

# STREAMLINED AUTHORISATION PROCESS GUIDELINES

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## 1 PREFACE

- 1.1 The Commerce Commission (Commission) may grant authorisations for restrictive trade practices or business acquisitions that may otherwise breach certain provisions of the Commerce Act 1986 (Commerce Act), on application by a person or business involved in such a practice or acquisition. In general, the Commission is empowered to grant an authorisation for a practice or acquisition if it is satisfied that the public benefit of the practice or acquisition outweighs the detriment arising from the loss of competition. Part 5 of the Commerce Act sets out some procedural requirements for the consideration of authorisation applications.
- 1.2 These guidelines set out a streamlined process developed by the Commission that will enable the Commission to make a decision on straightforward authorisation applications as quickly as possible. The Commission anticipates that not all authorisation applications will be able to be dealt with under the streamlined process.
- 1.3 The streamlined authorisation process will apply to applications that seek authorisation for practices or acquisitions that the Commission considers are relatively straightforward, have obvious public benefits and will have a relatively limited impact on competition in the relevant market. In cases where the streamlined process can be used the benefits to applicants will be:
  - **Timely decisions:** The streamlined process is designed to provide greater certainty as to the timetable and the timeframe required for the Commission to decide on authorisation applications. If the streamlined process applies, the Commission will aim to issue a draft determination within 20 working days and will aim to issue a final determination within 40 working days, of registering an authorisation application. This should allow businesses to make more timely commercial decisions.
  - **Cost-effectiveness:** The streamlined authorisation process is designed to help ensure that applicants' costs are kept to a minimum.
  - **Transparency:** The streamlined authorisation guidelines are designed to clarify the Commission's processes so that applicants are fully informed of the Commission's progress towards a determination.
- 1.4 The streamlined authorisation process is available for applications made under:
  - section 58 of the Commerce Act (restrictive trade practice authorisations); and
  - section 67 of the Commerce Act (business acquisition authorisations).
- 1.5 Applications that do not qualify for the streamlined process will continue to be considered under the Commission's standard authorisation procedures. This would be the case where the issues are complex or would have a significant impact on the relevant markets. However, it is expected that most of the features of the streamlined process will be used for all authorisation applications, thereby significantly reducing the time required for them as well.
- 1.6 These guidelines set out how the Commission will determine whether or not the streamlined process may be used for the application and the criteria against which a streamlined authorisation application will be assessed. These guidelines also describe the key milestones in the process.
- 1.7 The Commission's practice for assessing applications for authorisation will continue to develop in the light of judicial precedent, general practice and experience. These guidelines may, in due course, be supplemented, revised or replaced. Although the Commission will follow these guidelines in assessing authorisation applications that are submitted for consideration under the streamlined process, it will apply them flexibly and may depart from the approach described when warranted. These guidelines will be updated as required.

- 1.8 Although these guidelines cover the main process issues for businesses and their advisers, they do not cover every issue that may arise. They are not intended to be:
- a binding statement of how discretion will be exercised in a particular situation;
  - a substitute for legal advice; or
  - a restatement or definitive interpretation of the Commerce Act (or any regulations or orders made under it).
- 1.9 Anyone in doubt about whether they may be affected by the legislation should consider seeking legal advice.

## 2 THE LEGAL FRAMEWORK

### RESTRICTIVE TRADE PRACTICES AUTHORISATIONS

- 2.1 Section 61 of the Commerce Act allows the Commission to grant an authorisation for a practice that may otherwise breach one or more of the restrictive trade practice provisions of the Commerce Act (with the exception of sections 36 and 36A).
- 2.2 An example is a practice to which section 27 of the Commerce Act would apply, or might apply. In broad terms, that section prohibits contracts, arrangements, or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. In relation to applications for authorisation of this type of conduct, the Commission must first determine whether the practice would result, would be likely to result, or is deemed to result, in a lessening of competition in the relevant market(s). If so, the Commission must then determine whether the practice will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition.
- 2.3 The Commission considers that a public benefit is any gain, and a detriment is any loss, to the public of New Zealand, with an emphasis on gains and losses being measured in terms of economic efficiency. If the Commission is satisfied that the public benefit of a particular practice outweighs the detriments, it must grant an authorisation for the practice. There is no statutory timeframe within which the Commission must make a determination on restrictive trade practices authorisation applications.
- 2.4 A restrictive trade practice authorisation may be granted subject to certain conditions, as the Commission thinks fit.
- 2.5 While an authorisation for a practice is in force, the applicant and certain other parties involved in the practice are protected from having court action taken against them under certain provisions of the Commerce Act by the Commission or by private individuals.

### BUSINESS ACQUISITIONS AUTHORISATIONS

- 2.6 Section 67(3)(b) of the Commerce Act allows the Commission to grant an authorisation for an acquisition that may otherwise breach section 47 of the Commerce Act, if the Commission is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted. This requires the Commission to consider whether there is, or is likely to be, a lessening of competition and assess the public benefit.
- 2.7 The Commission can accept an undertaking from an applicant for a business acquisition authorisation to dispose of assets or shares. If accepted, the undertaking forms part of any authorisation (or clearance) granted.

