

COMMERCE ACT 1986: BUSINESS ACQUISITION APPLICATION FOR AUTHORISATION

Form for Notice under Section 67

Introduction

- 1.1 Section 47 of the Commerce Act 1986 (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.
- 1.2 Any person who proposes to acquire assets of a business or shares may either seek a clearance under s 66 or seek authorisation by giving notice under s 67(1). It is more appropriate to seek an authorisation in the first instance if the applicant considers it likely that the business acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.
- 1.3 The Commerce Commission recommends that anyone considering making an application for authorisation of a business acquisition, contact the Manager of the Mergers and Authorisations Team to discuss the application, prior to submitting the application.
- 1.4 If an application for authorisation is received, the Commission may either:
 - give a 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; or,
 - grant an authorisation 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.
- 1.5 If clearance is given or authorisation is granted, then s 47 does not apply to the proposed acquisition, provided it is made in accordance with the terms of the clearance or authorisation and while the clearance or authorisation is in force.

The Application Form

- 1.6 Section 109 of the Act empowers the Commission to prescribe the form for giving applications or notices required for the purposes of the Act. Attached is the application form to be used in applying for an Authorisation of a Business Acquisition under s 67.
- 1.7 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 ability to determine the application. In addition, if the information requested is not relevant, please specify why such information is irrelevant for the purposes of the Commission's ability to determine the application.

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

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 **\$23,000** (GST inclusive) for each application for authorisation. 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 November 2010

COMMERCE ACT 1986: Application for Authorisation for Business Acquisitions

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.

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

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.

Indicate whether the merger parties, or any of its associated companies, are listed on a stock exchange. If so, which stock exchange(s).

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 acquisition (eg, 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;

geographic area; and

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 acquisition *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 16-24 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					

Advise 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 (eg, 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

- 23.1 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?

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

PART SIX: OTHER FACTORS

- 24 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 acquisition.
- 25 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 acquisition 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 SEVEN: PUBLIC BENEFITS AND DETRIMENTS

- 26 With reference to the Notes to this form (at Appendix 1), please provide evidence to support the public benefits you are claiming, both qualitatively and quantitatively.
- 27 With reference to the Notes to this form (at Appendix 1), please provide evidence of any detriments that may result from the proposed acquisition, both qualitatively and quantitatively.

PART EIGHT: IDENTIFICATION OF INTERESTED PARTIES

- 28 Please provide the contact details of likely interested parties, such as customers 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			
Customers			
Suppliers			
Trade associations			
Any other relevant market participants or interested parties			

PART NINE: CONFIDENTIALITY

- 29 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.
- 30 Provide a separate schedule of all confidential information claimed in the application.
- 31 Please provide two copies of the application. One copy must be a confidential version and the other a public version.
- 32 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 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining, thus [].

- 34 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.

The Commission requires applicants to provide a separate schedule listing all the confidential information so the Commission can process confidentiality requests quickly. For further information on the Commission's confidentiality policy and procedures, please refer to the Streamlined Authorisation Process Guidelines.

DECLARATION

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 20.

* {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 }

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.

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 \$22,500 (GST inclusive).

APPENDIX 1

NOTES TO ASSIST YOU IN YOUR RESPONSES TO QUESTIONS 26 AND 27

Benefits and Detriments – the Commission’s analytical framework

When considering an authorisation application, the Commission will assess whether the detriments from a reduction in competition is outweighed by the benefit to the public from the acquisition for which authorisation is sought. The relevant detriments are those which arise in the market or markets where the competition is lessened, while the benefits may arise in those and in any other markets.

A public benefit is any gain, and a detriment is any loss, to the public of New Zealand that would result from the proposed acquisition. The emphasis is on gains and losses which impact on economic efficiency. Changes in the distribution of income, where one group gains at the expense of another, are generally not included because a change in efficiency is usually not involved.

For benefits to be included in the analysis, there must be a clear nexus between the acquisition for which the authorisation is sought and the claimed benefits. Please provide relevant information or evidence that demonstrates such a nexus. Please also provide comment on whether there is any less anti-competitive way of achieving the claimed benefits.

Benefits

The efficiency and other gains which constitute public benefits may include both tangible and intangible benefits.

Tangible benefits, which typically can be measured in monetary terms, may include those derived from:

- economies of scale (where increased output may reduce the average per unit cost of output, usually because fixed costs can be spread over more units);
- economies of scope (where the average per unit cost may reduce because some fixed costs can be spread over a greater range of goods or services);
- better utilisation of existing capacity; and
- cost reductions due to:
 - reduced labour costs,
 - greater specialisation of production,
 - lower working capital, and
 - reduced transaction costs.

Intangible benefits, which can be difficult to measure, may include:

- environmental improvements;
- health improvements; and
- greater innovation in products or processes.

Generally no additional weighting is given to:

- increased employment, unless national employment is increased;
- export earnings as against domestic earnings; and
- redistribution of activity to particular regions.

In accordance with the framework set out above, the applicant should provide information and evidence relevant to its claimed public benefits. The evidence provided may be of a qualitative or quantitative nature.

Also please provide information regarding whether such efficiencies could be realised without the merger, or over a longer timeframe.

Detriments

A firm which does not face the discipline arising from competition is less likely than competitive firms to meet buyers' wants at least cost. Consequently, economic efficiency is reduced if competition is lessened. The firm may be able to reduce output and charge more, leading to a loss of allocative efficiency. The quality of the product may also deteriorate. The firm may be able to afford slackness and waste and still be profitable.

Detriments from a lessening of competition are generally considered in the following categories:

- loss of productive efficiency (from production occurring at more than minimum cost);
- loss of product quality;
- loss of allocative efficiency (from prices being set above competitive levels, causing consumers to switch to less preferred alternative goods or services); and
- loss of dynamic efficiency (from a lessening in the incentive to engage in product and process innovation).

In accordance with the framework set out above, the applicant should provide information and evidence relevant to the detriments set out above. The evidence provided may be of a qualitative or quantitative nature.

Evidence

As noted above, evidence provided regarding benefits or detriments is likely to be both qualitative and quantitative.

In each case, the applicant should provide qualitative evidence regarding the relevant benefits and detriments whether or not quantitative evidence is provided.

As recognised by the courts, quantitative evidence can provide rigour to the assessment of benefits and detriments, if it is feasible. Generally, the Commission expects the applicant to provide quantitative evidence at the start of the process to inform this assessment. If the applicant considers quantitative evidence is not feasible, the applicant should discuss this with Commission in its pre-notification discussions.

Quantitative evidence can be highly technical. Any such evidence provided should, however be as far as possible readable and understandable to non-economists. Any economic analysis included in an application must include:

- the data used;
- the methodology used;
- the assumptions adopted and the underlying rationale, and any evidence relevant to these assumptions;
- the results of the analysis;
- any sensitivity testing undertaken; and
- the conclusions derived from the analysis.

Sufficient detail regarding each of these issues should be provided so that the Commission can understand fully (and test if necessary) the analysis, without having to seek more information or explanation from the applicant. Providing the quantitative evidence fully (as set out above) and at the time of application will assist the Commission to make informed, timely and cost-efficient decisions.