

Form S

Commonwealth of Australia

Competition and Consumer Act 2010 — section 95AU

APPLICATION FOR MERGER AUTHORISATION

To the Australian Competition Tribunal:

Application is hereby made under section 95AU of the *Competition and Consumer Act 2010* for an authorisation under subsection 95AT (1) to acquire shares in the capital of a body corporate or to acquire assets of another person.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. The Applicant (the Acquirer)

- (a) Name and registered office (where applicable) of the Applicant including the ACN (where applicable) and place of incorporation (where applicable)

.....

- (b) Describe the business or businesses carried on by the Applicant including the products and services the Applicant supplies

.....

(See Direction 3 of this Form)

- (c) Provide details of all related bodies corporate of the Applicant including the ACN

.....

(See Direction 4 of this Form)

- (d) Address in Australia for service of documents on the Applicant

.....

- (e) Name and address of any person for whose benefit or on whose behalf the shares or assets to be acquired will be held

.....

2. The Target

- (a) In the case of a body corporate whose shares or assets are to be acquired:

- (i) Name of the body corporate including the ACN where applicable

.....

- (ii) Place of incorporation of the body corporate

.....

- (iii) Registered office of the body corporate

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- (iv) Describe the business or businesses carried on by the body corporate including the products and services the Target supplies

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(See Direction 5 of this Form)

- (v) Number and type of shares or description of assets to be acquired

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.....

- (b) In the case of a body corporate whose shares are to be acquired, provide details of:

- (i) the issued capital of the body corporate;

.....

- (ii) the holders of such issued capital.

.....

- (c) Provide details of all related bodies corporate of the body corporate whose shares or assets are to be acquired by the Applicant

.....
(See Direction 4 of this Form)

- (d) In the case of a person (other than a body corporate) whose assets are to be acquired

- (i) Name and address of the person

.....

- (ii) Describe the business or businesses carried on by the person including the products and services the person supplies

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- (iii) Describe the assets to be acquired

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3. The acquisition

- (a) Outline the nature and details of the contract, arrangement, understanding or proposal for the acquisition and, if applicable, the public offer document, and provide a copy of any relevant contract, document or public offer document.

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(See Direction 6 of this Form)

- (b) Provide details of the commercial rationale for the acquisition and copies of all documents that were prepared specifically for the purpose of evaluating the proposed acquisition with respect to the market(s) affected and the nature of those effects

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- (c) Indicate whether the acquisition involves proposed ancillary arrangements and describe the proposed arrangements

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.....

4. Background information

- (a) Describe the industry sector(s) to which the acquisition relates

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(See Direction 7 of this Form)

- (b) Describe the area(s) of overlap in the operations of the Applicant and Target and any related bodies corporate (the merger parties)

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.....

(See Direction 8 of this Form)

- (c) Provide details of any acquisitions made by the merger parties and any other acquisitions made in the industry sector(s) during the past five years

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- (d) Provide details of any existing vertical or horizontal relationships between the merger parties and related bodies corporate

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.....

- (e) Describe any other cooperative agreements to which any of the merger parties is a party

.....
.....

(See Direction 9 of this Form)

5. Market definition

Describe the market(s) (product, functional, geographic and time) relevant to the assessment of the acquisition’s effect on competition – this includes markets for the supply of goods or services and markets for the acquisition of goods or services (the relevant market(s))

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.....

(See Direction 10 of this Form)

6. Suppliers

(a) Describe the inputs into the production of goods or services by each of the merger parties in the relevant market(s) and indicate the value of those inputs as a proportion of total production. Where alternative inputs are available, provide a list of substitutes

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.....

(b) Provide the names and contact details of a representative selection of suppliers of inputs to each of the merger parties in the relevant market(s)

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(See Direction 11 of this Form)

(c) Describe any purchasing arrangements in place with each of the suppliers identified above and outline whether it is expected or anticipated that these arrangements will continue or be varied in any way post-acquisition

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.....

7. Competitors

(a) Provide details of alternative suppliers of products now, or shortly to be, competitive with, or otherwise substitutable for, goods or services produced by each of the merger parties in the relevant market(s)

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.....

- (b) If the suppliers identified above do not produce goods or services which are substantially the same as those goods or services produced by the merger parties in the relevant market(s), explain why it is considered that these goods or services are viable alternatives

.....
.....

