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# MERGERS AND ACQUISITIONS CLEARANCE PROCESS GUIDELINES

COMMERCE ACT

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## 1 PREFACE

- 1.01 The role of the Commerce Commission (Commission) is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice.
- 1.02 Mergers perform an important role in the market and can bring benefits to the economy such as enabling businesses to achieve economies of scale and scope. Many are subject to commercial time constraints. However, some mergers may alter the structure of markets in such a way as to lessen competition. The Commission balances the desire for quick decisions against the need to ensure that it has the best information, in order to make sound decisions that will ultimately benefit consumers in New Zealand.<sup>1</sup>
- 1.03 The Commission is responsible for assessing applications for clearance from businesses seeking to acquire or merge with competitors.<sup>2</sup> These applications are voluntary. If clearance is given, the merger is protected from proceedings for breach of sections 27 or 47 initiated by the Commission and/or any other parties under the Commerce Act 1986 (the Act) provided it occurs within one year of the clearance being granted (or confirmed by a court), and proceeds in accordance with the clearance.
- 1.04 The Commission aims to make robust decisions on applications for clearance as quickly as possible in order to improve business certainty. These guidelines have been produced to help achieve robust and timely decisions by providing information about the process and the kinds of information the Commission requires, as well as indicative timelines. They should be read alongside the Commission's *Mergers and Acquisitions Guidelines*, which provide details of how the Commission applies the substantial lessening of competition test against which mergers are assessed.
- 1.05 The Commission recognises that it will often ask acquirers to provide a great deal of information at the start of the process, but considers that this will in most cases reduce the need for further information requests and extensions.<sup>3</sup> Assessing some applications for clearance may take longer than the timeframes indicated in the guidelines because of their complexity.
- 1.06 These guidelines reflect the Commission's current process for assessing applications for clearance. The Commission's practice will continue to develop in light of judicial precedent, general practice and experience. These guidelines may, in due course, be supplemented, revised or replaced. Although the Commission will generally follow these guidelines in assessing applications for clearance under the Act, it will apply them flexibly and may depart from the approach described when warranted. These guidelines will be updated as required.
- 1.07 Although they cover the main process issues for businesses and their advisers, these guidelines 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 law such as the Act (or the regulations or orders made under it).
- 1.08 Anyone in doubt about whether they may be affected by the legislation should consider seeking legal advice.

1. The Commerce Act 1986 and the Crown Entities Act 2004 allow for some functions, duties and powers to be exercised by a Division of the Commission, and/or to be delegated to a member of the Commission (referred to as a 'Commissioner' in these guidelines), the chief executive, or any other employee(s). References in these guidelines to these functions, duties and powers being exercised by the Commission include those exercised by Divisions or delegates.

2. Business acquisitions are referred to as 'mergers' throughout the remainder of these guidelines.

3. Acquirers are referred to as 'applicants' throughout the remainder of these guidelines.

## 2 THE LEGAL FRAMEWORK

- 2.01 Section 47 of the Act prohibits business acquisitions that would have, or would be likely to have, the effect of substantially lessening competition in a market.
- 2.02 Under section 66 of the Act, the Commission may give clearances for mergers if it is satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market. The Commission does not give informal clearances or letters of comfort for mergers.
- 2.03 There is no legislative requirement that businesses notify the Commission of a proposed merger. Acquirers have the option of proceeding with a merger without applying for an application for clearance. However, pursuing this option may put the merger parties at risk of the Commission or other interested parties taking legal action under section 47 of the Act on the basis that the merger would have, or would be likely to have, the effect of substantially lessening competition in a market. An applicant that applies for clearance may at any time withdraw an application for clearance by notice in writing to the Commission. However, the Commission may still continue to investigate such a merger under section 47 of the Act.
- 2.04 The Commission monitors markets in order to identify mergers that have not been notified to the Commission that may raise competition concerns. In these cases, and in cases where applications for clearance have been withdrawn, but the merger proceeds in any case, the Commission will consider whether or not to investigate and prosecute under section 47 of the Act. However, it does not follow that the Commission will investigate every non-notified merger. Rather, the Commission will assess whether to investigate on a case-by-case basis.
- 2.05 The fact that a merger has not been notified does not negatively affect the Commission's evaluation of the competitive effects of a merger. Where competition concerns clearly do not arise because there is no overlap between the merger parties' activities, the merger parties may well decide that an application for clearance to the Commission would be unnecessary. Many merger parties will still notify the Commission of such mergers, and the Commission encourages this practice.