- 2.8 The Act requires the Commission, within 60 working days after the date of registration or such longer period as the Commission and the applicant agree, to:
- give a clearance for the acquisition if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market; or
  - grant an authorisation for the acquisition, if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted; or
  - if the Commission is not satisfied as to either of the above matters, decline to give a clearance or grant an authorisation.
- 2.9 If no decision is made within 60 working days (or such longer period as agreed), the Commission is deemed to have declined to give a clearance or grant an authorisation.
- 2.10 While an authorisation for a business acquisition is in force, the applicant is protected from having court action taken against them, under sections 27 and 47 of the Commerce Act, by the Commission or another party. A business acquisition authorisation expires:
- 12 months after the date on which it was granted; or
  - in the event of an appeal being made against the Commission's determination to grant authorisation, and that determination being confirmed by the High Court, 12 months after the date on which the determination is confirmed.

## GENERAL

- 2.11 The Commission takes the same general approach toward assessing the public benefits and detriments of a proposed business acquisition as it does for restrictive trade practices.
- 2.12 The Commission does not give informal authorisations, nor provide letters of comfort, for practices or acquisitions.
- 2.13 The authorisation regime is voluntary. There is no legislative requirement that businesses proposing to engage in conduct that may breach the Commerce Act must apply for an authorisation. Parties have the option of proceeding without applying for an authorisation from the Commission. However, pursuing this option may put parties at risk of the Commission or other interested parties taking legal action under the Act.
- 2.14 The Commission monitors markets in order to identify practices and acquisitions that have not been the subject of an application for clearance or authorisation to the Commission. An applicant that applies for authorisation may at any time withdraw the application by notice in writing to the Commission. If an application for authorisation has been withdrawn, the Commission will consider whether or not to investigate and prosecute under the Commerce Act. The Commission will assess on a case-by-case basis whether or not to investigate.

## 3 WHEN AN APPLICATION CAN BE CONSIDERED UNDER THE STREAMLINED PROCESS

- 3.1 The following sections cover:
- the criteria that will be considered by the Commission in determining whether the application will be considered under the streamlined process;
  - the initial process for considering whether an authorisation application is suitable for consideration under the streamlined process; and
  - engaging in pre-registration discussions.

## CRITERIA

- 3.2 The criteria reflect a number of elements that may give the Commission comfort that a particular application may be suitable to be determined within 40 working days. The criteria relate to practical process considerations and considerations that relate to basic analysis. They are focused on establishing the straightforwardness of the proposed application and the likely impact of the proposed arrangement on competition in the relevant market.
- 3.3 In order for a proposed application to be suitable for the streamlined process, it would normally be characterised by the elements outlined below. The criteria are only indicative and are designed to be pragmatic and flexible, rather than prescriptive.
- 3.4 The weighting given by the Commission to each criterion will vary from case to case. Applicants should not be discouraged from applying to have their authorisation application considered under the streamlined process because the application does not fulfil any particular criterion.
- 3.5 The criteria that make it more likely the streamlined process would be appropriate are as follows:
- **Only one market or a small number of markets is affected:** If an application were to raise issues that affect a large number of relevant markets, the Commission would be unlikely to be able to make a determination within 40 working days. This would be the case even if all of the issues are reasonably straightforward.
  - **The issues raised by the application are limited:** Even if the issues raised by an application are relatively straightforward, but there are a large number of issues, a determination may not be possible within 40 working days.
  - **The issues raised by the application are discrete:** If an application involves only a small number of discrete and relatively straightforward issues. This criterion is designed to capture small or very specific transactions or issues in very large markets.
  - **The number of interested and/or affected parties is small:** If there is a large number of interested or affected parties, and thus a large number of parties that may need to be consulted, the Commission may need more time for consultation and for reviewing submissions.
  - **There is broad consensus in favour of the arrangement:** If the proposed arrangement is not considered to be controversial by affected parties in the relevant market(s) and there are, for example, no major opponents, the Commission will progress the application quickly. However, the Commission will exercise some caution in assessing whether this criterion applies, because a broad consensus in favour of the relevant practice or acquisition might imply an acceptance of a loss of competition in the relevant market(s), which may indicate that there are wider issues that the Commission needs to consider.
  - **It is a one-off event:** The streamlined process might be appropriate for an application for authorisation for a practice or acquisition that relates to a one-off event, such as a sporting occasion. In these cases, the issues may be more limited in scope (for example, confined to a limited period of time, or confined in terms of the size of the market and/or the value of the relevant transaction). However, the Commission will exercise some caution in assessing whether this criterion applies because some one-off events may still have a significant short-term impact on the market, and the effect on the market may still be permanent or structural. In such cases, the streamlined authorisation process may not be appropriate.
  - **At first glance benefits appear to be obvious, and there is no need for complex quantitative analysis:** This may arise where it is reasonably clear to the Commission that an application could be assessed on the basis of qualitative evidence. The Commission acknowledges that it has a general responsibility to quantify benefits and detriments to the extent that it is feasible, rather than rely solely on qualitative judgment. The Commission considers that in a streamlined process, it may not always be feasible or necessary to carry out quantitative analysis, given that the issues raised in these applications are likely to be straightforward. In such cases, the time and cost involved in carrying out quantitative analysis may not be justified. If quantified analysis of the effects of the practice or acquisition is to be submitted by the applicant, the data and analysis would need to be readily available and

the analysis would need to be relatively straightforward in the Commission's opinion. There might be obvious benefits and few detriments. However, applicants must consider whether the detriments are also obvious. There should be a clear nexus between the arrangement and the benefits and no less anti-competitive way of achieving them.