8. Customers

- (a) Provide the names and contact details of a representative selection of the customers of each of the Applicant and the Target in the relevant market(s)

.....
(See Direction 12 of this Form)

- (b) Describe the distribution channels available to the merger parties in supplying goods and services to customers and identify the relevant distribution channels in respect of each of the customers identified above

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- (c) Describe the existing supply arrangements that the merger parties have in place with the customers identified above and whether it is expected or anticipated that these arrangements will continue or be varied in any way post-acquisition

.....
(See Direction 13 of this Form)

9. Market concentration

Provide estimates of current and post-acquisition market shares for the merger parties and existing alternative suppliers or purchasers in the relevant market(s) identified above

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.....

(See Direction 14 of this Form)

10. Constraints on the exercise of market power

Provide details of the extent to which the merger parties are likely to be constrained post-acquisition from raising prices and profit margins and/or reducing the quality of good and/or services by:

- (i) suppliers in the relevant market(s)

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- (ii) competitors in the relevant market(s)

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- (iii) customers in the relevant market(s)

.....

- (iv) others

.....
(See Direction 15 of this Form)

11. Imports

- (a) Provide details of the actual and potential level of imports in the relevant market(s) and details of the importers and their suppliers

.....
(See Direction 16 of this Form)

- (b) Describe any barriers to importation in the relevant market(s) including whether significant investment in facilities or in distribution arrangements is needed to facilitate importation

- (c) Describe facilities and distribution arrangements necessary for importation in the relevant market(s), their capacity and who has ownership or control of these facilities and arrangements

- (d) Provide details of the price of imports as opposed to domestic production in the relevant market(s) and explain any divergence in these prices

- (e) Provide details as to the extent of constraint which would be likely to be provided by imports on domestic suppliers including the merger parties in the relevant market(s) post-acquisition

.....
(See Direction 17 of this Form)

12. Exports

- (a) Provide details of the actual and potential level of exports in the relevant market(s)

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(See Direction 18 of this Form)

- (b) Describe the export barriers faced by suppliers of inputs to the merger parties in the relevant market(s)

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.....

- (c) Provide details of the sale price of exports as opposed to domestic sales in the relevant market(s) and explain any divergence in these prices

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.....

- (d) Describe whether the suppliers of inputs to the merger parties are or would be able to export such inputs post-acquisition and, if so, describe the extent of constraint this would be likely to provide on the merger parties post-acquisition

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(See Direction 19 of this Form)

13. Barriers to entry and expansion

- (a) Provide details of any barriers to entry and expansion in the relevant market(s)

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(See Direction 20 of this Form)

- (b) Provide details of any firms not currently producing goods or services in the relevant market(s) but which could enter relevant market(s) quickly and provide an effective competitive constraint

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.....

- (c) Provide details of any firms which have recently tried and failed to enter the relevant market(s), including the reasons (if known) for their failure

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.....

14. Dynamic characteristics

Provide details of the dynamic characteristics of the relevant market(s)

.....
(See Direction 21 of this Form)

15. Vigorous and effective competitor

Indicate whether the Target or any other participant in the relevant market(s) could be described as a vigorous and effective competitor to the Applicant or other market participants to any and to what extent, and why

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.....

(See Direction 22 of this Form)

16. Vertical integration

- (a) Describe whether the acquisition would, or would be likely to, result in increased vertical integration between firms involved at different functional levels in the relevant market(s)

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.....

(See Direction 23 of this Form)

- (b) Describe whether the acquisition would, or would be likely to, increase the risk of limiting the supply of inputs or access to distribution such that downstream or upstream rivals face higher costs post-acquisition or full or partial foreclosure of key inputs or distribution channels

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.....

17. Prices and profit margins

- (a) Provide details of recent and current levels of pricing in the relevant market(s) including the use of rebates and discounts

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- (b) Provide details of supply costs of goods and services supplied by the merger parties including manufacturing, marketing and distribution costs in the relevant market(s)

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.....

- (c) Describe the competitive constraints, if any, which would, or would be likely to, prevent the merger parties from being able to significantly and sustainably increase the prices paid by their customers, or lower the prices paid to their suppliers, post-acquisition in the relevant market(s)

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.....

