Law Council
OF AUSTRALIA

Business Law Section

Draft merger process guidelines

Australian Competition and Consumer Commission

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Executive Summary

1. The Competition and Consumer Law Committee (**Committee**) of the Business Law Section of the Law Council of Australia welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (**ACCC**) on its draft merger process guidelines (the **Process Guidelines**).

2. The Committee generally welcomes the ACCC providing visibility of its proposed approach to the new merger process. We also acknowledge the difficulty inherent in anticipating how an entirely new process will operate, and we accept that a degree of 'learning by doing' will be necessary for the ACCC, merger parties and their advisers.

3. The Committee nonetheless encourages the ACCC to provide the maximum level of transparency it can—even if this involves a degree of bravery at this early point in the process and accepting that this may mean that changes are needed or refinements need to made over time. The comments and suggestions in this submission are, for the most part, not critical of specific process guidance but relate instead to areas where merger parties and advisers would benefit from more concrete insights into how the ACCC sees the new process working (even if this is subject to later adjustment or change, as everyone learns).

4. In summary:

   (a) **Pre-notification waivers.** The Committee welcomes the proposed use of waivers to facilitate fast-track clearance of proposed transactions that do not meet monetary thresholds or pose no material competition concerns. However, more clarity is needed around whether this will provide parties with the same protection as notification.

   (b) **Pre-notification engagement.** While the Committee appreciates the importance of pre-notification engagement, the Process Guidelines shed limited light on how this process will work in practice—including when transactions will likely require a longer or more involved engagement process.

   (c) **The register and confidentiality.** The Committee remains concerned that the new process will not deliver the level of increased transparency that had been a key benefit flagged at the outset. The Process Guidelines repeatedly emphasise that the ACCC will not be making available access to its file or to submissions. This is disappointing. Moreover, to the extent that access to the file or to stakeholder submissions are not available during the process, it is vital that section 157 materials are able to be released immediately following the final ACCC reasons being published so that parties can consider them prior to finalising any application to the Tribunal for review. The Committee notes that the ACCC will further consult on confidentiality and related issues, and we would invite the ACCC to revisit the issue of transparency.

   (d) **Market inquires and feedback**. The Committee is concerned that the process contemplated by the Process Guidelines does not provide any form of market feedback to merger parties within Phase 1—and potentially not until the Notice of Competition Concerns, which is late in Phase 2.

(e) **Remedies**. The Committee recognises that the ACCC intends to update its guidance to provide more detail around remedies, and we welcome it doing so. This further guidance would usefully include clarity around when an undertaking is taken to be 'offered' to the ACCC, for the purpose of the statutory timeframes. More guidance on the ACCC's intended approach to conditions is also needed.

(f) **Public benefits**. The Process Guidelines provide limited insight beyond the existing statutory and explanatory materials. The Committee notes that Treasury is yet to publish the form of public benefit application but note that a degree of flexibility and pragmatism is needed both in the form and substantive engagement by the ACCC (when assessing if an application is materially complete), given that public benefit issues are seldom suited to standardised information requirements.

(g) **Goodwill restraints**. The Process Guidelines do not currently provide any insight into how and when the ACCC will provide feedback regarding concerns with sale of business restraints for the purpose of the protection of the goodwill of the business.

(h) **Other issues**. Guidance would be valuable around a range of other issues not currently addressed (or not addressed in any detail) in the Process Guidelines, including:

(i) the ACCC's approach to handling 'stale' transactions;

(ii) more detailed guidance around what constitutes putting acquisitions into effect; and

(iii) interaction of the new process with FIRB.

5. As a general observation, the process prescribed by the *Competition and Consumer Act 2010* (Cth) (the **Act**), coupled with the Process Guidelines, suggest that there is a risk that the new regime may move towards a more document-heavy, prescriptive and paper-based process—potentially with less emphasis on direct engagement between ACCC staff and merger parties. This would be unfortunate and would result in the Australian system losing one of its enduring and distinctive features (i.e. the close, flexible and relatively collaborative nature of the interaction between merger parties and the ACCC through the preassessment and informal clearance processes).

6. We encourage Treasury and the ACCC to use the implementation of the new regime to retain and build upon those aspects of the current process that already work well. For example:

(a) ensuring that a shift to the administrative model (and increased use of the portal) does not result in reduced access to staff teams and direct engagement; and

(b) ensuring timely access to market feedback and stakeholder concerns at an early stage so that merger parties can respond (including through framing remedies).

7. As well as specific feedback on the Process Guidelines, the Committee in this response has also included some general questions about the approach which the ACCC is taking to its own internal structure and approach to engagement. These

are issues which may not be suited to formalising in the Process Guidelines but where we would welcome further consultation.

8. The **Annexure** steps through tasks in each phase under the new regime, including by reference to hypothetical examples which illustrate potential issues.

General comments on ACCC structure and approach

9. The Committee notes that there are aspects of the process that may not be suited to formal guidance, but which are important to the smooth introduction and operation of the new regime. While the current informal process is not perfect, it benefits from a degree of flexibility, and allows for pragmatic and direct engagement between merger parties, advisers and ACCC staff and Commissioners, often at critical points in the process. It would be unfortunate if this was lost.

10. We would therefore welcome the opportunity to discuss how the ACCC is thinking about a number of engagement and process issues not currently reflected in the Process Guidelines.

11. For example:

    (a) Does the ACCC see the move to an administrative model (from an enforcement model) requiring any change in the level of direct and pragmatic engagement that occurs today between merger parties, advisers and ACCC staff teams? For example, is it now necessary for certain types of engagement with ACCC staff or Commissioners to be subject to published transcripts (as has occurred in the past in relation to merger authorisations)? If so, in what circumstances would this be required?

    (b) The ACCC has indicated that it wishes for more engagement to be automated and managed through the ACCC portal. Is shifting engagement towards use of the portal principally to achieve a document management objective or is this reflective of the ACCC seeking to reduce the direct degree of contact with ACCC staff through the process?

    (c) The regime anticipates a greater emphasis on economic evidence and analysis in merger matters. The ACCC has previously flagged that an economist would be 'embedded' in staff teams involved in complex merger reviews. How will this occur and at what point in the process?

    (d) Relatedly, what approach does the ACCC see being taken to economic evidence more generally—for example, is there scope (as occurs in the EU and UK) for economists assisting merger parties to engage and discuss the economic theory of harm directly and collaboratively with ACCC economists (rather than being limited to providing evidence in support of the merger theory of case, as generally occurs today)?

    (e) How is the ACCC seeing its approach to resourcing matters? What will staff teams look like at each phase of the process? For example, the current model involves a hand-off of matters between different internal ACCC teams at the preassessment and public review stages. The Process Guidelines appear to contemplate a form of early assessment for matters that do not raise any concern, using the waiver process. Is it intended that this will also reflect the same current approach to how the ACCC's internal teams are structured (i.e. a separate 'waivers' team and Phase 1/2 team)?

