

# RUNNING A RED LIGHT ON MERGERS

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Most sensible drivers would not accelerate towards a traffic light without first checking to see that it is definitely green.

But some businesses seeking approval for mergers or acquisitions have been doing exactly that recently, causing concern for the ACCC as they speed towards a deal without waiting for the regulator to give them a final green light.

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Companies are not required by law to approach the ACCC when heading towards a merger. But many do as a way of identifying and avoiding potential competition problems and litigation that might follow from going ahead with a deal that breaches the Trade Practices Act.

Approaching the ACCC early in the process provides certainty and transparency for all parties. It shows investors and other interested parties that the companies are serious about ensuring the proposal complies with competition rules.

The main issue the ACCC seeks to test when assessing a complicated merger is whether the deal will substantially lessen competition.

To find that out, the ACCC often goes to the market during its investigations to seek feedback from industry and consumers. This may lead the ACCC to release a statement of issues, outlining competition issues that it may need further comment on.

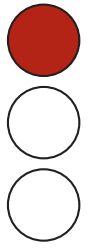
The concerns covered in an ACCC statement of issues can generally be broken up into three broad categories:

**Green-light issues**—those issues that, based on the current information, appear unlikely to lead to a substantial lessening of competition.

**Amber-light issues**—those areas where the ACCC does have concerns, but may be satisfied if it receives extra information indicating those matters will not lead to substantially less competition.

**Red-light issues**—those matters that, based on current information available, could represent a significant threat to competition and as such are likely to breach s. 50 of the Trade Practices Act.





The statement of issues is designed to focus stakeholder and market attention on the Commission's deliberations at the point of time that the statement is issued. Its purpose is to elicit more information for those issues to assist the Commission in coming to an informed position on a proposed merger.

Once further market information is assessed, the colour of those regulatory lights can change dramatically, or may in fact become reinforced. Once the public has had a chance to comment on a proposed merger or acquisition, it is quite possible for those green lights to turn red, or visa versa. However the ACCC avoids nasty surprises by going back to the merger parties and getting their response before issuing its final decision.

The ACCC has had problems with businesses indicating that as a result of their dealings with the ACCC the merger is likely to go ahead, when privately they know the ACCC has some significant unresolved competition concerns.

Making bold predictions to journalists that a merger or acquisition might get the tick of approval from the ACCC can lead to media speculation that misleads investors to buy or sell shares with only limited or even misleading information.

When this happens, the ACCC may be left with no other option than to inform other regulators like the Australian Securities and Investment Commission or the Australian Stock Exchange that the market may have been misled.

The ACCC may also be forced to take action and correct the record when companies choose to selectively disclose details of their confidential discussions with the ACCC.

The ACCC regards confidentiality during its clearance processes as highly important and will respect it in sensitive negotiations, but it will not sit back and let other parties paint half the picture. When companies choose to breach agreements and go public with parts of the information it asked the regulator to keep confidential, the ACCC may be left with little choice other than to put more confidential information on the table to allow the public to fill in the blanks.

Second-guessing the regulator's final decision or using confidentiality to pre-empt a final decision may lead to significant embarrassment for those who go out early and find themselves suddenly stomping on the brakes as they come up against a regulatory red light.