CONSULTATION

COMMERCE COMMISSION
NEW ZEALAND
Te Komihana Tauhokohoko

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Authorisation Guidelines

Contents

Contents

Consultation cover note

The Commerce Commission is consulting on a draft update of its Authorisation Guidelines. We welcome views on the draft from interested parties.

Our Authorisation Guidelines explain how the Commission assesses authorisation applications. We last updated our Authorisation Guidelines in 2013. Since then, we have considered several authorisations, and the courts have issued further guidance.

The changes proposed in our draft guidelines reflect both our internal learnings and the guidance we have received from the courts on how to assess authorisations since 2013.

In particular, the courts have confirmed the importance of our qualitative judgement in assessing the benefits and detriments arising from a proposed merger or agreement in an authorisation context. The Commission seeks to quantify benefits and detriments to the extent practicable. However, it is now well recognised that the Commission is required to have regard to all benefits and detriments, including those that cannot be quantified in monetary terms. Our draft guidelines seek to explain how we assess the nature and significance of unquantified benefits and detriments.

We have also amended our guidelines to further clarify our approach to assessing when benefits and detriments are likely. Finally, the revisions recognise the Court of Appeal's recent comments in *NZME v Commerce Commission*, indicating that it is open to the Commission to adopt a modified total welfare approach in our analysis of public benefits.

Our draft guidelines also include changes to our process section. Like our substantive approach, our processes have evolved since 2013, and we wish to ensure that businesses and their advisors have the most up-to-date information about the Commission's processes for assessing authorisations.

We have found that the streamlined process is rarely used and in practice can add to the time taken to review more straightforward applications. As such, we are proposing to remove the separate streamlined process and instead use pre-notification meetings to explore the information required and provide an indication of the anticipated investigation timeline.

We continue to seek to make the guidelines user-friendly and understandable for businesses and their advisors, and we welcome feedback and suggestions on any parts of the draft guidelines that could be made clearer.

To make a submission, or to arrange a time to meet with Commission staff to discuss these drafts, please email mergers@comcom.govt.nz with the subject line: Authorisation Guidelines.

Purpose

These guidelines explain when we will authorise mergers and agreements under Part 5 of the Commerce Act 1986 and our process for determining authorisation applications.

Introduction

1 The Commerce Act 1986 (the Commerce Act) prohibits certain agreements[1] and mergers that harm competition.[2]

2 However, the Commerce Act recognises that an anti-competitive agreement or merger may have sufficient public benefit to outweigh the competitive harm arising from the agreement or merger.

3 Firms can apply to the Commission for authorisation of an agreement or merger. Authorisation allows firms to undertake conduct that would otherwise breach the Commerce Act. We will grant an authorisation when we are satisfied that the agreement or merger is likely to benefit the New Zealand public.[3]

4 These Authorisation Guidelines set out our approach to assessing benefits and detriments for all authorisations and the process we follow in determining authorisation applications.

5 Because these guidelines are by their nature general, we apply them flexibly according to the facts of each application. These guidelines do not, and cannot, address every issue that might arise, so anyone contemplating applying to us for authorisation of an anti-competitive agreement or merger should consider seeking legal advice.

6 These guidelines reflect the current state of the law, international best practice, and our own experience. Our approach will, therefore, continue to evolve in light of new developments.

7 The remainder of these guidelines describe:

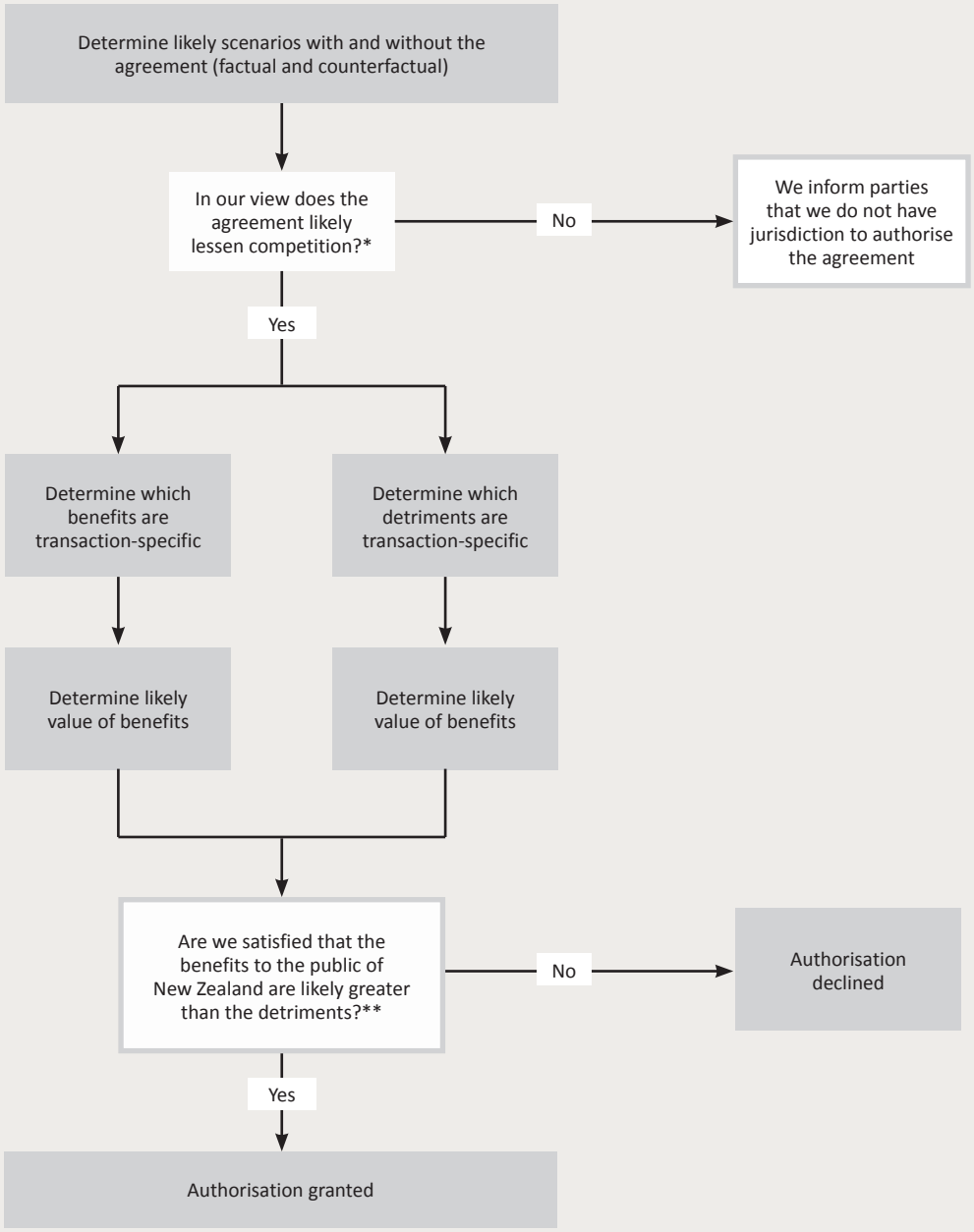
- 7.1 the framework we use to assess whether to grant an authorisation (see paragraphs 10-34);
- 7.2 the benefits and detriments that are relevant (see paragraphs 35-41);
- 7.3 how we assess and balance benefits and detriments (see paragraphs 42-86); and
- 7.4 the process we follow when considering authorisation applications (see paragraphs 87-204).

8 Attachment A sets out evidence that we find useful in assessing an authorisation application for an agreement or merger.

9 The figures below summarise how we decide whether to grant authorisation.

1. The Commerce Act prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market (s 27). We use the term 'agreements' to refer to any contracts, arrangements or understandings. The Commerce Act also prohibits covenants that have the purpose, effect or likely effect of substantially lessening competition in a market (s 28), and resale price maintenance (ss 37 and 38). Unless indicated otherwise, we use the term agreements to also cover all of these.
2. Unless otherwise stated we use the term 'mergers' in these guidelines to describe all types of acquisitions regardless of their legal form.
3. This is consistent with the purpose of the Commerce Act, as set out in s 1A: to promote competition in markets for the long-term benefit of consumers within New Zealand.

Figure 1: What the Commission considers when deciding whether to authorise an agreement

