

Notice seeking authorisation under section 58 (and interim authorisation under section 65AAA)

Restrictive trade practices

To apply for authorisation and, if applicable, interim authorisation you must send both a confidential and a public version of your notice seeking authorisation (“application”) to registrar@comcom.govt.nz, or The Registrar, Competition Branch, Commerce Commission, PO Box 2351, Wellington 6140, New Zealand.

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

An interim authorisation can only be granted if an application for authorisation is contemporaneously, or has previously been, filed for the same conduct.

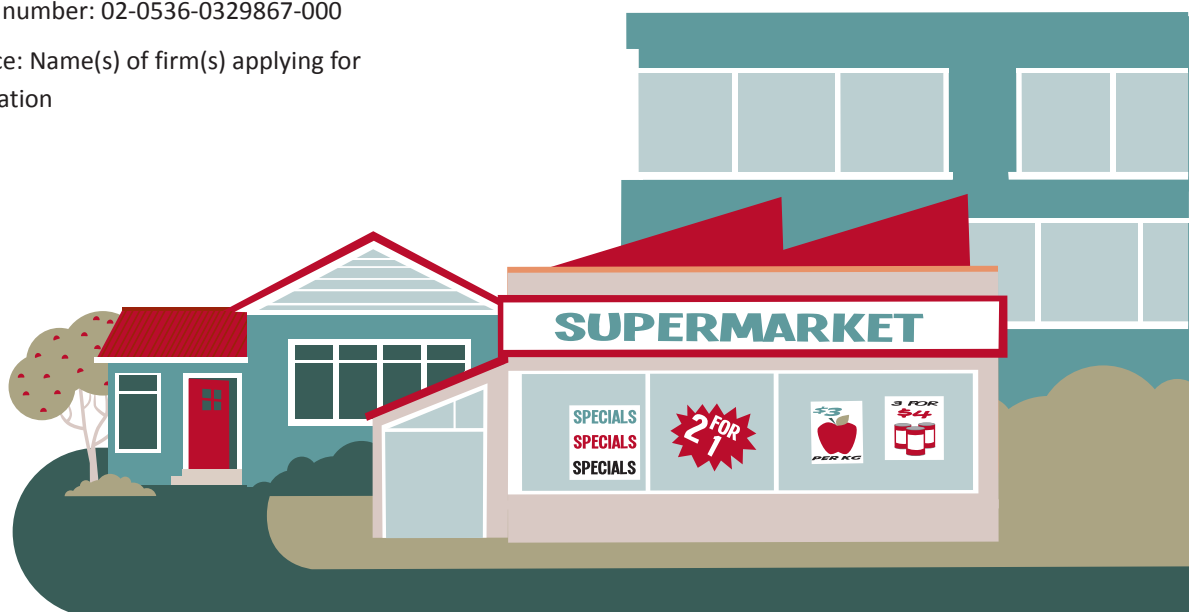
You must also pay the filing fee of NZ\$36,800 (including GST) for each application for authorisation. You can pay by proof of electronic payment to:

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

Warning

It is an offence to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission.

Any person who does so is liable upon summary conviction to a fine of up to \$100,000 (for an individual) or \$300,000 (for a body corporate). Refer to sections 103(2) and (4) of the Commerce Act.



Help in completing your application

You should consult the Authorisation Guidelines at www.comcom.govt.nz when completing your application.

Your application for authorisation will be assessed more efficiently and effectively if the information and evidence you provide in your application is comprehensive.

The level of detail and the type of information required in an application will differ depending on the nature and complexity of the proposed agreement¹ or unilateral conduct.²

Before submitting an application for authorisation or interim authorisation, we strongly encourage you to contact the Head of Competition Investigations to schedule a pre-notification discussion.³

As discussed in the Authorisation Guidelines, pre-notification discussions help clarify what information and evidence we are likely to need in your application.

To get the most out of these pre-notification discussions, we expect an applicant to provide us with a substantially developed draft authorisation application (including required documents) at least a week before meeting with us.

The Commission recognises that, in certain emergency situations, the prescribed form and fee may represent a barrier to some applicants seeking authorisation.

Section 60(4) of the Commerce Act provides that the Commission may on receipt of an application that does not comply with the prescribed form and fee in Section 60(1), in its discretion, either waive all or part of any fee or particulars as may be specified in the form for authorisations.

The exercise of the Commission's discretion will be highly fact-specific. Applicants should contact the Commission to discuss any request for a waiver of the form and fee requirements.

1 The Commerce Act prohibits contracts, arrangements, understandings or covenants that have the purpose, effect or likely effect of substantially lessening competition in a market (s 27 for contracts, arrangements or understandings and s 28 for covenants) or that contain a cartel provision (s 30). The Commerce Act also prohibits resale price maintenance (s 37 and 38). Unless indicated otherwise, we use the term "agreement" to also cover all of these.

2 The Commerce Act prohibits a person with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market (sections 36 and 36A). Unless otherwise indicated, we use the phrase "unilateral conduct" in this form to describe conduct that would be subject to sections 36 or 36A.

