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## **Draft Market Studies Guidelines**

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## Purpose

1. As part of our commitment to increasing the public's understanding of what we do, we have provided these guidelines to help you understand how we carry out market studies.<sup>1</sup>
2. You should read them for information on the following:
  - 2.1 **What** a market study is
  - 2.2 **How** market studies are initiated
  - 2.3 **How** we run our market studies
  - 2.4 **How** we will work with you
  - 2.5 **How** we deal with information gathered

## Scope

3. The Commission is responsible for administering and enforcing the Commerce Act 1986 (Act), the purpose of which is to promote competition in markets for the long-term benefit of consumers within New Zealand.<sup>2</sup>
4. Our vision is to make New Zealanders better off. We believe that New Zealanders are better off when markets work well and consumers and businesses are confident market participants.
5. These guidelines relate to the exercise of our market studies functions under Part 3A of the Act. Part 3A was introduced to the Act by the Commerce Amendment Act 2018. This amendment brought our powers into line with competition agencies in other jurisdictions which already have market studies functions.

## How we apply these guidelines

6. They are general and not exhaustive.
7. They are not a statement of the law and are not intended to have legal effect.
8. They do not provide guidance in respect of any of our other statutory functions arising under the Commerce Act, Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003, Dairy Industry Restructuring Act 2001 or Telecommunications Act 2001 or under any statutory provisions enacted after these guidelines were issued.
9. Much will be learned from the first studies that we undertake, and we expect that our approach will naturally evolve over time. We may therefore revise these guidelines from time to time in accordance with developments in our processes.

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<sup>1</sup> Referred to as Competition Studies in Part 3A of the Commerce Act 1986.

<sup>2</sup> Section 1A.

## Other guidelines and policies

10. These guidelines should be read alongside other related guidelines published by us to assist stakeholders to understand how we operate. These are available at the following link: <https://comcom.govt.nz/about-us/our-policies-and-guidelines>.
11. In particular, our Competition and Consumer Investigation Guidelines provide further information on how we investigate competition and consumer law matters. Specific sections relevant to market studies are the sections on information gathering<sup>3</sup> and how we deal with information.<sup>4</sup> These are available at the following link: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement>.

## What is a market study?

12. A market study, referred to as a “competition study” in Part 3A of the Act, is a study of factors that may affect competition working well for consumers in a market.<sup>5</sup>
13. Unlike an investigation under Part 2 or Part 3 of the Act, which examine the incremental effect of a particular acquisition or conduct on competition in a market, a market study allows us to look more broadly at the effectiveness of competition in a market, whether or not there could be a specific breach of the Act.
14. Competition is defined in section 3 as ‘workable’ or effective competition.
15. The High Court has noted the following points regarding workable competition:<sup>6</sup>

*A workably competitive market is one that provides outcomes that are reasonably close to those found in strongly competitive markets...*

*The degree of rivalry is critical. In a workably competitive market no firm has significant market power and consequently prices are not too much or for too long significantly above costs...*

*In our view, what matters is that workably competitive markets have a tendency towards generating certain outcomes.*
16. When markets work well, firms compete by providing customers with competitively priced offerings and high quality products and services, or using their strengths, skills and other advantages to meet customers’ needs more effectively than their rivals. In a competitive market, firms are incentivised to innovate. A competitive market usually provides customers, whether intermediate firms and/or end consumers with increased choice.
17. In a competitive market, customers usually have ready access to the information they need to make well-informed purchasing decisions, and the ability to easily

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<sup>3</sup> Pages 16-24.

<sup>4</sup> Pages 30-34.

<sup>5</sup> Section 48.

<sup>6</sup> *Wellington International Airport Ltd and others v Commerce Commission* [2013] NZHC 3289 (11 December 2013), para 14-15, and 18. See also more generally the discussion at [6] to [28].

switch between rival suppliers. However, even then customer behaviour may limit the effectiveness of competition in a market.