- (d) Describe the impact of the acquisition on the potential for coordinated conduct between remaining competitors in the relevant market(s) post-acquisition

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.....
(See Direction 24 of this Form)

- (e) Describe the likely impact of the acquisition on the profit margins of the merger parties post-acquisition and the expected cause of any change

.....
.....

18. Related markets

- (a) Describe the extent of complementarity between products supplied by the merger parties

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.....
(See Direction 25 of this Form)

- (b) Describe the extent to which the products identified above are, or could be, offered to customers as a product range through bundling or tying

.....
.....
(See Direction 26 of this Form)

- (c) Describe the competitive constraints that would, or would be likely to, prevent such bundling or tying from significantly foreclosing the ability of the merged entity's competitors to compete, including foreclosure of access to distribution by the merged entity's competitors

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19. Detriment from a lessening of competition

Having regard to the information provided above, and any other relevant information, describe any detriment which would or would be likely to flow from a lessening of competition as a result of the acquisition

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20. Other public detriment

Describe any public detriment likely to result from the proposed acquisition that has not already been described above

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21. Public benefit claims

- (a) Describe any public benefit in the form of increased efficiencies (for example, economies of scale or scope) which would, or would be likely to, result from the acquisition

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- (b) Describe whether the acquisition would, or would be likely to, result in a significant increase in the real value of exports

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- (c) Describe whether the acquisition would, or would be likely to, result in significant substitution of domestic products for imported goods

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- (d) Detail any public benefit claims relating to the international competitiveness of any Australian industry arising from the acquisition

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- (e) Detail any other public benefit claims

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22. The counterfactual

Describe the likely state of the relevant market(s) in the future if the proposed acquisition does not take place, giving reasons

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23. Joint ventures

- (a) Does this application for authorisation deal with a matter relating to a joint venture (see section 4J of the Act)

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- (i) If so, are there any other applications for clearance or authorisation under Part VII of the Act being made simultaneously with this application in relation to the joint venture

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- (ii) If so, describe the nature of the applications and who is making those other applications

.....

24. International

- (a) Does the acquisition involve:
 - (i) A company operating in Australia that has a foreign parent
.....
 - (ii) Australian businesses or consumers affected by conduct occurring overseas
.....
 - (iii) Foreign consumers affected by conduct occurring in Australia
.....
 - (iv) Conduct occurring across international boundaries
.....
- (b) Provide details of competition authorities in jurisdictions other than Australia to which the proposed acquisition has been, or is intended to be, notified and the timing of such notifications
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25. Period of authorisation

Outline the period for which authorisation is sought, detailing reasons why authorisation should be granted for the requested period
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26. Undertaking

Consistent with subsection 95AV (2) of the Act, the Applicant is required, pursuant to the regulations, to give an undertaking to the Commission under section 87B of the Act that the acquisition will not be made while the application for authorisation is being considered by the Tribunal. An undertaking which is in a form that must be offered to the Commission is attached to this Form.

27. Further information

Name, postal address, telephone, facsimile and email contact details of person authorised by the notifying parties to provide additional information in relation to this application
.....

28. Information provided in relation to the Target

Where the Target has been consulted during the preparation of information provided in response to the questions contained in this Form relating to the Target, an authorised representative of the Target must indicate here that information relating to the Target is complete and accurate.

Dated.....

Signed by/on behalf of the Target

.....
(Signature)

.....
(Full Name)

Note If the Target is a corporation, state position occupied in the corporation by person signing. If signed by a solicitor on behalf of the Target, this fact must be stated.

29. Declaration

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

The undersigned are aware of the provisions of section 95AZN of the *Competition and Consumer Act 2010*.

.....
Signature of authorised person Signature of authorised person

.....
Office held Office held

.....
(Print) Name of authorised person (Print) Name of authorised person

This [insert day] day of [insert month] [insert year]

Note If the Applicant is a corporation, state position occupied in the corporation by person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

Competition and Consumer Act 2010

**Undertaking to the Australian Competition and Consumer
Commission given for the purposes of section 87B**

by

[Insert name of company] (ACN [Insert ACN])

1. This undertaking (the Undertaking) is given to the Australian Competition and Consumer Commission (the Commission) by [company name, company ACN] of [company address] under section 87B of the *Competition and Consumer Act 2010* (the *Act*).
2. [Company name] has made an application for authorisation in respect of an acquisition pursuant to section 95AU of the Act.
3. [Company name] hereby undertakes that it will not make the acquisition the subject of the application referred to in paragraph 2 while the application is being considered by the Australian Competition Tribunal.
4. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by [company name]; and
 - (b) the Commission accepts the Undertaking so executed.
5. [Company name] acknowledges that the Commission will make this Undertaking available for public inspection.