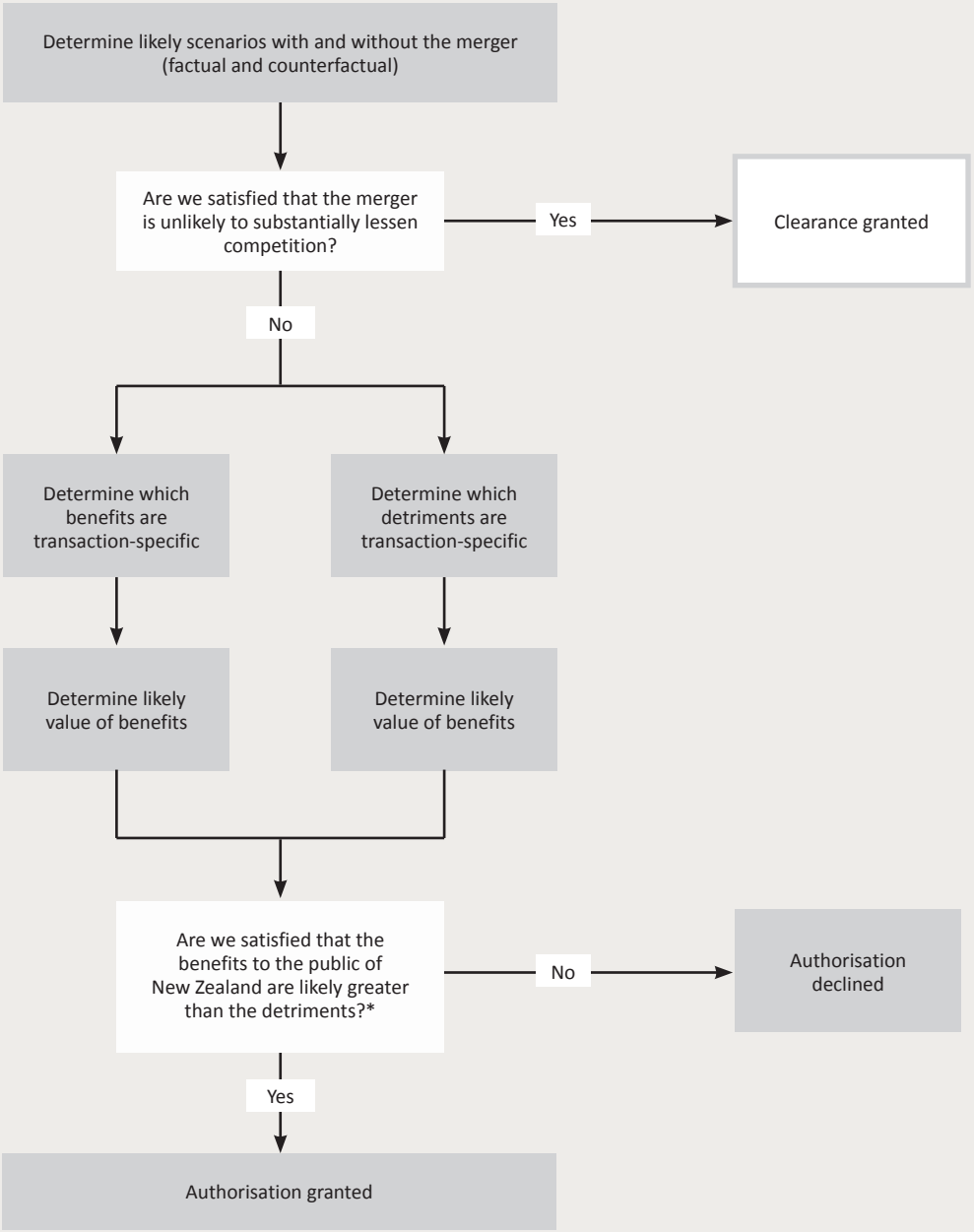


Notes:

* We also consider if the agreement breaches sections 37 or 38 (resale price maintenance).

** We take into account any conditions we may decide to impose at this point.

Figure 2: What the Commission considers when deciding whether to clear or authorise a merger



Notes:

* We take into account any undertakings at this point.

Authorisation framework

10 In this section, we explain:

- 10.1 what mergers or agreements can be authorised;
- 10.2 our jurisdiction to grant authorisation;
- 10.3 when we will grant authorisation;
- 10.4 the effect of authorisation and how long authorisation lasts;
- 10.5 our power to accept undertakings for mergers and to include conditions on authorisations for agreements; and
- 10.6 when we can amend and vary authorisations.

Mergers or agreements we can authorise

11 We can authorise the following conduct or provisions of agreements that would otherwise breach the Commerce Act:[4] [5]

- 11.1 mergers that would be likely to have the effect of substantially lessening competition in a market (section 47);[6]
- 11.2 provisions of agreements between any persons that have the purpose, effect or likely effect of substantially lessening competition in a market (section 27);[7]
- 11.3 covenants that have the purpose, effect or likely effect of substantially lessening competition in a market (section 28); and
- 11.4 if a supplier of goods sets, enforces, or tries to enforce, a minimum price at which a reseller must on-sell those goods (resale price maintenance) (sections 37 and 38).

12 We cannot authorise conduct that may breach sections 30, 36 or 36A of the Commerce Act. In other words, we cannot authorise entering into an agreement that contains or gives effect to a cartel provision (section 30),[8] or a firm with a substantial degree of market power taking advantage of that market power for an anti-competitive purpose (sections 36 and 36A).

13 However, when we authorise an agreement, it cannot be challenged either by us or by a third party as being a breach of section 27, section 30, section 30C, section 37 or section 38.

4. Commerce Act 1986, ss 58 and 67.
5. Some agreements are exempt from the prohibitions in the Commerce Act. Specific exceptions exist including for agreements between interconnected companies, partnership agreements (as long as none of the partners is a company) and agreements specifically authorised by another law. For further information on these and other exceptions, see our fact sheet *Exceptions under the Commerce Act* at https://comcom.govt.nz/__data/assets/pdf_file/0034/93949/Exceptions-under-the-Commerce-Act-Fact-sheet-July-2018.pdf.
6. We must clear a merger where we receive an authorisation application and are satisfied that the merger will not have, or will not be likely to have, the effect of substantially lessening competition in a market. Our approach to assessing merger clearance applications is explained in our *Merger and Acquisition Guidelines* (reference to be added on completion).
7. For further details, see our fact sheet *Agreements that Substantially Lessen Competition* at https://comcom.govt.nz/__data/assets/pdf_file/0025/90961/Agreements-that-substantially-lessen-competition-Fact-sheet-July-2018.pdf.
8. The Commission may give clearances relating to cartel provisions under section 65A of the Commerce Act. For further details, see our *Competitor Collaboration Guidelines* at https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf.

The public benefit test and our jurisdiction to grant authorisation

14 We have jurisdiction to grant authorisations where the public benefit test is satisfied. The Commerce Act contains two versions of the public benefit test.

14.1 For mergers,[9] we must authorise where we are satisfied that the merger will be likely to result in such a benefit to the public that it should be permitted.

14.2 For agreements generally,[10] we must authorise where we are satisfied that the agreement will be likely to result in a benefit to the public that would outweigh the lessening in competition.

15 While stated differently, the courts have held that there is no material difference between the two.[11] We refer to these two versions as the 'public benefit test'.

16 The public benefit test is the same for all authorisations; however, our jurisdiction to consider whether to authorise is different for mergers and agreements.

17 For mergers, when we receive an authorisation application, we must first assess whether the merger would be likely to substantially lessen competition in a market.[12] If we are satisfied that the merger would not be likely to have that effect, then we would clear the merger.

18 If we are not satisfied and cannot grant clearance, we apply the public benefit test to determine whether to authorise the merger.

19 For agreements, when we receive an authorisation application, we must first assess whether the agreement lessens competition.[13] [14] We call this the 'competition threshold'.[15] If we determine that an agreement does not meet the competition threshold, we are unable to grant authorisation.

20 If we determine that an agreement meets this competition threshold, we apply the public benefit test to determine whether to authorise the agreement.

21 The applicant bears the burden of demonstrating to the Commission that the public benefit test is satisfied.[16]

9. And resale price maintenance.

10. With the exception of resale price maintenance contrary to ss 37 and 38.

11. See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) (*Air New Zealand*) at [33] and also *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) *(Godfrey Hirst (No 1)* (HC)) at [88]-[90].

12. Commerce Act 1986, s 67(3)(a). We set out more detail about how we assess the competitive effects of mergers in our *Mergers and Acquisitions Guidelines* at https://comcom.govt.nz/__data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-July-2013.pdf.

13. In general, our competition assessment considers the extent of competition from existing competitors, whether existing competitors can expand their sales or new competitors can enter and compete effectively, and whether buyers can exercise countervailing power (or, in the case of potential buyer market power concerns, suppliers). Attachment A sets out evidence that we find useful to consider when considering an agreement or merger's impact on competition.

14. We also assess whether the agreement breaches the prohibitions on resale price maintenance (ss 37 and 38).

15. We can only authorise resale price maintenance if we determine that the practice amounts to resale price maintenance (as defined in ss 37 or s 38).

16. *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) *(NZME)* at [86(b)].

The effect of authorisation and how long authorisation lasts

22 When we authorise a merger, it cannot be challenged either by us or by a third party as being in breach of section 47 so long as the merger is carried out within one year of authorisation being granted or, if an authorisation is appealed, the Court upholding our decision to grant authorisation.

23 We can authorise agreements subject to conditions and for a time period we consider appropriate.[17] We have the power to vary and revoke authorisations in certain circumstances (see paragraphs 31-34 below).

24 Our decision can be appealed to the High Court by the applicant, or any person who has a direct and significant interest in the application and participated in the Commission's processes leading up to the determination.[18]

Undertakings and conditions

25 Where we are not satisfied that an agreement or merger is likely to result in net public benefits, we can nevertheless grant authorisation subject to conditions (for an agreement) or a divestment undertaking (for a merger). We will do this where we consider the conditions or undertaking will enable the agreement or merger to pass the public benefit test.[19]

Mergers

26 For mergers, we can only accept an undertaking to dispose of assets or shares, ie, a structural undertaking.[20] We cannot accept behavioural undertakings.

27 If a party to a merger breaches any undertaking given to the Commission, the authorisation is void.[21] For further details on our approach to assessing undertakings, refer to our Mergers and Acquisitions Guidelines.[22]

17. Commerce Act 1986, s 61(2).
18. Commerce Act 1986, s 92.
19. Applicants are invited to discuss divestment undertakings and/or proposed conditions with us at any time during the process. However, the early offer or suggestion of undertakings and/or conditions will avoid the need for the Commission to reconsider the application with and without the undertaking or condition.
20. Commerce Act 1986, s 69A(1).
21. Commerce Act 1986, s 69AB(1).
22. These are available at https://comcom.govt.nz/__data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-July-2013.pdf. (update link later)

Agreements

28 We can authorise agreements subject to conditions. Unlike for mergers, this includes behavioural remedies.[23] The conditions must be consistent with the Commerce Act.[24] We may include conditions that remove or lessen the detriments arising from an agreement, or include conditions that create or enhance the benefits.

29 It is unusual for us to impose behavioural conditions because they carry their own costs. In particular they:

- 29.1 may be difficult to design in a way that will achieve their objectives, while minimising the risk of unintended negative consequences;
- 29.2 may be difficult and costly to monitor and enforce; and
- 29.3 can create significant compliance costs for the firms involved.

