

BUSINESS ACQUISITION CLEARANCE FORM FOR NOTICE UNDER SECTION 66 COMMERCE ACT 1986

INTRODUCTION

Section 47 of the Act prohibits the acquisition of assets of a business or shares if that acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

Any person who proposes to acquire assets of a business or shares may seek clearance by giving the Commerce Commission (the Commission) notice under section 66(1). The Commission must give clearance if it is satisfied that the acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

If clearance is given, then section 47 of the Act does not apply to the proposed acquisition of assets of a business or shares, provided they are acquired in accordance with the clearance. A clearance expires 12 months after it is given (or confirmed by a court).

THE APPLICATION FORM

Section 109 of the Act empowers the Commission to prescribe a form for giving notice of a proposed business acquisition. Attached is the application form to be used in giving notice under section 66. The application form provides a framework for supplying the Commission with the information required to review mergers.

The application form is designed to help the Commission to make robust decisions about clearance applications as fast as possible in order to improve business certainty. The Commission recognises that it will often request a great deal of information from merger parties at the start of the process, but considers that this will in most cases reduce the need for further information requests and extensions. Some applications for clearance may take longer than the timeframes indicated in the guidelines. However, the Commission must balance the need for business certainty and speed against the need to ensure it has the best information in order to make sound decisions.

In conjunction with the application form, merger parties are encouraged to consult the:

- *Mergers and Acquisitions Guidelines*, which set out the Commission's general analytical approach to reviewing mergers; and
- *Mergers and Acquisitions Clearance Process Guidelines*, which outline the Commission's merger review processes and policy.

Both publications can be downloaded from the Commission's website at www.comcom.govt.nz under Business competition publications.

If it is not possible to provide some of the information specified in the form, please provide brief reasons as to why the omission of that information would not affect the Commission's merger review. In addition, if the information requested is not relevant, please specify why such information is irrelevant for the purposes of the Commission's merger review.

Applicants are encouraged to provide further information that may be outside the scope of the questions if it is relevant to the Commission's assessment of the proposed merger.

The notice should be sent to:

The Registrar
Mergers and Authorisations
Commerce Commission
PO Box 2351
WELLINGTON
registrar@comcom.govt.nz

The application should be accompanied by payment of the prescribed fee, which is currently \$2,300 (GST inclusive) for each acquisition for which clearance is sought. Payment can be made by cheque or electronic payment into the Commission's bank account. The Commission's bank account details are as follows:

Commerce Commission
BNZ North End
020536032986700 (Please use the applicant's company name as the reference when depositing funds electronically. Any bank transaction fees are to be met by the applicant.)

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 \$10,000 (FOR AN INDIVIDUAL) OR \$30,000 (FOR A BODY CORPORATE). REFER TO SECTIONS 103(2) AND (4) OF THE ACT.

This form was last updated in October 2010.

COMMERCE ACT 1986: BUSINESS ACQUISITION

SECTION 66: NOTICE SEEKING CLEARANCE

PART 1: TRANSACTION DETAILS

- 1 Provide the name of the acquirer (person giving notice), and the name and position of the individual responsible for the notice. Please include the:
 - registered office address, postal address and physical address of the acquirer;
 - telephone and fax numbers and website of the acquirer; and
 - email address, telephone number and position of the contact person.
- 2 Provide the name of the other merger parties, and the name/position of the relevant individual within the relevant merger parties. For each merger party, please include the:
 - registered office address, postal address and physical address;
 - telephone and fax number and website; and
 - email address, telephone number and position of the contact person.
- 3 With respect to the merger parties, list the relevant companies and the person or persons controlling these directly or indirectly. Please use organisational charts or diagrams to show the structure of the ownership and control of the acquirer and participant(s) to the acquisition.

When answering question 3, bear in mind that the Commission is only seeking information that is relevant to the proposal. The Commission does not require exhaustive details of the persons interconnected to, or associated with, the merger parties unless those interconnections or associations are relevant to the Commission's consideration of the competition implications of the proposal.

If relevant, identify and explain any other links, formal or informal, between the merger parties, including interconnected bodies corporate and other persons identified in question 3 above and its/their existing competitors in each market.

For further information on interconnected persons and associated persons, please refer to Part 2 of the Mergers and Acquisitions Guidelines.

- 4 Provide details on what is to be acquired.
- 5 Fully explain the commercial rationale for the proposed merger. Specify whether this is part of an international merger.
- 6 Provide copies of the final or the most recent versions of any documents bringing about the proposed merger (e.g. contracts, sales and purchase agreements, or offer documents if it is a public bid).
- 7 If any other jurisdiction's competition agency has been (or will be) notified of the proposed merger, please list each competition agency notified (or to be notified) and the date of the notification.
 - 7.1 Please indicate whether you would be willing to provide the Commission with a waiver allowing it to exchange confidential information with competition agencies in other jurisdictions in respect of the proposed merger.

For further information on international mergers and waivers, please refer to the Mergers and Acquisitions Clearance Process Guidelines.