EXECUTED BY [Company name and ACN] pursuant to section 127 (1) of the *Corporations Act 2001*.

.....
Signature of Authorised Person

.....
Signature of Authorised Person

.....
Office Held

.....
Office Held

.....
(Print) Name of Authorised Person

.....
(Print) Name of Authorised Person

This [insert day] day of [insert month] [insert year].

**ACCEPTED BY THE COMMISSION PURSUANT TO SECTION 87B OF THE
ACT**

.....
Commission Chairperson

DIRECTIONS

1. Where there is insufficient space on this Form to furnish the required information, the information must be shown on separate sheets, numbered consecutively and signed by, or on behalf of, the Applicant.
2. The facts and contentions set out in the application must be verified by a person able and qualified to give such verification (see relevant practice direction published by the Australian Competition Tribunal).
3. The response must include details of the ownership structure (including a list of shareholders with a greater than five per cent shareholding) and interests of the Applicant. The response must also include a copy of the Applicant's most recent annual report.
4. The following definitions apply in relation questions 1 (c) and 2 (c):

related body corporate means:

 - (a) a holding company of another body corporate; or
 - (b) a subsidiary of another body corporate; or
 - (c) subsidiary of a holding company of another body corporate.

subsidiary, in relation to a body corporate (***first body***) means a first body that is controlled by another body (***other body***), because:

 - (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the first body corporate; or
 - (iii) holds more than one half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
 - (b) the first body is a subsidiary of a subsidiary of the other body.

holding company, in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary.
5. The response must include details of the ownership structure (including a list of shareholders with a greater than five per cent shareholding) and interests of the Target. The response must also include a copy of the Target's most recent annual report.
6. The response must include the date on which the contract, arrangement, understanding or proposal was, or is intended to be, concluded, the date on which the public bid was or is intended to be made, the intended date on which the acquisition will be consummated and the consideration exchanged in relation to the acquisition. Where available, a copy of the contract, arrangement, understanding or proposal between the Applicant and the Target and the public offer document must be provided with this Form.
7. The response must include background information in relation to the industry sector(s), and a description of the role of the Applicant and the Target in the industry sector(s), including a description of the goods or services supplied both in Australia and internationally.

8. Product and geographic areas of overlap must be specified and the response must include the whereabouts of all major production, supply or distribution facilities of the Applicant and the Target.
9. Such agreements may include, but are not limited to, arrangements or alliances relating to distribution, supply, purchasing, joint development, or research and development. The response must include the type of agreement(s), the subject matter, the parties to the agreement(s) and the duration of the agreement(s), and whether the agreement(s) will continue following consummation of the acquisition.
10. In order to determine whether a particular acquisition breaches section 50 of the Act, an assessment of the relevant market(s) is required. Section 4E of the Act provides that:

4E Market

For the purposes of this Act, unless a contrary contention appears, 'market' means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.

The response must address the relevant product, functional, geographic and time dimensions of the market(s). The product dimension of the market must address sources and potential sources of substitutes for the goods or services produced by the merger parties. Both supply and demand side substitutability must be addressed. The functional dimension of the market must address the vertical stages of production and distribution which comprise the relevant arena of competition (for example, wholesale or retail distribution). The geographic dimension of the market must identify the area or areas over which the merger parties and their competitors currently supply or could supply the relevant product(s) and to which customers could practically turn. The time dimension of the market must address the period over which substitution possibilities must be considered.

11. The response must provide details of at least ten suppliers (or all suppliers if there are less than ten), comprised of a cross-section of entities including large, medium and small suppliers. The response must include a description of the goods and services supplied by each of these suppliers and an estimation of the value of the goods or services supplied.

The response must include the location of each of the suppliers identified and the areas to which each of the identified entities supplies.