## 3 WHAT IS A MERGER CLEARANCE?

- 3.01 A merger clearance provides applicants with protection from proceedings initiated under sections 27 and 47 of the Act by the Commission and/or from another party. If the merger has not been completed, a clearance expires:
  - 12 months after the date on which it was given; or,
  - in the event of an appeal being made against the Commission's determination, 12 months after the date on which the determination is confirmed by the court.

## 4 WHEN WILL THE COMMISSION GIVE CLEARANCE?

- 4.01 The core concept of the substantial lessening of competition test set out in paragraph 2.02 is a comparison of the prospects for competition with (the factual) and without (the counterfactual) the merger. For further details of how the Commission applies the substantial lessening of competition test please refer to the Commission's *Mergers and Acquisitions Guidelines*.

## 5 FIRST STEPS TOWARDS MAKING AN APPLICATION FOR CLEARANCE

- 5.01 The following sections explain how to apply for an application for clearance and the processes involved. In particular it covers:
- informing the Commission about potential applications for clearance; and
  - engaging in pre-notification discussions.

### INFORMING THE COMMISSION

- 5.02 Merger parties are encouraged to contact the Commission via the Manager of the Determinations Team as early as possible to inform the Commission about potential applications for clearance. In most cases, this enables the Manager to plan ahead and assign staff, which can help to expedite the assessment of an application for clearance.
- 5.03 The Commission recognises that mergers are often time sensitive and so endeavours to complete all applications for clearance as soon as practicable. Applicants are encouraged to advise the Commission of any commercial deadlines as early as possible, for example, at the pre-notification discussion stage discussed below. The Commission may also make its own inquiries as to the status of the proposed merger.

The Manager of the Determinations Team can be contacted at [mgrdeterminations@comcom.govt.nz](mailto:mgrdeterminations@comcom.govt.nz).

### PRE-NOTIFICATION DISCUSSIONS

- 5.04 In addition to early contact with the Determinations Team Manager, applicants can choose to engage in pre-notification discussions with Commission staff. Such discussions are likely to be particularly valuable for applications for clearance that may raise significant competition concerns.
- 5.05 Pre-notification discussions are not a compulsory element of the application for clearance process. However, the Commission encourages applicants to participate in pre-notification discussions before submitting an application. Applicants may request pre-notification discussions by contacting the Determinations Team Manager.
- 5.06 The main purpose of a pre-notification discussion is to expedite the assessment of an application for clearance when it is filed with the Commission. Pre-notification discussions benefit the applicant and the Commission by serving, for example, to:
- potentially reduce the need for further information requests and extensions in the assessment of an application for clearance;
  - inform the Commission's investigation team about markets that are complex and/or unfamiliar;
  - allow the Commission ample time to plan effectively for an application for clearance, and to allocate appropriate resources at an early stage;
  - 'set the scene' for the transaction, including its rationale and possible efficiencies, at an early stage;
  - clarify what information and evidence the Commission is likely to require, and identify useful items of evidence that may assist the applicant's case;
  - be an additional forum for informal discussion on the Commission staff's likely approach to consideration of a novel issue, or the assessment of particular competition concerns; and
  - discuss the possible use of economic modelling.
- 5.07 The Commission will treat all pre-notification discussions as fact confidential until an application is registered.<sup>4</sup> All information received for the purposes of the pre-notification discussions, as well as the statements of the parties, draft heads of agreement or tender documents will be considered by the Commission as strictly confidential.