(f) Does the increased role of delegated authority within the process (i.e. the ability for senior staff to make delegated decisions for the ACCC) change the approach which advisers should take to engagement? For example, advisers today typically seek direct engagement with Commissioners at critical points in the process, often at the start of Phase 2 (post-SOI) in order to hear and discuss ACCC concerns directly.

(g) The Committee has previously flagged with the ACCC the importance of the portal and challenges that exist with the current evidence and authorisation portals. We welcome further engagement around this important interface.

(h) Given that there is less time for negotiation of remedies and strict timeframes apply for parties to submit them at both Phase 1 and Phase 2, will the ACCC still be structured with a separate remedies unit for this purpose or will negotiation of remedies now occur with the same team that is considering and assessing the substantive notification?

(i) Similarly, will the same case team take a deal through both the competition and public benefit stages or will the ACCC have a different and specialised team addressing public benefit arguments?

12. The Committee considers that many of these internal and administrative arrangements contribute to the effectiveness of any regime and can be difficult to change once they are in place. The introduction of the new process also offers a somewhat unique opportunity for the ACCC to revisit its internal structure for managing mergers.

13. We would therefore welcome the opportunity to discuss the experiences and perspectives of advisers with the current arrangements as the ACCC is developing its new internal resourcing structure and arrangements.

Specific comments on the Process Guidelines

Pre-notification waivers

14. The Committee welcomes the use of the waiver power as a means of disposing of those merger applications that can be quickly resolved without the cost and burden of Phase 1.

15. The Process Guidelines state at paragraph 3.2 that a waiver may be available where "acquisitions should not need to be notified including because, on the information provided, they are unlikely to meet the monetary thresholds or do not raise competition risks that need further investigation". Paragraph 3.6 goes on to state that the ACCC's intention is that "the waiver process be an efficient means of considering straightforward matters quickly and with a low burden on business".

16. We note our comments above regarding the apparent similarity of the proposed use of waivers to the current preassessment process and our query as to whether the ACCC sees a similar approach to the structure of teams and handling of these applications.

17. The Committee recommends that the Process Guidelines clarify whether a waiver of the requirement to notify under the new regime means that the ACCC will not oppose the acquisition under section 50 of the Act, which will continue to apply. As the ACCC observes, section 50 does not apply to *notified* acquisitions,[1] but the position appears to be unclear in relation to acquisitions for which a waiver has been obtained. To that

[1] Process Guidelines, [13.1].

end, the Committee does not see any reason why acquisitions that have been assessed by the ACCC and granted a waiver should not have the same protections as mergers that are notified.

18. The Committee considers that in general, it would be helpful for the Process Guidelines to clarify the circumstances in which parties should apply for a notification waiver compared with voluntarily notifying an acquisition. For example, it appears that the former is more appropriate for acquisitions that do not raise competition concerns but may meet notification thresholds, whereas the latter is more appropriate for acquisitions that fall below the notification thresholds which may nonetheless raise competition concerns.

19. Finally, we make the following observations on the timing proposed in the Process Guidelines:

    - 20 business days (essentially one month) appears reasonable, although it is longer than the 15 business days which is the target for resolution of most Phase 1 applications. It appears odd that waivers (which will typically involve little or no competition concern) should require longer than even basic Phase 1 reviews.

    - The Committee accepts the need to wait for 10 business days from publication on the register to allow for procedural fairness. However, this means it will be critical that applications are placed immediately on the register once received and we would welcome confirmation of this in the Process Guidelines.

Pre-notification engagement

Pre-notification process

20. The Committee recognises the value of pre-notification engagement and that it plays a particularly important role under the new regime, as it has previously done in relation to merger authorisations.

21. We consider that the Process Guidelines would benefit from greater clarity about what pre-notification will practically involve. As it currently stands, the Process Guidelines indicate that pre-notification could take a number of different forms and can involve the provision of a draft notification form. The ACCC should address the extent to which it expects the approach to differ based on whether the acquisition is likely to involve a short form or long form notification. The ACCC should also outline the process for engaging in pre-notification—for example, by email as is currently the case or via the portal.

22. The Process Guidelines should also address what the ACCC expects in circumstances where a draft notification form is provided—for example, whether the ACCC expects to issue requests for information during pre-notification and whether the ACCC expects that such information will be provided to the ACCC by way of update to the draft notification.

23. The Process Guidelines also indicate that the extent of pre-notification may differ for each acquisition. Recognising the need for flexibility at this early stage, the Guidelines should nonetheless address whether the ACCC expects pre-notification engagement to include a step where it informs the parties that it considers an application and proposed data etc. are suited to being filed or, if not, how it otherwise expects this process to conclude.

Timeframe for pre-notification engagement

24. The Process Guidelines encourage parties to approach the ACCC at least two weeks before the proposed date for formal notification and state that it may be appropriate for parties to contact the ACCC 'much earlier' where there may be competition concerns.[2]

25. The Committee considers that it would be useful for the ACCC to provide an indicative timeframe for pre-notification engagement in relation to more complex acquisitions (e.g. those that may require Phase 2 (i.e. long form notifications) or potentially involve remedies) so that parties can appropriately factor this into their planning and minimise delay to their proposed date for formal notification.

26. In this respect, the Committee encourages the ACCC to consider the extent to which it can identify a more accurate timeframe for each category of notification.

Information requirements and the Notification Form

27. The Committee will respond separately to the form and information requirements proposed for the short and long form notifications, in its response to Treasury on the exposure draft of the relevant legislative instrument.

28. However, we consider the Process Guidelines would benefit from greater clarity around the extent to which the ACCC will take a flexible approach to determining whether parties have provided the necessary information and documents requested in the notification form.

29. The Committee notes that the Act provides the ACCC with ultimate discretion over whether a notification is incomplete and, we submit, allows a degree of administrative flexibility in each case as to whether the full or exact requirements of the form need to be met in each case.[3]

30. The proposed form requirements are extensive and will require a degree of flexibility in different cases. This is a matter the Committee will explore in more detail in its response to the Treasury instrument. The Committee expects that the ACCC's approach will need to vary depending on each acquisition, but considers it would be useful for the ACCC to outline the kinds of factors to which it will have regard in determining whether to permit parties to exclude certain requested information from the forms.

31. The ACCC should, for example, address in the Process Guidelines the extent to which it is likely to treat a form as 'complete' where parties are not reasonably or easily able to include requested information or documents because they do not capture, receive or create them in the usual course of business (provided this has been raised with the ACCC during pre-notification engagement).

Acquisitions Register

32. The Process Guidelines state that the ACCC does not intend to publish submissions from parties to the acquisition or third parties on the Acquisitions Register.[4] The ACCC is not otherwise required to provide access to its case file or disclose confidential third-party information.

