



# Proposed New Merger and Authorisation Application Forms:

Chapman Tripp Submission  
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## Introduction

- 1 This submission responds to the Commerce Commission (**Commission's**) consultation document 'Application forms for parties seeking section 66 clearance and section 67 authorisation of mergers or acquisitions under the Commerce Act 1986 (and guidance on filing an application)' (**Consultation Document**).
- 2 No part of this submission is confidential.
- 3 Chapman Tripp welcomes the opportunity to comment on the Consultation Document. We support the Commission's objective to enhance the transparency and rigour of the merger clearance and authorisation processes, and consider the new material advances those objectives. Our main concern is that the proposed forms impose a significantly greater evidentiary and resource burden on all merger parties, which may not be proportionate in all cases. We encourage the Commission to adopt a more flexible, targeted approach, particularly for straightforward transactions, and to provide greater clarity and practical guidance on certain aspects of the new forms.
- 4 We would welcome the opportunity to discuss this submission with you at your convenience. Our contacts are:



**Lucy Cooper**  
Partner



**Simon Peart**  
Partner



**Matt Sumpter**  
Partner

## Increased evidentiary requirements and proportionality

### Scope and scale of additional requirements

- 5 The proposed application forms require considerably more supporting evidence and data to be provided at the time of filing than the current forms. While we recognise that the new forms largely reflect the information the Commission has historically requested in larger or more complex matters, they represent a significant and costly step change for all merger parties, regardless of the complexity or size of the transaction.
- 6 For many parties (especially smaller, or resource-constrained businesses) the expanded requirements may act as a deterrent to using the formal clearance process. In our view, the new forms do not strike an appropriate balance for straightforward matters where the risk of competition concerns is low or the parties are of a small size. We do not expect the additional evidence to be required in every case, and the potential costs and resource implications are significant.
- 7 This concern is heightened by the fact that the proposed amendments to the Commerce Act do not include a *de minimis* threshold for section 47 (i.e. there is no transaction size below which notification is unnecessary). As a result, parties to low-value transactions are potentially subject to the same extensive evidentiary requirements as those involved in major national/international mergers. As set out in further detail below, we suggest the Commission consider a tiered approach, or at minimum, express a willingness to be flexible in the new application forms. In addition, parties should be invited to engage with the Commission if they consider that providing all information specified is disproportionate in the circumstances.

### Examples of new/expanded evidentiary requirements

- 8 We have set out in the below the anticipated implications of some of these new/expanded requirements, and our recommendations.

New/expanded requirement	Potential concerns	Recommendation
<p><b>Win/loss tender data (QE7)</b></p> <p>Where competition occurred by competitive tender/bid in a horizontal merger, QE7 requires parties to provide three years' worth of win/loss data for all tenders participated in, including detailed information for each tender (customer name, location, product/service, volumes/revenues, bid</p>	<p>While we recognise that win/loss data can be valuable for competitive assessment in tender markets, the scale of the data request is significant.</p> <p>Parties with a high volume of tenders, or with decentralised or legacy record-keeping systems, will face a significant administrative burden. In practice, relevant data may be</p>	<p>The Commission should adopt a proportionate approach, only requesting win/loss data where needed, or allowing for sampling, summaries, or focusing on significant tenders. Customer contact details should be provided only for a representative sample, or upon request.</p>

New/expanded requirement	Potential concerns	Recommendation
<p>details, outcome, reasons for outcome, and customer contact details).</p>	<p>incomplete, inconsistent, or not tracked for certain fields.</p> <p>Gathering this information may require coordination across multiple teams within a business, and may involve manual review of historic files, emails, and CRM systems.</p> <p>The number of entries could reach into the thousands for some parties. Providing customer contacts for all tenders could also result in a very large number of contacts, which seems unnecessary.</p>	<p>Merger parties should be encouraged to discuss the availability and scope of tender data with the Commission during pre-notification discussions, to agree a practical and targeted approach.</p>
<p><b>Details of customer contracts (QE8)</b></p> <p>Where customers tend to be signed up to term contracts in a horizontal merger, QE8 requires data on all currently contracted customers, including contract terms, pricing, and contact details.</p>	<p>For parties with large customer bases or multiple product lines, compiling this data is likely to be a significant task, requiring manual review of a large number of contracts.</p> <p>Contracts may be stored in disparate systems or formats, and not all fields (e.g., price review mechanisms, exclusivity status) may be centrally tracked.</p>	<p>The Commission should adopt a targeted approach, only requesting this data when needed, or allowing for summary tables or samples of significant contracts. Parties should be encouraged to discuss the scope and format of contract data with the Commission during pre-notification discussions.</p>
<p><b>Gross profit margin information for vertical mergers (QF5)</b></p> <p>For vertical mergers, QF5 asks for detailed gross profit margin breakdowns for each relevant input and downstream product, including revenues, components of costs (fixed and variable), and average prices.</p>	<p>Many businesses do not routinely calculate or report gross margins at the level of granularity requested, particularly by input or downstream product, and may need to conduct bespoke analysis or make estimates. Accordingly, preparing this information may require detailed financial analysis.</p>	<p>We note that the Consultation Document acknowledges that the degree of detail required will depend on market concentration and encourages pre-notification discussions to agree the appropriate level of detail. As noted below, we recommend that this principle of proportionality and pre-notification</p>