30 If a firm does not comply with any one of the conditions, we can vary or revoke the authorisation.[25] Parties to the transaction would then be at risk of legal action by us or third parties under the Commerce Act.

Varying or revoking authorisations

31 We cannot vary or revoke a merger authorisation.

32 We can vary or revoke the authorisation of an agreement if we are satisfied that:[26]

- 32.1 the authorisation was granted on information that was false or misleading in a material way;
- 32.2 there has been a material change of circumstances since the authorisation was granted (which may include a material change in the terms of the agreement); or
- 32.3 a condition upon which the authorisation was granted has not been complied with (see paragraphs 28-30 above).

33 If we revoke an authorisation of an agreement, we may decide to grant a new authorisation in its place.

34 Before deciding whether to vary or revoke the authorisation of an agreement, we will consult with the person who was granted the authorisation and any other interested party. We will consider these submissions when making our decision.[27]

23. Behavioural conditions could include a business agreeing not to reduce the supply of a product, a vertically integrated business agreeing to supply an input at current prices to competitors, or monitoring and reporting agreements.
24. Commerce Act 1986, s 61(2).
25. Commerce Act 1986, s 65(1)(c).
26. Commerce Act 1986, s 65(1).
27. Commerce Act 1986, s 65(2).

Relevant benefits and detriments

The definition of benefits and detriments

35 New Zealand's courts have defined a public benefit as:[28]

> anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

36 In particular, section 3A of the Commerce Act requires us to have regard to efficiencies that likely arise from the conduct when assessing public benefit.

37 However, the New Zealand courts have recognised that efficiencies are not the only benefits and detriments which are relevant to the Commission's assessment.[29] For example, benefits or detriments can relate to matters such as the environment, health, media or social welfare.[30]

38 The Commission therefore seeks to assess what benefits there are to the public in the circumstances of any given case.[31] Ultimately, a public benefit could be any gain to the public of New Zealand that would result from the proposed agreement or merger. Likewise, a public detriment could be any loss to the public of New Zealand that would result from the proposed agreement or merger.

Benefits and detriments must be likely and specific to the agreement or merger

39 Benefits and detriments must arise from the agreement or merger. If a benefit or detriment would likely result regardless of the proposed agreement or merger, then it will not form part of our assessment.[32]

40 To determine whether benefits and detriments are specific to the agreement or merger, we assess:

40.1 what is likely to occur in the future with the agreement or merger ('the factual'); and

40.2 what is likely to occur in the future without the agreement or merger ('the counterfactual').

41 The Commission may be required to consider multiple counterfactuals to determine all likely benefits and detriments relevant to its authorisation assessment.[33] [34] This approach is in contrast to our competition assessment where we usually only focus on the counterfactual that gives rise to the greatest competition concerns. This is because if the merger is unlikely to substantially lessen competition (or lessen competition in the case of an agreement) in this scenario, then it is unlikely to do so in any other scenario.[35]

28. See *Air New Zealand*, above n 11, at [319]; *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 527-530 citing *In Re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110 at 18,123.
29. *Godfrey Hirst (No 1)* (HC), above n 11, at [51]; *Air New Zealand*, above n 11, at [319]; *Telecom v Commerce Commission*, above n 28, at 528; Godfrey Hirst NZ Ltd v Commerce Commission [2016] NZCA 560 (Godfrey Hirst (No 2) (CA)), at [24]; *NZME*, above n 16, at [69]-[81].
30. See *NZME*, above n 16, at [68]-[73]: "… the Act is not exclusively concerned with efficiency but rather allows it to be balanced alongside other public benefits that may include anything of importance to the community as a whole. Nothing in the legislation requires that public detriments be defined less comprehensively".
31. See *NZME*, above n 16, at [72].
32. *Godfrey Hirst (No 1)* (HC), above n 11, at [119].
33. We note, however, the High Court's view in *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 2287 *(Godfrey Hirst (No 2)* (HC)) at [64] that "[T]he Commission is not required to chase down every conceivable possibility, irrespective of whether it has been considered by the applicant or identified by any other party". See also *NZME*, above n 16, at [86(b)].
34. Benefits and detriments will be likely if there is a real and substantial risk or real chance that it will happen if the agreement or merger proceeds: see *NZME*, above n 16, at [83] and [86(a)].
35. *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [122]. Our *Mergers and Acquisitions Guidelines* contain further details on how we assess the with and without a merger scenarios.

Assessing and balancing benefits and detriments

42 Once we have identified all likely benefits and detriments, we assess the value of those benefits and detriments. To assist the Commission with undertaking this assessment, applicants should provide supporting evidence regarding the nature and likely extent of benefits and detriments resulting from the agreement or merger. Applicants should also explain precisely how a benefit arises from an agreement or merger.

43 We place less weight on benefits and detriments that are less likely to occur[36] or where the link between them and the agreement or merger is less clear. This may include those that occur further into the future[37] or that are more distantly related to the goods and services being purchased and consumed.

44 We consider all likely benefits and detriments arising from the agreement or merger in the balancing process – whether quantifiable or not.[38] In doing so, we ensure that our analysis avoids double-counting gains and losses.[39] Ultimately, our decision whether to grant authorisation requires us to conduct an evaluative judgement of our quantitative and qualitative analysis.[40]

45 Our decision whether to grant authorisation is informed by a balancing exercise of the quantitative and qualitative benefits and detriments. Having assessed the value of benefits and detriments, if we are satisfied that the benefits of the agreement or merger likely outweigh the detriments, we will grant authorisation. If we are not satisfied, we will not grant authorisation.

46 In the remainder of this section, we explain our approach to assessing quantitative and qualitative benefits and detriments in more detail.

Our approach to assessing benefits and detriments

47 We seek to quantify the likely benefits and detriments to the extent practicable.[41] We assess the robustness of our quantification analysis by varying the underlying assumptions.[42] This is known as 'sensitivity testing'. This helps us test the reliability of any quantification, particularly when the information we have is incomplete or uncertain, or our estimates vary with the assumptions used and it is difficult to verify the most appropriate assumption.

48 We also carry out qualitative analysis to determine the nature and significance of benefits and detriments arising from the agreement or merger that may not be quantifiable. Qualitative factors are given independent and, where appropriate, decisive weight.[43]

36. See *NZME*, above n 16, at [88]. However, unless a benefit or detriment is thought "likely" it should not be considered as part of the Commission's balancing exercise: see *NZME*, above n 16, at [92].
37. When quantifying, we also discount the value of future benefits and detriments to obtain a present value as explained at paragraph [50].
38. See *Godfrey Hirst (No 2)* (CA), above n 29, at [38]; *Air New Zealand*, above n 11, at [415].
39. For example, we would not deduct the cost of achieving a benefit when assessing the magnitude of the benefit and then also count this cost as a detriment.
40. *Godfrey Hirst (No 2)* (CA), above n 29, at [35].
41. *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (*AMPS-A* (CA)) at 447; *Air New Zealand*, above n 11, at [319].
42. For example, when estimating the loss in allocative efficiency, we often need to make assumptions, such as the prospect for greater imports if prices increase. Sensitivity testing in this context would involve testing the profitability of price increases given different levels of imports that may occur in response to a price increase. If a small change in an estimate of imports significantly affects the estimated price increase, a range of price increases may be considered.
43. *Godfrey Hirst (No 2)* (CA), above n 29, at [38].

49 For each benefit and detriment, we consider:

49.1 the nature of the benefit or detriment;

49.2 whether there is a clear link between the agreement or merger and the benefit or detriment (ie, the benefit or detriment must be conduct-specific);[44]

49.3 whether the benefit or detriment is one-off or recurring;

49.4 how and when the benefit or detriment will arise; and

49.5 the likelihood and magnitude of the benefit or detriment.

50 As well as considering whether to place less weight on benefits and detriments that are less likely to occur, or for which the evidence is less strong,[45] we also discount benefits and detriments that arise in the future to reflect that there is a preference to receive a benefit today, rather than a benefit of the same value in the future, all else being equal.[46] This allows us to convert the value of future benefits and detriments into present values.

Relevant evidence

51 We expect applicants to provide robust qualitative and quantitative evidence of benefits or detriments when they make an authorisation application.[47]

52 Where an applicant considers efficiencies will result from the agreement or merger, it should substantiate its claims, wherever possible. Evidence could include plant and firm-level accounting statements, internal studies, strategic plans, integration plans, management consultant studies, consumer surveys or research and other available data.

53 More generally, we place weight on business documents prepared in the ordinary course of business in considering the competitive effects of an agreement or merger and the benefits and detriments arising from it. Attachment A sets out more detail on the type of evidence we find useful in assessing authorisation applications.

54 All quantitative evidence should be as clear and understandable as possible. In particular, it must include:[48]

54.1 an explanation of the hypothesis being tested and its relevance to the application;

54.2 a description of the quantitative technique used;

54.3 a copy of the underlying data used, with an explanation of its source and its reliability;

54.4 a description of the assumptions adopted, the underlying rationale, and any evidence relevant to these assumptions;

54.5 any sensitivity testing undertaken; and

54.6 the results of the analysis and the conclusions derived from the results.

55 If an applicant is not able to provide this evidence, it should discuss this with us prior to lodging the application.

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44. See *Air New Zealand*, above n 11, at [319].

45. See paragraph 43 above.

46. We consider which discount rate to use on a case-by-case basis, and within any one case a different discount rate may be appropriate depending on the benefit or detriment in question. For example, if the benefit in question is an increase in productive efficiency that is only to be realised at some point in the future, the firm's own cost of capital may be the appropriate discount rate.

47. We are happy to discuss what evidence may be useful prior to the application being lodged (see paragraphs 89-95 for further information).