PART 2: THE INDUSTRY

- 8 Describe the relevant goods or services supplied by the merger parties (it is sufficient to refer in general terms to activities in which there will be no aggregation).
- 9 Describe the industry or industries affected by the proposed acquisition. Where relevant, describe how sales are made, the supply chain(s) of any product(s) or service(s) involved, and the manufacturing process. If relevant, provide a glossary of terms and acronyms.
- 10 Describe the current industry trends and developments including the role of imports and exports, emerging technologies, and/or changes in supply and demand dynamics.
- 11 Please highlight any relevant mergers that have occurred in this industry over the past three years. Include:
 - 11.1 any acquisition of assets of a business or shares which the merger parties (or any interconnected or associated businesses) have undertaken in the last three years.

PART 3: MARKET DEFINITION

HORIZONTAL AGGREGATION

- 12 For each area of aggregation of market shares, please define the relevant market(s) for the:
 - 12.1 product(s) or service(s);
 - 12.2 functional level;
 - 12.3 geographic area; and
 - 12.4 customer dimension and timeframe (if relevant).
- 13 Where relevant, please explain how products or services are differentiated within the market(s).

For further information on market definition and differentiated products, please refer to Part 3 of the Mergers and Acquisitions Guidelines.

VERTICAL INTEGRATION

- 14 Provide details of any creation or strengthening of vertical integration that would result from the proposed merger. Please use organisational charts or diagrams to illustrate the structure of the ownership and/or control of the participants and the vertical relationships in question.

For further information on vertical integration, please refer to Part 10.1 of the Mergers and Acquisitions Guidelines.

PART 4: COUNTERFACTUAL

- 15 In the event that the proposed merger does not take place, describe what is likely to happen to the business operations of the merger parties and the market/industry.

For further information on the counterfactual, please refer to Part 4 of the Mergers and Acquisitions Guidelines.

PART 5: COMPETITION ANALYSIS

Please answer questions 16-28 below in respect of each market identified in question 12 above.

EXISTING COMPETITORS

16 Identify all of the relevant competitors in the market(s), including near competitors and importers in the market(s), and describe how they all compete in the market(s).

17 Outline the estimated market shares in terms of sales, and, where relevant, volume and productive capacity, of the merger parties and competitors identified above. Please include:

- 17.1 the estimated total value of the domestic market; and
- 17.2 the source of the data provided.

Market share information may be illustrated by the use of the table below:

RANK	COMPETITORS (INCLUDING MERGER PARTIES)	ESTIMATED REVENUE	ESTIMATED % OF MARKET SHARE BY REVENUE	ESTIMATED VOLUME	ESTIMATED % OF MARKET SHARE BY VOLUME
1					
2					
3					
4					
5					
6					
ETC					

SOURCES OF ESTIMATES:

18 To what extent do you consider that the merged entity would be constrained in its actions by the conduct of existing competitors in the markets affected? Where relevant please include a full discussion and examples of:

- 18.1 the ease with which customers may switch between suppliers, and, if so, how readily;
- 18.2 any local or overseas firms that are not currently producing the product, or providing the service in the market, but could enter the market quickly (using essentially their existing productive capacity) in a response to an attempt by suppliers to raise prices or reduce output or quality (near competitors and importers); and
- 18.3 the extent to which existing competitors, near competitors and importers could expand in the market, and any difficulties that they might face in doing so.

For further information on existing competition, please refer to Part 5 of the Mergers and Acquisitions Guidelines.

POTENTIAL COMPETITION

CONDITIONS OF ENTRY

19 Please explain the requirements for new entry and/or importers in the relevant market(s), including:

- a breakdown of the estimated costs;

Estimated costs might include, for example, raw materials, machinery, specialised assets, sunk costs and/or any other costs which may be necessary for new entry.

- anticipated timeframes;
- regulatory requirements;
- frontier requirements (e.g. tariffs, import licensing, quarantine requirements); and
- business requirements involved.

Please provide the source for any data used.

20 Include a full discussion on:

- 20.1 any factors that could impede entry; and
- 20.2 what might prompt new entry post-merger.

For further information on market entry and barriers to entry, please refer to Part 6 of the Mergers and Acquisitions Guidelines.

LIKELIHOOD, EXTENT AND TIMELINESS OF ENTRY (THE LET TEST)

21 Please name any likely businesses (including overseas businesses) you are aware of that do not currently supply the market but which you consider could supply each of the relevant market(s). Discuss the likelihood of such entry.

22 To what extent do you consider that potential entry would be sufficient to constrain the merged entity in the markets affected?

23 How long would you expect it to take for entry to occur, and for market supply to increase, in respect of each of the potential entrants named in question 21 above? Provide reasons for your estimates.

For further information on the LET test, please refer to Part 6.3 of the Mergers and Acquisitions Guidelines.

COUNTERVAILING POWER OF BUYERS

24 To what extent do you consider that the merged entity would be constrained in its actions by the conduct of buyers in the markets affected? Where relevant, please include:

- 24.1 a full discussion on the ability of buyers to self supply or import, and the alternative sources of supply available to buyers; and
- 24.2 evidence of buyers seeking alternative supply and/or switching suppliers.