4. Further information on confidentiality can be found at paragraphs 7.36-7.41 of these guidelines.

- 5.08 Pre-notification 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.
- 5.09 The Commission will not seek third party views at the pre-notification stage.
- 5.10 While Commission staff may highlight possible relevant markets and competition issues in pre-notification discussions, these are not binding on the Commission. Ultimately, the quality of Commission staff's comments will, to a large extent, reflect the quality of the information provided by the applicant. As noted in paragraph 2.02, the Commission does not give informal clearances or letters of comfort for mergers.
- 5.11 In most cases, pre-notification discussions are likely to involve three stages as outlined below. However, the Commission's intention is that the process should be informal and flexible, The Commission may depart from the process outlined below where it considers this is appropriate.
- Stage one: Applicants notify the Commission via the Manager of the Determinations Team that it wishes to engage in pre-notification discussions by letter, email or telephone. Once the Commission has received the request, a suitable meeting date will be arranged. Pre-notification discussions are intended for transactions that are likely to occur. Applicants should provide evidence to show the good faith intention to complete the anticipated merger, such as a draft heads of agreement, public tender documents or similar. As discussed in paragraph 5.07 these documents will be kept strictly confidential.<sup>5</sup> 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 merger situation, a brief description of the relevant market(s) and sector(s) involved, and the likely impact of the merger situation on competition in those markets and sectors in general terms.
  - Stage two: It is helpful if applicants are able to submit a substantially developed draft application form at least two working days before the pre-notification discussion meeting. However, a longer timeframe may be appropriate for more complex mergers. This allows the Commission staff time to review the draft application form in preparation for the meeting. The purpose of providing a substantially completed application form 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-notification discussion meeting is held. The Commission encourages at least one senior employee of the applicants to attend. The main purpose of the meeting is to review the application form. Commission staff may indicate further information should be included in the application form. Likely timeframes for the assessment of an application for clearance 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.

5. Further information on confidentiality can be found at paragraphs 7.36-7.41 of these guidelines.

## 6 SUBMITTING AN APPLICATION

- 6.01 Applications for clearance must be made on the prescribed form. The form is available on the Commission's website, [www.comcom.govt.nz](http://www.comcom.govt.nz).
- 6.02 Section 68(1) of the Act states that an applicant must provide the Commission with documents and information in relation to the acquisition, within a specified timeframe, in order to enable the Commission to assess an application for clearance.
- 6.03 The application form is an effective method of gathering relevant information from applicants in order to ensure an efficient merger process. It also allows applicants to present their argument as to why the Commission should give clearance. Where appropriate, applicants are encouraged to provide economic evidence as this will assist the Commission's analysis. The Commission encourages applicants to provide such material as early as possible.
- 6.04 The application should be accompanied by payment of the prescribed fee for each acquisition for which clearance 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
- 6.05 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 clearance; or
  - it does not contain such particulars as may be specified in the form.
- 6.06 It may take up to five days for the Commission to check that an application for clearance is compliant and for the Commission to record the application in the register. Where information relevant to an application for clearance is missing from the form, the Commission will inform the applicant of this fact at the earliest opportunity. In most cases, the pre-notification discussion process will aid the applicant in ensuring that its application form is compliant, and is also useful in more complex cases where consideration can be given to the nature of the information that the Commission would be looking for in an application for clearance. Generally, applicants are also encouraged to contact the Manager of the Determinations Team if they have any questions in respect of filing an application for clearance.
- 6.07 Applicants sometimes request fact confidentiality when they file an application for clearance with the Commission, asking that the application itself, and the fact that it has been filed, is kept confidential (i.e. not disclosed publicly). Fact confidentiality may be requested, for example, because merger parties may not have informed their employees about the proposed acquisition, or there is competition from other parties to acquire the business in question.
- 6.08 The Commission will consider requests for fact confidentiality on a case-by-case basis, but is only likely to grant it for a limited period of time and in exceptional circumstances. Fact confidentiality is likely to severely hamper crucial parts of the Commission's assessment of an application for clearance, as investigators cannot gather information from market participants and test information provided in an application for clearance.
- 6.09 Once an application for clearance has been registered and confidential information has been identified and confirmed, the public version (i.e. a version that omits the merger parties' commercially sensitive and confidential information) will be published on the Commission's website, and a media release will be issued.<sup>6</sup> These actions aim to inform the public of the proposed merger, and enable third parties to make submissions to the Commission.

6. Further information on confidentiality can be found at paragraphs 7.36-7.41 of these guidelines.

## 7 THE PROCESS FOR THE COMMERCE COMMISSION TO DETERMINE APPLICATIONS FOR CLEARANCE

- 7.01 The following sections explain the application for clearance process in more detail. In particular it covers:
- a summary of the process and key milestones;
  - the time limits for the Commission to determine applications for clearance, and when and how the Commission seeks to agree an extension;
  - what applicants can expect in terms of communication from the Commission while it is assessing an application for clearance;
  - how the Commission seeks information from the merger parties, market participants and interested parties;
  - the Commission's approach to confidentiality;
  - international mergers, waivers and the sharing of information with other jurisdictions;
  - the purposes of a Statement of Preliminary Issues, a Letter of Issues and a Letter of Unresolved Issues;
  - how the Commission will treat divestment undertakings;
  - the Commission's publication of written reasons; and
  - the merger parties' rights of appeal and review.

### SUMMARY OF THE PROCESS INCLUDING KEY MILESTONES

- 7.02 Once an application for clearance has been registered, a multi-disciplinary investigation team, comprising one or more investigators, and specialist economic and legal staff, is usually 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.
- 7.03 Separately, the Chair of the Commission appoints a Division of Commissioners (Division) to make a determination on an application for clearance.
- 7.04 Soon after an application for clearance is registered, the investigation team conducts background research and identifies 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 an application for clearance.
- 7.05 The purpose of the meeting is to obtain staff agreement about the likely complexity of an application for clearance, 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 clearance. 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 7.29-7.32 for more information about the Commission's approach to information requests.
- 7.06 The investigation team presents information and analysis to the Division on a regular basis. Further information in respect of the role of Commissioners can be found at paragraphs 7.16-7.18 below.

7.07 The timeline below is an indicative one for the Commission's assessment of an application for clearance. It has been designed to allow the Commission to review and consider an application for clearance and other evidence (including submissions) in order to make a determination within 40 working days. However, more straightforward applications for clearance may take less time. It is important to note that timeframes may vary depending on the complexity of the case.

- Day 1 Application for clearance registered.
- By Day 10 Commission provides a draft timeline for the assessment of the application for clearance based on likely complexity and resources. Commission seeks an extension based on the draft timeline.
- By Day 15 Commission publishes a Statement of Preliminary Issues on its website.<sup>7</sup>
- Day 25 Commission gives clearance (for straightforward applications) or sends a Letter of Issues.<sup>8</sup>
- Day 30 Meeting with applicant and provision of an updated tentative timeline.
- Day 40 Commission gives, or declines to give, clearance.

7.08 However, in more complex applications for clearance, the process is likely to continue as follows:

- Day 40 Commission sends a Letter of Unresolved Issues and seeks an extension.
- Day 45 Meeting with applicant on Letter of Unresolved Issues and provision of updated tentative timeline.
- Days 60+ Commission gives a final decision.

## TIME LIMITS FOR THE COMMISSION TO DETERMINE APPLICATIONS FOR CLEARANCE

7.09 The Act sets out the statutory timeframe for the Commission to give clearance or decline to give clearance. If no decision is made within this period, the Commission is deemed to have declined to give clearance.

7.10 The Commission has committed to determining applications for clearance within an average of 40 working days of registering the application.

## EXTENSIONS

7.11 Having made an initial assessment of the issues and complexity surrounding an application for clearance, the Commission may seek an extension. The Commission endeavours to do this as early as possible in the process. The Commission will use the information provided in the application form and any pre-notification discussions to estimate the likely time it needs to complete its assessment of an application for clearance. The applicant will be informed of requests for an extension and the likely timeframes as soon as practicable.

7.12 After any initial request for an extension, if the Commission's assessment of an application for clearance is that the matter is fairly straightforward, the Commission is unlikely to request any further extensions. Reasons that a further extension may be requested include:

- to consider divestments that have been offered;
- to test new information provided by the applicant or market participants;
- where appropriate, to allow for the Commission to undertake economic modelling and the applicant to respond to such modelling; and
- where there are still unresolved issues.

7.13 Extension requests will initially be made verbally, and they will always be followed up with a written request via email or letter. Extension requests may sometimes be accompanied by requests for further information, in which case a deadline by which the applicant should respond will be given.

## COMMUNICATION BETWEEN THE COMMISSION AND THE APPLICANT

7. Further information about the Statement of Preliminary Issues can be found at paragraphs 7.51-7.55 of these guidelines.

8. Further information about Letters of Issues can be found at paragraphs 7.56-7.59 of these guidelines.

- 7.14 Throughout the Commission's assessment of an application for clearance 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. In particular, it will depend on the extent to which an application for clearance raises competition concerns. In cases that raise no material competition issues, it may well be sufficient for the applicant to liaise with the investigation team by email on a periodic basis.
- 7.15 The lead investigator will contact the applicant regularly to update them on the progress of the application for clearance. In some cases, a detailed update may not be able to be given. 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

- 7.16 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 extensions;
  - oversee and guide the direction of the Commission's assessment of an application for clearance;
  - discuss and provide direction on issues as they arise;
  - approve the Statement of Preliminary Issues, Letter of Issues and Letter of Unresolved Issues;
  - approve the written reasons; and
  - decide whether to give, or decline to give, clearance.
- 7.17 The Division receives and reviews all relevant information in relation to an application for clearance. This will include:
- the application form;
  - the applicants' responses to the Letter of Issues;
  - the applicants responses to the Letter of Unresolved Issues;
  - relevant evidence provided by the merger parties and third parties;
  - any expert reports;
  - relevant third party submissions; and
  - any divestment undertakings.
- 7.18 In considering an application for clearance, 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. It is likely to be very rare for Commissioners to meet directly with the applicant during the assessment of an application for clearance.

## SEEKING VIEWS FROM MARKET PARTICIPANTS

- 7.19 An important part of assessing an application for clearance 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) operates, assess the likely effects of the merger and test the information provided in an application for clearance.
- 7.20 There are a variety of ways in which information can be gathered: these include face-to-face interviews, telephone interviews, letters or emails. The investigation team will choose the preferred method(s) of gathering information on a case-by-case basis. The investigation team may also request information from market participants, for example, market data, supply contracts and technical information.
- 7.21 If customers, competitors, suppliers or other interested parties do have information that they believe is important for the Commission's assessment of an application for clearance, and they

have not been contacted by the Commission, they should contact the Registrar at registrar@comcom.govt.nz.

- 7.22 A third party may also provide the Commission with its views on an application for clearance via a written submission or in response to the Statement of Preliminary Issues that the Commission publishes on its website.<sup>9</sup> 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.
- 7.23 The Commission usually issues a media release upon registering the application, to promote awareness of an application for clearance and give interested parties the opportunity to comment or provide the Commission with relevant information. Submissions can be made orally or in writing to the registrar at registrar@comcom.govt.nz.

## THE INTERVIEW PROCESS

- 7.24 If an interview is desirable, Commission staff will get in touch with the contact person provided 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 an application for clearance, explain the Commission's processes and provide an agenda or a list of topics to be discussed.
- 7.25 The length of interviews varies depending on the complexity of the issues, and on 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.
- 7.26 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.
- 7.27 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.
- 7.28 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 clearance.

9. Further information about the Statement of Preliminary Issues can be found at paragraphs 7.51-7.55 of these guidelines.

## INFORMATION REQUESTS

- 7.29 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 clearance. This can be requested on a voluntary basis or the Commission may require information to be furnished, documents to be produced, and/or appearance before the Commission using statutory information-gathering powers.
- 7.30 Voluntary requests will often specify a deadline by which the information or documents or evidence should be provided. In order for the Commission to progress its assessment of an application for clearance, 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

- 7.31 During the Commission's assessment of an application for clearance, the majority of information, documents and other evidence is usually gathered voluntarily from the merger parties 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 e.g. 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.
- 7.32 In an application for clearance, 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.
  - 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

- 7.33 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 clearance. 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.
- 7.34 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.
- 7.35 Any person who contravenes section 103 is liable for a fine of up to \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.

## CONFIDENTIALITY

- 7.36 Much of the information sought by the Commission when assessing an application for clearance 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 to it.
- 7.37 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 when 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 would either prejudice the supply of similar information or information from the same source where it is in the public interest that such information continue to be supplied, or be likely otherwise to damage the public interest.
- 7.38 The Commission aims to conduct its assessments of application for clearances 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 Determinations Team if they have any questions on confidential information.
- 7.39 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 a clearance, 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.

- 7.40 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.
- 7.41 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.

#### INTERNATIONAL MERGERS: SHARING INFORMATION AND REQUESTING WAIVERS

- 7.42 For multi-jurisdictional mergers, the Commission may contact staff in overseas competition authorities to inform them that an application for clearance has been received. Commission staff may also exchange views on the merger with their overseas counterpart if this does not involve exchanging any confidential information.
- 7.43 The Commission may request a waiver from the applicant and, where appropriate, from third parties so that confidential information can be disclosed where it seems likely that:
- information or evidence provided to overseas competition authorities may demonstrate a competition issue that requires further investigation; and
  - the exchange of confidential information will benefit the assessment of an application for clearance, or make it easier to identify appropriate divestment undertakings.
- 7.44 The Commission encourages applicants and, where appropriate third parties, to complete a waiver form, as it generally expedites the Commission's assessment of an application for clearance in both jurisdictions, ensures symmetry of information and potentially reduces the need for information requests. However, if a waiver is not granted, no confidential information will be exchanged. The fact that a waiver is not granted will not unduly influence the Commission's assessment of an application for clearance.

#### COOPERATION PROTOCOL FOR MERGER REVIEW BETWEEN NEW ZEALAND AND AUSTRALIA

- 7.45 For trans-Tasman mergers, the Commission has agreed a specific Cooperation protocol for merger review (Cooperation protocol) with the Australian Competition and Consumer Commission (ACCC). Cooperation is desirable to:
- reduce compliance costs of trans-Tasman business activity;
  - reduce the transaction costs of the ACCC and Commission in applying their competition laws; and
  - increase the effectiveness of competition laws in both New Zealand and Australia.
- 7.46 This protocol formalises a number of practices already routinely employed by the Commission and the ACCC and builds on current good practice by setting out further opportunities and mechanisms for cooperation between the agencies. Cooperation may include:
- coordinating agency processes;
  - sharing information held by each agency that was provided by the applicant and third parties;
  - sharing agency analysis; and
  - from time to time, gathering information on behalf of the other agency.

- 7.47 The effectiveness of the cooperation protocol in the context of an individual application for clearance will depend to a considerable extent on the cooperation and goodwill of the applicant and of third parties. In particular, cooperation will be most effective when the applicant, and, where appropriate, third parties, allow the Commission and the ACCC to share information where the disclosure of that information would otherwise be subject to confidentiality restrictions. Therefore, as discussed above, the Commission encourages applicants, and, where appropriate, third parties, to complete a waiver form.

## CONFERENCES

- 7.48 Applicants may request a conference at which they and interested third parties have opportunity to present information directly to Commissioners. Anyone who participates in such a conference can appeal the determination by the Commission in relation to an application for clearance.
- 7.49 While the Commission can decide to hold a conference, in practice such conferences are rarely held for an application for clearance. To date, the Commission has found that the gathering and testing of information from the merger parties and market participants through information requests and interviews has enabled it to make well-informed decisions. However, the Commission may hold a conference when it considers it appropriate to do so.
- 7.50 If the Commission were to decide to hold a conference, this would be likely to require a longer extension to the statutory timeframe, due to the practicalities of organising and holding a conference.

## STATEMENT OF PRELIMINARY ISSUES

- 7.51 The Statement of Preliminary Issues outlines the Commission's preliminary view of the competition issues that could arise if the proposed merger were to proceed. The Commission will usually publish a public version of the Statement of Preliminary Issues on its website and will issue an accompanying media release.
- 7.52 The Commission aims to publish the Statement of Preliminary Issues by working Day 15. Where the issues are more complex, the Statement of Preliminary Issues may be published later, but no later than working Day 25. The early publication of the Statement of Preliminary Issues will largely depend on the quality of information received by the Commission during pre-notification discussions and in the application form.
- 7.53 The purpose of the Statement of Preliminary Issues is to:
- increase the transparency of the process;
  - allow interested parties the opportunity to consider the issues identified by the Commission; and
  - facilitate the submission of further information which might assist the Commission's assessment of an application for clearance.
- 7.54 Responses to the Statement of Preliminary Issues should be made to the Registrar and must clearly identify any confidential information.<sup>10</sup>
- 7.55 The initial issues highlighted in the Statement of Preliminary Issues will be based on the information available at that time, and may change as the Commission's assessment of an application for clearance progresses. The publication of the Statement of Preliminary Issues does not necessarily mean that the Commission is likely to decline to give clearance.