- **The Commission is familiar with the market(s):** If the Commission has had experience with the market(s) in question, it would need less time to investigate the background to the application.
- **Size of the market:** Applications that involve a total market size of \$20 million or less are more likely to be suitable for the streamlined process. However, an application might still be able to be considered under the streamlined process even in a significantly larger market. The Commission will exercise caution in applying this criterion because some practices or acquisitions might have a significant impact on some consumers even though the total size of the market is small. While the detriment might be small, so too might be the benefits (in absolute terms). Generally, the Commission considers that it is likely that the smaller the market, the smaller the potential impact of the practice or acquisition on individuals and the economy, and the more likely the relevant application is to be able to be considered under the streamlined process.
- **Small and medium enterprises (SMEs) threshold:** This is where all parties involved in a practice or acquisition are SMEs (ie, each party has 19 or fewer employees).<sup>1</sup>
- **Market concentration ratios:** The Commission may consider concentration ratios when assessing the suitability of an application for the streamlined process. Concentration ratios can identify situations where the impact on individuals and the market might be low because competition is expected to continue in the market. The Commission intends to apply the following concentration ratio:
  - Arrangements entered into by firms with a combined market share of 70 per cent would usually have a large impact on the market and would usually require more in-depth analysis. If the firms had a combined market share of 70 per cent or more, it would be unlikely that the application would be eligible for a streamlined authorisation. However, as with all of the criteria, applicants should not be discouraged from applying to have their authorisation application considered under the streamlined process because the application does not fulfil the market concentration ratio criterion. The Commission will be pragmatic and will consider this criterion in conjunction with all other criteria.

3.6 In addition to the above criteria, there are further circumstances which, if they were to arise, would make it unlikely that the Commission could consider the application under the streamlined process because of the additional time they would add. Those factors are listed below:

- **If a challenge to the Commission's jurisdiction to grant an authorisation is made (on the basis that the practice is not likely to lessen competition):** In general, the Commission's first step in considering an application for authorisation for a restrictive trade practice is to determine whether the practice or acquisition would, would be likely to, or is deemed to, lessen competition. It must undertake this step before considering the public benefits that may result. If an applicant does not accept that a practice would be likely to lessen competition, the Commission is less likely to be able to consider the application under the streamlined process. In general, the Commission is required to assess whether there is a lessening of competition in every case whether or not the applicant challenges jurisdiction on that basis, but this assessment is likely to be done more readily if the lessening of competition itself is not disputed by the parties.
- **A conference is held:** The 40 working day timeframe is very unlikely to be achieved if a conference is held.<sup>2</sup> This is because of the additional time the Commission requires to organise and hold a conference, and to receive and review submissions. Based on the Commission's experience, the holding of a conference is likely to add at least 20 working days to the timeframe for a determination.

1. Ministry of Economic Development August 2008 ISSN 1178-2811, *SMEs in New Zealand: Structure & Dynamics 2008*.  
 2. Further information on conferences can be found at paragraphs 5.55-5.58 of these guidelines.

- **The Commission needs to use its statutory information-gathering powers:** Based on the Commission's experience, the use of its statutory information-gathering powers, such as issuing section 98 information requests or the conducting of section 98C interviews, is likely to mean that a determination is not able to be made within 40 working days.<sup>3</sup> The full cooperation of the parties in providing complete and accurate information promptly to the Commission is likely to avoid the need for the Commission to use those powers. In addition, the pre-registration discussions (discussed further in the next section), if held, should ensure that the parties are aware of the information required by the Commission.
- **Fact confidentiality is requested:** Applicants sometimes request fact confidentiality when they file an application for authorisation with the Commission, asking that the application itself, and the fact that it has been filed, is kept confidential. Fact confidentiality may be requested for a proposed business acquisition, for example, because parties may not have informed their employees about the proposed arrangement, or there is competition from other parties to acquire the business in question.  
This is likely to hamper crucial parts of the Commission's assessment of an application for authorisation, as investigators cannot gather information from market participants and test information provided in the application. It would adversely affect the Commission's ability to determine the application within 40 working days, and is therefore likely to mean that the relevant application is not be able to be considered under the streamlined authorisation process.
- **Quantitative analysis is complex and/or data is not readily available:** Based on the Commission's experience, this would adversely affect the Commission's ability to determine the application within 40 working days.
- **Divestment undertakings are offered at a late stage:** If a divestment undertaking is offered (in relation to a business acquisition application) near the end of the Commission's assessment of an application for authorisation, the Commission is likely to require more time to consider the application in light of the proposed undertaking.
- **The applicant does not participate in pre-registration discussions:** This is a crucial procedural step for achieving the 40 working days target.

## INITIAL PROCESS

- 3.7 Before an authorisation application is registered, and before any pre-notification discussion takes place, applicants should advise the Commission if they consider that their proposed application could be considered under the streamlined authorisation process. Applicants will be required to submit a written request that explains why they believe the proposed application is suitable for the streamlined process based on the criteria set out below. Applicants are encouraged to provide any relevant evidence with the written request.
- 3.8 The Commission will endeavour to notify applicants within five working days of the Commission receiving the written request (and accompanying evidence) whether or not the application is likely to be able to be considered under the streamlined process.
- 3.9 The Manager of the Market Structure Group can be contacted at [authorisations@comcom.govt.nz](mailto:authorisations@comcom.govt.nz)

3. Further information on the Commission's statutory information gathering powers can be found at paragraphs 5.36-5.39 of these guidelines.