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[2] Process Guidelines, [4.9].
[3] Section 51ABY(1) and (4). Noting that the ACCC may have regard to *"the extent to which"* the notification is in the form specified, in making its determination.
[4] Process Guidelines, [11.3].

33. The Committee considers that disclosure and transparency are important aspects of any administrative regime. In circumstances where the ACCC is the primary decision-maker, the provision of timely information to the applicant is an important check and balance on the ACCC's process.

34. The Process Guidelines appear to stress that the ACCC is not required to give access to its file or third-party submissions—either on the register or to merger parties at critical points in either Phase 2 or the public benefit assessment.[5] This emphasis on limiting access to evidence is disappointing. As the ACCC will be aware, international regimes vary in the level of disclosure and transparency they provide. For example, the UK Competition and Markets Authority (the **CMA**) publishes all submissions of merger parties and third parties, as well as CMA decision-making. The European Commission publishes its decisions and offers parties (including interested complainants) access to the file. The current proposed approach to publication on the Acquisitions Register or otherwise providing access to file is out of step with these regimes.

35. The Committee notes that the ACCC currently already publishes such submissions on its merger authorisation register (except for confidential information).[6] It is unclear why the ACCC should depart from this approach, particularly in circumstances where it has acknowledged the Acquisitions Register is important for reasons of transparency under the new regime.[7] The Committee considers there is benefit to making those submissions available on the Acquisitions Register, including because they could help to inform the views of other market participants that would not otherwise have access to that information.

36. If there is concern about the disclosure of confidential information on the Acquisitions Register, the ACCC could address this by adopting a similar process to the one it has implemented for dealing with confidential information under the current merger authorisation process.[8]

37. The Committee also recommends that the ACCC clarify to the extent to which parties will have access to the underlying information and submissions provided by third parties (other than confidential information) that the ACCC has received, even if the ACCC will not publish this information on the Acquisitions Register. Paragraph 7.16 of the Process Guidelines appears to imply that merger parties may not have any such access except for a description of the submissions in the Notice of Competition Concerns. The Committee considers merger parties would be in a position to more effectively and efficiently address the ACCC's concerns if they were given access to the underlying submissions and information (with confidential information redacted).

38. The Committee notes that the ACCC intends to undertake further consultation around its approach to confidentiality and disclosure[9] and would welcome more consideration around this issue of transparency.

[5] Process Guidelines [7.16], [8.21] [11.3] and [11.8]
[6] Section 89(3)-(5C) of the Act requires the ACCC to publish on its register a copy of its draft determination, as well as any document furnished to it and particulars of any oral submissions made in relation to an application for authorisation, subject to confidentiality claims. Section 5 of the ACCC's Merger Authorisation Guidelines sets out the process for dealing with confidential information from authorisation applicants and interested parties.
[7] Process Guidelines, [11.1].
[8] ACCC, Merger Authorisation Guidelines, section 5.
[9] Process Guidelines, 56.

39. Separately, the Process Guidelines state the ACCC *"may"* publish the Notice of Competition Concerns on the Acquisitions Register.[10] We do not understand this to imply that the ACCC could determine not to publish a Notice of Competition Concerns. However, if there is any circumstance in which this may occur, it should be explained in the Process Guidelines. Otherwise, the Committee suggests that, for the avoidance of doubt, the ACCC clarify that any Notice of Competition Concerns issued to the merger parties *"will"* be published on the Acquisitions Register.

Phase 1

Market inquiries and market feedback

40. It is unclear from the Process Guidelines whether the ACCC intends to conduct general market inquiries as part of its normal process in Phase 1 or whether, given the compressed timeframe, the ACCC will take a different and more targeted approach to market inquiries in this phase.

41. The Committee's primary and most significant concern regarding Phase 1 is that it does not appear from the Process Guidelines that the ACCC intends to provide merger parties with market feedback during this phase.

42. As currently framed, the first time that merger parties receive any detailed understanding of concerns raised by stakeholders is with publication of the Notice of Competition Concerns, which can occur as late as 5 weeks (or later) into Phase 2—a full 11 weeks into the process (assuming the standard 30 business days for Phase 1). Moreover, in Phase 2, it appears likely Notices of Competition Concerns may be issued before the ACCC's market inquiries have concluded. Where this occurs, will there be a process to provide updated market feedback to the merger parties?

43. Under the current informal clearance process, the ACCC typically provides the parties with a market feedback letter during Phase 1. This has the significant benefit of enabling parties to respond to concerns as early as possible, with the potential to resolve all concerns in Phase 1 or at least narrow any concerns that may require further review in Phase 2. The Committee considers there would be similar benefits to providing market feedback during Phase 1 under the new regime in addition to the Notice of Competition Concerns later in the process. In particular, merger parties could address the evidence the ACCC has before it in Phase 1 and potentially obviate the need for a Phase 2 review.

44. In addition, the Process Guidelines encourage merger parties that are contemplating offering remedies to *"put their best offer forward"* as early as possible in Phase 1 and require parties to offer a remedy within 20 business days.[11] The Process Guidelines also state that the ACCC expects any remedies offered during Phase 1*"will be clearly defined and will effectively address the competition concerns raised by the acquisition"*.[12] Practically, merger parties will have difficulty achieving this in the absence of early feedback because it is usually not possible for merger parties to anticipate the nature and extent of potential competition concerns arising from a proposed acquisition without any (or detailed) feedback.

[10] Process Guidelines, [7.17].
[11] Guidelines, [6.21]-[6.22].
[12] Guidelines, [6.21].

45. To the extent that the ACCC is reluctant to commit market feedback of this kind to writing under the formal administrative process, given this may duplicate or pre-empt its Phase 1 reasons or any Notice of Competition Concerns, we invite the ACCC to consider some alternative form of briefing or feedback by ACCC staff.

46. The Committee observes that providing market feedback during Phase 1 would also be consistent with the Explanatory Memorandum, which states that the Notice of Competition Concerns is intended to complement and provide further particulars of any issues identified by the ACCC *"during the Phase 1 process"*.[13]

Section 155 notices

47. The Process Guidelines refer to the ACCC issuing compulsory information and document requests to third parties and obtaining oral evidence via section 155(1)(c) examinations during Phase 2. As a practical matter, the Committee would welcome any indication the ACCC can provide as to whether it considers that the change in process is likely to mean the ACCC will use its compulsory powers more frequently than it currently does (noting that the ACCC typically uses section 155 notices only in Phase 2 of the current informal clearance process).

Remedies and conditions

Undertakings

48. The Committee recognises that the ACCC intends to update the Process Guidelines with more detail around its approach to remedies in due course. This is welcome.