18. Markets that are not working well can result in negative effects for consumers, businesses and the New Zealand economy. These negative effects can include higher prices, lower quality, reduced output, reduced efficiency and/or less innovation. In some cases, firms with buyer power may also be able to reduce choice, prices and/or output below efficient levels. This may not be in the long-term interest of consumers.<sup>7</sup>
19. Market studies allow us to examine whether markets are working well for consumers and how they could work better. We do this by investigating the features of the market, including regulatory and competition features and patterns of consumer and supplier behaviour.
20. Examples of features that could affect competition include:
  - 20.1 market concentration;
  - 20.2 conditions for entry and exit;
  - 20.3 cost structures;
  - 20.4 degree of differentiation in products or offerings;
  - 20.5 availability of substitutes;
  - 20.6 search and switching costs;
  - 20.7 applicable laws and regulation;
  - 20.8 market growth and technological development;
  - 20.9 consumer and business behaviour; and
  - 20.10 access to information.
21. By gathering and analysing information on markets we can identify whether there are features preventing markets from working well. We can then look at the effects of features identified and consider how they can best be addressed using proportionate means.
22. Outcomes of our work may range from a 'clean bill of health' for the sector to recommendations to enhance market performance. Recommendations may include, without limitation:<sup>8</sup>

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<sup>7</sup> For further discussion on buyer market power, see chapter four of our Mergers and acquisitions Guidelines. These are available at the following link: <https://comcom.govt.nz/business/merging-or-acquiring-a-company>.

<sup>8</sup> Section 51B.

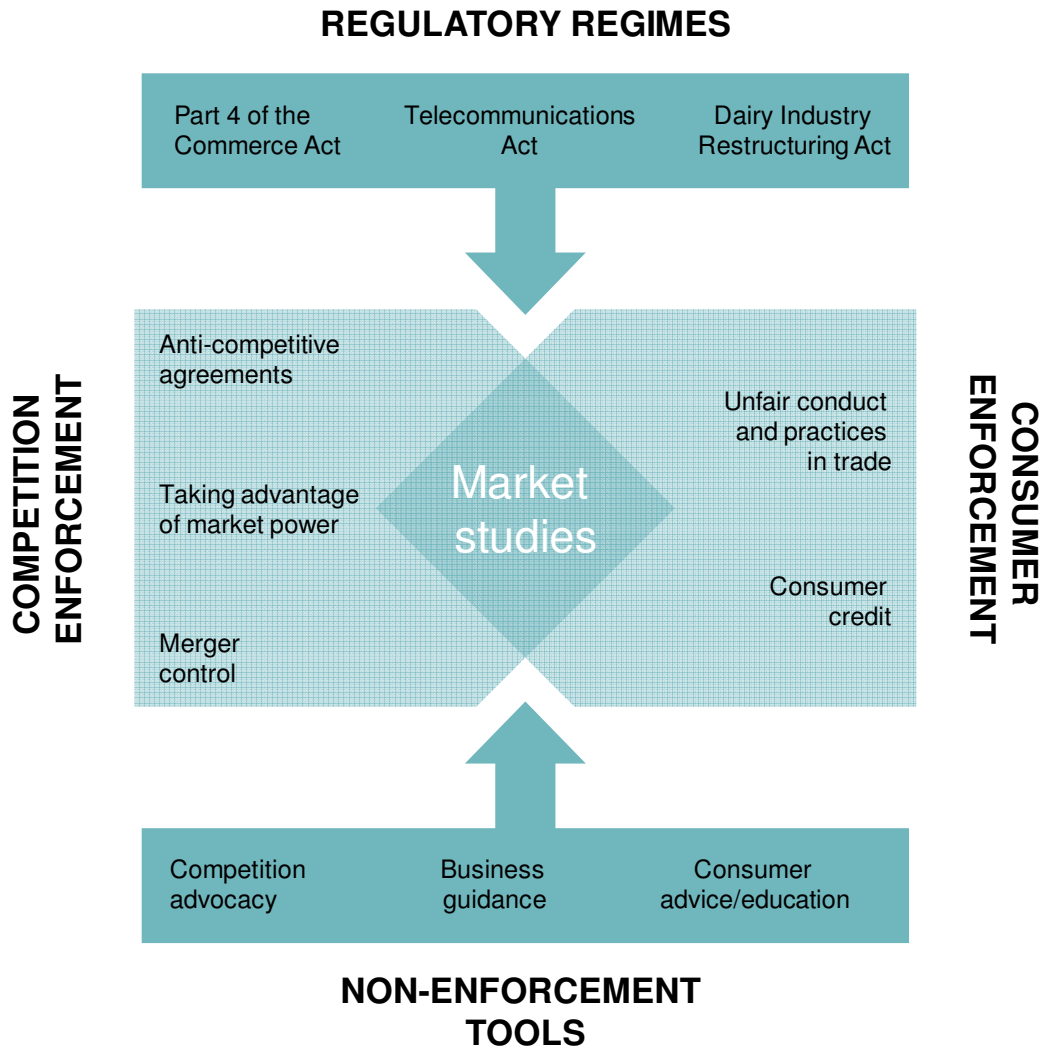
- 22.1 changes to the law or policies or practices of central or local government;
  - 22.2 changes to policies or practices of a person or organisation responsible for the oversight or regulation of a specific industry;
  - 22.3 changes to the behaviour of persons within the industry;
  - 22.4 changes to the amount or type of information made available by people or organisations in relation to an industry; or
  - 22.5 further research or monitoring of specified matters related to the industry.
23. We may also carry out further work using our other tools and functions, including:
- 23.1 commencing an investigation into particular conduct that may breach statutes we enforce;
  - 23.2 understanding and/or engagement in a particular market; or
  - 23.3 considering issues relevant to our economic regulation tools.
24. Market studies sit alongside and complement enforcement tools available to us under the Act by allowing us to investigate a market where there are indications that features of the market may not be working as competitively as they could be. This includes markets where anti-competitive conduct by a firm or firms may or may not have occurred.
25. Market studies also complement our advocacy functions by enabling us to publish information and engage with market participants to help inform suppliers and customers, encourage public debate and understanding.<sup>9</sup>
26. Finally, market studies complement our regulation work by allowing us to examine the effect of existing regulation in a market, or to examine markets not currently subject to regulation and in either case to recommend changes to remedy any problems which may exist.
27. Market studies sit alongside our powers under section 9A of the Telecommunications Act 2001 and Part 4 of the Act. Under section 9A of the Telecommunications Act 2001 we may conduct inquiries, reviews, and studies (including international benchmarking) into any matter relating to the telecommunications industry or for the long-term benefit of end-users of telecommunications services within New Zealand. Under Part 4 of the Act, we have powers to conduct a Part 4 Commission inquiry. In conducting an inquiry into particular goods and services under this section of the Act, the Commission must consider whether those goods or services may and should be regulated under Part 4 of the Act and how they should be regulated.

