becomes public, the ACCC will place details of the merger on its website, including the names of the acquirer and target, the relevant industry involved, the commencement date of the ACCC’s review, the ACCC staff contact details, and, once the ACCC has reached its decision, reasons for the ACCC’s decision. The ACCC does not make public any submissions it receives under the informal system unless required by law. The ACCC website includes both mergers where the parties have requested informal clearance and those that the ACCC is reviewing where no clearance request was made.</p> <p>In relation to formal merger clearances, the ACCC is required to make public all applications for formal merger clearance on its merger clearance register (s. 95AH of the <i>Trade Practices Act</i>). The application, along with supporting submissions (and subsequent third party submissions), are available for inspection on a public register and on the ACCC’s website. There is, however, provision for maintaining confidentiality of commercially sensitive information or otherwise where it appears desirable to the ACCC to grant confidentiality, in which case the information will be withheld from the public register</p>
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	(s. 95AI of the <i>Trade Practices Act</i>).
<p>B. Do notifying parties have access to the authority’s file? If so, under what circumstances can the right of access be exercised?</p>	<p>Information gathered during the course of an informal merger review is held in the strictest confidence by the ACCC and will generally not be accessible to the merger parties.</p> <p>The process whereby the ACCC assesses applications for formal clearance is public, highly transparent and consultative. The <i>Trade Practices Act</i> requires that the ACCC maintains a merger clearance register which is available for inspection by the public and is largely replicated on the ACCC’s website. This register must contain, subject to confidentiality, applications for clearance, any document provided to the ACCC in relation to an application or proposal, particulars of oral submissions made to the ACCC in relation to an application, the ACCC’s determination on the application or proposal and an accompanying statement of reasons.</p>
<p>C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?</p>	<p>Access by third parties is consistent with the approach taken to access by the merger parties – refer to Q.13B.</p> <p>Section 155AAA of the <i>Trade Practices Act</i> provides that the ACCC may disclose certain information provided by merger parties and third parties to certain Australian government agencies, ministers, departments, Royal Commissions and foreign government bodies where the information will enable or assist the agencies, bodies or persons to perform or exercise any of its functions or powers.</p> <p>Section 155AAA is available at:</p> <p>http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A</p>
<p>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</p>	<p>Parties may approach the ACCC on either a confidential or public basis for an informal review. Where the parties request a confidential review, the ACCC is unlikely to be in a position to provide the parties with an unqualified final view about the acquisition until the matter becomes public and market inquiries can be conducted. Based on the confidential review, the ACCC will, if possible, identify to the merger parties the issues that the ACCC proposes to focus on in its market inquiries, and, if possible, any concerns that have been identified on a preliminary basis.</p> <p>Applications for formal clearance and merger authorisation cannot be received or considered on a confidential basis.</p>

E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?

Australia is a party to a formal treaty with the United States of America to cooperate in Antitrust Enforcement Assistance.

The ACCC has agency cooperation agreements with:

- the New Zealand Commerce Commission;
- the Canadian Competition Bureau;
- the Taiwan Fair Trade Commission;
- the Commerce Commission of the Fiji Islands; and
- the Papua New Guinea Independent Consumer and Competition Commission (formerly the Consumer Affairs Council).

These agreements provide for one country to share information with the other, subject to any constraints imposed by domestic law, where the agencies agree it is in their mutual interest.

The ACCC is also party to two tripartite agreements – one with the New Zealand Commerce Commission and the Canadian Competition Bureau, and another with the Taiwan Fair Trade Commission and the New Zealand Commerce Commission.

These agreements are publicly available on the ACCC website:

<http://www.accc.gov.au/content/index.phtml/itemId/255435>

F. Can the agency exchange documents or information with other reviewing agencies? If so, does it need the consent from the parties who have submitted confidential information to exchange such information?

Yes, merger parties should be aware that the ACCC and other regulators may share information of a confidential and non-confidential nature concerning particular mergers.

Section 155AAA of the *Trade Practices Act* allows the ACCC to disclose certain information to a foreign government body where it will enable or assist the foreign government body to perform or exercise any of its functions or powers. Such disclosure may be subject to conditions.

Alternatively, the ACCC and other overseas regulators can seek a confidentiality waiver from the merger parties to enable them to exchange confidential information on a particular merger where it is considered appropriate. Refusal by merger parties to grant confidentiality waivers may cause delays in the ACCC's and overseas regulators' assessment processes.

