

# MERGER NOTIFICATION AND PROCEDURES TEMPLATE

NEW ZEALAND

DECEMBER 2005

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**IMPORTANT NOTE: This template is intended to provide introductory material. Reading the template is not a substitute for consulting the referenced statutes and regulations. If you are analysing a particular transaction, this template should be a starting point only.**

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<b>1. Merger notification and review materials (please provide title(s), popular name(s) and citation(s))</b>	
<b>A. Notification provisions</b>	<p>The Commerce Act (NZ) 1986 provides for a voluntary notification regime for proposed mergers and acquisitions (mergers), under which parties contemplating mergers may submit an application for clearance (a clearance is granted if the Commission is satisfied that the merger is not likely to substantially lessen competition in a market) or authorisation (where immunity from legal action can be conferred on an anti-competitive merger which is otherwise demonstrated to be in the public interest) if they are in doubt as to whether their proposed merger might contravene section 47.</p> <p>Mergers will breach section 47 if they would have, or would be likely to have, the effect of substantially lessening competition in a market.</p> <p>If the parties proceed with an merger without seeking prior clearance or authorisation and the Commission considers the merger would contravene section 47, the Commission may take a variety of actions, including seeking an injunction, divestment or applying to the Cease and Desist Commissioners for an order.</p>
<b>B. Notification forms or information requirements</b>	<p>There is a specific application form required. It can be found on the NZCC's website at <a href="http://www.comcom.govt.nz">http://www.comcom.govt.nz</a></p>
<b>C. Substantive merger control provisions</b>	<p>Commerce Act 1986 sections 47, 66 and 67. Also relevant to the merger clearance and authorisation</p>

	provisions are sections 68, 69, 69A and 69B.
<b>D. Implementing regulations</b>	Commerce Act 1986
<b>E. Interpretive guidelines and notices</b>	NZCC Mergers and Mergers Guidelines. The guidelines are a summary designed to give parties basic information. They are not a substitute for professional advice. This publication can be downloaded for free from the NZCC's website at <a href="http://www.comcom.govt.nz">www.comcom.govt.nz</a>
<b>F. Annual report</b>	NZCC Annual Reports available from <a href="http://www.comcom.govt.nz">www.comcom.govt.nz</a>
<b>2. Authority or authorities responsible for merger enforcement</b>	
<b>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</b>	The New Zealand Commerce Commission (NZCC).
<b>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</b>	NZCC 44 – 52 The Terrace PO Box 2351 Wellington New Zealand Tel: (64-4) 924 3600 Fax: (64-4) 924 3700 Website: <a href="http://www.comcom.govt.nz">www.comcom.govt.nz</a> Language: English
<b>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</b>	Sonia Wansbrough Manager Market Structure Group PO Box 2351 Wellington New Zealand Tel: (64-4) 924 3655 Fax: (64-4) 924 3700
<b>3. Notification requirements</b>	
<b>A. Is notification mandatory pre-merger?</b>	No.
<b>B. Is notification mandatory post-merger?</b>	No.
<b>C. Can parties make a voluntary pre-or post-</b>	Yes.

<b>merger filing even if filing is not mandatory?</b>	
<b>4. Covered transactions</b>	
<b>A. Definitions of potentially covered transactions</b>	<p>Section 47 of the Commerce Act 1986 states that:</p> <ol style="list-style-type: none"> <li>(1) A person must not acquire assets of a business or shares if the merger would have, or would be likely to have, the effect of substantially lessening competition in a market.</li> <li>(2) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected or associated.</li> <li>(3) For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.</li> <li>(4) A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of subsection (3) by reason only of the fact that— <ol style="list-style-type: none"> <li>(a) those persons are in competition in the same market; or</li> <li>(b) 1 of them supplies goods or services to the other.</li> </ol> </li> </ol> <p>The Merger and Merger Guidelines provide direction on mergers likely to be subject to the Act.</p>
<b>B. If change of control is a determining factor, how is control defined?</b>	N/A
<b>C. Are partial (less than 100%) stock mergers/minority shareholdings covered? At what levels?</b>	There is no threshold for the purposes of section 47 of the Commerce Act 1986. Section 47 applies to all share and asset mergers, no matter how large or small. Only those mergers that contravene section 47 are prohibited.
<b>D. Do the notification requirements cover production joint ventures or any other type of joint venture?</b>	There are no mandatory notification requirements in New Zealand merger law. However, section 47 applies to joint ventures which involve the merger of shares or assets.
<b>E. Are any sectors excluded from notification</b>	There are no mandatory notification requirements in New Zealand merger law. No sectors are excluded from the

