

Overview of ACCC informal merger review process

Voluntary procedure

- 1 The Australian Competition and Consumer Commission (**ACCC**), operates a voluntary merger review process. This process is almost exclusively used in preference to the formal process.
- 2 As the process is informal (meaning it is not provided for in the legislation) and voluntary, there is no fee involved in seeking informal clearance. The only expense will therefore be the fees for the advisors and any experts engaged by the parties in the process. The ACCC bears all its own expenses.
- 3 The acquirer usually notifies the ACCC and takes the primary carriage of the process, as primary liability for breaches of section 50 of the *Competition and Consumer Act 2010* (Cth) lies with the acquirer.

No fixed timelines

- 4 The key point to note is that there are no statutory timelines for informal clearance but the ACCC's Informal Merger Review Process Guidelines recommend that parties notify a proposed transaction with sufficient time for the informal process to be finalised before completion. However, in considering the stages of an application (below), we have commented on the typical duration for each stage.

Notification thresholds

- 5 Because approaching the ACCC for informal clearance is voluntary, there is no specific threshold at which parties must notify the ACCC of their proposed transaction. The ACCC has suggested that any merger that results in a combined market share of less than 20% is unlikely to raise any competition concerns. As a result, it recommends that parties to acquisitions that exceed that threshold approach it for informal clearance. The 20% could be because two competitors combine and their added market share is more than 20%. However, it could also be because an existing player who already has more than 20% in one market buys a supplier or customer, or buys a player in a closely related market.

Stage 1A - courtesy letter and ACCC pre-assessment

- 6 It is common practice, even where the parties do not reach that threshold, to approach the ACCC to provide a 'courtesy letter' informing them of the transaction with a brief explanation of why you do not consider it raises any competition concerns. This practice has arisen because the ACCC conducts its own market monitoring to detect mergers that have not been notified to it and also because the ACCC is made aware of proposed mergers through information shared by overseas regulators where a merger may have had to be notified under mandatory clearance requirements. (The ACCC will also often get access to information provided to the overseas regulators.) The ACCC will take 2-4 weeks to determine whether it has any concerns with a merger notified by courtesy letter. If it does have concerns, it will treat the courtesy letter as a request for informal clearance and ask for more information to assist it to start public consultation on the merger.

Stage 1B – detailed assessment and public consultation

- 7 If the ACCC considers it must go to public consultation, a straightforward clearance may take a further 6-12 weeks.
- 8 During that time, the ACCC will seek the views of suppliers, customers and competitors and ask the parties for further information to reach a view on whether the acquisition raises any competition issues.
- 9 The ACCC may then make a decision to clear the merger.

Stage 2

- 10 However, for a contentious merger, or where the public consultation raises issues for the proponents to address, the process can take a further 6-12 weeks (in addition to the previous 6-12 week period). This second 6-12 week period typically begins with the ACCC issuing a 'Statement of Issues' setting out its competition concerns. This begins a further period of public consultation, gathering information and further submissions from the parties before making a final decision.
- 11 These timelines are effectively paused if the ACCC has to wait for information from the parties or the public. Accordingly, the process can be considerably longer.
- 12 The ACCC has published a diagram setting out its approach to the informal merger review process. We have reproduced this in the Annexure.

Confidentiality

- 13 The parties can approach the ACCC before the transaction has been announced, and it will keep the information strictly confidential. While it states that it is prepared to give clearance during this confidential phase, in practice, it tends not to do so because it is almost always given subject to public consultation, so it is of little use to the parties.
- 14 The ACCC is open to having confidential discussions about a potential transaction before the parties seek informal clearance or provide a courtesy letter. However, it will only give limited guidance about how it will deal with a given case, because it will not have had the benefit of public consultation to test the arguments and facts being put forth by the parties.
- 15 Material provided to the ACCC during the informal merger review process is not disclosed by the ACCC. It is not possible to know what customers, suppliers and competitors have told the ACCC during the public consultation phase

Procedural issues

- 16 There is no statutory obligation to suspend a transaction pending the outcome of the informal processes. If the ACCC has some concerns about a merger it is reviewing, it may seek an undertaking from the parties that they will not complete the merger until the informal process is concluded.
- 17 Generally, parties will not complete a merger until the informal process is concluded because if they do, the ACCC can take court action to prevent the merger proceeding or to unwind the transaction.