25 If you consider that there is a constraint from buyers, identify the top five buyers by sales and/or volume (including overseas companies/importers) in the relevant market(s). Where there are significant differences in the size of the buyers please provide details for five medium and five small buyers.

For further information on the countervailing power of buyers, please refer to Part 7.3 of the Mergers and Acquisitions Guidelines.

COORDINATED MARKET POWER

26 Identify and discuss the various characteristics of the market that, post-merger, you consider would either facilitate or impede coordination.

For further information on the coordinated market power, please refer to Part 9 of the Mergers and Acquisitions Guidelines.

EFFICIENCIES

27 If applicable, provide a description of any efficiencies that you believe the acquisition could bring. Would such efficiencies enhance rivalry, or offset the impact of a lessening of competition? Please include a full discussion on:

- 27.1 how the merger would facilitate the realisation of efficiency improvements. Specify the steps the combined entity anticipates it would take, and the timeframe needed, to achieve the efficiencies. Where relevant, include a discussion of the risks and costs involved;
- 27.2 the magnitude of the efficiencies, whether the impact would be on fixed, variable or other costs, and generally how the cost structure of the merged entity would change;
- 27.3 whether such efficiencies could be realised without the merger, or over a longer timeframe; and
- 27.4 whether, and the extent to which, such efficiencies would be passed on to the customers of the merged entity.

For further information on efficiencies, please refer to Part 7.4 of the Mergers and Acquisitions Guidelines.

OTHER FACTORS

28 Where relevant, provide a description of any other features of the market(s) that should be taken into account in considering the effect of the proposed merger.

PART 6: FURTHER INFORMATION AND SUPPORTING DOCUMENTATION

29 Provide the contact details of relevant competitors, buyers and suppliers and any other relevant market participants in the form of the example table shown below.

	NAME OF COMPANY	CONTACT DETAILS	RELEVANT CONTACT PERSON
	BOTH LEGAL AND TRADING NAMES	POSTAL AND PHYSICAL ADDRESS, TELEPHONE AND FAX, WEBSITE	NAME, POSITION AND CONTACT DETAILS INCLUDING TELEPHONE PHONE, FAX, EMAIL
COMPETITORS			
BUYERS			
SUPPLIERS			
TRADE ASSOCIATIONS			
ANY OTHER RELEVANT MARKET PARTICIPANTS OR INTERESTED PARTIES			

30 Please provide a copy of the most recent annual report for each of the merger parties. If an annual report is not available, please provide a copy of the audited financial statements of the merger parties (profit and loss account, showing total turnover and profit before tax, and balance sheet). If the merger only relates to a segment of the business of the merger parties, please also provide a copy of any management accounts for the relevant business segment.

PART 7: CONFIDENTIALITY

31 If you wish to request confidentiality for specific information contained in or attached to the notice, please state why you consider the information to be confidential and state the reasons for your request in terms of the criteria set out in the Official Information Act 1982.

32 Provide a separate schedule of all confidential information claimed in the application.

The Commission requires applicants to provide a separate schedule listing all the confidential information so the Commission can process confidentiality requests quickly.

33 Provide two copies of the application. One copy must be a confidential version and the other a public version.

33.1 In the confidential version of the application any information for which confidentiality is sought must be highlighted in bold and contained in [square brackets].

33.2 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining, thus [].

A hard copy, and an electronic copy of the confidential version and the public version both in Microsoft Word format and in PDF format, should be sent to the email address: registrar@comcom.govt.nz.

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

THIS NOTICE is given by

*{individual(s)}/{company}.

*{the company/I/we} hereby confirm(s) 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(s) which is relevant to the consideration of this application/notice has been supplied; and
- all information supplied is correct as at the date of this application/notice.

*{the company/I/we} undertake(s) to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this day of 200 .

* {Signed by (name of applicant company):

Director/Chief Executive Officer/other (specify)}

*{I am a director/officer of the company and am duly authorised to make this application/notice.}

or

*{The common seal of (name of applicant company/organisation) was affixed hereto in the presence of:

Director/Authorised signatory }

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NOTES ON DECLARATION

- This declaration is to be made only by the applicant. It may not be made by a solicitor or other adviser acting on the applicant's behalf.
- The wording in this declaration may not be varied by the applicant.
- If this declaration is not completed, the Commission may decline to register the notice/application.

CHECKLIST

MAKE SURE YOU HAVE ENCLOSED THE FOLLOWING:

- A CONFIDENTIAL VERSION OF THE NOTICE IN HARD COPY, PDF AND MICROSOFT WORD;
- A PUBLIC VERSION OF THE NOTICE IN HARD COPY, PDF AND MICROSOFT WORD;
- A SEPARATE SCHEDULE OF ALL CONFIDENTIAL INFORMATION CLAIMED IN THE APPLICATION;
- ALL SUPPORTING DOCUMENTATION REQUESTED UNDER PART 6 OF THE FORM;
- ANY DOCUMENTS REFERRED TO IN THE NOTICE AS SUPPORTING EVIDENCE;
- A SIGNED DECLARATION ON THE CONFIDENTIAL VERSION; AND
- PAYMENT OF \$2,300