## PRE-REGISTRATION DISCUSSIONS

- 3.10 Pre-registration discussions are an essential element of the streamlined authorisation process. Applicants should request pre-registration discussions by contacting the Manager of the Market Structure Group.
- 3.11 The main purpose of a pre-registration discussion is to expedite the assessment of a streamlined application when it is filed with the Commission. Pre-registration discussions benefit the applicant and the Commission by:
- potentially reducing the need for further information requests and extensions in the assessment of the application;
  - informing the Commission’s investigation team about markets that are complex and/or unfamiliar;
  - allowing the Commission ample time to plan effectively for its consideration of the application, and to allocate appropriate resources at an early stage;
  - ‘setting the scene’ for the relevant practice or acquisition, including its rationale and possible efficiencies, at an early stage;
  - clarifying what information and evidence the Commission is likely to require and identifying useful evidence that may assist the applicant’s case; and
  - being an additional forum for informal discussion about the Commission staff’s likely approach to consideration of a novel issue, or the assessment of particular competition concerns.
- 3.12 The Commission will generally treat all pre-registration discussions as fact confidential until an application is registered.<sup>4</sup> All information received for the purposes of the pre-registration discussions, as well as the statements of the parties, draft heads of agreement or tender documents, will generally be considered by the Commission as confidential.
- 3.13 Pre-registration discussions are not intended for transactions that are hypothetical. The Commission will generally expect to be satisfied that there is a good faith intention to proceed as evidenced by, for example, adequate financing, heads of agreements, or evidence of board-level consideration. However, the Commission will take into account other evidence of good faith intention, for example, when an acquirer is genuinely considering making a bid in the context of an auction situation.
- 3.14 The Commission will not seek third party views at the pre-registration stage.
- 3.15 While Commission staff may highlight possible relevant markets and competition issues in pre-registration discussions, these are not binding on the Commission. Ultimately, the quality of the Commission staff’s comments will, to a large extent, reflect the quality of the information provided by the applicant. The Commission does not give informal authorisations or letters of comfort for practices or acquisitions.
- 3.16 In most cases, pre-registration discussions are likely to involve three stages as outlined below. However, the Commission’s intention is that the process should be informal and flexible and the Commission may depart from the process outlined below where it considers this is appropriate.
- **Stage one:** Applicants notify the Commission by letter, email or telephone, via the Manager of the Market Structure Group, that they intend to engage in pre-registration discussions. Once the Commission has received the request, a suitable meeting date will be arranged. Pre-registration discussions are intended for practices or acquisitions that are likely to occur. Applicants should provide evidence to show the good faith intention to complete the anticipated transaction or implement the relevant practice, such as draft heads of agreement, public tender documents or similar documents. Applicants are encouraged to provide their likely timeframe for filing to enable the Commission to plan and allocate resources early. It is also helpful if applicants submit basic background information, such as details of the status of any practice or acquisition, a brief description of the relevant market(s) and sector(s) involved and the likely impact of the practice or acquisition in those markets and sectors in general terms.

4. Further information on confidentiality can be found at paragraphs 5.43-5.48 of these guidelines.

- **Stage two:** It is helpful if applicants are able to submit a substantially developed draft application at least two working days before the pre-registration discussion meeting. This allows the Commission staff the time to review the draft application in preparation for the meeting. The purpose of providing a substantially completed application is to expedite the process by identifying whether the application form could be enhanced to capture additional relevant information. This is intended to reduce the likelihood of further information requests and the need for extensions.
- **Stage three:** The pre-registration discussion meeting is held. The Commission encourages at least one senior employee of the applicant to attend. The main purpose of the meeting is to review the draft application. Commission staff may indicate what further information should be included in the application form. Likely timeframes for the assessment of an application for authorisation may also be discussed. Where possible, Commission staff will highlight any potential relevant markets or competition issues not identified by the applicant. As mentioned above, these discussions are not binding on the Commission.

## 4 SUBMITTING AN APPLICATION

- 4.1 Applications for authorisation must be made on the prescribed forms. There are separate application forms for business acquisitions and restrictive trade practices. The forms are available on the Commission's website [www.comcom.govt.nz](http://www.comcom.govt.nz)
- 4.2 The application form is an effective method of gathering relevant information in a structured way from applicants in order to ensure an efficient process. It is particularly important if the application is being submitted for consideration under the streamlined process. The Commission encourages applicants to provide supporting evidence to assist the Commission's analysis. The application form also allows applicants to present their argument as to why the Commission should authorise the arrangement.
- 4.3 The application should be accompanied by payment of the prescribed fee for each application for which authorisation is sought. Payment can be made by cheque or electronic payment into the Commission's bank account. Please use the applicant's company name as the reference when depositing funds electronically. The Commission's bank account details are:  
Commerce Commission  
BNZ North End  
020536032986700
- 4.4 The Commission may decline to register an application if:
  - it is not in the prescribed form; or
  - it is not accompanied by the prescribed fee; or
  - question(s) have not been answered and there is no accompanying explanation as to why the question(s) have not been answered; or
  - it is not completed to a sufficient standard to enable the Commission to proceed with its assessment of an application for authorisation; or
  - it does not contain such particulars as may be specified in the form.
- 4.5 Where information relevant to an application for authorisation is missing from the form, the Commission will inform the applicant of this fact at the earliest opportunity. In most cases, the pre-registration discussions will aid the applicant in ensuring that its application form is compliant. Generally, applicants are also encouraged to contact the Manager of the Market Structure Group if they have any questions in respect of filing an application for authorisation.
- 4.6 As mentioned, if fact confidentiality is requested this would adversely affect the Commission's ability to determine the application within 40 working days and this means that the relevant application is unlikely to be able to be considered under the streamlined authorisation process.