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<sup>9</sup> Section 25. In addition, under s6(b) of the Fair Trading Act 1986 we also have the power to undertake studies and publish reports and information regarding matters affecting the interests of consumers.

28. **Figure 1** below illustrates the relationship between market studies and our other tools.

**Figure 1: Market studies and the Commission's toolbox**



### How market studies are initiated

29. The Minister of Commerce and Consumer Affairs (the Minister)<sup>10</sup> or the Commission can initiate a market study by publishing a notice about it in the *Gazette*.<sup>11</sup> This notice must:
- 29.1 prescribe the **terms of reference** for the market study; and
  - 29.2 specify the **date** by which we must make our final report for the study publicly available.<sup>12</sup>

<sup>10</sup> The Minister currently responsible for administering the Commerce Act 1986, as specified in Section 2.

<sup>11</sup> Section 50(1) and Section 51(1).

30. Once the terms of reference have been publicly notified, we must:<sup>13</sup>
- 30.1 carry out the study in accordance with those terms; and
  - 30.2 may exercise our discretion in relation to any **ancillary matters** that are related to, but not explicitly covered by, the terms of reference.

### **Public interest**

31. Market studies can only be initiated when we or the Minister consider it to be in the public interest to do so.<sup>14</sup>
32. 'Public interest' is not defined by the Act, but the purpose of the Act is to promote competition in markets for the long-term benefit of consumers.<sup>15</sup> When initiating a study ourselves under the Act some factors relevant to whether a study may be in the public interest are likely to include:
- 32.1 whether there are indications that the market may not be working as competitively as it could be;
  - 32.2 whether the particular conduct of concern can be considered under another part of the Act or another statute; and
  - 32.3 whether we are best placed to carry out the study.

### **Terms of reference**

33. The terms of reference set out the matters we must analyse and report on, and the timeframe for doing so.
34. The terms of reference for a market study must:<sup>16</sup>
- 34.1 specify the goods or services (or both) to which the market study relates; and
  - 34.2 describe the scope of the study.
35. They may explicitly identify other goods and services that, although not goods or services to which the study relates, are likely to affect competition for those goods and services.<sup>17</sup>
36. The Minister may additionally require us to consult departments, organisations, persons or classes of persons.<sup>18</sup> This enables the Minister to ensure that views or

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<sup>12</sup> Section 50(2) and Section 51(2).