10. Further information on confidentiality can be found at paragraphs 7.36-7.41 of these guidelines.

## LETTER OF ISSUES AND LETTER OF UNRESOLVED ISSUES

- 7.56 Letters of Issues and Letters of Unresolved Issues provide an opportunity for applicants to respond to issues raised by the Commission. The Commission will not send a Letter of Issues in every case. However, where the Commission has concerns about potential competition issues that may arise from a proposed merger, it may send a Letter of Issues to the applicant inviting them to respond and/or provide further information. The Commissioners are provided with the applicants' responses to Letter of Issues and Letter of Unresolved Issues.
- 7.57 A Letter of Issues is not a final decision and it does not mean that the Commission intends to decline to give clearance to an application for clearance. Rather, a Letter of Issues aims to clearly outline the Commission's issues and invite the applicant to provide any further information that might address these issues. Applicants may also be invited to meet with the investigation team to discuss the Letter of Issues. Following this, the applicant may wish to make a formal written response in which further information or evidence is furnished.
- 7.58 If the Commission considers the issues that have been raised in the Letter of Issues remain unresolved and, on the basis of the evidence before it, its preliminary view is that it cannot be satisfied that the merger would not have, nor would be likely to have, the effect of substantially lessening competition, it is likely to send a Letter of Unresolved Issues to the applicant. Commission staff may also invite the applicant to meet with the investigation team again. This provides the applicant with a further opportunity to:
- provide further relevant information or submissions;
  - provide evidence to allay the Commission's concerns; and/or
  - put forward any other material, including divestment undertakings, which may allay the Commission's concerns.
- 7.59 Applicants may wish to make a further formal written response following the meeting with Commission staff. It is important to note that if an applicant receives a Letter of Issues or a Letter of Unresolved Issues this does not necessarily mean that the Commission is going to decline to give clearance.

## DIVESTMENTS

- 7.60 The Commission encourages applicants to offer divestments as early as possible if they consider that it may remedy a substantial lessening of competition caused by the merger.
- 7.61 The Commission may accept a written undertaking by the applicant to dispose of assets or shares. If an undertaking is accepted, it is deemed to form part of an application for clearance. Under the Act the Commission is only able to consider structural undertakings, and not behavioural undertakings such as price caps.
- 7.62 If divestments are offered as part of an application for clearance, this enables the Commission to assess the effects of the merger, taking into account divestments from the start. If divestments were offered near the end of the Commission's assessment of an application for clearance, the Commission may need to request an extension to consider the merger situation in light of the proposed divestments. This could significantly extend the Commission's assessment of an application for clearance.

## PUBLICATION OF DECISIONS AND WRITTEN REASONS

- 7.63 Once the Commission's assessment of an application for clearance has been completed, the Division will make a decision on whether to grant or decline to give clearance. Following this, a Notice of Clearance/Decline of Clearance will be prepared for the Chair 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. 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. If requested, the Commission will also inform market participants and other interested parties of the decision.
- 7.64 The Commission provides written reasons for decisions under the 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.
- 7.65 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 clearance.
- 7.66 The Commission aims to publish reasons within an average of 20 working days of its decision. The length of the Commission's written reasons may vary depending on the complexity of the case and the novelty of the issues raised.
- 7.67 The Commission usually gives priority to making clearance determinations as quickly as possible in order to give businesses certainty. Written reasons are prepared during the Commission's assessment of an application for clearance and finalised following the decision. This may mean that, at times, Commission staff may be diverted onto assessing another application for clearance rather than immediately finalising the written reasons of applications for clearances that have already been decided. In general, following an application for clearance 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

- 7.68 Merger parties, and persons who participated in a Commission conference, have the right to appeal a clearance determination to the High Court. Such appeals proceed by way of rehearing.
- 7.69 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>11</sup> The Act does not give the Commission authority to give 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.
- 7.70 Judicial review proceedings may also be brought in relation to the Commission's exercise of its statutory power to make a clearance determination. All judicial reviews are heard in the High Court.

11. Section 91(2) Commerce Act 1986.