

Commerce Act 1986: Clearance relating to cartel provisions

Notice seeking clearance

To apply for clearance you must send both a confidential and a public version of your notice seeking clearance (“application”) to either registrar@comcom.govt.nz, or The Registrar, Competition Branch, Commerce Commission, PO Box 2351, Wellington, New Zealand.

Your application must be provided in both Microsoft Word format and searchable PDF format and include a signed (hard-copy or electronic) declaration.

You must also pay the filing fee of NZ\$3,680 (including GST). You can pay by proof of electronic payment to:

- Commerce Commission
- BNZ North End
- Account number: 02-0536-0329867-000
- Reference: Name(s) of firm(s) applying for clearance



Help in completing your application

You should consult the *Competitor Collaboration Guidelines* at www.comcom.govt.nz when completing your application.

Your application for clearance will be assessed more efficiently and effectively if the information and evidence you provide in your application is comprehensive. The level of detail and the type of information required in an application will differ depending on the nature and complexity of the agreement.¹

Before submitting a clearance application, we strongly encourage you to contact the Trade Practices Manager to schedule a pre-notification discussion.² As discussed in the *Competitor Collaboration Guidelines*, pre-notification discussions can help clarify what information and evidence we are likely to need in your application. To get the most out of these pre-notification discussions, we expect an applicant to provide us with a substantially developed draft clearance application (including documents) at least a week before meeting with us.

Warning

It is an offence to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission. Any person who does so is liable upon summary conviction to a fine of up to **\$100,000** (for an individual) or **\$300,000** (for a body corporate). Refer to sections 103(2) and (4) of the Commerce Act.

1. We use the term “agreement” to refer to any contracts, arrangements or understandings in terms of s 30 of the Commerce Act 1986 (the Act). See pages 9-15 of our *Competitor Collaboration Guidelines* for further information.
2. The Trade Practices Manager can be contacted at registrar@comcom.govt.nz.

Required information

We give less weight to a statement or submission that cannot be supported with corroborating evidence. As such, any evidence in support of your application should be submitted with your application. If your application includes calculations or analysis, please explain the methodologies and information sources used, and provide us with copies of the underlying data (preferably in Excel).

Where possible, please provide documents that exist in electronic form in their native or original electronic format (eg, Outlook (.pst or .msg), Microsoft Word (.doc or .docx), Microsoft PowerPoint (.ppt), Microsoft Excel (.xls), etc). Documents that exist only in hard copy should be provided as scanned images. This assists us in quickly and accurately identifying the information relevant to our investigation.

Clearance sought

- 1 Provide the name(s) of the applicant(s) for clearance, and the name(s) of the individual(s) responsible for the application. In addition, please include the:
 - 1.1 postal address, physical address, telephone number and web address of the applicant(s)
 - 1.2 email address, telephone number and position of the contact person(s)
 - 1.3 names of any relevant related entities (showing shareholdings).
- 2 Provide the name(s) of all other parties to the agreement and provide the:
 - 2.1 postal address, physical address, telephone number and web address of each party
 - 2.2 name, email address, telephone number and position of the contact person(s) for each party.
- 3 For each party to the agreement, please provide an organisational chart or diagram that shows the structure of ownership and control of the business or organisation. If relevant, identify and explain any other links, formal or informal, between the parties.
- 4 Please provide a copy of the proposed agreement for which you are seeking clearance. If the agreement has not been drafted or is unable to be provided, please provide a clear and detailed description of the agreement.³ Please also set out:
 - 4.1 when the parties intend to enter into, or give effect to, the agreement
 - 4.2 the key terms of the agreement and how these will be implemented by the parties
 - 4.3 the rationale for the agreement
 - 4.4 the likely relevant scenario(s) if the agreement does not go ahead.
- 5 Identify all cartel provisions within the agreement for which you are seeking clearance. For each cartel provision:
 - 5.1 outline the nature of the provision
 - 5.2 the type of cartel provision that you consider applies (ie, price fixing, market allocation, output restriction)
 - 5.3 the scope (for example, time and geography) of the cartel provision
 - 5.4 the nature of the goods and/or services the cartel provision applies to.



3. It is often helpful for applicants to provide a diagram setting out an overview of the agreement, the parties involved, the relevant parts of the supply chain and the effect of the agreement.

The collaborative activity

- 6 Describe the collaborative activity that the parties to the agreements are involved in having regard to the Competitor Collaboration Guidelines, including:
 - 6.1 the parties to the collaborative activity, including any parties that are a party to the collaborative activity but not a party to the agreement that clearance is being sought for, as well as the details outlined at question 2 for these parties
 - 6.2 the enterprise, venture or other activity in trade carried on in cooperation by the parties (this could include a diagram showing each party's role in the claimed collaborative activity)
 - 6.3 the purpose(s) for which the parties are carrying on the collaborative activity.
- 7 Explain the relationship between the agreement containing the cartel provision(s) and the collaborative activity. For example, is the agreement containing the cartel provision(s) the same agreement which gives rise to the collaboration, or is the agreement a part of a broader collaboration already in existence between the parties?
- 8 Identify and explain any other links between the parties to the claimed collaborative activity, including interconnected bodies corporate.