48. Our *Quantitative Analysis Guidelines* provide further information on how to use quantitative analysis to support submissions to the Commission: https://comcom.govt.nz/__data/assets/pdf_file/0010/111520/How-to-use-quantitative-analysis-in-your-merger-analysis-Advisory-note-December-2018.pdf.

Detriments

56 Our assessment of detriments arising from a lessening of competition is informed by our competition analysis. A lessening of competition is typically associated with a decrease in allocative efficiency. A lessening of competition may also lead to productive and dynamic inefficiencies.

57 As noted above, detriments can include wider losses to the New Zealand public as well as efficiency losses wherever they occur.[49] While we cannot exhaustively identify these types of detriments, examples include:

57.1 loss of media plurality as a result of a merger between two media firms;[50]

57.2 adverse effects on the environment;

57.3 privacy interests; and

57.4 social welfare impacts or impacts on the community generally.

58 We assess detriments based on the facts of each case, rather than assuming inefficiency based on economic theory alone.[51]

Loss of allocative efficiency

59 A reduction in competition tends to result in higher prices and/or a reduction in service, quality, choice or some other element of value to the consumer.[52] This causes a proportion of consumers to switch some or all of their purchases to otherwise inferior or less satisfactory products/services. This type of switching is referred to as an allocative inefficiency (or a deadweight loss). More precisely, it "reflect(s) the 'cost' to society of an increase in price which leads either to unsatisfied demand or the purchase of a less preferred substitute".[53]

60 When considering whether to grant an authorisation, we consider the extent of any resulting allocative inefficiency.

61 We consider two aspects of allocative inefficiency: price effects and non-price effects.

62 In terms of price effects, an agreement or merger which lessens competition will tend to create a greater allocative inefficiency:

62.1 the more sensitive demand is to price;

62.2 the greater the pre-existing market power;

62.3 the greater the loss of competition between the parties to the agreement or merger; and

62.4 the greater the size of the market.

63 We also consider non-price effects, such as any impacts on service, quality and choice, as well as any other dimension of competition that customers value. Non-price effects are typically difficult to measure and may be assessed qualitatively.

49. See paragraph [37] above; *Godfrey Hirst (No 2)* (CA), above n 29, at [24]; *NZME*, above n 16, at [69]-[81].

50. *NZME*, above n 16, at [126].

51. *AMPS-A* (CA), above n 41, at 439.

52. It is not only the parties to the agreement or merger that may increase prices (or otherwise make their offerings less valuable) to consumers. Other market participants may have the incentive to similarly increase prices (or otherwise make their offerings less valuable) unilaterally, reducing the amount of product purchased overall. Alternatively, the agreement or merger may make it more likely that all or some firms in the market would coordinate their behaviour by accommodating one another's responses and thereby collectively exercise market power such that output reduces across the market.

53. *Air New Zealand*, above n 11, at [243].

Loss of productive efficiency

64 Productive efficiency is the use of the minimum amount of resources to produce a certain volume of output given available technology. An agreement or merger will lead to a loss in productive efficiency if it results in a greater number of inputs being required to produce a certain volume of output.[54]

65 We do not assume an agreement or merger leads to productive inefficiency. Instead, we assess on the facts of the case whether productive inefficiency would likely result, and where possible, the likely size of that efficiency loss.

66 In this context we note that shareholders generally want a firm to minimise its costs.[55] An agreement or merger is less likely to lead to a loss in productive efficiency if shareholders can effectively monitor productive efficiency and pressure management to minimise costs.[56] A loss in productive efficiency may be more likely if it reduces management's ability and/or incentive to minimise costs.

67 Relevant factors and evidence can include:

- 67.1 the impact of the agreement or merger on competition;
- 67.2 the extent to which management retains the ability to minimise costs, including being able to monitor costs against an external benchmark to assess efficiency (cost benchmarking);
- 67.3 the extent to which management retains the incentive to minimise costs, for example:
  - 67.3.1 whether shareholders can easily monitor productive efficiency and pressure management to minimise costs;
  - 67.3.2 whether corporate takeover and management displacement is a significant possibility; or
  - 67.3.3 whether the competition remaining in the market sufficiently disciplines management's behaviour;
- 67.4 information on the parties' past acquisitions and what happened to production costs after the acquisition;
- 67.5 information on productive efficiency within the industry or market over time; and
- 67.6 whether the parties have plans in place to address these issues above and how well-developed and robust those plans are.

54. *Air New Zealand*, above n 11, at [272].
55. We recognise many mergers and agreements will be based, at least in part, on an intention to reduce cost.
56. In particular, the incentive for managers to minimise costs is likely to be more acute when they are (substantial) shareholders/owners of the business.

Loss of dynamic efficiency

68 Dynamic efficiency is an increase in economic efficiency over time through the introduction of demand-enhancing new products or cost-reducing production processes.

69 We do not assume an agreement or merger will lead to a loss in dynamic efficiency. While competition can be a key driver of innovation, more profitable firms may have a greater ability to carry risk. Increased concentration may therefore increase or reduce dynamic efficiency, depending on the context.[57]

70 The effect on dynamic efficiency can be difficult to measure and typically involves qualitative judgement. However, when assessing the possibility of losses in dynamic efficiency, we review the relevant evidence, taking into account:

- **70.1** the importance of innovation to the industry, for example:
  - **70.1.1** levels of research and development and related spending in the industry;
  - **70.1.2** the extent of innovation introduced in recent years in the industry, and the extent to which product or service innovation drives sales;
  - **70.1.3** any evidence about future innovation in the industry;
- **70.2** the importance of each party to the agreement or merger in driving innovation in the industry relative to other parties, for example:
  - **70.2.1** whether the parties compete closely in terms of innovation;
  - **70.2.2** the importance of other parties in the industry in driving innovation;
- **70.3** how the ability and incentives to innovate differ with and without the agreement or merger, specifically whether, and the extent to which:
  - **70.3.1** the parties bring together complementary or substitutable intellectual property, trade secrets or skill sets;[58]
  - **70.3.2** without the agreement or merger, innovation by one of the parties would likely take sales from one of the other parties, so that the incentive to innovate may decrease as a result of the agreement or merger;[59]
  - **70.3.3** innovations may be imitated by rivals, reducing the payoff from innovation.

57. We discuss how we assess whether an agreement or merger would increase dynamic efficiency at paragraph 79 below.
58. Bringing together complementary intellectual property, trade secrets or expertise may increase the ability to innovate (see paragraph 79 below).
59. This is an extension of the unilateral effects logic to innovation. To illustrate, without a merger, firm A may have the incentive to innovate in order to win share from firm B. If firm A and firm B, say, merge, the incentive to innovate would be diminished because of the loss in dynamic competition between firms A and B.

Benefits

71 A benefit is anything of value to the community generally regardless of the market in which it occurs, and is not limited to efficiencies that would result from the proposed agreement or merger.[60] While we cannot exhaustively identify these benefits, we have previously taken into account the following types of benefits:

- 71.1 reduced pollution or other environmental improvements;[61]
- 71.2 health benefits of breastfeeding;[62]
- 71.3 safer handling of hazardous substances;[63] and
- 71.4 improved industry viability and resourcing.[64]

72 We take into account any costs incurred in achieving benefits.[65] Applicants must provide sufficient qualitative evidence to support any claimed benefits, as well as quantify the likely level of benefits where possible.

73 The remainder of this section explains how we assess potential improvements in allocative, productive and dynamic efficiency and other benefits.

Allocative efficiency

74 An agreement or merger may have allocative efficiency benefits when it leads to improvements in the allocation of resources across society, for example by:

- 74.1 reducing transaction costs;
- 74.2 addressing a market failure, such as:
  - 74.2.1 addressing an externality;
  - 74.2.2 reducing information asymmetry; or
  - 74.2.3 solving the hold-up problem to increase the incentive to invest.

75 As with other types of benefits, allocative efficiency may occur in the same market as the relevant agreement or merger, or elsewhere.

60. See paragraphs [37]-[38] above; *Godfrey Hirst (No 2)* (CA), above n 29, at [24]; *NZME*, above n 16, at [69]-[81].
61. *Nelson City Council and Tasman District Council* [2017] NZCC 6 at [111]-[112].
62. *Infant Nutrition Council Ltd* [2015] NZCC 11 at [69]-[71].
63. *Refrigerant Licence Trust Board CC* Decision No 735, 25 November 2011 at [77]-[81].
64. *NZME Ltd v Commerce Commission* [2017] NZHC 3186 at [27].
65. See *Air New Zealand*, above n 11, at [319].

Productive efficiency

76 An agreement or merger may improve productive efficiency in a number of ways, including by:[66]

- **76.1** increasing economies of scale (where unit costs fall as production increases);
- **76.2** creating or increasing economies of scope (where unit costs fall when more than one product is produced or transported etc);
- **76.3** allowing better use of existing capacity; or
- **76.4** reducing costs by:
  - **76.4.1** allowing greater specialisation of production, such as where parties bring together complementary strengths in production;
  - **76.4.2** allowing rationalisation of assets; or
  - **76.4.3** reducing transaction costs.

77 Productive efficiencies accruing to New Zealand businesses are typically a benefit to the New Zealand public, even if the business is not owned by New Zealanders, except where those efficiencies give rise to functionless monopoly rents which accrue to foreign shareholders.[67]

78 Applicants should explain whether the claimed improvement to productive efficiency involves savings of fixed or variable costs.