- 4.7 Once an application for authorisation that the applicant is seeking to have considered under the streamlined process has been registered and confidential information has been identified and confirmed, the public version (ie, a version that omits the parties' commercially sensitive and confidential information) will be published on the Commission's website and a media release will be issued. These actions aim to inform the public of the application and to invite third parties to make submissions to the Commission.

## 5 THE PROCESS FOR THE COMMERCE COMMISSION TO DETERMINE APPLICATIONS FOR AUTHORISATION

- 5.1 The following sections explain the process in more detail, and include:
- a summary of the process and key milestones (including the anticipated 40 working day timeframe for the Commission to determine applications for authorisation that are considered under the streamlined process);
  - when an application can no longer be considered under the streamlined process;
  - what applicants can expect in terms of communication from the Commission while it is assessing an application for authorisation;
  - how the Commission seeks information from the parties to the relevant practice or acquisition, market participants and interested parties;
  - the Commission's approach to confidentiality;
  - the purposes of the draft determination;
  - conferences;
  - publication of the final determination; and
  - rights of appeal and review.
- 5.2 Once an application for authorisation has been registered, a multi-disciplinary investigation team, comprising one or more investigators and specialist economic and legal staff, is formed. A member of the investigation team will contact the applicant and inform them who the main point of contact (usually the lead investigator) will be at the Commission.
- 5.3 Separately, the Chair of the Commission appoints a Division of Commissioners (Division) to make a determination on an application for authorisation.
- 5.4 Soon after an application for authorisation is registered, the investigation team will continue to conduct background research and identify potential issues. An initial planning meeting of senior Commission staff is then held. Attendees at the meeting may vary according to the estimated level of complexity of the application.
- 5.5 The purpose of the meeting is to obtain staff agreement about the likely complexity of an application for authorisation, as well as the timeframes and resources required. After the meeting, the lead investigator will provide the applicant with an indicative timeframe for the Commission's assessment of an application for authorisation. The investigation team will then gather and analyse information from market participants and interested parties. Following this, further information may be requested from the applicant. Please refer to paragraphs 5.36-5.37 for more details about the Commission's approach to information requests.
- 5.6 The investigation team will present information and analysis to the Division on a regular basis. Further information in respect of the role of Commissioners can be found at paragraphs 5.18-5.20 below.

## TIMEFRAME

- 5.7 The timeline below has been designed to allow the Commission to review and consider an application under the streamlined authorisation process and other evidence (including submissions) in order to make a determination within 40 working days. It assumes that no conference will be held.<sup>5</sup>
- 5.8 The achievement of the 40 working day timeline greatly depends on the cooperation of the applicant throughout the streamlined process. It is critical for achieving the timetable that applicants provide complete, concise and relevant information within the timeframes specified below. This enables the Commission to assess the application for authorisation expeditiously. Interested parties will also be requested to comply with strict timeframes for submissions and consultation. The indicative timeframe below may vary.
- |                     |   |
|---------------------|---|
| Before Registration | Applicant requests that the proposed application be considered under the streamlined process. Commission responds within five working days with its preliminary view as to whether the application could be considered under the streamlined process. |
|                     | Applicant submits a substantially completed draft application two working days before pre-registration discussions (PRD), and PRD held.   |
| Day 1               | Application for authorisation is registered.  |
| By day 5            | Confidentiality is determined and public version of application is included on the Commission's website register.   |
| Day 20              | Commission publishes a draft determination.   |
| By day 30           | Commission receives all submissions from applicant and interested parties.  |
| Day 40              | Commission gives a final determination.   |
- 5.9 However, in applications for authorisation where a conference is required, the process is likely to continue as follows:
- |            |                     |
|------------|---------------------|
| Days 40-50 | Conference is held. |
| Days 60+   | Conference is held. |
- 5.10 The pre-registration discussions should ensure that expectations as to the timeframe that the Commission intends to follow will be established early in the process.
- 5.11 Appendix 1 provides a flow chart of the Commission's streamlined authorisation process.

## WHEN AN APPLICATION CAN NO LONGER BE CONSIDERED UNDER THE STREAMLINED PROCESS

- 5.12 The ability of the Commission to consider an application under the streamlined process will be kept under review throughout the Commission's consideration of the application. At any stage, the Commission may conclude that it is no longer appropriate to assess the application under the streamlined process. This could occur for a number of reasons, including where the Commission found the issues more complex than they had first appeared. Further examples of where the Commission may find that it is no longer appropriate to continue under the streamlined process can be found at paragraph 3.6 above.

5. Further information on conferences can be found at paragraphs 5.55-5.58 of these guidelines.

- 5.13 Where the Commission considers that an application can no longer be considered under the streamlined process, it will provide written reasons for this view to the applicant. The applicant will then have two working days to respond to the Commission's concerns. Applicants may need to provide new evidence to the Commission that shows that the application is still eligible for the streamlined process, or may need to respond to the Commission's information requests more promptly.
- 5.14 While the Commission needs to retain flexibility to move to a full authorisation process if a greater depth of analysis is found necessary, in most cases the early application procedures and the pre-registration discussions should ensure that applications are correctly classified as qualifying for the streamlined process.
- 5.15 If the Commission concludes that an application can no longer be considered under the streamlined process, the applicant would have the choice of:
- allowing the application to be declined; or
  - allowing the Commission to consider the application outside of the streamlined authorisation process; or
  - withdrawing the application.