requirements? If so, which sectors?	section 47 test.
<b>F. Are transactions that do not meet merger notification thresholds subject to substantive merger control?</b>	There are no mandatory notification requirements in New Zealand in relation to mergers and mergers.
<b>5. Thresholds for notification</b>	
<b>A. What are the general thresholds? Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.</b>	<p>The NZCC Mergers and Mergers Guidelines outline a safe harbours test. The object of the safe harbours test is to provide some guidance as to which mergers are unlikely to substantially lessen competition. The safe harbours test is not intended as a replacement for a case-by-case analysis.</p> <p>The Commission is of the view that an merger is unlikely to substantially lessen competition in a market where, after the proposed merger, either of the following situations exist:</p> <ul style="list-style-type: none"> <li>• The three-firm concentration ratio in the relevant market is below 70 percent and the market share of the combined entity is less than in the order of a 40 percent share; or</li> <li>• The three-firm concentration ratio in the relevant market is above 70 percent and the market share of the combined entity is less than in the order of 20 percent.</li> </ul>
<b>B. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based test, calendar year-end, fiscal year-end, other)?</b>	Market shares generally relate to the previous fiscal year. However, no specific timeframe is mandated and the NZCC adopts a case-by-case approach.
<b>C. Describe methodology for identifying and calculating any values necessary to determine if notification is required, including:</b>	In determining concentration ratios, the NZCC considers a number of factors: volume, value and capacity. The NZCC also assesses market shares on a qualitative and quantitative basis.
<b>i. The methodology for identifying and</b>	N/A

<b>calculating the value of the transaction, if applicable.</b>	
<b>ii. The methodology for identifying and calculating relevant sales or turnover, if applicable.</b>	N/A
<b>iii. The methodology for identifying and calculating the value of relevant assets, if applicable</b>	N/A
<b>iv. Methodology for calculating exchange rates.</b>	N/A
<b>D. Do thresholds apply to worldwide sales/ assets, to sales/assets within the jurisdiction, or both?</b>	Market shares should relate to the New Zealand market only.
<b>E. How is the nexus to the jurisdiction determined? If based on an “effects doctrine,” please describe how this is applied.</b>	Nexus is determined by a party to the merger being resident in or carrying on business in New Zealand and the relevant merger <u>affecting</u> a market in New Zealand (section 4). Thus, foreign mergers that involve a New Zealand entity and which affect a market in New Zealand may be caught even though no part of the merger occurs in New Zealand
<b>F. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?</b>	Determined using the “SSNIP” test. That is, market definition, including the geographical dimension, in which the merger will be assessed involves identifying the smallest area over which a hypothetical monopolist would impose a small but significant non-transitory increase in price (SSNIP) above the level that would prevail absent the merger.
<b>G. If there are market share tests, are these guidelines for calculating market shares?</b>	Market shares are generally based on capacity, sales volume or sales revenue.
<b>H. If there are market share tests, do they apply even if there is no horizontal overlap in the parties’ activities, either in the jurisdiction or worldwide?</b>	Generally not. A market share test may possibly apply where a vertical merger has an impact at a horizontal level within a market in New Zealand.

<b>I. Describe the methodology for determining relevant undertakings/firms for threshold purposes (e.g., group-wide? Only the acquired entity? If based on control, how is control determined?)</b>	Where the merger is made indirectly, the Commerce Act looks to the particular facts of the matter under consideration in order to determine the identity of the acquirer. It looks to a number of factors including directorships; common management; whether independence is demonstrated in the market and likely information flows, in determining the competition effects. The Commission looks to determine the substance of the relationships and arrangements.
<b>J. Are there special threshold calculations for joint venture?</b>	No.
<b>K. Are there special threshold calculations for particular sectors (e.g., banking, airlines) or particular types of transactions (e.g., partnerships, financial investments?)</b>	No.
<b>6. Transactions in which the acquiring and acquired parties are foreign. Are there special rules or exemptions</b>	
<b>A. With respect to application of jurisdictional thresholds?</b>	Where global mergers impact on a market in New Zealand and are likely to result in a substantial lessening of competition they will be subject to the Commerce Act.
<b>B. With respect to information required (e.g., information submitted or document legalization)?</b>	There are no special rules or exemptions with respect to information where the parties to the merger are foreign.
<b>C. With respect to waiting periods?</b>	N/A
<b>7. Simplified procedures</b>	
<b>A. Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, waivers, etc.).</b>	There are no special procedures for notifying the NZCC of transactions that do not raise competition concerns.