49. In preparing the updated Process Guidelines, the Committee would invite more detail around the following:

- Parties are required to have 'offered' a remedy by the relevant Phase 1 and Phase 2 deadlines.[14] Does the ACCC consider that this means that the undertaking at this point is final and sufficiently complete that it is capable of immediate acceptance by the ACCC? As the ACCC is aware, it is common under the current process for a period of negotiation and development with the remedies unit to occur after a draft remedy is first offered. Does the ACCC contemplate this would continue to happen and if so at what point?

- Will the ACCC indicate to merger parties that a remedy is sufficiently developed to be accepted as 'offered' for the purpose of the process?

- The ACCC currently makes available precedent undertakings for standard remedies (such as hold separate and divestment remedies) and there is a template included with the ACCC's section 87B guidelines. However, this is somewhat ad hoc and informal. Given the compressed timeframes and the need for greater certainty around acceptability of remedies, the Committee considers that the ACCC could consider making the publication of precedent forms for undertakings more standardised so that negotiations are not distracted by matters of form and detail but can focus on substance (e.g. identity and suitability of a proposed buyer; the nature of the package of divested assets, etc.).

[13] Explanatory Memorandum, [4.80].
[14] Section 51ABZZC.

Conditions

50. The Process Guidelines offer limited insight into the ACCC's approach to conditions, other than to largely restate the statutory language. The Committee notes that the ACCC intends to publish updated guidance on this issue, which would be welcome.

51. In particular, the Committee would welcome further guidance on what types of conditions may be imposed on merger parties which do not take the form of a requirement that they give and comply with a section 87B undertaking.

52. Practical questions also include:

- What notice will be provided to merger parties in relation to conditions? Will they be provided with a draft for comment?

- Whether there will be a similar approach to consultation and negotiation in relation to conditions as occurs for section 87B undertakings.

Public benefit phase

53. As a general observation, the Process Guidelines provide very limited insight into the ACCC's practical approach and intentions for the public benefit phase of the process.

Form of public benefit application

54. The Committee notes that Treasury is yet to publish the form to be used for a public benefit application and will respond separately on this issue in our response to the draft instrument. However, we note that any assessment of public benefits will necessarily be shaped by each transaction. This is not as conducive to standardised information requirements and the Committee is therefore hopeful that both Treasury and the ACCC will take a pragmatic and flexible approach to the formal application requirements (and, in the ACCC's case, to determining if an application is materially incomplete under section 51ABZQ).

Goodwill protection

55. The Process Guidelines do not contain any detail as to when the ACCC will provide initial feedback to the parties regarding consistency of any restraints with the goodwill protection provisions.

56. The Committee submits that any ACCC concerns with goodwill restraints should be raised with merger parties as early as possible in the process and certainly no later than the Notice of Competition Concerns.

57. Amongst other things, concerns around timing of any decision by the ACCC to disallow restraints is exacerbated by the fact that where restraints in the Share Purchase Agreement may otherwise apply pre-completion to protect the interests of the business being sold (e.g. to stop the business selling material assets between execution and completion without the consent of the purchaser).

Other areas where further guidance would be valuable

Stale notifications

58. Paragraph 7.33 of the Process Guidelines notes that a notification becomes stale 12 months after the ACCC makes its determination. However, more guidance is required around the approach that the ACCC may take to reconsidering a stale transaction that has previously been cleared and requires re-notification.

59. For example, questions include:

- Will the parties be required to complete the full notification form again, or will the ACCC only require details that have changed to be updated? How will this be assessed?
- What is the position in relation to pre-completion steps that have been taken to give effect to the transaction after the ACCC's determination (i.e. commencing some types of IT integration or staff reorganisation)?
- Can a party re-file prior to the 12-month mark to enable the ACCC to refresh its determination without any 'gap'?

60. This issue arises in a number of practical contexts, including global transactions that may have complex and extended completion periods or involve overseas regulatory or other processes and some agreements for lease (**AFL**) where construction of a building will take more than 12 months, but anchor leases (requiring ACCC clearance) need to be agreed before construction commences.

Putting acquisitions into effect

61. The scope of pre-completion transition work that can be undertaken by parties without being considered to have 'put into effect' an acquisition is an important concern. The Committee notes the examples offered at paragraph 2.14 of the Process Guidelines, but it would be useful if the ACCC could also offer examples of the kinds of conduct that would be permitted during the pre-clearance period, particularly where the ACCC condition is the only or the last condition prior to completion (and so completion will occur very shortly after any ACCC determination). For example:

- It is common for merger parties to meet with customers to discuss transitional issues in the lead up to completion.
- Merger parties typically discuss and plan for the integration of IT systems. The Committee recognises that integration itself cannot begin until the ACCC determination, but it would be expected that some form of preliminary discussions and planning would be permitted.
- As noted above, business sale agreements may include provisions restricting actions outside the normal course of the target's business or governing such things as what assets the vendor can dispose of prior to completion. Would enforcing, or acting in accordance with, such clauses constitute 'putting into effect' the acquisition?

62. It may be that some form of practical FAQs could help provide some clarity around the kinds of steps that can be safely taken. Generally, the approach taken globally is that planning for integration is appropriate and does not equate with 'implementation'.

A consistent position to that effect would be helpful. We note that this is not an issue addressed in the ACCC's FAQs to date.

Interaction with FIRB

63. The Committee notes that further guidance will be provided about the interaction of the new regime with FIRB. While we acknowledge it is a matter for Treasury, it would be disappointing and frustrating if competition issues continued to be progressed through both processes separately. This was a point of focus and attention during the development of the regime, with a desire to have the separate FIRB review of competition concerns removed. The Committee would welcome further refinement of this interface.

Access to section 157 materials

64. It is possible, and perhaps likely, that the new merger process will give rise to more regular reference of mergers to the Tribunal.

65. The Committee is aware that the Act currently does not provide for access to section 157 materials immediately following a Phase 2 review but that this was intended and, we understand, is likely to be addressed.[15] This is an important issue we have separately raised with Competition Taskforce members.

66. Given that the ACCC at this stage is not proposing to make available access to evidence or submissions during the process, it will be even more important that access to the file is made quickly available following completion of the process where a Tribunal review is being contemplated. This is important given that parties have only 14 calendar days to bring an application for review after the ACCC releases its statement of reasons on the register.

67. While it may be the case that an application for review can be framed based on the ACCC's Phase 2 reasons (or the reasons given for a public benefit determination), any application is likely to be shaped also by the evidence that was before the ACCC. It would be inefficient and inconvenient for the merger parties and the Tribunal if applications were required to be routinely amended at a later stage in the process once the ACCC file was released.