<sup>13</sup> Section 51A(4).

<sup>14</sup> Section 50(1) and Section 51(1).

<sup>15</sup> Reflecting the Act's purpose as stated in section 1A.

<sup>16</sup> Section 51A.

<sup>17</sup> Section 51A(1)(a).

<sup>18</sup> Section 51A(2). The Commission may, where initiating a study, similarly prescribe persons to be consulted: section 51A(3).



information are obtained from certain sources that he or she considers are likely to be relevant.

37. When we are carrying out a study on our own initiative, we may also name departments, organisations, persons or classes of persons we intend to consult with in the terms of reference.<sup>19</sup> Doing this would not limit the sources of information or extent of consultation.
38. The terms of reference are not required to contain content as to the process to be followed, but may do so. To the extent that they do not include any explicit prescriptions or limitations, we may exercise discretion as to the process we follow.

### **Ancillary terms**

39. We may exercise our discretion in relation to any ancillary matters that are related to, but not explicitly covered by, the terms of reference.<sup>20</sup>
40. The Act does not define matters “ancillary” to the terms of reference.
41. We regard this discretion as extending our study to cover any matter that we consider is necessary to properly respond to the terms of reference. An “ancillary matter” will therefore be one which is connected in some material way to matters that fall within the express terms of reference. For example, where the terms omit reference to a market feature or dimension that it is necessary to consider in making findings and framing recommendations about competitive conditions in a market, we may exercise our discretion to analyse that feature or dimension.
42. We consider that exercising our discretion in relation to ancillary matters involves deciding whether and how to deal with such a matter in the context of the study.
43. Where an ancillary matter arises we may choose to:
  - 43.1 seek to amend the terms of reference;<sup>21</sup> or
  - 43.2 analyse and report on the ancillary matter within the original terms of reference.

### **Study timeframe**

44. The Act does not establish a statutory timeframe for completion of a market study, so the duration of each study may differ. The date by which we will make our final report publicly available must be stated in the *Gazette* notice.<sup>22</sup>
45. The scale of the inquiries we make and analysis we undertake will be determined according to the timeframe of the study.

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<sup>19</sup> Section 51A(3).

<sup>20</sup> Section 51A(4).

<sup>21</sup> Section 51(5) for a Minister-initiated study; where we initiate a study, we may simply amend the Terms: section 50(4).

<sup>22</sup> Sections 50(2)(b) and 51(2)(b).

46. While the time taken to conclude a market study depends on several factors, including the complexity of the study and the number of parties involved, a key factor is the timely provision of information to us.

#### **Amendment or revocation**

47. The *Gazette* notice initiating the study and prescribing the terms of reference for the study may be amended or revoked, where it is in the public interest to do so.<sup>23</sup>
48. Where the Minister amends or revokes the notice, he or she must first consult with us.<sup>24</sup> We are not required to consult before amending or revoking a notice by which we initiated a study, but may choose to do so.
49. Amendment or revocation occurs by placing a further notice in the *Gazette*, and making it publicly available.
50. Amendments can be made to prescribed terms of reference and the date on which the final report is due.<sup>25</sup> The market study comes to an end if the notice is revoked. In these circumstances we would not take any further steps in the study or issue a competition report.<sup>26</sup>
51. Neither we nor the Minister are required to provide reasons for amending or revoking the notice, but may choose to do so.

#### **How we run our market studies**

52. We are committed to providing transparency on our processes so that you can contribute effectively to our studies.
53. We recognise that each market study will differ in subject matter, stakeholders, analysis and recommendations. Nonetheless, we aim to run each market study using a broadly consistent approach, while applying flexibility relevant to the needs of the particular study.
54. **Figure 2 below** summarises our market studies process.