## COMMUNICATION BETWEEN THE COMMISSION AND THE APPLICANT

- 5.16 Throughout the Commission's assessment of an application for authorisation there will be an ongoing dialogue between the investigation team and the applicant. The level of interaction required will depend on the circumstances of the case.
- 5.17 The lead investigator will contact the applicant regularly to update them on the progress of the application for authorisation. In some cases, a detailed update may not be possible. This could be because information provided by a market participant is commercially sensitive, or because the Commission is in the middle of its analysis of a particular issue.

## THE ROLE OF COMMISSIONERS

- 5.18 The investigation team meets with the Division on a regular basis, and Commission staff present information and analysis to the Division. Generally, the role of the Division is to:
- approve the critical issues;
  - agree time extensions;
  - oversee and guide the direction of the Commission's assessment of an application for authorisation;
  - discuss and provide direction on issues as they arise;
  - make a draft determination;
  - approve the written reasons; and
  - decide whether to grant, or decline to grant, authorisation (or, for a business acquisition application, grant a clearance).
- 5.19 The Division receives and reviews all relevant information in relation to an application for authorisation. This will include:
- the application form;
  - submissions made on the draft determination;
  - relevant evidence provided by interested parties and third parties;
  - any expert reports; and
  - any divestment undertakings.
- 5.20 In considering an application for authorisation, the Commission is acting as an adjudicative tribunal and must treat all affected parties fairly and equally. At any stage of the process, the applicant can raise issues that they wish Commission staff and Commissioners to consider.

## SEEKING VIEWS FROM MARKET PARTICIPANTS

- 5.21 An important part of assessing an application for authorisation is to gather and analyse information from market participants, such as customers, existing and potential competitors, and suppliers. This helps the Commission, among other things, to understand how the market(s) operate, to assess the likely effects of the practice or acquisition and test the information provided in the application.
- 5.22 There is a variety of ways in which information can be gathered, including face-to-face interviews, telephone interviews, letters or emails. The investigation team will choose the appropriate method(s) on a case-by-case basis. The investigation team may also request information from market participants, such as market data, supply contracts and technical information.
- 5.23 If customers, competitors, suppliers or other interested parties have information they believe is important for the Commission's assessment of an application for authorisation and they have not been contacted by the Commission, they should contact the Registrar at **registrar@comcom.govt.nz**
- 5.24 A third party may also provide the Commission with its views on an application for authorisation via a written submission or in response to the draft determination that the Commission publishes on its website. If it is necessary to protect confidential information within that submission, where possible the Commission will either convey the views of the third parties to the applicant hypothetically or encourage the third party to provide a non-confidential version of its submission which can be viewed by the applicant.
- 5.25 The Commission usually issues a media release upon registering an application, to promote awareness of the application and to give interested parties the opportunity to comment or to provide the Commission with relevant information. Submissions can be made by contacting the registrar at **registrar@comcom.govt.nz**

## INTERESTED PARTIES

- 5.26 In relation to authorisation applications that relate to restrictive trade practices, the Commission is required to give notice of the application to any person who, in the Commission's opinion, is likely to have an interest in the application. The Commission is also required to give public notice of the application in such manner as the Commission thinks fit.
- 5.27 It is the Commission's practice to give public notice of applications for authorisation that relate to either restrictive trade practices or business acquisitions by publishing a media release and including the application on its website register.
- 5.28 The Commerce Act specifically provides that any person who has an interest in a restrictive trade practice authorisation application may give written notice to the Commission of its interest and the reasons for that interest. The Commission is required to take into account any submissions in relation to such an application made to it by any person, whether or not the person has notified their interest to the Commission.
- 5.29 In addition, in relation to business acquisition authorisation applications, the Commission is specifically empowered to consult with any person who, in the opinion of the Commission, is able to assist it in making a determination.

- 5.30 In order to ensure, as far as possible, that the streamlined process is fair to all parties and that timeliness is maintained:
- The Commission encourages the applicant to assist it in identifying third parties who may have an interest, or who could assist the Commission in making its determination. This should be done at the pre-registration discussion stage, and details of the third parties should be included in the application form; and
  - In the case of restrictive trade practices authorisations, the Commission will invite parties who consider they have an interest in the application to notify the Commission of their interest within five working days of the public version of the application, and its accompanying media release, being published.

### THE INTERVIEW PROCESS

- 5.31 If an interview with a third party is desirable, Commission staff will get in touch with the contact person named in the application form or the relevant senior person of the business in question to request a time for a face-to-face or telephone interview. Before the interview, Commission staff will provide the interviewee with a public version of the application for authorisation, explain the Commission's processes and provide an agenda or a list of topics to be discussed.
- 5.32 The length of interviews varies depending on the complexity of the issues and the complexity of the market(s). The Commission prefers to use an electronic recording device to make a copy of the interview. An electronic copy can be provided to the interviewee on request. Recording the interview ensures that both parties have access to an accurate record of what was discussed at the interview, and it expedites the interview by allowing the Commission to converse freely with the interviewee without the need to take extensive notes.
- 5.33 During the interview, Commission staff may ask a variety of questions and seek further information as required. If specific information is required at the interview, the Commission will inform the interviewee of the information needed well before the interview. Depending on the circumstances, the Commission may also request follow-up face-to-face or telephone interviews, or send interviewees further questions in writing.
- 5.34 The Commission may ask applicants, market participants and other interested parties to provide information to it, such as market shares and future strategies. The Commission recognises that this information may be commercially sensitive information which could considerably benefit competitors if disclosed. The equitable principle of confidentiality requires that where the Commission receives information on a confidential basis, subject to the requirements of the Official Information Act 1982, it must not disclose that information to third parties. Interviewees are encouraged to identify all commercially sensitive and/or confidential information during the course of the interview process.
- 5.35 The Commission will often request that interviewees provide evidence or information to substantiate their arguments. This is more likely to happen where such arguments are key considerations in the Commission's assessment of an application for authorisation.