Dynamic efficiency

79 An agreement or merger may increase innovation in products or processes compared to the situation without the agreement or merger. This may be the case if the agreement or merger:

- **79.1** increases the ability to innovate, eg, if the merger allows for a combination of intellectual property, trade secrets or expertise that are more likely to give rise to innovation, and this combination would otherwise be unlikely to occur;[68] or
- **79.2** increases the incentive to innovate, eg, without the merger, one party would be likely to imitate the innovations of the other, so that the incentive to innovate may be greater as a result of the merger.[69]

66. Quantification of an increase in productive efficiency typically involves a comparison of the costs of producing a given level of output with and without the conduct.
67. *Godfrey Hirst (No 2)* (CA), above n 29, at [42].
68. We may also consider whether the agreement or merger will increase the ability to take on risk and, therefore, innovate. A merger may increase the ability to innovate, eg, if the parties were unprofitable pre-merger, the merged entity would be profitable, and returning the parties to profitability may increase their ability to take on risk. As with any such arguments, we expect to receive evidence to support arguments that such a benefit is merger-specific and evidence of the value of the benefit.
69. For example, if without the merger firm B was likely to quickly imitate any innovation firm A made and so reduce the benefits of that innovation to firm A, firm A would be less likely to invest in innovation in the first place. A merger between firms A and B would remove this effect, and the merged firm may consequently be more likely to invest in innovation.

Distribution of benefits and detriments

80 It is not necessary that the benefits from an agreement or merger be passed on to consumers in the form of lower prices for those benefits to be counted. A merger may generate considerable productive efficiencies, for example, by enabling the merged firm to make resource savings, that could constitute a benefit to the public even if there is no evidence that these gains will feed through into lower prices for consumers. Generally, these benefits will be counted in full.

81 However, in some cases, we may give less weight to benefits that flow only to a few members of the community because those benefits are not spread among the community generally.[70] This is known as the 'modified total welfare approach'.[71] The Commerce Act permits us to apply the modified total welfare approach but does not require it.[72] For example, if a merger benefits a limited number of shareholders through dividends or higher profits, in some cases we may attribute these benefits less weight than benefits that are widely spread among consumers.[73] Conversely, we may give more weight to benefits that are realised by the wider community and sustained over a period of time.[74]

82 We may also adjust the weight given to detriments to reflect their distribution. We will decide whether to apply the modified total welfare approach and assess the weight to be given to benefits and detriments on a case-by-case basis.

Role of wealth transfers

83 Unless we are applying a modified total welfare approach, changes in the distribution of wealth, where one group gains at the expense of another, are generally not relevant to our analysis because they do not usually involve a change in overall public benefit.[75]

84 However, wealth transfers may become relevant where the transfer is between New Zealanders and non-New Zealanders. This is because the public benefit test focuses on benefits within New Zealand.[76] As a result, a transfer of wealth from another country to New Zealand may be a public benefit. Similarly, transfers of wealth in the opposite direction may be a public detriment.

85 To assess the direct effects of wealth transfers, we also consider any effects outside New Zealand that may ultimately feed back to New Zealand. For example, if an agreement would lead to a New Zealand firm charging higher prices to tourists, that would result in a transfer of wealth from those tourists to the New Zealand firm resulting in a public benefit. However, those higher prices could lead to fewer tourists coming to New Zealand, which could result in a flow-on detriment. Equally, where the circumstances give rise to profits flowing off-shore, there will be a wealth transfer from New Zealand to overseas; however, there may be reciprocal benefits in terms of import competition and foreign investment within New Zealand.[77]

86 We will decide on a case-by-case basis whether benefits should be discounted to take into account any wealth transfers to non-New Zealanders.

70. *NZME*, above n 16, at [66]-[67] citing *Re Howard Smith Industries Ltd* at 17,334; [75].
71. *NZME*, above n 16, at [67].
72. *NZME*, above n 16, at [75].
73. *NZME*, above n 16, at [67] citing *Re Howard Smith Industries Ltd* at 17,334.
74. This approach is reflected in the Australian Competition Tribunal's decision *Qantas Airways Ltd* [2005] ACompT 9, (2005) ATPR 42-065 at [185]-[189] cited in *NZME*, above n 16, at [66]; also see *NZME*, above n 16, at [64]-[68].
75. See *Air New Zealand*, above n 11, at [241] and *Telecom* (HC), above n 28, at 531.
76. See *Air New Zealand*, above n 11, at [242] and *Telecom* (HC), above n 28, at 531. The Commission treats the New Zealand public as those people domiciled in New Zealand.
77. *Godfrey Hirst (No 2)* (CA), above n 29, at [50].

The authorisation process

87 In this section we describe the process we follow when considering authorisation applications for anti-competitive agreements or mergers. We also describe our approach to confidential information.

88 Our process has the following stages: pre-notification, the authorisation application, our investigation and determination, and post-determination.

Pre-notification

89 A person may apply for authorisation if they propose to acquire assets of a business or shares or if they propose to enter into an agreement that lessens competition.

90 We encourage potential applicants to inform us by contacting the Mergers Manager (for a merger) or the Trade Practices Manager (for an agreement)[78] about potential authorisation applications as early as possible.

91 We also encourage potential applicants to initiate pre-notification discussions with us before submitting an authorisation application. We will engage in pre-notification discussions if we are satisfied that a potential applicant has a good faith intention to proceed with the agreement or merger.[79]

92 We treat the fact and content (including any documents provided) of all pre-notification discussions as confidential until an application is registered. We do not seek any interested party views at the pre-notification stage.

93 While pre-notification discussions are not compulsory, they enable us to focus our investigation once we have received an authorisation application. Pre-notification discussions can benefit both the applicant and the Commission by:

- 93.1 informing our investigation team about the relevant markets and giving us the opportunity to carry out background research;
- 93.2 setting the scene for the agreement or merger, including its rationale, at an early stage;
- 93.3 enabling us to identify the information and evidence we are likely to need, and highlighting useful evidence that may assist our analysis (including expert evidence);
- 93.4 providing us with an opportunity to indicate further information that should be included in the application;
- 93.5 enabling us to plan the resourcing of our investigation effectively; and
- 93.6 allowing for a preliminary discussion with the applicant about likely competition issues (although our comments are only indicative and not binding) and providing us with an opportunity to indicate further competition issues that should be addressed in the application.

94 To get the most out of these discussions, we encourage at least one of the applicant's senior employees to attend. We also expect an applicant to provide us with a substantially developed draft authorisation application and supporting documents at least one week before meeting with us, to allow us to review the application prior to meeting.[80]

95 For mergers, during the pre-notification stage, we are likely to also seek relevant documents (and other information) relating to the target. Given the commercial sensitivity of such documents, we are likely to request them from the target directly. Similarly, we may seek documents from the parties to an agreement separately during the pre-notification stage.

78. The Mergers Manager and the Restrictive Trade Practices Manager can be contacted at registrar@comcom.govt.nz.

79. As evidenced by, for example, adequate financing, heads of agreements, or evidence of board-level consideration. We will also take into account other evidence of good faith intention; for example, when an acquirer is genuinely considering making a bid at auction.

80. A longer timeframe may be appropriate for more complex agreements or mergers.

Applying for authorisation

96 An application for authorisation must be made using the prescribed form. There are separate application forms for mergers and agreements. The forms are available on our website at www.comcom.govt.nz

97 The application forms set out the information we need to start our investigation. This includes providing information on the key competition issues and supporting evidence (including any expert economic evidence the applicant wishes to provide). Where data or statistics are used, these must be supported by source material and an explanation of any calculations (preferably in Excel) or analytical tools used.

98 Advisors involved in the preparation of the application form should have adequate processes in place to ensure that commercially sensitive information is not exchanged between the relevant parties before the agreement or merger is authorised.

99 We require both a confidential version and a public version of the application. In the confidential version, any information for which confidentiality is sought must be highlighted and contained in square brackets. In the public version the confidential information should be removed from within the square brackets, with the brackets remaining, ie, [ ].

100 If the application contains information which is considered confidential, a schedule must be provided which identifies each piece of information over which confidentiality is claimed and the reason why the information is confidential (preferably with reference to the Official Information Act 1982 (OIA)).

101 The application must be accompanied by payment of the $36,800 filing fee (GST incl). Payment can be made by electronic payment into our bank account. Please use the applicant's company name as the reference when depositing funds electronically. Our bank account details are:

Commerce Commission
BNZ North End
02 0536 0329867 00

102 After receiving an authorisation application and payment, we check that the application is in the correct form and provides us with the necessary information and supporting evidence to enable us to proceed with our investigation. If we are satisfied that the application meets our requirements, we then register the application and inform the applicant of this fact.[81]

103 Applications that do not meet our requirements, including the provision of both a confidential and a public version of the application form, and a confidentiality schedule, will not be registered. If the application does not meet our requirements, we will inform the applicant as soon as we can and give them the opportunity to remedy the deficiencies.

104 If the agreement or merger is being considered by overseas competition authorities, we request that applicants provide confidentiality waivers to allow us to discuss the application with these authorities. In general, we are more likely to require waivers in applications to authorise mergers than agreements. A template waiver is attached to the application form. We discuss this further in paragraphs 184-188 below.

105 If the applicant does not address our concerns with the application, or does not pay the fee, we may decline to register the application.[82]

81. Commerce Act 1986, ss 60(2) and 67(2).
82. Commerce Act 1986, ss 60(4) and 67(2).

Confidentiality as to the fact of an authorisation application

106 Applicants sometimes ask that we do not publicly disclose the fact that they have made an authorisation application (fact confidentiality).[83]

107 We consider requests for fact confidentiality on a case-by-case basis, but we are only likely to grant fact confidentiality for a limited period and only in exceptional circumstances. This is because fact confidentiality hampers our ability to investigate, as we cannot gather information from interested parties and test information provided in an authorisation application.[84]

Publication of a public version of an authorisation application

108 Once we have registered an authorisation application and agreed which information is confidential, we publish a public version on the authorisations[85] or anti-competitive practices authorisations[86] register on our website and issue a media release. We do this to inform the public of the proposed agreement or merger and to enable interested parties to make submissions to us.

How we investigate an authorisation application

Who determines an authorisation application

109 Each authorisation application is decided by members of the Commission appointed by the Chair for that purpose (the Division).