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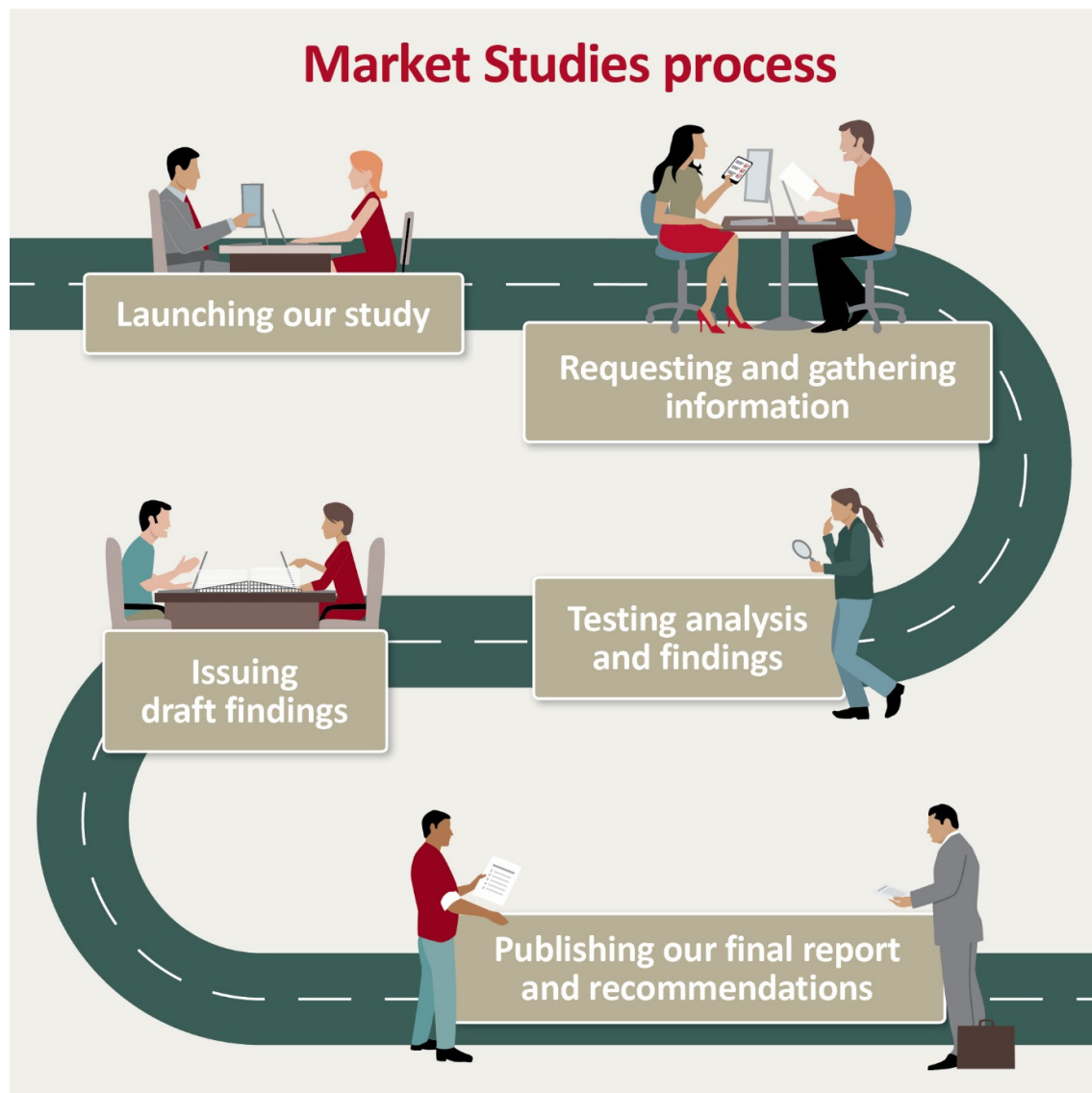
<sup>23</sup> Section 51(5) and (6) (Minister-initiated study); sections 50(4) and (5) (Commission-initiated study).

<sup>24</sup> Sections 51(5) and (6).

<sup>25</sup> Sections 50(4) and 51(5).

<sup>26</sup> Section 48, a report prepared under section 51B which records the Commission's findings from the competition (or market) study.

Figure 2: Market studies process



### Launching our study

55. Market studies are likely to involve matters of significant public interest.
56. To launch a market study and signal publication of the *Gazette* notice we will usually issue a media release.
57. Shortly after this we will publish a process statement for each study we carry out. Information we will look to include in this update is as follows:
  - 57.1 likely processes to be followed; and
  - 57.2 how interested parties can contact us.