68. In other Tribunal matters (particularly in merger authorisations), release of section 157 materials has been delayed by protracted disputes over third-party confidentiality. As noted above, the Committee welcomes the ACCC's indication that it is further considering confidentiality processes. As part of this process, the Committee considers the ACCC should test whether there is a process for testing and settling confidentiality claims during the process, so that these do not have to be revisited and disputed under time pressure in the early stages of a Tribunal process.

[15] Sections 68 and 69 (which do not currently amend s 157 to apply to final ACCC Phase 2 determinations or public benefit determinations).

Annexure A: Process review with questions

This Annexure seeks to identify the key phases of engagement with the ACCC under the new mandatory merger control regime, the key tasks identified in each phase based on the Process Guidelines, comments and questions that arise from the Process Guidelines and potential implications for parties seeking clearance from the ACCC, as illustrated by reference to hypothetical examples.

Phase	Tasks within phase	Questions and comments	Hypothetical examples
Notification waivers **(likely within 20 business days)**	The Process Guidelines state: • A business may apply for a notification waiver in respect of an acquisition. If the ACCC makes a determination to grant a waiver, the acquisition is not required to be notified. However, the acquisition remains subject to section 50 of the Act.[16] • Waivers are intended to provide a flexible mechanism for businesses to seek relief from the notification requirement where acquisitions should not need to be notified including because, on the information provided, they are unlikely to meet the monetary thresholds or do not raise competition risks that need further investigation.[17] • Waiver applications must be made in writing.[18]	The current guidance only includes that the *"vast majority of cases to make waiver determinations within 20 Business Days of receive an application, however the ACCC will not make a determination until an application has been on the Acquisitions Register for 10 Business Days"*. Potential problems with this process: • The ACCC's guidance indicates that one of scenarios where it might be appropriate to apply for a waiver is where an acquisition *"is unlikely to meet the monetary thresholds"*. Is the ACCC envisaging that a waiver would be sought where there is uncertainty whether any threshold may be met? Given the serious consequences of a failure to notify a transaction that does meet the thresholds (namely, the automatic invalidation of the transaction) parties	**Example 1** Company A is a global producer of alcoholic beverages and carbonated soft drinks. It is proposing to vertically integrate by acquiring Company C, a beverage bottling manufacturer. Company A does not have any other operations in this part of the supply chain and Company C is a small supplier nationally. Company A has assessed that the proposed transaction meets a notification threshold. Since there is no horizontal overlap and there are unlikely to be vertical foreclosure issues, Company A proposes to seek a notification waiver. The ACCC decides to consult on the notification waiver application

[16] Process Guidelines, [3.1].
[17] Process Guidelines, [3.2].
[18] Process Guidelines, [3.3].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	• The ACCC expects in the vast majority of cases to make waiver determinations within 20 business days of receiving an application. However, the ACCC will not make a determination until an application has been *"on the Acquisitions Register for 10 Business Days. This will provide an opportunity for third parties who wish to make submissions about the potential waiver to do so"*.[19]	will necessarily err on the side of notification if there is any doubt. The notification waiver procedure may assist in providing necessary certainty. • When is it appropriate to apply for a notification waiver—when the threshold is met but you don't believe it raises any competition concerns? If so, what is the measure for this? • What kind of information needs to be supplied to the ACCC for a waiver to be considered (noting the ACCC has indicated that this will be subject to further guidance)?[20] • Will parties have an opportunity to respond to third-party submissions and how long will they have to do so? • The ACCC notes that it will give the parties a written notice and explanation of the determination (published on the Acquisitions Register)—what is the timeline for this? • If the waiver is rejected, will this affect the timeline for the assessment process?	on Acquisitions Register. A number of parties ask for extensions beyond the mandatory 10-business day period to make submissions on the waiver. The Notification Waiver is then rejected by the ACCC on day 30 and Company A is required to lodge a formal application, triggering another minimum 30-day review period. **Example 2** The ACCC publishes details of Company A's waiver application on its Acquisitions Register for 10 business days. The ACCC grants a notification waiver after 20 business days. Company A aims to complete the transaction within 8 weeks of the notification waiver being granted. 6 weeks after the notification waiver is granted, some small business customers of Company A raise a complaint to the ACCC about the transaction which the

[19] Process Guidelines, [3.9].
[20] Process Guidelines, [3.6].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
		• When will an acquisition be rejected in the waiver process but accepted in the assessment process? •	ACCC raises with Company A. Since the transaction remains subject to s 50 and a potential enforcement investigation, Company A does not have any certainty about whether it can complete the transaction, even though a notification waiver has been issued.
Pre-notification discussions **(no timeline specified)**	The Process Guidelines state that: • When to contact the ACCC, the information to provide and how long pre-notification engagement will take depend on the likely complexity of the acquisition.[21] • Following initial contact with the ACCC about the acquisition, pre-notification engagement could take a number of different forms—it could involve sending a draft notification followed by a single brief discussion with the ACCC or it could involve a series of more detailed discussions about information requirements and possible areas of focus. The nature and extent of pre-notification engagement will differ for each acquisition.[22]	It is noted in the Process Guidelines that *"the ACCC encourages businesses to initiate pre-notification engagement at least two weeks before the proposed date for formal notification"* and *"[a] benefit of early and constructive pre-notification engagement is that businesses can proactively raise issues that are likely to be relevant to the ACCC's assessment, and the ACCC can discuss the information, and any data, which is likely to be relevant to its assessment. Businesses are then able to collate the information and provide it upfront, which helps to ensure the notification can be assessed as quickly as possible within the assessment timelines."*	**Example 3** Company A has signed a conditional sale and purchase agreement to acquire Company B, a sports and energy drink producer. Company B is keen to sell and has set a sunset date of completion in the contract of 7 months, allowing time for a Phase 1 and Phase 2 review. Company A has assessed that the transaction meets one of the relevant notification thresholds. Since it does not have a large market share and does not supply energy and sports drinks, it is not anticipating that any substantive competition issues will arise.

[21] Process Guidelines, [4.3].
[22] Process Guidelines, [4.3].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	• The ACCC encourages businesses to initiate pre-notification engagement at least two weeks before the proposed date for formal notification.[23] • For acquisitions where competition concerns may be identified, it may be appropriate, and in the interest of the parties to the acquisition, to contact the ACCC much earlier.[24] • Following receipt of a pre-notification engagement request, a member of the ACCC team will aim to contact the party as soon as possible, typically within 5 business days. During this period, the ACCC team will start to consider a range of factors relevant to the acquisition, including the complexity of the competition issues, the ACCC's existing level of knowledge about the industry or market/s and the type of information (including data) and documents that may be relevant to the ACCC's assessment.[25]	Potential problems with this process: • Without real guidance on the timeline for this assessment process, potential issues can arise for parties on a deadline. It is noted that in certain circumstances, parties are encouraged to contact the ACCC *"much earlier"*—what is much earlier? It is not clear if this is a period of weeks or months. • As this is meant to avoid delays in the future timelines, does this mean that time to collate and discuss relevant information and data is not built into the timelines for each phase of the assessment process? • It would greatly assist the parties if, upon being approached in relation to a transaction, the ACCC gives the parties guidance on the likely timeframe for discussions in the pre-notification phase. In that way, parties can adjust timeframes in transaction documents to ensure the ACCC has sufficient time for consideration in the pre-notification phase.	Company A approaches the ACCC for a pre-notification discussion 4 weeks prior to formal notification, submitting a draft notification. The ACCC responds 5 business days later. The ACCC issues a detailed request for documents and data to Company A. Providing the information / documents sought and responding to further questions from the ACCC on its response takes a period of 3 weeks. Company A then submits a revised of notification, which the ACCC confirms is satisfactory 10 business days later. 6 weeks of pre-notification discussions have elapsed, meaning the sunset date likely cannot be met if the merger progresses through to a Phase 2 review. Company A had no guidance that pre-notification discussions could take up to six weeks when agreeing the sunset date with Company B.