3 The Head of Competition Investigations can be contacted at registrar@comcom.govt.nz.

Required Information

We give less weight to a statement or submission that cannot be supported with corroborating evidence. As such, any evidence in support of your application should be submitted with your application. If your application includes calculations or analysis, please explain the methodologies and information sources used, and provide us with copies of the underlying data (preferably in Excel).⁴

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

- 1 Provide the name(s) of the applicant(s) for authorisation, and the name(s) of the individual(s) responsible for the application. In addition, please include the:
 - 1.1 postal address, physical address, telephone number and web address of the applicant(s)
 - 1.2 email address, telephone number and position of the contact person(s)
 - 1.3 names of any relevant related entities (showing shareholdings).
- 2 For agreements, provide the names of all other parties to the agreement and provide the:
 - 2.1 postal address, physical address, telephone number and web address of each party
 - 2.2 name, email address, telephone number and position of the contact person(s) for each party.
- 3 For the applicant and, in the case of agreements, each party to the agreement, please provide an organisational chart or diagram that shows the structure of ownership and control of the business or organisation. If relevant, identify and explain any other links, formal or informal, between the parties.
- 4 Please provide a copy of the proposed agreement, or planning documents for the proposed unilateral conduct, for which the parties seek authorisation. If the agreement or plans for the unilateral conduct have not been finalised or are unable to be provided, please provide a clear and detailed description of the agreement or unilateral conduct.⁵ Please also set out:
 - 4.1 when the parties intend to enter into, or give effect to, the agreement or unilateral conduct
 - 4.2 whether authorisation is only being sought for a specific time period and, if so, what time period
 - 4.3 the key terms of the agreement or key aspects of the unilateral conduct, and how these will affect the behaviour of the parties
 - 4.4 the rationale for the agreement or unilateral conduct, and
 - 4.5 the likely relevant scenario(s) for each party if the agreement or unilateral conduct does not go ahead.
- 5 If the agreement or unilateral conduct is being considered by other competition agencies, list the other agencies that are being notified and the date on which those agencies were or will be notified. Where relevant, indicate the status of reviews by other agencies.
- 6 If the applicant requests that the Commission varies, revokes or replaces an existing authorisation, set out the grounds on which the applicant considers the Commission has jurisdiction to do so.⁶

4 The Commission understands that the cost and time involved in attempting to quantify the nature and extent of benefits and detriments may be a barrier to parties filing applications in emergency situations. In such situations, applicants may wish to seek interim authorisation as well. Where a situation is covered by the Commission's *Business collaboration in response to an emergency* guidance, the Commission may be able to consider an application for interim authorisation without detailed quantification.

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

6 See s 65(1) of the Act.

- 7 Describe the products and/or services that are relevant to the agreement or unilateral conduct. For each product/service, please provide:
 - 7.1 the parties' view on the appropriate market definition⁷
 - 7.2 the names and contact details⁸ for each party's key customers and/or suppliers (as applicable)⁹ relevant to the agreement or unilateral conduct, including at least the top five by value in terms of revenue or spend (please include these figures)
 - 7.3 the names and contact details of each party's main competitors in each market identified above that are not party to the agreement or unilateral conduct, and
 - 7.4 the names and contact details for any other relevant market participants or interested parties.
- 8 Explain the extent to which the agreement or unilateral conduct is likely to result in a lessening of competition in the relevant market(s),¹⁰ such that the Commission has jurisdiction to authorise the agreement or unilateral conduct.¹¹ You should address:
 - 8.1 how firms compete in the relevant markets, including how the parties seek to acquire and retain customers,¹² how sales are made and the key dimensions of competition such as price, quality or innovation
 - 8.2 the parties' existing competitors, including approximate market shares (explaining how these have been calculated), and the extent to which these competitors would mitigate a lessening of competition
 - 8.3 the likelihood, extent and timeliness of entry and expansion by potential competitors, and the extent to which such entry or expansion would mitigate a lessening of competition
 - 8.4 the countervailing power of suppliers and/or customers in the relevant markets and the extent to which that countervailing power would mitigate a lessening of competition,¹³ and
 - 8.5 any other relevant factors.
- 9 If your application relates to unilateral conduct, explain why you consider the person intending to undertake the conduct has or may have a substantial degree of power in a market.¹⁴
- 10 Explain why you consider the agreement or unilateral conduct will be likely to result in such a benefit to the public that it should be permitted, having regard to the *Authorisation Guidelines*. Please provide quantitative and qualitative evidence of the benefits and detriments that may result from the agreement or unilateral conduct. You should address:
 - 10.1 the proposed benefits that will arise from the agreement or unilateral conduct, including the likelihood and magnitude of the benefits
 - 10.2 how and when these benefits will arise (including whether the benefits are one-off or recurring)
 - 10.3 whether these benefits can be achieved absent the agreement or unilateral conduct, and
 - 10.4 any detriments that may result from the agreement or unilateral conduct.
- 11 If you consider the distribution of benefits and/or detriments is relevant to your application for authorisation, you should explain why and provide evidence in support.¹⁵

7 For further information on market definition, please refer to Chapter 3 of the *Mergers and Acquisitions Guidelines*.

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

9 For agreements or unilateral conduct that could restrict competition between competing sellers, please provide customer details. If the proposed agreement or unilateral conduct could restrict competition between competing buyers, please provide supplier details.