58. We will also issue a statement describing likely key issues and avenues of inquiry for the study. We may issue this statement at the time we launch our study or soon afterward.
59. We will maintain a website page for each market study we conduct. This page will typically be our primary communication tool for publishing information relevant to the study, and is likely to include:
  - 59.1 the terms of reference;
  - 59.2 timetable and key dates;
  - 59.3 papers issued by us, including our draft and final competition reports;
  - 59.4 key submissions received by us during the study; and
  - 59.5 contact details for our study.
60. Where appropriate, we will also make use of email and other online channels to communicate with parties. In doing so, we will aim to provide access to process updates to provide reasonable opportunity for stakeholders to participate in our study.

#### **Requesting and gathering information**

61. We have previously provided guidance on how we gather information in the 'Information gathering' section of our Competition and Consumer Investigation Guidelines.<sup>27</sup> These are available on our website at the following link: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement>.
62. In the early phases of the study we gather detailed information about the sector involved. This requires us to source the qualitative and quantitative information required to complete our study from businesses, consumers and organisations in a number of ways.
63. Information may be requested through voluntary or compulsory information requests. We may also look to collect information in other ways, including through questionnaires, surveys, holding meetings and focus groups or hearings.
64. We may make multiple requests for information during a market study. We are likely to request information from the main parties at the outset. As the study progresses, further information may be sought from those parties and from others. Early discussions may be useful for focusing information requests and identifying the most streamlined ways to collect information.
65. All suppliers and acquirers of the goods or services being studied are potentially parties to a study. However, the degree of our engagement with each stakeholder

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<sup>27</sup> Pages 16-24.

will vary, particularly where there are substantial numbers of parties in a market. We may need more information and evidence from some parties than from others.

- 66. In order for us to carry out a market study effectively and efficiently, we will also closely manage data collected to facilitate our analysis. As such, we may request data in a specified format.
- 67. We aim to be fair and reasonable with our requests for information and the deadlines we set for parties to respond to our requests. In doing so, we will aim to adopt a flexible approach and tailor the form of our engagement to individual circumstances. We will use our statutory powers where necessary or desirable to collect information that is relevant to our study.

*Duty to provide truthful, accurate and complete information*

- 68. Regardless of how you provide information to us – compulsorily or voluntarily in response to an information request or in an interview – you have a legal duty to ensure that it is complete, truthful, and accurate.
- 69. It is a criminal offence to attempt to knowingly mislead or deceive us,<sup>28</sup> for example by supplying information to us knowing it to be false or misleading or by colluding with other people to provide misleading or false answers to our requests or questions.
- 70. You should use your best efforts to ensure that the information you provide to us is accurate, truthful and complete.

*More details on our policies and guidelines in this area*

- 71. Further information on how we gather information is available in the ‘Information gathering’ section of our Competition and Consumer Investigation Guidelines.<sup>29</sup> These are available on our website at the following link:  
<https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement>.

**Testing analysis and findings**

- 72. We analyse information we collect to identify whether features of the market are impeding competition, and to consider how these features can best be addressed using proportionate means.
- 73. We will aim to test our analysis and recommendations with relevant parties to assist our identification of the scale and scope of competition impediments and effects of recommendations.
- 74. Depending on the needs of the study, we may test information in various ways with parties at other points in our process and may choose to:

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<sup>28</sup> Section 103(2).

<sup>29</sup> Pages 16-24.

- 74.1 release working paper(s) prior to publishing a draft competition report (whether publicly or to groups of parties);
  - 74.2 convene in-person workshops, hearings, conferences or other discussions which are open to the public or only to selected interested parties; or
  - 74.3 share data with relevant parties in various ways including through electronic data rooms.
75. This engagement is aimed at ensuring our processes and recommendations are as transparent as possible and that the reasons for our recommendations are understood. These processes also provide us with the ability to increase our understanding of sectors being studied and test our analysis and recommendations to ensure that they are fit for purpose.

### **Issuing the draft report**

76. We are required to make a draft competition report publicly available for comment and to allow a reasonable time for comments on it.<sup>30</sup>

### **Publishing our final report**

77. To conclude our study, we will produce a final competition report. This will set out our findings on issues analysed, provide information on any recommendations we have identified and further information to enable you to understand the reasons for our findings.
78. We are required to make this report available to the Minister and, at least five working days later, to make it publicly available.<sup>31</sup>
79. In order to achieve this, we will publish our report on our website.
80. The Minister must respond to the final report within a reasonable time after it is made publicly available.<sup>32</sup>

### **How we deal with information**

81. It is important that parties have confidence in the way that information will be treated.
82. We are committed to dealing with all information responsibly. This means that we will:
- 82.1 use information as allowed by law; and
  - 82.2 take steps to ensure that we appropriately protect private, confidential or commercially sensitive information against disclosure.