[23] Process Guidelines, [4.8].
[24] Process Guidelines, [4.9].
[25] Process Guidelines, [4.10].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
Phase 1—Initial assessment (15–30 business days)	The Process Guidelines state that: • **Day 1** (*Acquisitions Register update*)—First business day after the effective notification date.[26] ACCC publishes details of notification on Acquisitions Register.[27] • **Day 15** (*Earliest ACCC can approve acquisition*)—The ACCC is required to wait 15 business days to allow time for third parties to comment on the notified acquisition.[28] • **Day 20** (*Final day to offer remedy*)—If parties to the acquisition offer a remedy by way of commitments or undertakings, the Phase 1 timeline may be extended by up to 15 business days.[29] • **Day 30** (*Phase 1 concludes*)—Phase 1 concludes after 30 business days, unless the timeline is extended (including based on the circumstances outlined in chapters 9 and 10 of the Process Guidelines).[30] The ACCC may approve the acquisition (with or without	Potential problems with this process: • If a party has not gone through pre-notification discussions, is there an opportunity for the party to collate further information / data, outside of a specific request from the ACCC? • What information / data should be submitted upfront? • What information / data is only needed for Phase 1? For instance, is engaging economists only needed for Phase 2? • Given that the ACCC does not intend to publish any third-party submissions on its website,[39] will merger parties be provided a feedback letter from the ACCC (market feedback letter equivalent) before Phase 1 concludes? How long will this take to issue? • 15 business days does not appear to be a sufficient time for the ACCC to seek third-party submissions on any remedy and provide the merger	**Example 4** The ACCC has published details of Company A's proposed acquisition of Company B on its Acquisitions Register. The ACCC obtains submissions from Company A's customers and competitors on Day 15. The ACCC identifies follow-up questions for customers and competitors on their submissions. These take 5 business days to issue and another 5 business days for the market participants to respond to the ACCC on Day 20. Company A has no visibility of the requests made by the ACCC or the concerns raised by market participants because submissions are not published on the Acquisitions Register and no feedback letter was issued. Company A would have been prepared to offer a divestiture of a key brand, but the 20-business

[26] Effective notification date means the date upon which a notification is made (that complies with the Act) and the applicable fee is paid.
[27] Process Guidelines, [6.1].
[28] Process Guidelines, [6.1].
[29] Process Guidelines, [6.1].
[30] Process Guidelines, [6.1].
[39] Process Guidelines, [6.16].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	conditions)[31] or issue a Phase 2 Notice if the acquisition could have the effect or likely effect of SLC.[32] Other key steps involved in Phase 1 include: • **Information gathering**: ○ The ACCC may seek further information from the parties to a proposed acquisition in writing seeking information within a specified period or it may issue a notice. If a longer period is required to respond, this may result in an extension to the timeline.[33] ○ The ACCC will undertake market inquiries with third parties and may seek information from third parties by voluntary or compulsory requests.[34] ○ The ACCC will not publish third-party submissions on the Acquisitions Register. Parties	parties with feedback on the remedy, to allow them to address any additional issues raised during the consultation. What scope will there be for the ACCC and merger parties to agree to extend Phase 1 to consider remedies? • Phase 1 concludes *"unless the timeline is extended"*. In what circumstances will it be extended outside of what is already identified? • How long before the conclusion of Phase 1 will the merger parties be issued with a Phase 2 Notice? • How long will parties have to make submissions on a Phase 2 Notice? • The ACCC may approve a merger at Phase 1 with conditions, but the guidelines do not state how any consultation with merger parties on those conditions will occur. Will there be consultation with merger parties on the conditions and if they can practically be implemented? • The parties need to understand the ACCC's likely concerns and concerns	day deadline has elapsed and it does not have market feedback necessary to structure a divestiture package. ACCC engagement with other market participants is not specified in the Process Guidelines as a basis for an extension of the review timelines. The ACCC issues a Phase 2 Notice on Day 29. Company A does not have an opportunity to respond before Day 30.

[31] Process Guidelines, [6.28].
[32] Process Guidelines, [6.38].
[33] Process Guidelines, [6.8]-[6.10].
[34] Process Guidelines, [6.12]-[6.14].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	will be given an appropriate opportunity to respond to material issues raised by third parties prior to the ACCC making a determination, for example through the Notice of Competition Concerns,[35] which is not issued until day 25 of Phase 2.[36] • **Before the end of Phase 1**: The ACCC may approve the acquisition, with or without conditions or issue a **Phase 2 Notice** (for acquisitions that could SLC and will be subject to an in-depth Phase 2 assessment). A Phase 2 notice must:[37] ○ Identify the parties to the acquisition and the economic activities in which they engage. ○ Explain why the ACCC is satisfied that the acquisition, if put into effect, could SLC, specifying the nature of the theory of harm and nature of the matters the ACCC intends	expressed by third parties as soon as possible in order to develop a remedial package to address those concerns. If a market feedback letter is not contemplated, parties will not be able to practically offer remedies in Phase 1 unless these are remedies that are already contemplated as part of a global deal. • The market feedback letter was an important innovation that allowed parties to see at an early stage what competition concerns were likely to arise so that they could prepare evidence and remedies for the ACCC as soon as possible. The absence of a market feedback letter means that it will be much more difficult for parties to prepare relevant evidence and materials for the ACCC at an early stage, thereby slowing the review process.	