110 The Division is supported by a multi-disciplinary team of Commission staff, comprising one or more investigators, and economic and legal staff. Staff brief and advise the Division during the investigation, including providing key facts and documents. The Division provides staff with guidance and direction.

Indicative authorisation timeframes

111 The Commerce Act sets out a 60 working day statutory timeframe in which we must clear, authorise or decline to authorise a merger[87] and 120 workings days to authorise or decline to authorise an agreement.[88] If this period expires without a decision, we are deemed to have declined to grant an authorisation. For some applications, especially those that are not straightforward, we may require more time to process an application than allowed for in the statutory timeframe. We may therefore need to seek an extension beyond this timeframe.[89]

112 For straightforward applications,[90] or applications for agreements or mergers that have obvious public benefits and limited impact on competition,[91] we may be able to make our determination within 40 working days.

83. Applicants may request fact confidentiality because, for example, the merging firms have not informed their employees about the merger, or there is competition from other parties to acquire the business in question.
84. Confidentiality of information is discussed further below at paragraphs 161-183.
85. For merger authorisation applications.
86. For agreement authorisation applications.
87. Commerce Act 1986, ss 67(3) and 67(4).
88. Commerce Act 1986, s 61(1A).
89. We make extension requests verbally in the first instance, although we will follow that request with a written request by email or letter.
90. For example, applications where detailed quantification is not necessary or where the analysis is relatively straightforward, where the issues raised are discrete, or where the number of interested parties is small.
91. For example, where the total size of the relevant market(s) is $20 million or less, or the combined market share of the parties to the agreement or merger is less than 70%.

113 We will discuss the complexity of the application with the applicant(s) during pre-notification meetings. Our decision on whether we consider we can make our determination within 40 working days will be reflected in our draft investigation timeline provided to the applicant(s); however, we may revise this timeline, for example, if issues are more complex than they first appeared.

114 We set out an indicative investigation timeframe below. The time taken to reach a decision varies depending on the application. The timeframe below reflects our approach for complex agreements or mergers.

Pre-notification	Draft authorisation application provided to the Commission. Pre-notification meeting held. We provide feedback on draft authorisation application and may make initial information requests.
Day 0	Application for authorisation registered. We publish a public version of the application on our website.
Day 10-15	We provide a draft investigation timeline. In some cases, we will publish a Statement of Preliminary Issues on our website (discussed at paragraphs 123-124 below).
Day 20-25	Submissions due on the application and/or the Statement of Preliminary Issues. We post public versions of any submissions on our website.
Day 20-40	Initial interviews and information gathering.
Day 45- 55	We publish a draft determination.[92]
Day 55-65	We receive submissions on the draft determination.
Day 60-70	We receive cross-submissions on the draft determination. For some merger applications where there is no conference, we will be able to grant, or decline to grant, authorisation.
Day 60-90	We may decide to hold a conference if we consider it would be useful.[93] If necessary, we carry out any further interviews or information gathering.
Day 90+	We grant, or decline to grant, authorisation.

115 As actual timelines will vary depending on the circumstances of an application, we try to give the most accurate timeline we can at an early stage. However, we may have to seek further extensions later in the authorisation process, particularly if we need to:

115.1 consider any undertakings or divestments offered or discuss any proposed conditions with the applicant;

115.2 test new information provided by the applicant(s), target (for mergers), or an interested party (including economic evidence);

115.3 provide the applicant with the opportunity to respond to any unresolved issues;

115.4 deal with requests for information under the OIA;

115.5 allow for responses to information requests; and / or

115.6 consider whether the agreement or merger being reviewed in another overseas jurisdiction(s) causes delay to our investigation.

116 To achieve our investigation timeline, we rely on the full cooperation of the applicant throughout the process. Applicants must provide complete, concise and relevant information promptly. We also require interested parties to comply with strict timeframes for submissions and consultation.

92. The Commission is not required to publish a draft determination for merger authorisations. However, we generally do.

93. Commerce Act 1986, ss 62(6) and 69B.

Communication with the applicant

117 A member of the investigation team contacts the applicant or the applicant's lawyer early in the investigation to let them know who the Commission's main point of contact will be.

118 Throughout our investigation, we keep in regular contact with the applicant or the applicant's lawyer about progress. How often depends on the circumstances of the case.

Seeking views from market participants the applicant, target, and interested parties

119 We gather information from the applicant, target (for mergers), and interested parties (customers, existing and potential competitors, and suppliers) in a variety of ways, depending on the circumstances. This can include through interviews or by way of information requests. This helps us assess the likely competitive effects of the proposed agreement or merger and to test the information provided in an authorisation application.[94]

120 We generally give public notice of authorisation applications by publishing a media release and the application on our website, and inviting parties to give notice to us if they have an interest in the application.[95] In respect of authorisation applications for agreements, we must give notice of the application to any person who, in our opinion, is likely to have an interest in the application.[96]

121 We usually seek information on a voluntary basis, although in some cases we use our compulsory information-gathering powers to require parties to provide information. We discuss our powers to do so in more detail at paragraphs 141-146 below.

122 It is an offence under section 103 of the Commerce Act for any person to attempt to deceive or knowingly mislead the Commission through communications with us, interviews, emails or telephone conversations.

Statement of Preliminary Issues

123 For some authorisation applications, we publish a Statement of Preliminary Issues. This outlines our preliminary view of the issues that we will need to consider during our investigation (based on the information we have at that time) with the aim of:

123.1 increasing the transparency of our process;

123.2 providing interested parties with an opportunity to consider and submit on the matters identified; and

123.3 gathering further information which might assist our investigation.

124 In cases where we choose to issue one, we usually aim to publish a Statement of Preliminary Issues on our website 10-15 working days after registering the application.

94. Under ss 60(3A) (agreements) and 68(5) (mergers) of the Commerce Act we may consult with any person we think is able to assist us in making a determination.

95. Under s 60(2)(d) of the Commerce Act we are required to give public notice of applications for agreement authorisation in such manner as we think fit.

96. Commerce Act 1986, s 60(2)(c).

Submissions

125 Typically, we invite submissions from the applicant, interested parties and, for mergers, the target. We will seek submissions after publishing the application on our website.

126 We will also seek submissions if we issue a Statement of Preliminary Issues as well as when we publish our draft determination. We allow for cross-submissions in some cases. Cross-submissions are not an avenue to introduce new issues or arguments or repeat submissions: they must address the specific points made in submissions.

127 Submissions and cross-submissions will generally only be accepted within the notified submission timeframe. This ensures that we continue to progress the investigation in a timely fashion.

128 We may place less weight on submissions received after our deadline. Parties wishing to make a submission that are unlikely to meet our deadline should let us know beforehand and explain why. We will only grant extensions to the deadline in exceptional circumstances.

129 Any party providing a submission or cross-submission on the draft determination should provide both confidential and public versions, together with a schedule that explains why information is confidential or commercially sensitive, preferably with reference to the OIA. We post public versions of submissions on our website. Confidentiality is discussed further in paragraphs 161-183 below.

130 Anyone who has information that they believe is important for our investigation, or wants to provide us with a written submission, can contact us at registrar@comcom.govt.nz.

Interviews

131 We often conduct interviews with the applicant(s), target (for mergers), and interested parties as part of our investigation. These interviews enable us to gather detailed information to help us understand the likely competitive effects of a proposed agreement or merger.

132 The purpose of our interviews will differ depending on the stage of our investigation. For example, our initial interviews are likely to entail broader, fact-gathering discussions, while interviews conducted later in the investigation may focus on testing information that has been provided to us.

133 Where we wish to interview someone, we make contact to request a time for a face-to-face meeting or interview via telephone or video conference. Before the interview, we provide a link to the public version of an application for authorisation (unless we are interviewing a party to the merger or agreement), explain our processes (including confidentiality processes) and provide an agenda or a list of topics to be discussed (including any specific information we require).

134 We prefer to conduct these interviews on a voluntary basis. However, under our powers to require information (discussed below), we can require persons to appear before us to give evidence under oath or affirmation.

135 We prefer to record interviews and can provide a copy of the recording to the interviewee on request. Recording interviews ensures that the Commission and the interviewee have access to an accurate record of what was discussed and allows us to converse freely without the need to take extensive notes.

136 Interviews often include discussion of information that is confidential. Interviewees are encouraged to identify all commercially sensitive or confidential information during the interview.

137 Following the interview, we may request that interviewees provide evidence or information to substantiate their views, including source data (preferably in Excel format) and any underlying documents. This is more likely to happen where such arguments are key considerations in our assessment of an authorisation application.

Information requests

138 We also often ask the applicant, target (for mergers), and interested parties to provide information relevant to our investigation, such as market share estimates and future business plans.

139 We recognise that in many cases such information is confidential. As with interviews, we encourage parties to identify all commercially sensitive or confidential information when responding to our requests. Please refer to the section on confidentiality below for guidance on how to claim, and how we assess, confidentiality.

140 When we make an information request, we specify a deadline for the information to be provided. This allows us to progress our investigation as quickly as possible. We encourage parties to contact us as soon as possible if they cannot meet the deadline.

Our statutory information-gathering powers

141 We can require a person to supply information or documents or give evidence by issuing a statutory notice (a section 98 notice).

142 We may decide to use a section 98 notice for a number of reasons, including because:

142.1 it ensures information is gathered in a timely manner;

142.2 parties may prefer it because, for example, they might be under a duty such as a confidentiality obligation not to reveal that information unless compelled to do so; or

142.3 parties with relevant information are unwilling to disclose the information.

143 A section 98 notice explains what is required under the notice (for example, the provision of information, documents and/or giving evidence in person), and provides a timeline for providing that information or documents.

144 A section 98 notice imposes a legal obligation on the recipient to provide us with the information requested. It is an offence to refuse or fail to comply with a section 98 notice without reasonable excuse.