<b>8. Timing of notification</b>	
<b>A. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; If so, when is an agreement considered definitive?)?</b>	The NZCC encourages parties to apply for clearance as soon as there is a real likelihood that a proposed merger may proceed.
<b>B. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the vent.</b>	No.
<b>9. Documents to be submitted</b>	
<b>A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents)</b>	<p>The NZCC requires that parties complete the NZCC's Application form. The form requires parties provide a variety of information, including the commercial rationale for the transaction, existing competitors, potential competition and countervailing power. The form can be found on the NZCC's website at <a href="http://www.comcom.govt.nz">www.comcom.govt.nz</a>.</p> <p>The NZCC during its investigation may also use its statutory powers to request information and documents including annual reports, market studies and transaction documents.</p>
<b>B. Are there any document legalization requirements (e.g., notarization or apostille)?</b>	<p>An officer of the applicant who is authorised to make the application to the NZCC must sign a declaration attached to the application form that:</p> <ul style="list-style-type: none"> <li>• all specified information has been provided;</li> <li>• all information known to the applicant and relevant to the application has been provided; and</li> <li>• all information is correct.</li> </ul>

<b>10. Translation</b>	
<b>Describe any requirements to submit translations of documents with the initial notification, or later in response to request for information, including the categories or types of documents for which translation is required, requirements for certification, language(s) accepted, and whether selected excerpts are accepted in lieu of complete documents.</b>	The NZCC application form and any supporting documents should be provided in English.
<b>11. Review and waiting periods/Suspensive effects</b>	
<b>A. Describe any applicable review and/or waiting periods following notification, including whether closing is suspended during any initial review or waiting period and/or further review periods (i.e., second-phase proceedings).</b>	The Commerce Act specifies 10 working days for clearance and 60 working days for authorisations. However, the Commerce Act allows for extensions to the specified period to be agreed by the applicant. Generally, the NZCC's request for an extension are agreed by the applicant. There is no specified period in the Act for merger investigations. The Commission has a self imposed target of 20 working days for clearances and 100 working days for authorisations and investigations.
<b>B. Are there different rules for public tenders (e.g., open market stock purchases or hostile bids)?</b>	No.
<b>C. Are the applicable waiting periods limited to aspects of the transaction that occur within the jurisdiction (e.g., merger or merger of local undertakings/business units)? If not, to what extent do they apply to parties' ability to</b>	Given the merger review regime is voluntary there is no requirement that the parties wait until the NZCC has completed its assessment before proceeding with their merger. However, the risk of not waiting for NZCC clearance is the possibility of court action by the NZCC to stop the transaction (assuming the transaction is likely to result in a substantial lessening of competition in contravention of section 47 of the Commerce Act.

<p>proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance. (e.g., request for a derogation from the bar on closing, commitment to hold separate the local business operations.)</p>	
<p><b>D. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period. Is there a statutory maximum for extensions of the review period by the authority.</b></p>	<p>As explained in question 11A above, the NZCC may request an extension to the statutory waiting period. There is no statutory maximum for an extension.</p>
<p><b>E Describe any procedures for obtaining early termination of the application waiting period, and the criteria and timetable for deciding whether to grant early termination</b></p>	<p>N/A.</p>
<p><b>F. describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no “irreversible measures” are taken).</b></p>	<p>N/A</p>
<p><b>12. Responsibility for notification / representation</b></p>	
<p><b>A. Who is responsible for</b></p>	<p>There is no statutory pre-merger notification requirement</p>

<b>notifying – the acquiring person(s), acquired person(s), or both?</b>	in New Zealand. Generally, the person who proposes to acquire assets or shares gives the NZCC notice seeking clearance or authorisation.
<b>B. Do different rules apply to public tenders (e.g., open market stock purchases or hostile bids)?</b>	N/A.
<b>C. Are the parties required to appoint a joint representative?</b>	No.
<b>D. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?</b>	No.
<b>E. How does the validity of representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?</b>	N/A.
<b>13 Filing fees</b>	
<b>A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined?</b>	The fee for a clearance application is \$2,250 (inclusive of GST) The fee for an authorisation is \$22,500 (inclusive of GST)
<b>B. Who is responsible for payment?</b>	The Applicant.
<b>C. When is payment required?</b>	Payment should accompany the application.
<b>D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?</b>	Cheque payment addressed to: The Commerce Commission, P.O.Box 2351, Wellington, New Zealand, or direct credit to bank account (electronic banking).