[35] Process Guidelines, [6.16].
[36] Process Guidelines, [7.2].
[37] Process Guidelines, [6.38].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	to investigate before making its determination. ○ Specify the date by which the Phase 2 fee must be paid. ○ The Phase 2 Notice will be provided to the merger parties and published on the ACCC's Acquisitions Register. • A notifying party can request an extension at any time within each phase.[38]		
Phase 2—In depth assessment (90 business days)	• **Day 1** (*Start of Phase 2*)—Phase 2 commences immediately after the end of Phase 1.[40] • **TBD** (*Deadline for Phase 2 fee*)—If fee is not paid (as applicable), the ACCC must stop considering the notification.[41] • **By Day 25** (*Notice of Competition Concerns issued*)—Notice of Competition Concerns only issued if	Potential problems with this process: • In what circumstances will the ACCC approve an acquisition prior to issuing a Notice of Competition Concerns? • The Process Guidelines indicate that all parties will need to comply with set deadlines for making submissions and that it may not take information into account after a specified deadline.[55] How will these deadlines be set? How can parties be assured that the ACCC will provide a	**Example 5** Company D is a competitor to Company B and raised concerns about the acquisition in confidential submissions during Phase 1. Shortly after the ACCC issues its Notice of Competition Concerns on Day 25, the ACCC issues Company D with an extensive compulsory notice seeking information and documents, requiring a response within 4 weeks.

[38] Process Guidelines, [9.9].
[40] Process Guidelines, [7.2].
[41] Process Guidelines, [7.2].
[55] Process Guidelines, [7.9].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	the ACCC has not already approved the acquisition by this day.[42] • **By Day 50** (*Response to Notice of Competition Concerns*)—Deadline for parties to the acquisition to make written or oral submissions to respond to the Notice of Competition Concerns.[43] The notifying party may request an extension to the 25-business day period and the ACCC may extend more than once.[44] • **By Day 60** (*Final day to offer remedy*)—If parties to the proposed acquisition offer a remedy after Day 50, the Phase 2 timeline may be extended by up to 15 business days.[45] The ACCC must not have regard to a remedy that is offered after the 60 business-day period.[46] • **Day 75** (*Final day to provide information to ACCC*)—Except in limited circumstances, parties to the proposed acquisition and third parties may not provide information or	reasonable period of time for parties to make submissions? • In what circumstances may the ACCC issue a Notice of Competition Concerns later than Day 25? Will there be an automatic extension to the balance of the timeframe? How will the parties' commercial timeframes for completing a deal be factored into this period? • In circumstances where information and submissions provided in response to a Notice of Competition Concerns will not be published on the ACCC website, what transparency will there be about any concerns raised by the market? Will the ACCC be issuing parties with a market feedback letter in response to the Phase 2 Notice and/or Notice of Competition Concerns? • If additional issues are raised by market participants following the publishing of the Notice of Competition Concerns, what is the	Company D has limited resources, which are consumed by responding to the compulsory notice, such that it cannot prepare a written submission by Day 50, with which it intended to provide an accompanying economic report. The basis on which Company D may be permitted to seek an extension to respond to the compulsory notice or the Notice of Competition Concerns (beyond Day 50) is not clear on the Process Guidelines.

[42] Process Guidelines, [7.2].
[43] Process Guidelines, [7.2].
[44] Process Guidelines, [7.18].
[45] Process Guidelines, [7.2].
[46] Process Guidelines, [7.24].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	submissions between Days 75 and 90 (block-out period).[47] • **Day 90** (*Phase 2 concludes*)—Phase 2 concludes after 90 business days, unless the timeline is extended. Other key steps involved in Phase 2 include:[48] • **Information gathering:** The ACCC may issue additional targeted requests for information and documents as needed, including through voluntary or compulsory requests, submissions in response to a Notice of Competition Concerns from the merger parties or third parties and oral evidence through compulsory examinations or voluntary interviews.[49] • **Notice of Competition Concerns**: Sets out the ACCC's preliminary assessment of whether the acquisition would be likely to SLC. ○ The ACCC is required to refer to the evidence or other material it has relied on in reaching its	mechanism by which merger parties will be consulted on this? • Can parties meet with the ACCC before Phase 2 concludes (like in the informal process)? • The Process Guidelines say that the ACCC *"may determine the nature, form or scope of conditions"* imposed on any approval, but are silent on what consultation there will be with merger parties about any proposed conditions. ○ Will proposed conditions be included in the Notice of Competition Concerns? ○ Will the parties be given an opportunity to be heard on the conditions and the extent to which they are practical to implement? • Where the issues are complex, parties who wish to oppose a transaction may wish to put on detailed economic evidence and submissions (or even invite the ACCC to a site visit to provide practical examples of concerns raised). The proposed timelines do not seem to	

[47] Process Guidelines, [7.2].
[48] Process Guidelines, [7.5].
[49] Process Guidelines, [7.8].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	preliminary view, which will be described in sufficient detail to enable the parties to understand the issue, although it is not required to provide access to the file or disclose confidential third-party information.[50] ○ It is to be provided to the parties and published on the Acquisitions Register.[51] ○ The ACCC may provide parties with additional opportunities to provide submissions in some circumstances—for example, if new information or issues material to the ACCC's assessment are raised after the Notice of Competition Concerns is issued.[52] • **Determination:** Before the end of Phase 2, the ACCC may make a determination that the acquisition may be put into effect with or without conditions or must not be put into effect (not approving the acquisition). A copy of the determination will be provided to the merger parties and	cater for circumstances where such information needs to be prepared and longer-term engagement with the ACCC required. The guidelines also need to address circumstances where third parties need additional time, which will presumably entail the ACCC requesting more time.	

[50] Process Guidelines, [7.16].
[51] Process Guidelines, [7.17].
[52] Process Guidelines, [7.19].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	published on the ACCC's Acquisitions Register.[53] • A notifying party can request an extension at any time within each phase.[54]		
Application for Tribunal Review (following conclusion of Phase 2)	• If a notifying party or third party is dissatisfied with an ACCC determination, they may apply to the Tribunal for a review of the ACCC's determination.[56] • There cannot be an active Tribunal review of an ACCC competition determination and an ACCC consideration of a public benefit application occurring simultaneously. The Tribunal must cease its review until either the ACCC ceases considering or makes a determination on the notifying party's public benefit application.[57]	• Third parties may apply for Tribunal review of an ACCC decision and potentially delay implementation of a merger, but the ACCC will not be publishing any third-party submissions on its Acquisitions Register. • This means that parties may make submissions that 'game' the ACCC and lead to opposition of a merger and a Tribunal review, with the merger parties not having the opportunity to review those submissions. • There is little certainty provided in the Process Guidelines regarding where the ACCC provides clearance and a third party (with sufficient standing) appeals that clearance to the Tribunal.	N/A