145 If the recipient anticipates difficulty in complying with a section 98 notice, they should let us know as early as possible and explain the reasons why. For example, if the information we have asked for does not exist or the documents are no longer in the recipient's possession or control, the recipient must explain why the requested documents or information cannot be provided.

146 Similarly, if the recipient wishes to seek an extension to the deadline, they should make a request stating the reasons and allowing sufficient time for us to process the request before the original deadline.

Conferences

147 The purpose of a conference[97] is to allow the Division to question the applicant, target (for mergers), and interested parties on issues relating to the application which require further testing or clarification. A conference allows:

147.1 the Division to test preliminary views with the applicant, target, and interested parties;

147.2 the Division to test the submissions of the applicant, target, and interested parties; and

147.3 the applicant, target, and interested parties to hear and comment on each other's public views.

97. Commerce Act 1986, s 69B.

148 Before any conference, we publish the fact of the conference on our website. We may also inform interested parties directly. The notification includes:

148.1 the date, time and location of the conference;

148.2 a request for attendees at the conference;

148.3 an outline of the agenda and key issues for the conference; and

148.4 an outline of the procedures for the conference.

149 The process of a conference is inquisitorial rather than adversarial and will be carried out in the way that best assists the Commission's decision-making process.

150 At the conference, we expect parties to provide new information on the matters already identified. There will not usually be an opportunity for attendees to make general submissions or restate information already provided to us in interviews or via the submission process. New matters should not be raised by attendees, other than in exceptional situations. If a party cannot respond to a direct question from the Division or a staff member, that party may be given the opportunity to respond after the conference.

151 Attendees at a conference may include any experts that have been advising parties throughout the consultation process. We expect experts to attend as experts in their fields rather than as an advocate for any party and to follow the guidance in the High Court's code of conduct for expert witnesses.

152 Members of the public and media representatives may attend the conference but are not entitled to address the conference.

153 We expect that confidential material will be kept to a minimum at the conference in order to maintain as transparent a process as possible. When required, we may decide to conduct a confidential closed session which would limit attendees to those participants and experts that have confidentiality undertakings in place with the Commission.

154 We also record the conference and provide a transcript on our website as soon as practicable.

155 At or after the conference, we may request final written submissions on issues discussed at the conference. Any final submission must introduce new information. We will not accept information that is already on the conference record or has already been provided to us.

How we use information collected

156 We use the information we collect to assess the authorisation application for which it was obtained.

157 However, where information disclosed to us gives rise to concerns that another provision of the Commerce Act or other law we enforce has been breached, we can use information sought by us or given to us in relation to an authorisation application for our other statutory functions, including enforcement actions and court proceedings.

158 In such a situation, we can share the information within the Commission, on the same terms as it was collected during our authorisation process.

159 If we intend to use a party's information obtained in relation to an authorisation application for another purpose, we will endeavour to notify that party as soon as we are reasonably able.

160 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 us in discharging another one of our functions.

Confidentiality and information requests under the Official Information Act

161 During an investigation, we seek to make our determinations on the basis of the fullest set of information available.

162 We seek to be as transparent as possible. This includes publishing submissions and determinations on our website and sometimes sharing information provided to us by one party with others so that we can test that information to inform our decision. This is an important part of ensuring the applicant and other parties have a fair opportunity to represent their positions and helps ensure we make robust determinations.

163 The OIA provides a legal basis for any person[98] to request information that we hold and it operates with an overriding principle of availability,[99] which means that we should release information unless there is an administrative,[100] conclusive[101] or other good[102] reason not to. In general, we adhere to these principles throughout our investigations, including when deciding which information to publish and whether there are reasons not to publish or disclose information.

164 For example, we are aware that some information that parties provide to us is confidential or commercially sensitive and that sharing information could, for example, cause harm either to the party that provided it or a third party, or impede the Commission's ability to undertake investigations.

165 This section explains our approach to managing confidential and commercially sensitive information, including how we assess whether information is confidential or commercially sensitive, and how and why we might share confidential or commercially sensitive information for the purposes of our investigation. It also explains our obligations under the OIA and how the OIA affects our investigations.

Assessing whether information is confidential or commercially sensitive

166 We understand that disclosing confidential or commercially sensitive information could cause harm to the provider of the information or a third party, and therefore affect parties' willingness to share information with us in future investigations. This reduces the quality of information available to us and our ability to investigate an application and make a fully formed decision.

167 When providing information to us, it is important that parties identify the specific information they consider to be confidential or commercially sensitive and explain the reasons, ideally before or at the time it is provided to us. This can be done by providing a schedule which sets out the information over which confidentiality or commercial sensitivity is claimed, the reasons why (preferably with reference to the OIA) and any supporting information or evidence.[103] Parties should also provide versions of any key documents over which they claim confidentiality or commercial sensitivity with proposed redactions so that these versions can be made public. However, it is ultimately for us to decide whether information provided to the Commission should be treated as confidential or commercially sensitive. Where a party claims confidentiality or commercial sensitivity over a piece of information, in deciding whether or not to release it we balance that parties' rights and expectations against:

- 167.1 the need for us to effectively and efficiently complete our investigation;
- 167.2 the need for us to carry out our investigation transparently and adhere to the principles of natural justice; and
- 167.3 our legal obligations under the OIA, in particular, the principle of availability of information and statutory reasons for withholding information, which are discussed in paragraphs 171-178 below.

98. As defined in the Official Information Act 1982, s 12.
99. As defined in the Official Information Act 1982, s 5.
100. As defined in the Official Information Act 1982, s 18.
101. As defined in the Official Information Act 1982, s 6.
102. As defined in the Official Information Act 1982, s 9.
103. Note that all applications must be accompanied by a confidentiality schedule (paragraph 100) and we request the same for submissions (paragraph 129).

168 We will carefully evaluate each assertion of confidentiality or commercial sensitivity and may need to test claims with the provider or subject of the information.

169 We are unlikely to accept a claim of confidentiality or commercial sensitivity for information that is already publicly or readily available or information that is unlikely to cause harm if released.

170 If the Commission's decision whether to grant authorisation is appealed, matters of confidentiality are determined by the Court irrespective of the position taken by the Commission during our investigation.

Requests for information and disclosure of information

171 Any person may request access to information[104] and all information we hold is subject to the principle of availability under the OIA.[105]

172 However, the OIA does not require us to release information in certain circumstances, including if there are administrative, conclusive or other good reasons for withholding it. This may include withholding all or part of the information if it would prejudice our investigation (section 6(c) of the OIA), or where the public interest in making the information available is outweighed by the fact that, in our view, and on any information or evidence provided:

- 172.1 disclosure would unreasonably prejudice the commercial position of the supplier or subject of the information (section 9(2)(b)(ii)); or
- 172.2 we received the information under an obligation of confidence, and if we were to make that information available, it would (section 9(2)(ba)):
  - 172.2.1 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
  - 172.2.2 be likely otherwise to damage the public interest.

173 The OIA enables us to release information subject to conditions that balance the public interest in the information being released against the confidentiality and/or commercial sensitivity of the information. As noted above, these are also factors that we consider when assessing claims of confidentiality and commercial sensitivity made in the course of our investigation. We might use conditions to limit how the information is released. For example, we might release the information by way of a physical data room, or only provide the information to specified persons (typically external legal advisers or other experts) who have signed confidentiality undertakings.[106]

174 The OIA also enables us to provide information in a manner which balances the public interest in the information being released against the confidentiality and/or commercial sensitivity of the information. Rather than providing a copy of the information, we might instead allow the requester an opportunity to view the information, or we may provide an excerpt, summary, or verbal description of the information.[107]

175 In some instances, we may consider there is sufficient reason to redact confidential or commercially sensitive information being provided to external legal advisers or other experts, even if other information has been provided subject to confidentiality undertakings. For example, if the confidential information is material to contemporaneous commercial negotiations and the lawyers to which disclosure would be made are involved in those negotiations.[108]

104. Official Information Act 1982, s 12.
105. See paragraphs 179-183 regarding section 100 orders.
106. See Official Information Act 1982, s 28.
107. See Official Information Act 1982, s 16(1).
108. See for example *Carter Holt Harvey v Sunnex Logging Ltd* [2001] 3 NZLR 343 (CA) at [24].

176 When the Commission receives a request for information which covers confidential or commercially sensitive material that has been provided during our investigation, we generally consult with the parties that provided, or are the subject of, the information. We do this to confirm that relevant confidential or commercially sensitive information has been identified and to obtain parties' views before making our decision on the request.[109]

177 Information requests can contribute to the need to extend the timeframe of our investigation.

178 Section 28 of the OIA provides parties with the right to ask an Ombudsman to investigate and review decisions made by the Commission to refuse to make information available or impose conditions on the release of information.

Section 100 orders

179 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 purposes of an investigation, for example, where an application occurs in circumstances of high commercial sensitivity.[110]

180 Section 100 orders protect specific information or documents provided to or obtained by the Commission from being published, communicated, or given in evidence as follows:

> 100(1) [Confidentiality order] Subject to subsection (2) the Commission may, in relation to any application for, or any notice seeking, any clearance or authorisation under Part 5… 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, –
>
> (a) where that order was made in connection with any application for, or any notice seeking, any clearance or authorisation under Part 5, after the expiry of 20 working days from the date on which the Commission makes a final determination in respect of that application or notice, or, where that application or notice is withdrawn before any such determination is made, after the date on which the application or notice is withdrawn: …
>
> **(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.

181 Section 100 orders can be made over any information, document or evidence that is provided to or obtained by the Commission. This includes the questions that we ask or information that we convey, as well as the answers, information, and documents with which we are supplied.[111]

182 Where a confidentiality order is made, we will assess throughout our investigation whether the order remains necessary and rescind any order that is no longer needed.[112] On the expiry of an order under this section, the provisions of the OIA will apply.