<b>14. Confidentiality</b>	
<b>A. To what extent, if any,, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?</b>	<p>It is the Commission’s invariable practice to publicise receipt of applications for clearance. In rare situations the Commission may allow fact confidentiality for a limited time.</p> <p>The Commission respects parties’ requests to maintain confidentiality but this must be balanced against the public interest in process transparency and the need for the Commission to test issues raised by the application.</p> <p>The Commerce Commission has established a public register of all mergers considered by it. That register does not include confidential or other sensitive information, but includes the public version of the application and a summary of the details of the proposed merger (including the names of the acquirer and target), a product description and decision date.</p> <p>Authorisation is a public process in which any interested party may make a submission. Submissions are open for inspection on a public register, and there is provision for conference of interested parties.</p> <p>Under Section 100 of the Commerce Act there is a statutory mechanism for maintaining confidentiality over commercially sensitive information or otherwise where it appears desirable to the Commission to grant such a confidentiality order.</p>
<b>B. Do notifying parties have access to the authority’s file? If so, under what circumstances can the right of access be exercised?</b>	<p>In New Zealand, information gathered from industry participants through the course of market inquiries is crucial to the consideration of merger proposals and, where necessary, is held in the strictest confidence by the Commerce Commission. The Commission relies extensively on this information and recognises that there is a need to protect the confidentiality of information provided by organisations and individuals.</p> <p>Under the Official Information Act 1982, the public have a right of access to official information held by a Department; or a Minister of the Crown in his official capacity; or an organisation. This includes the Commerce Commission. Under the Official Information Act, the Commission must disclose all official information held</p>

	<p>by it, unless there are reasonable grounds for withholding it. Reasonable grounds commonly relied upon by the Commission include where the release would prejudice an ongoing investigation, reveal a confidential source, prejudice an adjudication examination, breach legal professional privilege, disclose a trade secret or breach confidence.</p>
<p><b>C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?</b></p>	<p>Same as above.</p>
<p><b>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</b></p>	<p>Under s 100 of the Commerce Act, the Commerce Commission may make confidentiality orders prohibiting the publication or communication of any information, document, or evidence furnished or tendered to, or obtained by the Commission in connection with the operations of the Commission; or the giving of evidence involving any such information, document, or evidence.</p> <p>Note, however, that sufficient details of the application will need to be made public in order for the Commerce Commission to test the assertion made in the application and provide the parties with its finalised view about the merger or merger.</p>
<p><b>E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</b></p>	<p>The Commission currently has five formal cooperation agreements with:</p> <ul style="list-style-type: none"> <li>• ACCC, signed in 1994;</li> <li>• Taiwan Fair Trade Commission, signed in 1997;</li> <li>• ACCC/Canadian Competition Bureau, signed in 2000;</li> <li>• ACCC/Taiwan Fair Trade Commission, signed in 2002; and</li> <li>• ACCC/United Kingdom Department of Trade and Industry and the Office of Fair Trading, signed in 2003.</li> </ul> <p>These agreements provide for one country to share information with the other country, where the agencies agree it is in their mutual interests. The NZCC's ability to share information with another agency is subject to domestic law constraints. However, these agreements do not extend to providing investigative assistance or</p>

	positive comity.
<b>15 Sanction/penalties</b>	
<b>A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods?</b>	<p>There is no statutory pre-merger notification requirement in New Zealand. However, the risk of not waiting for NZCC clearance is the possibility of:</p> <ul style="list-style-type: none"> <li>• pecuniary penalties (up to \$5 million for a company and \$500,000 for an individual)</li> <li>• injunctions;</li> <li>• An action for damages; and</li> <li>• an application for a divestiture order</li> </ul> <p>if the Court finds the transaction contravenes section 47 of the Commerce Act.</p>
<b>B. Which party/ies are potentially liable?</b>	N/A
<b>16. Judicial review</b>	
<b>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</b>	<p>Under s 91 of the Commerce Act, there is a right of appeal to the High Court of New Zealand. Notice of appeal must be given within 20 working days after the date of the determination appealed against. Judicial review of the Commission's decision may be sought in accordance with relevant common law.</p> <p>Only the applicant and target may appeal Section 66 clearance decisions. For Section 67 authorisations, the applicant, target and interested parties (those giving submissions at Authorisation conference) can appeal.</p>
<b>17. Additional filings</b>	
<b>Are additional filings/clearances required for some types of transactions, e.g., foreign investment or regulated sectors?</b>	<p>Consent from the Overseas Investment Office is required for transactions if it will result in an overseas investment in a significant business asset in New Zealand.</p> <p>Sometimes consent is required from the Securities Commission.</p>
<b>18. Closing deadlines</b>	
<b>When a transaction is cleared or approved, is there a time period within which the parties must close for it to</b>	A clearance expires 12 months after the date on which it was given.

<b>remain authorized?</b>	
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