### INFORMATION REQUESTS

- 5.36 In addition to the information required in the application form, the Commission will often make targeted requests for further information, documents, or the giving of evidence in order to progress the assessment of an application for authorisation. This can be requested on a voluntary basis. The Commission can also use its statutory information-gathering powers to obtain information, documents and/or compel parties to appear before the Commission.

- 5.37 Voluntary requests will often specify a deadline by which the information, documents or evidence should be provided. In order for the Commission to progress the assessment of an application for authorisation, it is important that businesses comply with these requests in a timely manner. A failure to do so is likely to extend the time taken by the Commission to make a determination. Accordingly, parties are encouraged to contact the lead investigator as soon as possible in the event it believes that it cannot meet the deadline.

## STATUTORY INFORMATION-GATHERING POWERS

- 5.38 During the Commission's assessment of an application for authorisation, the majority of information, documents and other evidence is usually gathered voluntarily from the applicant and market participants. However, there may be circumstances when the Commission considers it is necessary or desirable to use its statutory information-gathering powers. Under section 98 of the Act, the Commission may require a person to supply information or documents or give evidence by issuing a statutory notice, which creates a legal obligation on the recipient of the notice. A section 98 notice, together with a covering letter, will generally contain:
- an explanation of the notice and its purpose;
  - details of what is required under the notice, eg, information, documents and/or giving evidence in person; and
  - the timeframe for responding to the notice to provide information and/or documents and/or to give evidence.
- 5.39 In relation to an application for authorisation, common reasons why the Commission may use its statutory information-gathering powers are as follows:
- It ensures that information is gathered in a timely manner.
  - Some parties prefer that the Commission use its statutory information-gathering powers because, for example, they might be under a duty such as a confidentiality obligation not to reveal that information unless compelled to do so under section 98.
  - Parties with relevant information are unwilling to disclose the information.

## PROVIDING FALSE OR MISLEADING INFORMATION

- 5.40 As discussed earlier, section 68 of the Act requires an applicant to provide the Commission with documents and information in relation to an application for authorisation. In addition, it is an offence under section 103 of the Act for any person to attempt to deceive or knowingly mislead the Commission in relation to any matter before it. Section 103 of the Act applies to both the applicant and third parties and this could potentially cover, for example, all communications with Commission staff, including voluntary interviews, emails and telephone conversations.
- 5.41 It is also an offence under section 103 of the Act to refuse or fail to comply with a section 98 notice without reasonable excuse, or to provide information or a document in purported compliance with a section 98 notice knowing it to be false or misleading. If a notice recipient anticipates difficulty in complying with a section 98 notice, they are encouraged to contact the Commission as early as possible and well in advance of the expiry of the deadline for providing information, documents or evidence. Any extension request should be made in writing and should include the reasons for requesting an extension.
- 5.42 Any person who contravenes section 103 is liable for a fine by the Courts of up to \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.

## CONFIDENTIALITY

- 5.43 Much of the information sought by the Commission when assessing an application for authorisation will be commercially sensitive information. The Commission recognises that respecting the confidentiality of commercially sensitive information and providing protection against disclosure is necessary to prevent parties from being discouraged from supplying that information.
- 5.44 All information received by the Commission from the merger parties or third parties is subject to the principle of availability under the Official Information Act 1982. However, the Official Information Act 1982 does not require disclosure of information that would prejudice investigations and also offers protection to confidential information through the exceptions to the disclosure obligations contained in it. These include cases where the public interest desirability in making the information available is outweighed by good reasons to withhold information from disclosure such as:
- it would unreasonably prejudice the commercial position of the supplier or subject; or
  - the information is subject to an obligation of confidence and making it available either would prejudice the supply of similar information or information from the same source where it is in the public interest that such information continues to be supplied, or be likely otherwise not be in the public interest.
- 5.45 The Commission aims to conduct its assessments of application for authorisations quickly and transparently while adhering to the principles of natural justice. This means that the Commission takes a cautious approach in accepting assertions of confidentiality. For example, when the Commission receives information that is publicly available, it will not consider it to be confidential. All claims of confidentiality will generally be tested by the Commission. The Commission encourages applicants to contact the Manager of the Market Structure Group if they have any questions on confidential information.
- 5.46 Sometimes applicants will request that the Commission grant a section 100 confidentiality order, which prohibits the publication or communication of certain information. In the context of an application for an authorisation, an order under section 100 expires after 20 working days from the Commission's final determination (or, where the application is withdrawn before a determination is made, after it was withdrawn). The making of an order under section 100 is at the Commission's discretion.
- 5.47 In many cases, a section 100 order is unlikely to be necessary to protect confidential information due to the obligations of confidence and the exceptions to disclosure obligations in the Official Information Act.
- 5.48 The Commission will liaise closely with the applicant and third parties to ensure that confidential information is protected and to understand the basis on which any order under section 100 is requested. Applications for orders under section 100 will be considered on a case-by-case basis. An example of where an order under section 100 may be appropriate is to allow confidential information to be exchanged between applicants and other interested parties (and/or their independent advisers) for the purposes of obtaining their comments or analysis of it.