Section 155AAA is available at:

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/C7F08B8A219DB518CA2575FC0082807A>

14. Transparency

A. Does the agency publish an annual report? Please provide the web address if available.

Yes. The ACCC's Annual Reports can be found at:

<http://www.accc.gov.au/content/index.phtml/itemId/668577>

H. Does the agency publish press releases related to merger policy or investigations?

In some instances where matters are considered complex or of public interest, the ACCC will publish a press release relating to investigations or merger policy. The ACCC's press releases relating to Mergers can be found at:

<http://www.accc.gov.au/content/index.phtml/itemId/621419>

B. Does the agency publish decisions on why it cleared / blocked a transaction?

The ACCC publishes a summary of its reasons in all decisions relating to public mergers. For informal merger clearance reviews this includes at least a brief competition analysis and the market definition considered by the ACCC. The ACCC's assessments can be viewed at:

<http://www.accc.gov.au/content/index.phtml/itemId/751043>

In more complex informal clearance reviews the ACCC publishes a more comprehensive Public Competition Assessment detailing the reasons for the ACCC's decision, examples of which can be viewed at:

<http://www.accc.gov.au/content/index.phtml/itemId/501191>

A Public Competition Assessment will be provided when:

- a merger is rejected;
- a merger is subject to court-enforceable undertakings under s. 87B of the *Trade Practices Act*;
- the merger parties seek such disclosure; or
- a merger is cleared but raises important issues that the ACCC considers should be made public.

In relation to formal clearance reviews, the ACCC is required to publish, subject to confidentiality, its determination on the application and an accompanying statement of reasons.

<http://www.accc.gov.au/content/index.phtml/itemId/774503>

15. Sanctions/penalties

A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods?

Pre-merger notification is not mandatory in Australia and therefore sanctions do not apply for failure to notify.

B. Which party/ies are potentially liable?

N/A

16. Judicial review

Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.

A decision by the ACCC during an informal merger clearance review is not binding on the applicant. In the event the applicant does not agree with the outcome of an informal merger review, the applicant is entitled to proceed with the merger or seek a declaration from the Federal Court of Australia that the merger will not contravene s. 50 of the *Trade Practices Act*.

Administrative review of formal clearance determinations by the ACCC is available from the Tribunal where the applicant is dissatisfied with a determination made by the ACCC (for example if the ACCC refuses a clearance or if the ACCC grants a clearance subject to conditions that the applicant finds unsatisfactory). Only the applicant for formal clearance has a right to apply to the Tribunal for review and an application for review must be lodged within 14 days of the ACCC making its determination. The Tribunal must issue its review decision within 30 business days, or 60 business days if it decides to extend the review period.

17. Additional filings

<p>Are any additional filings/clearances required for some types of transactions, e.g., sectoral regulators, securities regulator?</p>	<p>The Foreign Investment Review Board (FIRB) considers acquisitions by foreign entities in Australia under the <i>Foreign Acquisitions and Takeovers Act 1975</i>. It uses a ‘national interest test’ as the basis for its assessment and notification of foreign investment proposals to FIRB is compulsory above certain thresholds. FIRB approval is separate to any ACCC clearance on competition grounds.</p> <p>Further information on FIRB is available at:</p> <p>http://www.firb.gov.au</p>
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18. Closing deadlines

<p>When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?</p>	<p>There are no deadlines for merger parties that have sought informal merger clearance. If a transaction for which informal merger clearance has been granted is significantly delayed and changes have occurred to the relevant market(s) since the ACCC provided its view, the parties should discuss the need for a subsequent review of the merger with the ACCC.</p> <p>In the case of applications for formal merger clearance, once the clearance is granted in relation to an acquisition the acquisition must be completed within the period specified in the clearance determination. Provided all conditions of clearance have been met and the acquisition is completed within the specified period, neither the ACCC nor any other party can take legal action to unwind the acquisition.</p>
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19. Post merger review of transactions

<p>Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?</p>	<p>The ACCC reserves the right to reconsider mergers that have been informally cleared if it becomes aware that any information upon which it has based its view is in any way incorrect or incomplete.</p> <p>For those mergers which contravene s. 50, the ACCC may seek divestiture within three years after the date on which the acquisition was completed.</p> <p>Where formal merger clearances are granted based on information by the applicant that is subsequently found to be false or misleading, the ACCC may revoke the clearance, revoke the clearance and substitute a</p>
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new clearance or, when certain conditions are satisfied, take legal action to seek injunction, divestiture or pecuniary penalties. Similarly, acquirers to whom formal clearance has been granted subject to conditions must comply with such conditions regardless of whether they are to be complied with prior or subsequent to the acquisition taking place. If a condition of the clearance has not been complied with, the ACCC may revoke the clearance. Also, if a condition is not complied with, the merger will not be in accordance with the clearance and so may expose the applicant to legal action pursuant to s. 50 of the *Trade Practices Act* in respect of the acquisition.