183 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.[113]

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109. Detailed guidance on the application of the Official Information Act can be found on the Ombudsman's website: www.ombudsman.parliament.nz.

110. For example, the application may relate to a merger by way of competitive bid or where there are contemporaneous commercial negotiations between parties to the merger and other interested parties.

111. *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (CA) at [89]-[92].

112. Orders under s 100 relating to authorisation applications expire at the end of 20 working days from the date the Commission makes its decision (Commerce Act 1986, s 100(2)(a).

113. Commerce Act 1986, s 100(4).

International mergers and agreements: sharing information and requested waivers

184 For mergers and agreements also affecting other jurisdictions, we may contact relevant overseas competition authorities to discuss the application.

185 For trans-Tasman mergers, we have a specific Cooperation Protocol for Mergers Review with the Australian Competition and Consumer Commission.[114]

186 Cooperation may include:

186.1 coordinating our processes;

186.2 sharing information provided by the applicant, interested parties and, for mergers, the target;

186.3 sharing our analysis; and

186.4 from time-to-time, gathering information on behalf of the other agency.

187 Except in certain circumstances, we cannot disclose confidential information to another agency without consent from the party that provided us the information.[115] For that reason, we request a waiver from the parties and, where appropriate, third parties so that we can disclose information to an overseas competition authority, and a reciprocal waiver so that the overseas authority can disclose information to us. We request a waiver because:

187.1 information or evidence provided to overseas competition authorities may demonstrate a competition issue that requires further investigation; and

187.2 the exchange of information could benefit the assessment of an application, particularly where both authorities are considering the same issues, or make it easier to identify appropriate divestment undertakings.

188 Where relevant, an applicant is requested to provide a waiver with the application, because a waiver generally speeds up the investigation, ensures we are considering the same information as our counterparts, and can reduce the need for us to make information requests. A template waiver is attached to the application form.

Access to information

189 We recognise that the applicant(s) and interested parties have an interest in understanding our process, and the evidence and submissions that we rely on when deciding whether to grant authorisation.

190 During our investigation we will keep interested parties informed through our public register, and through media releases when necessary. These are the primary means we use to communicate the issues and evidence we are considering, and the progress of our investigation.

191 In some circumstances we may need to make certain documents and evidence available to the applicant(s) and interested parties to assist them in preparing submissions, or to better understand the basis on which we have reached our preliminary conclusions. We also publish documents on our website such as parties' submissions and our draft and final determinations. The ways in which the Commission may make this information available, and the safeguards we will use to protect confidential information, are outlined above.

114. A copy of the protocol is available at https://comcom.govt.nz/about-us/working-with-other-agencies.

115. The Commission can provide compulsorily acquired information and investigative assistance to overseas regulators in certain circumstances without consent: see ss 99C to 99P of the Commerce Act.

Draft determination

192 We publish a draft determination for authorisations on our website around 40 to 50 working days after receiving an application (as outlined above, this may be longer for complex applications).[116] A copy of the draft determination is sent to the applicant and interested parties.[117]

193 The draft determination sets out our preliminary view on whether or not we are likely to grant an authorisation, and the reasons for that view. In particular, the draft determination outlines any unresolved issues and requests further submissions and evidence that may assist us in making a final determination. Parties are encouraged to provide only new evidence at this stage of the process.

194 As discussed above, any party providing a submission or cross-submission on the draft determination should provide both a confidential and public version, together with a confidentiality schedule.

Post-determination: publication of determination and written reasons

195 Once we have completed our investigation, the Division decides whether to grant the authorisation or decline to grant the authorisation.

196 We inform the applicant of our determination by telephone usually 30 minutes to an hour before we issue our decision via media release and update the relevant authorisations register on our website. Where the applicant or the target is listed on the New Zealand and/or Australian stock exchanges, we issue the media release outside of trading hours.[118] We may also inform interested parties of our determination.

197 We are only required by law to publish written reasons if we decline to grant authorisation.[119] However, we generally publish reasons to explain our determination, and to provide guidance for interested parties and future applicants.

198 While we draft written reasons during our investigation, we can only finalise these following our determination. This may mean that we do not publish written reasons on the day we issue our determination.

199 We do, however, recognise that businesses want to understand the reasons for our decisions as soon as possible, particularly when we decline to grant authorisation. Because of this, we aim to publish reasons as soon after our determination as we are able.

116. The Commission is not required under the Commerce Act to publish a draft determination for merger authorisations; however, we generally do. Under s 62(1) of the Commerce Act we must prepare a draft determination before determining an application for authorisation of an agreement.

117. Under s 62(2) of the Commerce Act, in relation to an application for authorisation of an agreement, we must send a copy of the draft determination to the applicant, those who have given notice to the Commission under s 60(3) or other people who may be interested or may be able to assist.

118. For parties listed on stock exchanges in other countries, we will liaise with the applicant and/or the target regarding any need to publish any media releases outside of trading hours.

119. Commerce Act 1986, s 68(3).

Rights of appeal

200 The applicant(s) and any other person who has a direct and significant interest in the application and participated in the Commission's processes leading up to the determination, has the right to appeal against an authorisation determination to the High Court.

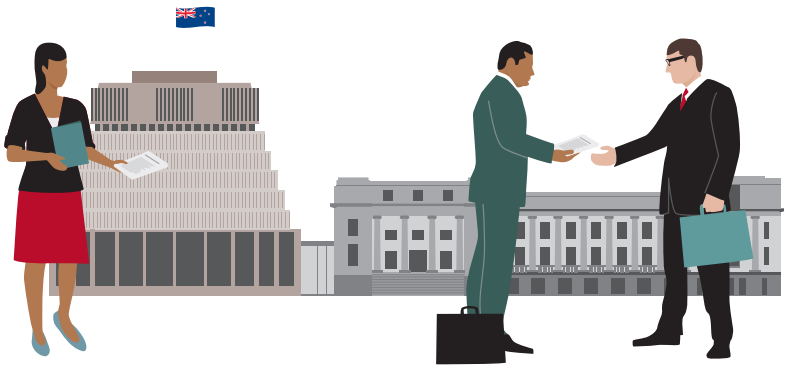
201 The High Court Rules and section 91(2) of the Commerce Act provide that a party must file any appeal within 20 working days of the date on which the decision is made. As the determination date may be different to the date on which we publish our reasons, we generally indicate to parties that we do not oppose a party filing an appeal out of time provided they file any appeal within 20 working days of the date on which we publish our written reasons.

Public Records Act 2005

202 The Commission is subject to the Public Records Act 2005 which means that we must create and maintain full and accurate records, until their disposal is authorised.

203 This means that parties are not able to withdraw submissions or evidence provided to us once they have been submitted. If a party no longer wishes the Commission to place any weight on submissions or evidence provided, we can disregard it or limit the weight that we give to that submission. However, a submission cannot be withdrawn: it will remain on our record and subject to the OIA.

204 If we receive a request under the OIA that includes any submission or evidence that a party no longer wishes to be taken into account, we will consult with the party before making a decision on its release.



Attachment A

Documents and other information that we find useful in assessing authorisation applications

Documents and other information

205 We examine parties' statements and submissions and assess those against the documents and other information put forward by the parties. We give less weight to a statement or submission that a party cannot support with corroborating evidence, than a statement or submission that a party can support with corroborating evidence.

206 As a general rule the types of information we find most persuasive are business documents and records that were prepared in the ordinary course of business.

207 We encourage merging parties to discuss with us at the earliest opportunity, and ideally before the parties file an authorisation application,[120] the types of evidence that we might find helpful in our investigation. Providing information as early as possible will help us to progress our investigation more efficiently.

208 In this respect, we request certain documents as part of an application, namely:

- 208.1 Transaction or agreement documents such as sale and purchase agreements, memoranda of understanding, share transfer documents and registers of assets being transferred;
- 208.2 company structure documents such as organisational diagrams and listings of shareholders and directors;
- 208.3 financial statements for the three financial years prior to the current year; and
- 208.4 documents showing the rationale/strategy for the merger or agreement.

209 We also request, as part of an application, documents that contain the following:

- 209.1 General information which explains market conditions and trends. This may include market reports or studies prepared by a merging firm, a party to an agreement or an independent third party, and market forecasts.
- 209.2 Information on how the merging firms or parties to an agreement and other parties view their competitors. This may include documents that assess or describe competing firms, such as SWOT or competitor analysis, and regular reporting on business performance (eg, monthly sales reports).
- 209.3 Information on customers, and their preferences and behaviour. This may include information about recent tenders, such as who bid and who won, information about customers switching between suppliers, such as reports on customer churn, and customer surveys and forecasts.
- 209.4 Strategy documents and financial information. This may include research and development plans, investment proposals, business plans and financial projections, marketing and advertising strategies, and financial reports specific to the product(s) or geographic region(s) we are interested in.
- 209.5 Information on how a party determines its pricing. This can include price lists, forecasts, analysis and strategies, discount/rebate policies, and examples of how pricing decisions have been made in the past and what factors influence those decisions.

120. See paragraphs 89-95 for further details on pre-notification discussions.

Data for quantitative analysis

210 In addition to examining information and documents, we may also carry out quantitative analysis to assist our decision making. We may carry out and rely on a quantitative analysis, if the analysis is likely to help clarify the issues in the case and appropriate reliable data is available.

211 Our quantitative analysis can take many forms. Please refer to our Advisory Note explaining the types of quantitative analysis we might conduct internally or receive from parties from time to time.[121]

212 Before requesting data we generally discuss our data requirements with the parties so that we can better understand what data is available and the easiest way it can be provided to us.

121. Available on our website at: https://comcom.govt.nz/__data/assets/pdf_file/0010/111520/How-to-use-quantitative-analysis-in-your-merger-analysis-Advisory-note-December-2018.pdf.

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This is a guideline only and reflects the Commission's view. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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