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<sup>30</sup> Section 51C(1).

<sup>31</sup> Section 51D(1).

<sup>32</sup> Section 51E.

83. In doing so, we are required to balance your rights and expectations as to the confidentiality of information you supply us against:
- 83.1 the need for us to effectively and efficiently complete a market study within the terms of reference; and
  - 83.2 our legal obligations under the Official Information Act 1982 (OIA), in particular the principle of availability of information.<sup>33</sup>
84. We set out more detail on the following in Attachment A:
- 84.1 **how** we use information collected;
  - 84.2 **how** we share information with other agencies;
  - 84.3 **how** we protect confidential information;
  - 84.4 **how** we respond to Official Information Act requests; and
  - 84.5 **how** we use confidentiality orders under the Act.
85. If you would like to find more information on these topics, please refer to the 'How we deal with information' section in our Competition and Consumer Investigation Guidelines.<sup>34</sup> These are available on our website at the following address:  
<https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement>.

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<sup>33</sup> See section 5 OIA.

<sup>34</sup> Pages 30-34.

## Attachment A

### How we use information collected

1. We use the information we collect for the purposes of completing the market study for which it was obtained.
2. However, where information disclosed to us gives rise to concerns that one of the other laws we enforce has been breached, we can use information sought by us or given to us for a market study for our other statutory functions, including enforcement actions and court proceedings.
3. In such a situation, we can share the information within the Commission, on the same terms as it was collected in the market study.
4. Where any issue arises as to the use we may make of the information, we have the statutory power to compel provision of the same information for use in discharging another one of our functions.

### How we share information with other agencies

5. Where we gather information that raises concerns under a law that another agency enforces, we may advise that agency in general terms of our concern and possible sources of information for its own enquiry. Other than in specific situations, we do not share evidence with other New Zealand or overseas law enforcement or government departments or entities.<sup>35</sup>

### How we protect confidential information

6. We recognise the need to ensure that parties can have confidence in our use and retention of information, including our commitment to respecting as far as possible any privacy, confidentiality, or commercial sensitivity attaching to the information.
7. Much of the information that we receive in the course of carrying out a market study (whether provided voluntarily or compulsorily) is likely to be information that is not otherwise in the public domain. Common kinds of confidential or sensitive information include:
  - 7.1 information that if released would prejudice the commercial or privacy interests of the supplier or the subject of the information;
  - 7.2 competitively sensitive information, the release of which could facilitate a lessening of competition in a market;

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<sup>35</sup> Our Competition and Consumer Investigation Guidelines provide further information on these specific situations from page 33. These guidelines are available at the following link:  
<https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement>.



- market-sensitive information, the release of which could influence trading in listed entities;
- 7.3 source-sensitive information, such as insider or whistle-blower information where it may be important that the source's identity is protected; or
  - 7.4 information which, if released, would prejudice the supply of information to the Commission.
8. There are a number of ways that we may respond to a confidentiality claim over information:
- 8.1 We may consult with the provider of the information before we reach a decision. We may ask that they reconsider part or all of the confidentiality claimed.
  - 8.2 We may request that 'public' copies of documents or information are provided, with sensitive material redacted for Commission use only.
  - 8.3 We may request, or prepare, a summary of the documents or information that enables testing of it to occur without releasing sensitive material.
  - 8.4 We may agree only to share confidential information within a small, restricted circle of recipients and on terms that impede wider disclosure. For example, in some cases we may obtain confidentiality undertakings from the lawyers for certain parties, and those lawyers will be able to view this information but their client will not.
9. Where you provide us with information that you consider is confidential or commercially sensitive, you should clearly assert that qualification when (or before) you provide the information to us.
10. We will not always accept at face value your assertion that information is confidential or commercially sensitive, and we may test this with you as the provider of the information.
11. We are unlikely to accept 'blanket' claims of confidentiality over a suite of information. We may ask parties to provide further reasons about why information requires protection against release.
12. Where we want to test one stakeholder's information with another person, we will consider any assertions of confidentiality before we make a decision about disclosing the information. We may consult with the supplier of the information before we reach a decision. We will also consider whether we can satisfactorily test the information during the study by asking questions based on the confidential information, but without disclosing the information itself.
13. We will not disclose any information we consider to be confidential or commercially sensitive in a media statement, public report, or in response to a request, unless

there is a countervailing public interest in doing so in a particular case. Such cases are likely to be rare.