New/expanded requirement	Potential concerns	Recommendation
	In markets with low concentration or where vertical effects are unlikely, such detailed margin information may not be necessary for the Commission's assessment.	engagement be applied more generally throughout the application forms.
<p><b>Documents relating to the counterfactual (Q22)</b></p> <p>The proposed forms introduce a new category of documents to be provided for both the applicant and the target regarding the counterfactual, including any documents discussing alternatives to the merger, alternative offers or expressions of interest, and material changes to strategies or operations absent the merger.</p>	This request does not appear to be time bound. This does not seem appropriate, particularly to resolve a question that is inherently forward-looking (so, for example, strategy documents from several years ago are unlikely to be current). We also note more generally that this additional requirement further adds to the work required by merger parties.	While we acknowledge the relevance of these documents, we suggest that the request should be time bound (e.g., documents prepared in the last two years) to ensure parties are not required to search for and disclose historical documents.
<p><b>Internal documents to now be provided by both applicant and the target (para 52)</b></p>	The current application forms only require the <i>applicant</i> to provide internal documents relevant to the transaction, market conditions, and counterfactual. The proposed forms extend this requirement to the target, potentially doubling the document count. This will increase the administrative burden for both parties and the Commission's case team, with potential implications for review timelines and costs.	The Commission could initially request a subset of key documents from the target, with further requests as needed. This requirement may also need adapting if the target is not actively cooperating with the applicant. In this regard, we note that the Commission acknowledges at paragraph 36 that in certain circumstances an applicant may not be able to access and provide a target's responsive material (e.g. in a hostile takeover situation).
<p><b>Pricing documents (Q25.3)</b></p> <p>Q25.3 requires merger parties to provide documents from the last two years discussing how pricing is determined,</p>	The Commission provides further detail about these pricing documents in footnote 19. However, the inclusion of "price lists" and "discount/rebate policies" in this	The Commission should clarify whether the intention is to seek all documents evidencing actual prices, or only those that discuss or

New/expanded requirement	Potential concerns	Recommendation
<p>including discussions of pricing strategies, price lists, forecasts, and discount/rebate policies.</p>	<p>footnote suggests the Commission may want access to documents showing actual prices, not just strategic or analytical documents.</p> <p>If the Commission expects all price lists, discount schedules, and rebate policies for two years, this could be a substantial volume, especially for parties with multiple products, segments, or changing prices. Actual price lists are less likely to be informative for competitive assessment than documents explaining how prices are determined.</p> <p>We also note more generally that this additional requirement further adds to the document collation/review required by merger parties.</p>	<p>analyse pricing strategies and decision-making.</p>
<p><b>Document index to be provided alongside documents (paragraph 55)</b></p> <p>The proposed forms require an index indicating the date each document was prepared and the identity and role of the author(s) within the merger parties or external consultants.</p>	<p>Identifying the author(s) and their roles for every document, especially in large organisations or for documents prepared some time ago, can be significant and time-consuming. Documents may have multiple contributors or be unsigned, making attribution difficult.</p>	<p>We support indexing and dating of documents as reasonable and helpful for the Commission’s review but question the proportionality and relevance of requiring identification of all authors and their roles for every document. This information should only be required where readily available or material to the document’s significance.</p>
<p><b>Annual reports and financial statements (Q26)</b></p>	<p>Q26 now requires annual reports/audited financial statements for both merger parties for the last three financial years (rather than the most recent financial year). While these documents are not generally time intensive to gather, this is another example of</p>	

New/expanded requirement	Potential concerns	Recommendation
	additional documentation that will need to be prepared by the parties and reviewed by the Commission.	

## Practical implications of the proposed changes

- 9 We acknowledge that the Consultation Document accurately captures the types of material that, in practice, the Commission has required from parties in order to reach a determination in larger and more complex clearance processes. The proposed forms bring greater clarity and structure to these expectations, which is a positive development. Our main comment is that it is important these requirements are applied in a tailored and proportionate manner, reflecting the complexity of the particular transaction under consideration.
- 10 The proposed changes may, in practice, increase the time, effort, and cost required to prepare a standard formal clearance application. The new forms require considerably more supporting evidence and data to be provided upfront, including detailed market data, internal and strategic documents from both parties, and extensive customer and contract information. This could have material implications for merger parties, particularly for straightforward applications.
- 11 The new requirements will likely necessitate additional legal and internal resources, with parties likely incurring higher legal fees and internal costs to compile the detailed information and documents now sought. The time required to prepare a clearance application is likely to increase, even for transactions that are likely to require only a straightforward clearance process to reach a view on. As a result, the proposed changes will widen the gap between the time, effort and cost associated with an informal “courtesy letter” approach (where parties typically submit a short 5-10 page letter and possibly a small number of supporting documents) and the formal clearance application process.
- 12 The additional costs and resource implications associated with the proposed changes also risks disincentivising parties from seeking clearance (or engaging with the Commission at all), particularly for straightforward transactions. Instead, parties may increasingly opt for self-assessment, even where a formal clearance may be more appropriate or desirable for certainty. This could result in fewer clearance applications, reducing the number of transactions subject to the Commission’s full review and potentially undermining the transparency and robustness of the merger control regime.
- 13 It is important that the Commission considers the practical effect of the new requirements and seeks to maintain an appropriate balance between thorough information gathering and the need for a proportionate, efficient clearance process. In particular, the Commission should retain flexibility for less complex transactions, to ensure that the formal clearance process remains accessible and does not become unduly onerous for merger parties.

