

Commerce Act 1986

# Notice seeking clearance

Mergers and acquisitions

To apply for clearance you must send both a confidential and a public version of your notice seeking clearance ('application') to either [registrar@comcom.govt.nz](mailto: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.

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

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

## Help in completing your application

You should consult the *Mergers and Acquisitions Guidelines* at [www.comcom.govt.nz](http://www.comcom.govt.nz) when completing your application.

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

Before submitting a clearance application, we strongly encourage you to contact the Mergers Manager to schedule a pre-notification discussion.<sup>1</sup> As discussed in the *Mergers and Acquisitions 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 clearance application (including required documents) at least a week before meeting with us.

## International transactions

Where a transaction forms part of an international transaction, it will assist the Commission if we are able to liaise with other agencies that are also considering the transaction. As such, we request applicants provide waivers to enable us to liaise with the notified agencies. Our waiver template is attached to this form. An applicant can provide a waiver during the pre-notification period or with their finalised clearance application.

### Warning

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

Refer to sections 103(2) and (4) of the Commerce Act.

1. The Mergers Manager can be contacted at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz).

## Required information

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

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

- 1 Provide the name(s) of the applicant(s) for clearance, and the name(s) of the individual(s) responsible for the application. In addition, please include the:
  - 1.1 postal address, physical address, telephone number and web address of the applicant(s)
  - 1.2 email address, telephone number and position of the contact person(s)
  - 1.3 names of any relevant related entities (showing shareholdings).
- 2 Provide the name(s) of the other party/parties to the merger<sup>2</sup> 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 Set out details of the merger for which you are seeking clearance including, where relevant:
  - 3.1 the type of transaction (such as a merger or joint venture), what is to be acquired, how the merger is structured (such as whether assets or shares are to be purchased), the purchase price and anticipated timing of the merger
  - 3.2 the rationale for the merger
  - 3.3 how the merger changes the control of the company, including a diagram(s) of how the structure of ownership and affiliated companies are to change
  - 3.4 a description of relevant ancillary agreements associated with the merger, such as long-term supply agreements between the target and the acquirer, and
  - 3.5 the likely relevant scenario(s) for each merging party<sup>3</sup> if the merger does not go ahead.<sup>4</sup>
- 4 If this merger forms part of an international transaction, list the other competition 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.
- 5 Describe the relevant products and/or services<sup>5</sup> of the merging parties and provide the following for each:
  - 5.1 the merging parties' view on the appropriate market definition<sup>6</sup>
  - 5.2 each merging party's total sales revenues, volumes, and, where relevant, capacity and excess capacity figures for the past three financial years

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2. For simplicity we use 'merger' to refer to the transaction for which clearance is being sought, including asset acquisitions and other relevant transaction types.
  3. The application form requires the provision of certain information relating to the target of the merger. This requirement can be satisfied by the applicant providing the information on behalf of the target or by the target providing the information directly to the Commission. If the applicant provides the information on behalf of the target, the merging parties and their advisors that are involved in the preparation of the application must have adequate processes in place to ensure that commercially sensitive information is not exchanged between the applicant and target.
  4. For example, whether the merging parties would continue to operate as they do now, seek to enter relevant market(s) through other means such as acquisition or de novo entry, or exit the relevant market(s). See the *Mergers and Acquisitions Guidelines* for more details on how we assess the without-the-merger scenario.
  5. 'Relevant' products or services can be overlapping products or services supplied by each of the firms in the same geographic area and which could be considered substitutes for one another, products or services that form part of the same supply chain (for example, with one product being an input for another product), or different products or services that are complementary or sold to the same customers.
  6. See Chapter 3 of the *Mergers and Acquisitions Guidelines* for more details on why and how we define a market.

5.3 the names and contact details<sup>7</sup> for each merging party's main competitors, and any trade or industry associations in which one or more of the merging parties participate, and

5.4 the names and contact details<sup>8</sup> for each merging party's key customers, including at least the top five by value, and the revenue earned from each in the last financial year.

6 Explain why you consider the merger is unlikely to result in a substantial lessening of competition in any market having regard to the *Mergers and Acquisitions Guidelines*. You should address:

6.1 how firms compete in the relevant markets, including how the merging parties seek to acquire and retain customers,<sup>9</sup> how sales are made and the key dimensions of competition, such as price, quality or innovation

6.2 the merging parties' existing competitors, including approximate market shares (explaining how these have been calculated), and the extent to which these competitors will constrain the merged firm

6.3 the likelihood, extent and timeliness of entry and expansion by potential competitors (including conditions of entry and expansion) and the extent to which such entry or expansion will constrain the merged firm

6.4 the countervailing power of customers and the extent to which that countervailing power will constrain the merged firm, and

6.5 any other relevant factors.



## Documents<sup>10</sup>

7 Provide copies of the final or most recent versions of any documents bringing about the merger such as the sale and purchase agreement, contracts, ancillary agreements or offer documents.