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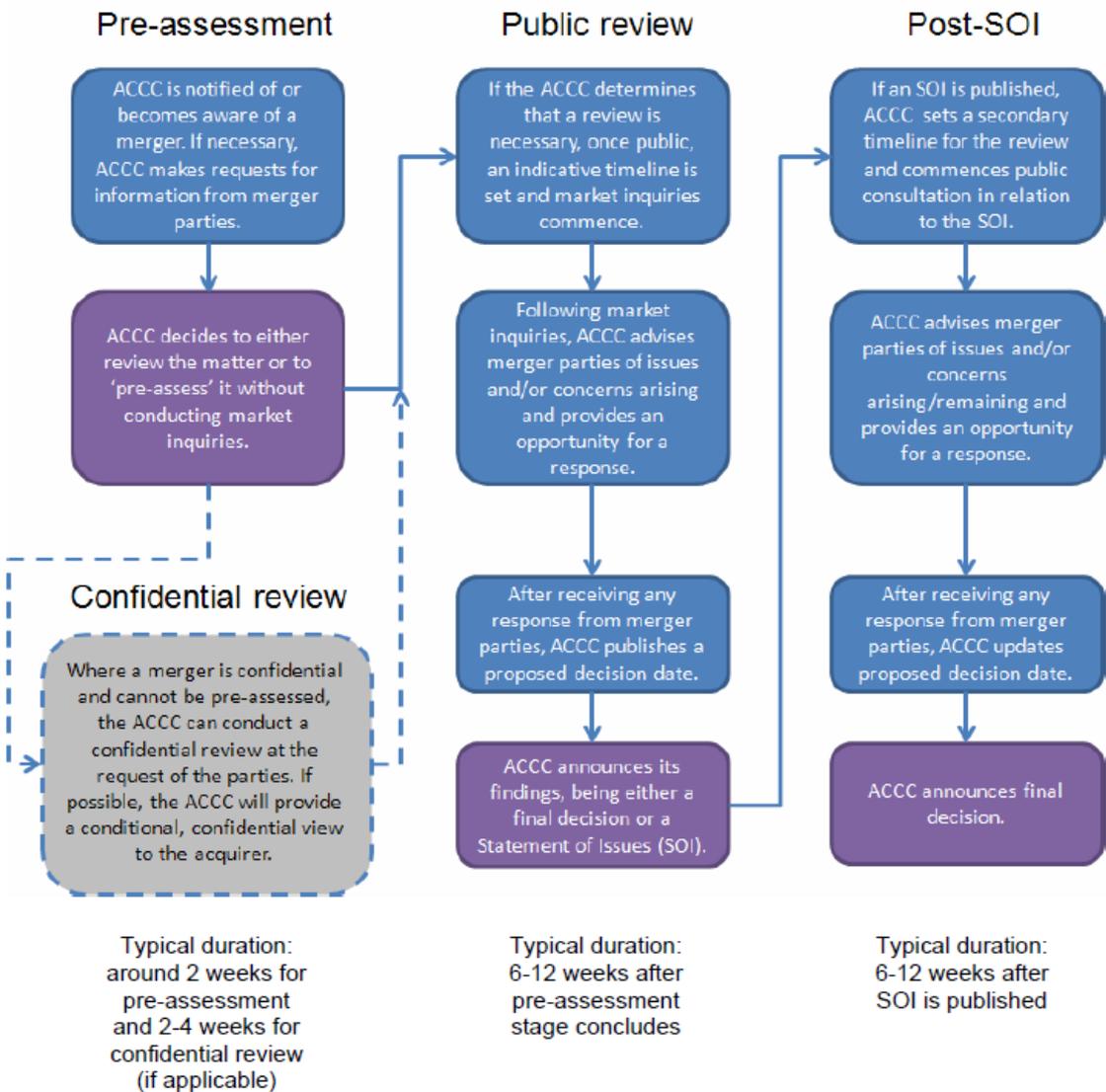
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Annexure

Diagram of informal merger review process



Notes: Undertakings may be offered at any time during or prior to the commencement of a review and this will generally impact on the sequence and duration of stages.