- 14 As noted in the table above, the Commission includes an explanatory note to QF5 to note that the degree of detail required for that question is likely to depend on the degree of concentration in the relevant markets, and invites the parties to discuss the appropriate level of detail in pre-notification discussions. We recommend that this principle of proportionality and pre-notification engagement be applied more generally throughout the application forms, especially for other requests for detailed data (such as tender and contract information). Explicit guidance to this effect would assist merger parties in preparing targeted and proportionate submissions, while ensuring the Commission receives the information most relevant to its assessment. The Commission could also make clear in its guidance that it has the opportunity to seek further information from the merger parties as its review progresses.

### Ambiguity regarding information required for the merger parties' customers

- 15 The Consultation Document states on page 14 that the Commission proposes to seek names, contact details, and revenue figures for the ten customers closest to the median spend with each of the merger parties in the last financial year, to ensure evidence is gathered from a broader cross-section of customers. However, the draft form (Q10.3) appears to focus only on the parties' top 10 customers, with the explanatory note stating that, "In some circumstances we may find it helpful to receive contact details for a broader set of customers/suppliers, or for customers/suppliers representing different relative levels of annual spend. The merger parties are encouraged to discuss this with us during pre-notification."
- 16 It is unclear whether median customer information is required, and if so, whether it is in addition to, or instead of, information regarding the parties' top 10 customers. We note that identifying median customers requires additional data analysis, particularly for parties with large and complex customer bases. Median customers may also be smaller and less accustomed to engaging with the Commission, potentially leading to confusion if contacted. The top 10 customers are generally the most significant and likely to be most affected by a merger, and are usually well-placed to comment on competitive effects. In addition, requests for additional customer data can be made by the Commission during the review process if, after initial consideration of the application, it appears that a particular customer group (such as middle-sized customers) may be potentially most affected.
- 17 We suggest the Commission clarify in the final forms and guidance whether median customer information is required, and if so, in what circumstances, and whether it is in addition to, or instead of, the top 10 customers. We suggest that any requirement to provide median customers should be applied flexibly, depending on the nature of the market and the parties' customer base, and only where it is likely to add material value to the Commission's assessment. We support the proposed approach of encouraging parties to discuss customer selection with the Commission during pre-notification, rather than mandating a rigid requirement in all cases.

### Confidentiality

- 18 We have set out below our views on the confidentiality aspects of the proposed application forms. We note that these comments may be affected by the changes to the Commerce Act currently being considered.

### **Market share ranges in public versions of applications**

- 19 We support the proposal to include market share ranges in the public version of the application, as this increases transparency and facilitates informed submissions. However, we suggest that the application form notes that parties can request wider ranges or full redaction in circumstances where disclosure would harm the parties' commercial interests.

### **Confidentiality undertakings**

- 20 We support confidentiality undertakings being signed upfront by external legal advisors and experts, as this assists with efficiency. We suggest the Commission go a step further: when such undertakings are in place and third-party submissions have been received, we recommend the Commission should notify those third parties that external counsel may request relevant confidential information on a counsel-only basis, and deal with any objections at that point. Earlier consultation with third parties regarding sharing their confidential information with external counsel will minimise consultation time and avoid delays later in the process.

### **Confidentiality of pre-notification discussions**

- 21 We suggest the Commission set out in the application forms the extent to which pre-notification discussions and drafts of applications will be kept confidential. We note that this topic is not covered in the confidentiality section of the draft forms, and is likely to be of significant interest to would-be applicants. That is particularly the case where pre-notification discussions would occur while the transaction remains confidential from the public (and is heightened where one or both parties are publicly listed). We note the Commission's intention to issue guidance in early 2026 on its treatment of confidential information, but it does not appear from the materials that this issue will be covered.

### **Template confidentiality schedule**

- 22 The Commission could consider publishing a template for the confidentiality schedule required (see paragraph 42 of the Consultation Document) so parties understand the level of detail expected.

## **General**

- 23 We appreciate the Commission's commitment to improving the merger clearance and authorisation processes. As a general point, we note the proposed new forms provide significantly more guidance than the current forms, which is helpful and will assist merger parties in preparing applications that meet the Commission's expectations.
- 24 We suggest consideration be given to the cumulative effect of all of the additional/expanded requirements. The Commission should ensure that the forms remain proportionate and accessible for all parties, including those involved in smaller or less complex transactions.
- 25 We would welcome the opportunity to discuss these issues further with the Commission.