10 Or contains or may contain a cartel provision, or amounts to or may amount to resale price maintenance.

11 If the Commission does not consider that the agreement or unilateral conduct is likely to lessen competition, does not contain a cartel provision or does not constitute resale price maintenance we do not have jurisdiction to grant or decline to grant authorisation.

12 If the agreement or unilateral conduct relates to the acquisition of goods or services rather than the supply, describe the typical procurement strategies of the parties.

13 For further information on countervailing power, please refer to Chapter 3 of the *Mergers and Acquisitions Guidelines*.

14 We explain in our *Misuse of Market Power Guidelines* the factors we consider when determining whether a person has a substantial degree of market power. See https://comcom.govt.nz/_data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf

15 See page 16 of our *Authorisation Guidelines*.

Documents¹⁶

- 12 Provide copies of any documents (including planning documents, due diligence reports, strategy documents, minutes of meetings, customer research, pricing studies, reports, presentations, surveys, analyses, industry/market reports and recommendations) in the applicant's possession which:
- 12.1 have been prepared for, seen or considered by senior management and/or any member of the board of directors (or equivalent body) (whether prepared internally or by external consultants), and
 - 12.2 either:
 - 12.2.1 set out the rationale for the agreement or unilateral conduct
 - 12.2.2 assess or analyse the agreement or unilateral conduct with respect to competitive conditions, competitors (actual and potential), market conditions, market shares, or
 - 12.2.3 within the last two years, set out the competitive conditions, market conditions, market shares, competitors, or the applicant's business plans in relation to the relevant product(s) or service(s) as identified in response to question 7 above.

Interim authorisation (if applicable)

- 13 If an application for authorisation has already been registered with the Commission, provide the case details of the application for authorisation to which the application for interim authorisation relates.
- 14 Confirm whether the applicant for interim authorisation is a party to the agreement or unilateral conduct in respect of which authorisation is, or has been, sought.
- 15 Describe the scope and duration of the interim authorisation sought. You should address whether interim authorisation is sought in respect of all or some of the conduct for which authorisation is, or has been, sought.

- 16 Explain the reason(s) for the application for interim authorisation. You should address:
- 16.1 whether there is any urgent need to carry out the conduct for which interim authorisation is sought, including:
 - 16.1.1 the risk that some or all of the benefits of the authorisation may not materialise if interim authorisation is not granted
 - 16.1.2 whether an emergency situation exists and interim authorisation is needed to allow parties to respond
 - 16.2 the proposed benefits that will arise if interim authorisation is granted, including:
 - 16.2.1 the likelihood and magnitude of the benefits
 - 16.2.2 how and when these benefits will arise (including whether the benefits are one-off or recurring), and
 - 16.2.3 whether these benefits can be achieved absent interim authorisation
 - 16.3 the possible detriments that may arise from the agreement or unilateral conduct if interim authorisation is granted, including the likelihood, magnitude and likely duration of the detriments
 - 16.4 the possible harm, if any, to the applicant if the application for interim authorisation is not granted
 - 16.5 the possible harm, if any, to third parties (such as consumers) or the public if the application for interim authorisation is not granted, and
 - 16.6 any other public interest factors relevant to the application for interim authorisation.

¹⁶ For the documents provided with the application, please provide an index indicating the date each document was prepared and the identity and role of the author(s). Responses to question 12 will typically include minutes of meetings, studies, reports, presentations, surveys, analyses or recommendations. In most cases, we would not expect to receive in the first instance documents such as emails, handwritten notes, or instant messages.

Confidentiality

- 17 If you wish to request confidentiality for specific information contained in or attached to the application(s), a schedule must be provided which sets out the reasons for each request, preferably with reference to the Official Information Act 1982.¹⁷
- 18 Provide two copies of the application(s). One copy must be a confidential version and the other a public version both in Microsoft Word format and in searchable PDF format.
 - 18.1 In the confidential version of the application any information for which confidentiality is sought must be highlighted in bold and contained in [square brackets].
 - 18.2 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining as [].

Checklist

Make sure you have provided the following:

- a confidential version of the application(s)
- a public version of the application(s)
- a schedule explaining why information is confidential
- all supporting documentation
- a signed declaration by each applicant
- payment of \$36,800 (GST inclusive)

17 For further information on the Commission's confidentiality policy and procedures, please refer to the *Authorisation Guidelines*.

Declaration

Restrictive trade practices

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

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

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

If this declaration is not completed, the Commission may decline to register the notice seeking authorisation or, if application is made for interim authorisation after registration of the notice seeking authorisation, the Commission may decline to grant interim authorisation.

I, _____, have prepared, or supervised the preparation of, this notice seeking authorisation and/or, if applicable, interim authorisation.

To the best of my knowledge, I confirm that:

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

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

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

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

Name and title of person authorised to sign:

Sign: _____

Date: _____