Cartel provisions reasonably necessary

- 9 For each cartel provision, explain why the cartel provision is reasonably necessary for the purpose of the collaborative activity. For example, explain the purpose of the cartel provision for the collaborative activity, what alternatives are available to the parties to the collaborative activity and why were they rejected?

Assessment of whether the agreement is likely to substantially lessen competition

- 10 Describe the goods and/or services⁴ that are relevant to the agreement for which you are seeking clearance, and provide the following for each:
 - 10.1 the parties' view on the appropriate market definition for the goods or services that the agreement relates to⁵
 - 10.2 where applicable, the names and contact details⁶ for each party's key customers and/or suppliers (as applicable)⁷ relevant to the agreement, including at least the top five by value in terms of revenue or spend (please include these figures)
 - 10.3 where applicable, the names and contact details for each party's main competitors in each market identified above that are not party to the agreement
 - 10.4 the names and contact details for any other relevant market participants or interested parties.
- 11 Explain why you consider that the agreement is unlikely to result in a substantial lessening of competition in any market having regard to the *Mergers and Acquisitions Guidelines*. Where applicable, you should address:
 - 11.1 how firms compete in the relevant markets, including how the parties seek or intend to acquire and retain customers,⁸ how sales are made and the key dimensions of competition such as price, quality or innovation
 - 11.2 the current participants in each market identified above that are not party to the agreement, including approximate market shares (explaining how these have been calculated), and the extent to which these competitors will constrain the parties

4. 'Relevant' goods or services can be overlapping goods or services supplied by each of the firms in the same geographic area and which could be considered substitutes for one another, goods or services that form part of the same supply chain (for example, with one good being an input for another good), or different goods or services that are complementary or sold to the same customers.

5. See Chapter 3 of the *Mergers and Acquisitions Guidelines* for more details on why and how we define a market.

6. Contact details should include a named contact person, an email address, telephone number and the position of the contact person(s) within the firm.

7. For agreements that could restrict competition between competing sellers, please provide customer details. If the proposed agreement is between competing buyers, please provide supplier details.

8. If the proposed agreement is between competing buyers rather than sellers, describe the typical procurement strategies of the parties.

- 11.3 the likelihood, extent and timeliness of entry and expansion by potential competitors (including conditions of entry and expansion) and the extent to which such entry or expansion will constrain the parties
- 11.4 the countervailing power of customers and the extent to which that countervailing power will constrain the parties
- 11.5 any other relevant factors.

Documents⁹

- 12 Provide copies of any documents (including planning documents, due diligence reports, strategy documents, minutes of meetings, customer research, pricing studies, reports, presentations, surveys, analyses, industry/market reports and recommendations) in the applicant's possession which:
 - 12.1 have been prepared for, seen or considered by senior management and/or any member of the board of directors (or equivalent body) whether prepared internally or by external consultants, and
 - 12.2 either:
 - 12.2.1 set out the rationale for the agreement and the rationale for the inclusion of the cartel provision
 - 12.2.2 assess or analyse the agreement with respect to competitive conditions, competitors (actual and potential), market conditions, market shares or
 - 12.2.3 within the last 2 years, set out the competitive conditions, market conditions, market shares, competitors, or the applicant's business plans in relation to the relevant good(s) or service(s) as identified in response to question 10 above.

Confidentiality

- 13 If you wish to request confidentiality for specific information contained in or attached to the application, a schedule must be provided which sets out the reasons for each request, preferably with reference to the Official Information Act 1982.¹⁰
- 14 Provide two copies of the application. One copy must be a confidential version and the other a public version both in Microsoft Word format and in searchable PDF format.
 - 14.1 In the confidential version of the application any information for which confidentiality is sought must be highlighted in bold and contained in [square brackets].
 - 14.2 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining as [].

Checklist

Make sure you have provided the following:

- a confidential version of the application
- a public version of the application
- a schedule explaining why information is confidential
- all supporting documentation
- a signed declaration by each applicant
- payment of NZ\$3,680 (GST inclusive).

9. For the documents provided with the application, please provide an index indicating the date each document was prepared and the identity and role of the author(s) within the merging party or external consultants. Responses to question 12 will typically include minutes of meetings, studies, reports, presentations, surveys, analyses or recommendations. In most cases, we would not expect to receive in the first instance documents such as emails, handwritten notes, or instant messages.

10. For further information on the Commission's confidentiality policy and procedures, please refer to the *Mergers and Acquisitions Guidelines*.

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Declaration

This declaration is to be made only by the applicant. It may not be made by a solicitor or other adviser acting on the applicant's behalf.

If there are multiple applicants, each applicant must make this declaration.

The wording in this declaration may not be varied by the applicant(s).

If this declaration is not completed, the Commission may decline to register the notice seeking clearance.

I, _____,
have prepared, or supervised the preparation of, this notice seeking clearance.

To the best of my knowledge, I confirm that:

- all information specified by the Commission has been supplied
- if information has not been supplied, reasons have been included as to why the information has not been supplied
- all information known to [the applicant] that is relevant to the consideration of this notice has been supplied
- all information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of [the applicant] and am duly authorised to submit this notice.

Name and title of person authorised to sign:

Sign: _____ **Date:** _____