## DRAFT DETERMINATION

- 5.49 The Commission will aim to publish a draft determination by working day 20. Based on the information available, the draft determination will set out the Commission's preliminary view as to whether it will grant an authorisation, or decline to grant an authorisation, and the reasons for that view.
- 5.50 In particular, the draft determination will clearly outline any unresolved issues, and will invite the applicant and other parties to provide any further information they have that might address these issues.

- 5.51 For applications considered under the streamlined process, the Commission intends to keep the draft determination concise (in most cases no longer than five pages).
- 5.52 Applicants and interested parties will be requested to provide submissions and further evidence that may assist the Commission in making a final determination, as soon as possible and within five to ten working days of the publication of the draft determination. Applicants and interested parties are encouraged to provide only new evidence at this stage of the process.

## DIVESTMENTS

- 5.53 The Commission can accept undertakings from an applicant for a business acquisition authorisation (or clearance) to dispose of assets or shares. If accepted, the undertaking forms part of any authorisation (or clearance) granted.
- 5.54 If divestments are offered as part of an application for authorisation, this enables the Commission to assess the effects of the business acquisition, taking into account divestments from the start. If divestments were offered near the end of the Commission's assessment, the Commission may need to request an extension to consider the situation in light of the proposed divestments. This could significantly extend the timeframe for the Commission's assessment of an application.

## CONFERENCES

- 5.55 Applications that can be considered under the streamlined authorisation process are likely to be relatively straightforward and to have a limited impact on the relevant market. Under the streamlined process, the Commission will gather and test information provided by the applicant, interested parties and market participants through information requests and interviews.
- 5.56 Although the Commission can decide to hold a conference in relation to business acquisition applications, it is unlikely to do so.
- 5.57 However, for restrictive trade practices authorisations, the applicant or any interested party may request that the Commission holds a conference and the Commission is required to do so if one is requested. If a conference is held, this would be likely to add at least 20 working days to the streamlined timeframe, as discussed at paragraph 3.6.
- 5.58 For information on the Commission's conference procedures, applicants should contact the Commission at [authorisations@comcom.govt.nz](mailto:authorisations@comcom.govt.nz)

## PUBLICATION OF FINAL DETERMINATION

- 5.59 Once the Commission's assessment of an authorisation application has been completed, the Division will make a decision on whether to:
- in relation to an application for authorisation of a restrictive trade practice:
    - grant the authorisation or decline the application; and
  - in relation to an application for authorisation of a business acquisition:
    - give a clearance for the acquisition if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market;
    - grant an authorisation for the acquisition, if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted; or
    - if the Commission is not satisfied as to either of the above matters, decline to give a clearance or grant an authorisation.
- 5.60 Following this, a notice of the Commission's decision will be prepared for the Chairperson to sign. The applicant will be informed by telephone of the Commission's decision. The decision will then be announced publicly through a media release.

- 5.61 Where companies are listed on the New Zealand and/or Australian stock exchanges, the media release will be issued outside of trading hours. The Registrar will then update the public register on the Commission's website. When market participants and other interested parties of the decision have requested it, the Commission will inform them of the decision.
- 5.62 The Commission provides written reasons for decisions under the Commerce Act. The Commission's policy is to publish its determinations. This is done to:
- help the business community understand how the Commission assesses the competitive effects of proposed transactions;
  - provide useful precedents; and
  - ensure transparency.
- 5.63 The Commission recognises that businesses want to understand the reasons for the Commission's decisions as soon as possible, particularly when the Commission has declined to give authorisation.
- 5.64 The Commission aims to publish its reasons as soon as possible. The length of the Commission's written reasons may vary depending on the complexity of the case and the novelty of the issues raised. In general, the reasons published for a decision on an application considered under the streamlined authorisation process will generally be shorter than those of a decision on an application that has not been considered under the streamlined process. This reflects the fact that an application considered under the streamlined process is likely to involve limited and relatively straightforward issues.
- 5.65 The Commission usually gives priority to making authorisation determinations as quickly as possible in order to give businesses certainty. Written reasons are prepared during the Commission's assessment of an application for authorisation and finalised following the decision. This may mean that, at times, Commission staff may be diverted onto assessing another application for authorisation rather than immediately finalising the written reasons of applications for authorisations that have already been decided. In general, following an application for authorisation being declined, priority will usually be given to these written reasons because they may be the subject of an appeal.

## RIGHTS OF APPEAL AND REVIEW

- 5.66 In general, merger parties and persons who participated in any conference held by the Commission have the right to appeal against an authorisation determination to the High Court. Such appeals proceed by way of rehearing.
- 5.67 An appeal must be made within 20 working days after the date of the Commission's decision or within a timeframe that the Court allows.<sup>6</sup> The Commerce Act does not give the Commission authority to grant an extension beyond the 20 working day timeframe. Applicants must apply to the Court for such an extension. However, the Commission will not oppose an application made to the Court, if it is made within 20 working days of the release of the Commission's written reasons.
- 5.68 Judicial review proceedings may also be brought in relation to the Commission's exercise of its statutory power to make an authorisation determination. All judicial reviews are heard in the High Court.

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6. Section 91(2) Commerce Act 1986.

## APPENDIX 1 TIMEFRAME