12. The response must provide details of at least ten customers (or all customers if there are less than ten), comprised of a cross-section of entities including large, medium and small customers. The response must include a description of the goods or services and the value of the goods or services purchased by these customers.
13. The response must describe the duration of contracts, the nature and extent of exclusivity, rebates and discounts and identify any customers with contracts which are due to expire within the next two years and indicate the supply volumes associated with such contracts.
14. The market shares of each of the suppliers or purchasers identified, the Applicant and the Target in the relevant market(s) must be provided. In the case of supply markets, market shares must be given on the basis of productive capacity, sales and revenue

and must be provided for each of the past five years. In the case of acquisition markets, market shares must be given on the basis of volume and value of inputs purchased and, again, must be provided for each of the past five years. The total size of the domestic market must be provided. The source(s) of the data relied upon in estimating market shares and total market sizes must be provided.

15. The response must address the ability of suppliers to switch from supplying inputs to the merger parties to other avenues, the ability of competitors in the relevant market(s) to increase supply, the ease with which customers could change suppliers including any switching costs that they would incur, whether goods and services produced in the relevant market(s) should be considered homogeneous or whether there are variations in price or quality and whether the relevant market(s) are characterised by brand loyalty. The response must also discuss whether the relevant market(s) are characterised by countervailing power, the market participants who are said to have such power and the extent that such power would be likely to constrain the merger parties post-acquisition.
16. The response must cover whether it is viable for customers to import substitutes and the origin of imports, and address issues including but not limited to: options for the transportation of imports (for example, air, sea or rail); transport costs; whether the product is a high or low value product; whether the product is high or low density; and whether the product is durable enough to be transported without damage or deterioration in quality. The response must also give details of historical import levels for the past five years and the source of the information provided. The response must include the outcomes of any anti-dumping investigations concluded in the past five years.
17. The response must provide details of the price of actual or potential imports (including additional costs such as freight and customs duties), whether existing import suppliers can accommodate a significant expansion in capacity without the need for significant investment and whether import competition would provide a constraint on the merged firm via a downstream market. The response must also include contact details of existing importers and their customers.
18. The response must cover whether it is viable for suppliers to export to alternative purchasers and the likely export markets, and address issues including, but not limited to, the following:
 - options for the transportation of exports (for example, air, sea or rail);
 - transport costs;
 - whether the product is a high or low value product;
 - whether the product is high or low density; and
 - whether the product is durable enough to be transported without damage or deterioration in quality.

The response must also give details of historical export levels for the past five years and the source of the information provided.

19. The response must include contact details of existing exporters.
20. (1) The response must include reference to the following:
 - both the nature and height of barriers to entry and expansion;
 - details of exit;
 - entry and expansion in the relevant market(s) in the previous five years;
 - any incentives or disincentives for new entry;

- how long it would take for a new entrant to establish itself as a vigorous and effective competitor.

(2) Barriers which must be addressed include, but are not limited to, the following:

- sunk costs in production capacity;
- accessing shelf space;
- advertising and promotion;
- regulatory restrictions;
- requirements for scarce inputs;
- brand loyalty;
- minimum efficient scales of operation;
- goodwill;
- access to intellectual property; and
- the potential response of incumbents to new entry.

21. The response must include references including, but not limited to, the following:

- growth;
- levels of innovation;
- technological change; and
- product and service differentiation in the relevant market(s).

22. The response must refer to current and historical pricing and purchasing behaviour, its record of innovation, its growth relative to the growth of the relevant market(s), and its history of independent behaviour.

23. The response must indicate the extent to which the Applicant buys from, or sells to, the Target raw materials, supplies, services, capital or finished products for resale.

24. The response must discuss factors conducive to coordination in a market including, but not limited to, the following:

- the number of participants in the relevant market(s);
- transparency;
- homogeneity of product;
- homogeneity of firms;
- the size and frequency of purchases; and
- the presence of the same firms in more than one market.

25. The response must address the complementarity that occurs where there is significant commonality of customers' products and whether the strength of demand for one product is positively correlated with the strength of demand for another, either because the products form part of a range that distributors need to carry or because they must be consumed together for technical reasons.

26. The response must address the circumstances where two or more products are or could be supplied only as a bundle (pure bundling) or, if supplied individually, are also offered as a bundle at a price that is lower than the price charged if sold individually (mixed bundling). The response must also address circumstances where customers seeking to acquire one product are required also to purchase a second product, or carry amounts of the second product (tying).