### **How we respond to Official Information Act requests**

14. The OIA provides the framework for disclosure of the information that we hold. Under the OIA all information is to be made available unless good reasons exist to withhold it. This is known as the principle of availability.
15. We do not need to receive an OIA request for information in order for the principle of availability to apply. We can release information that in our assessment should be made publicly available.
16. There are a number of reasons that we may withhold information from disclosure in response to an OIA request. In some cases the existence of particular facts is a conclusive reason to withhold the information. These include, most relevantly, where:
  - 16.1 release would prejudice the maintenance of the law; and<sup>36</sup>
  - 16.2 release would be in contempt of court.<sup>37</sup>
17. In other cases we must undertake a balancing exercise. This includes, most relevantly, where:
  - 17.1 release would unreasonably prejudice the commercial position of the supplier or subject of the information;<sup>38</sup>
  - 17.2 withholding the information is necessary to protect the privacy of natural persons; and<sup>39</sup>
  - 17.3 we received the information under an obligation of confidence, and if we were to make that information available it would:
    - 17.3.1 prejudice the supply of similar information to us (by any person) where it is in the public interest that such information continues to be supplied to us; or<sup>40</sup>
    - 17.3.2 be likely otherwise to damage the public interest;<sup>41</sup> and
  - 17.4 the information is the subject of legal professional privilege.<sup>42</sup>

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<sup>36</sup> Section 6(c) Official Information Act 1982.

<sup>37</sup> Section 100 Official Information Act 1982.

<sup>38</sup> Section 9(2)(b)(ii) Official Information Act 1982.

<sup>39</sup> Section 9(2)(a) Official Information Act 1982.

<sup>40</sup> Section 9(2)(ba)(i) Official Information Act 1982.

<sup>41</sup> Section 9(2)(ba)(ii) Official Information Act 1982.

<sup>42</sup> Section 9(2)(h) Official Information Act 1982.

18. If we consider that any of these potential reasons for withholding apply, we must still consider the public interest in release.<sup>43</sup> As the principle of availability applies, the information may only be withheld if the potential harm from releasing it is greater than the public interest in disclosure. This ‘balancing exercise’ means that in some cases information can be released where nonetheless there is some possible harmful effect that might appear to justify withholding it.

### Confidentiality orders under the Act

19. We have the power to issue confidentiality orders under section 100 of the Commerce Act where we consider it necessary to do so for the purpose of our market study.
20. These orders protect specific information or documents from being published, communicated, or given in evidence as follows:

**100(1) [Confidentiality order]** Subject to subsection (2) the Commission may... in the course of carrying out any other investigation or inquiry under this Act, make an order prohibiting –

(a) The publication or communication of any information or document or evidence which is furnished or given or tendered to, or obtained by, the Commission in connection with the operations of the Commission:

(b) The giving of any evidence involving any such information, document, or evidence.

**(2) [Period of effect]** Any order made by the Commission under subsection (1) may be expressed to have effect for such period as is specified in the order, but no such order shall have effect –

...

(b) where that order was made in connection with any other investigation or inquiry conducted by the Commission, after the conclusion of that investigation or inquiry.

**(3) [Expiry of order]** On the expiry of any order made under subsection (1), the provisions of the Official Information Act 1982 shall apply in respect of the information, document or evidence that was the subject of that order.

21. Section 100 orders can be made over any information, document or evidence which is given to or obtained by the Commission. This includes the questions that we ask or information that we convey, whether in writing or orally, as well as the answers, information, and documents that are supplied to us.<sup>44</sup>
22. It is a criminal offence to breach a confidentiality order, punishable by a fine of up to \$4,000 for an individual and \$12,000 for a company.<sup>45</sup>

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<sup>43</sup> Section 9(1) Official Information Act 1982.

<sup>44</sup> *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.) at [89] to [92].

<sup>45</sup> Section 100(4) Commerce Act 1986.

23. Where a confidentiality order is made, we will assess throughout our study whether the order remains necessary, and will rescind any extant order that is no longer needed.<sup>46</sup>

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<sup>46</sup> Orders under section 100 are in effect for the period specified in the order, but expire at the end of the investigation (section 100(2)(b) Commerce Act 1986). *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal).