

Commerce Act 1986

# Notice seeking clearance

Mergers and acquisitions

To apply for clearance you must send both a confidential and a public version of your notice seeking clearance (“application”) to either [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz), or The Registrar, Competition Branch, Commerce Commission, PO Box 2351, Wellington, New Zealand.

Your application must be provided in both Microsoft Word format and searchable PDF format, and include a signed (hard-copy or electronic) declaration.

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

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

## Help in completing your application

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

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

Before submitting a clearance application, we recommend contacting the Competition Manager to schedule a pre-notification discussion. As discussed in the Mergers and Acquisitions Guidelines, pre-notification discussions can help clarify what information and evidence we are likely to need in your application. To get the most out of these pre-notification discussions, we expect an applicant to provide us with a substantially developed draft clearance application at least two working days before meeting with us.

## International transactions

Where a transaction forms part of an international transaction, it will assist the Commission if we are able to liaise with other agencies who are considering the transaction. As such, we encourage applicants to provide waivers to enable us to liaise with the notified agencies. Our waiver template is attached to this form. An applicant can provide a waiver at the time they apply for clearance.

### 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 Commerce Act.

# Required information

We give less weight to a statement or submission that cannot be supported with corroborating evidence. As such, any evidence in support of your application should be submitted with your application. Please consider submitting documents that might assist our understanding of the market, such as industry or marketing reports, and any reports prepared in contemplation of the merger.

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

- 1** Provide the name of the applicant(s) for clearance, and the name of the individual(s) responsible for the notice. In addition, please include the:
  - 1.1** postal address, physical address, telephone number and web address of the applicant(s);
  - 1.2** email address, telephone number and position of the contact person(s); and
  - 1.3** names of any relevant related entities (showing shareholdings).
- 2** Provide the other merger party's (parties') name(s) and provide the:
  - 2.1** postal address, physical address, telephone number and web address of the party; and
  - 2.2** email address, telephone number and position of the contact person(s) for that party.
- 3** Set out the transaction details including, where relevant:
  - 3.1** the type of transaction (such as a merger or joint venture), what is to be acquired and how the transaction is structured (such as whether assets or shares are to be purchased);
  - 3.2** the rationale for the merger;
  - 3.3** how this transaction changes the control of the company, and a diagram(s) of how the structure of ownership and affiliated companies are to change; and
  - 3.4** a description of relevant ancillary agreements associated with the merger, such as long-term supply agreements between the target and the acquirer.
- 4** Provide copies of the final or most recent versions of any documents bringing about the proposed merger such as the sale and purchase agreement, contracts, or offer documents.
- 5** If this merger forms part of an international transaction, list the other competition agencies that are being notified and the date on which those agencies were or will be notified.
- 6** If the merger results in horizontal aggregation, outline the overlapping products and/or services<sup>1</sup> and provide the following for each:
  - 6.1** a copy of, or link to, the most recent annual report, audited financial statements and management accounts for the relevant business unit(s);
  - 6.2** each party's total sales revenues, volumes, and, where relevant, capacity and excess capacity figures;
  - 6.3** the names and contact details for the parties' main competitors, and any trade or industry associations in which one or both of the merging parties participate;
  - 6.4** for a merger between competing sellers, the names and contact details for each party's key customers, and the revenue earned from each in the last financial year;<sup>2</sup> and
  - 6.5** for a merger between competing buyers, the names and contact details for each party's key suppliers, and the amount paid to each in the last financial year.<sup>3</sup>

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1. 'Overlapping' products or services are those products or services supplied by each of the firms in the same geographic area and which could be considered substitutes for one another.

2. The target may submit this information separately to the acquirer's notice. Confidential information in this submission should be identified.

- 7 Describe why you consider the merger is unlikely to result in a substantial lessening of competition in any market having regard to the factors set out in the Merger and Acquisition Guidelines.

You should address:

- 7.1 the merging parties' existing competitors, including approximate market shares, and the extent to which they will constrain the merged firm;
- 7.2 the likelihood, extent and timeliness of entry and expansion by potential competitors (including conditions of entry and expansion) and the extent to which such entry or expansion will constrain the merged firm;
- 7.3 the countervailing power of customers and the extent to which that countervailing power will constrain the merged firm; and
- 7.4 any other relevant factor.

## Confidentiality

- 8 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.
- 9 Provide two copies of the application. One copy must be a confidential version and the other a public version both in Microsoft Word format and in searchable PDF format.
  - 9.1 In the confidential version of the application any information for which confidentiality is sought must be highlighted in bold and contained in [square brackets].
  - 9.2 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining as [ ].

### Checklist

Make sure you have provided the following:

- a confidential version of the notice seeking clearance;
- a public version of the notice seeking clearance;
- if you intend to provide them, waivers for international mergers;
- all supporting documentation;
- a signed declaration; and
- payment of NZ\$3,680.

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# Declaration

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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 seeking clearance.

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

To the best of my knowledge, I confirm that:

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

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

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

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

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

\_\_\_\_\_

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

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

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# Confidentiality Waiver

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## Background

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

## Waiver

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

## Conditions

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

- 3 See our Guidelines for overseas requests for compulsorily acquired information and investigative assistance at [www.comcom.govt.nz/the-commission/commission-policies/guidelines-for-overseas-requests-for-compulsorily-acquired-information-and-investigative-assistance/](http://www.comcom.govt.nz/the-commission/commission-policies/guidelines-for-overseas-requests-for-compulsorily-acquired-information-and-investigative-assistance/)

The Confidentiality Waiver granted is limited to Confidential Information given to the NZCC in the course of performing its duties for the NZCC Purpose and does not apply to information obtained in the course of any other review of any case either now or in the future.

Where the NZCC has provided Confidential Information to the [overseas competition authority] in accordance with the terms of this document, a failure by the [overseas competition authority] to treat that information in the manner described in paragraph 8 above will not give rise to any liability on the part of the NZCC.

The Confidentiality Waiver does not constitute a waiver by [acquirer] or [target] of their rights under the Confidentiality Obligations with respect to the protection afforded to [acquirer] or [target] against the direct or indirect disclosure of information to any third party other than the [overseas competition authority].

The Confidentiality Waiver does not extend to any materials asserted by [acquirer] or [target] to be privileged.

The Confidentiality Waiver does not limit the ability of the NZCC to disclose information that it would otherwise be able to disclose in accordance with relevant laws, including the NZCC’s ability to provide compulsorily acquired information and investigative assistance to recognised overseas regulators under sections 99B to 99P of the Commerce Act 1986.<sup>3</sup>

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

\_\_\_\_\_

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

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