[53] Process Guidelines, [7.26].
[54] Process Guidelines, [9.9].
[56] Process Guidelines, [7.35].
[57] Process Guidelines, [8.6].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
Public Benefit Phase—consideration of public benefits (50 business days)	The Process Guidelines state: • A public benefit application may be made following a determination that an acquisition may be put into effect subject to conditions (in Phase 1 or 2) or must not be put into effect (at the end of Phase 2).[58] • **Within 21 calendar days of relevant Phase 1 or Phase 2 determination**: The notifying party may lodge a public benefit application.[59] Once the requirements under the CCA have been met, including the form and fee, the ACCC will provide written confirmation of the effective application date.[60] • **Day 1** (*Acquisitions Register update*)—ACCC publishes details on Acquisitions Register within 1 business day of the effective application date.[61] • **By Day 20** (*Public Benefit Assessment issued*)—ACCC issues Public Benefit Assessment[62] which it must provide to the notifying party	Potential problems with this process: • It is not clear what information will be made available to third parties at the commencement of the Public Benefit Phase to invite submissions. • The Process Guidelines note that *"the ACCC is committed to assessing notified acquisitions in a timely manner and in accordance with statutory timelines. However, there will be some circumstances, where it will be necessary for the timeline to be adjusted as the ACCC's assessment progresses"*.[75] Is there a limit to how many extensions can occur or how many days total? In some circumstances, this could burden notifying parties by imposing multiple extensions for long periods of time. • It is noted that the ACCC *"may provide the parties to the acquisition with additional opportunities to provide submissions in some circumstances, for example if new*	**Example 6** The ACCC receives confidential submissions from Company D in response to its Public Benefit Assessment, which suggest that Company A's potential merger with Company B will not result in any public benefit and proposing conditions for any approval. It is not clear how Company A and Company B will have the opportunity to respond to such conditions prior to the Public Benefit Determination being issued. There is currently no set consultation mechanism between Day 35 and Day 50.

[58] Process Guidelines, [8.2].
[59] Process Guidelines, [8.8].
[60] Process Guidelines, [8.11].
[61] Process Guidelines, [8.7].
[62] Process Guidelines, [8.7].
[75] Process Guidelines, [9.1].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	and may publish a copy on the Acquisitions Register.[63] The ACCC will refer to the evidence / other material relied on, but is not required to provide access to its case file or disclose confidential third-party information.[64] The ACCC must issue preliminary assessment on: [65] ○ benefits and detriments to the public; and ○ grounds on which the ACCC makes the assessment (referring to evidence / other material). • **Day 35** (*Response to Public Benefit Assessment and final day to offer remedy*)—Deadline for parties to the proposed acquisition to respond to Public Benefit Assessment (unless it is in response to an ACCC request).[66] If parties to the proposed acquisition offer a remedy by Day 35 (by way of commitments and undertakings), the Public Benefit Phase may be	*information or issues that are material to the ACCC's ongoing assessment are raised after the Public Benefit Assessment is issued".*[76] ○ What new information will be considered material? ○ How are the deadlines set for parties to respond and how can parties be assured that this will be a reasonable period of time for submissions to be made? • Third parties are given the opportunity to respond to the Public Benefit Assessment.[77] Will third parties be given beyond Day 35 to comment on proposed remedies? • If the ACCC has relied on confidential third-party evidence to make a Public Benefit Assessment, which can't be disclosed, how are the notifying parties informed of the grounds on which the assessment is made? • In circumstances where information and submissions in response to a	

[63] Process Guidelines, [8.22].
[64] Process Guidelines, [8.21].
[65] Process Guidelines, [8.20].
[66] Process Guidelines, [8.18].
[76] Process Guidelines, [8.24].
[77] Process Guidelines, [8.25].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	extended by up to 15 business days.[67] • **Day 50** (*Public Benefit Phase concludes*)—Public Benefit Phase concludes after 50 business days, unless the timeline is extended. The ACCC must make a public benefit determination and will provide the determination to the notifying party and publish the determination on the Acquisitions Register.[68] The ACCC may approve an acquisition in the public benefit phase with or without conditions.[69] • **No determination in this Phase**: If the ACCC does not make a determination within the statutory timeline, subject to any timeline extensions, the ACCC is deemed to have not made the public benefit determination applied for—the relevant Phase 1 or Phase 2 determination stands.[70] Steps involved in the Public Benefit Phase include:	Public Benefit Assessment will not be published on the ACCC website, what transparency will there be about any concerns raised by the market? • Can parties meet with the ACCC before Public Benefit Phase concludes (like in the informal process)? • As in Phase 1 and 2, the ACCC may approve a merger with conditions, but the Process Guidelines do not state how any consultation with merger parties on those conditions will occur. Will there be consultation with merger parties on the conditions and if they can practically be implemented? • Public benefit applications can be made where the ACCC has determined that an acquisition can be put into effect subject to conditions in Phase 1 or 2.[78] Are there circumstances where a determination will be made that an acquisition must not be put into effect in this phase	

[67] Process Guidelines, [8.28].
[68] Process Guidelines, [8.31].
[69] Process Guidelines, [8.33].
[70] Process Guidelines, [8.36].
[78] Process Guidelines, [8.2].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	• **Information gathering:** The ACCC will commence a consultation process to inform its assessment of the likely benefits and detriments. The ACCC will consider the information it already has about the likely competition effects of the acquisition, but will focus on testing the claimed public benefits and detriments in this consultation.[71] • ACCC will seek further information and documents as needed—including through voluntary or compulsory requests to the parties to the proposed acquisition or third parties.[72] • **Public Benefit Assessment:** The notifying party will be able to make written or oral submissions in response to the Public Benefit Assessment. An extension can be requested and the ACCC may agree to more than one extension (this extends the phase by the same number of days).[73]	that has previously been approved subject to conditions in Phase 1 or 2? • In what circumstances may the ACCC let the timeline for issuing a Public Benefit Determination lapse, such that no determination is made, allowing its Phase 1 or Phase 2 decision to stand? What happens in a case where there are genuine public benefits? Can the parties raise public benefit arguments in the Tribunal?	

[71] Process Guidelines, [8.16].
[72] Process Guidelines, [8.17].
[73] Process Guidelines, [8.23].

Phase	Tasks within phase	Questions and comments	Hypothetical examples
	A notifying party can request an extension at any time within each phase.[74]		
Application for Tribunal Review (following conclusion of Public Benefit Phase)	• If a notifying party or third party is dissatisfied with an ACCC determination, they may apply to the Tribunal for a review of the ACCC's determination.[79]	• Third parties may apply for Tribunal review of an ACCC decision and potentially delay implementation of a merger, but the ACCC will not be publishing any third-party submissions on its Acquisitions Register. • This means that parties may make submissions that lead to opposition of a merger and a Tribunal review, but there is no opportunity for the merger parties to review those submissions.	N/A

[74] Process Guidelines, [9.9].
[79] Process Guidelines, [8.35].

Annexure B: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 1000 members. It currently has 14 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee

The Section has an Executive Committee of 12 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Dr Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech
- Mr Chris Pearce
- Ms Lisa Huett

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.au.

The Section's website is www.lawcouncil.au/business-law.