8 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:

8.1 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

8.2 either:

8.2.1 set out the rationale for the merger (including but not limited to the benefits of, and/or investment case for the merger) and/or plans following the merger, or

8.2.2 assess or analyse the merger with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new product or geographic areas, market conditions, market shares and/or the price to be paid, or

8.2.3 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 5 above.

9 Provide copies of, or links to, the most recent annual report, audited financial statements and management accounts for the relevant business unit(s) as identified in response to question 5.

7. Contact details should include a named contact person, an email address, telephone number and the position of the contact person(s) within the firm.
8. If the merger is between competing buyers rather than sellers, provide instead the names and contact details for each party's key suppliers, and the amount paid to each supplier in the last financial year.
9. If the merger is between competing buyers rather than sellers, describe the typical procurement strategies of the merging parties.
10. For the documents provided with the application, please provide an index indicating the date each document was prepared and the identity and role of the author(s) within the merging party or external consultants. Responses to question 8 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

- 10 If you wish to request confidentiality for specific information contained in or attached to the application, a schedule must be provided which sets out the reasons for each request, preferably with reference to the Official Information Act 1982.<sup>11</sup>
- 11 Provide two copies of the application. One copy must be a confidential version and the other a public version both in Microsoft Word format and in searchable PDF format.
- 12 In the confidential version of the application any information for which confidentiality is sought must be highlighted in bold and contained in [square brackets].
- 13 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining as [ ].

## Checklist

Make sure you have provided the following:

- a confidential version of the application
- a public version of the application
- a schedule explaining why information is confidential
- if you intend to provide them, waivers for international mergers
- all supporting documentation
- a signed declaration by each applicant
- payment of NZ\$3,680 (GST inclusive).

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

Commerce Act 1986

# Declaration

Mergers and acquisitions

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

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

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

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

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

To the best of my knowledge, I confirm that:

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

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

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

**Name and title of person authorised to sign:**

\_\_\_\_\_

**Sign:** \_\_\_\_\_ **Date:** \_\_\_\_\_

Commerce Act 1986

# Confidentiality waiver

Mergers and acquisitions

## Background

- 1 [Details of the transaction]
- 2 [Details of the international competition authority. For example, “An application for informal merger clearance in respect of the Proposed Australian Acquisition has recently been lodged with the Australian Competition and Consumer Commission (ACCC)”].
- 3 The New Zealand Commerce Commission (NZCC) will be considering the application pursuant to its powers and obligations under section 66 of the Commerce Act 1986 (NZCC Purpose).
- 4 As part of the proposed application for merger clearance, [target or acquirer] has provided, and will continue to provide, the NZCC with information confidential of [target or acquirer] for the NZCC Purpose (Confidential Information).
- 5 The Confidential Information that is to be provided to the NZCC is subject to confidentiality obligations arising from all relevant statutes, regulations and other laws (including the provisions of the Official Information Act 1982) (Confidentiality Obligations).

## Waiver

- 6 [Acquirer or target] consents to the NZCC sharing the Confidential Information with the [overseas competition authority, for example “the ACCC”], subject to the conditions set out below (Confidentiality Waiver).
- 7 A corresponding waiver has been provided to the [overseas competition authority].

## Conditions

- 8 Prior to disclosing any Confidential Information to the [overseas competition authority] the NZCC must receive written confirmation\* from the [overseas competition authority] that the [overseas competition authority] will apply the confidentiality protections under all relevant statutes, regulations and other laws that would be applicable if the [acquirer or target] had provided the documents and information directly to the [overseas competition authority].

\* If the [overseas competition authority] has a written statement or policy confirming that the [overseas competition authority] will apply the confidentiality protections in the manner described above, written confirmation from that authority is not required.

- 9 The Confidentiality Waiver granted is limited to Confidential Information given to the NZCC in the course of performing its duties for the NZCC Purpose and does not apply to information obtained in the course of any other review of any case either now or in the future.
- 10 Where the NZCC has provided Confidential Information to the [overseas competition authority] in accordance with the terms of this document, a failure by the [overseas competition authority] to treat that information in the manner described in paragraph 8 above will not give rise to any liability on the part of the NZCC.
- 11 The Confidentiality Waiver does not constitute a waiver by [acquirer] or [target] of their rights under the Confidentiality Obligations with respect to the protection afforded to [acquirer] or [target] against the direct or indirect disclosure of information to any third party other than the [overseas competition authority].
- 12 The Confidentiality Waiver does not extend to any materials asserted by [acquirer] or [target] to be privileged.
- 13 The Confidentiality Waiver does not limit the ability of the NZCC to disclose information that it would otherwise be able to disclose in accordance with relevant laws, including the NZCC’s ability to provide compulsorily acquired information and investigative assistance to recognised overseas regulators under sections 99B to 99P of the Commerce Act 1986.<sup>12</sup>

**Name and title of person authorised to sign:**

\_\_\_\_\_  
\_\_\_\_\_

**Sign:** \_\_\_\_\_

**Date:** \_\_\_\_\_

12. See our *Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance*.