

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

Commerce Commission, New Zealand

The following template is submitted by *the Commerce Commission, New Zealand*, pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The New Zealand Commerce Commission (NZCC) is New Zealand’s independent competition, consumer and regulatory agency: <https://comcom.govt.nz/>. Our overarching goal is to make New Zealanders better off.

The NZCC is responsible for enforcing laws relating to competition, fair trading, and consumer credit. The NZCC also has regulatory responsibilities in the electricity lines, gas pipelines, telecommunications, dairy and airport sectors.

The NZCC enforces the following legislation:

- [Commerce Act 1986](#)
- [Credit Contracts and Consumer Finance Act 2003](#)
- [Dairy Industry Restructuring Act 2001](#)
- [Fair Trading Act 1986](#)
- [Telecommunications Act 2001](#)

Information on the NZCC website is in English, with some consumer rights and business responsibility factsheets and information available in [Te Reo Maori, Samoan, Tongan Chinese and Korean](#). New Zealand has a common law legal system. Competition law consists of both legislation and case law.

For the purposes of this template, NZCC regulatory responsibilities in the consumer protection, credit, electricity lines, gas pipelines, telecommunications, dairy and airport sectors are excluded in the answers that follow.

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate. Please update your Template reflecting significant changes as they relate to the CAP, as needed.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

Section 4 of the Commerce Act extends the application of the Commerce Act to conduct by persons or business outside New Zealand, to the extent that their conduct unlawfully affects a market in New Zealand. The nationality of the person being investigated is therefore irrelevant to the question of whether the law applies.

The procedural rules of the New Zealand legal system do not generally provide for Persons of another jurisdiction to receive different treatment from that of a New Zealand citizen. Such discrimination would be inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Section 19 of the [Bill of Rights Act 1990](#), provides the right to freedom from discrimination by executive government bodies such as the NZCC, including freedom from discrimination as outlined in s 21(1)(g) of the [Human Rights Act 1993](#), which refers to ‘ethnic or national origins, which includes nationality or citizenship’.

Our policies and Procedural Rules reflect New Zealand law and do not provide for the treatment of Persons on a differing basis according to nationality.

c) Transparency and Predictability

- i. *Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*

The New Zealand Government maintains the [New Zealand’s legislation](#) website. This website provides free public access to up-to-date versions of New Zealand’s Act, Bills (proposed Acts) and Legislative Instruments, including all amendments.

- ii. *Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*

The NZCC has the following guidelines in place relating to investigation and enforcement activities, all of which are publicly available from our [website](#):

- [Competition and Consumer Investigation Guidelines \(CCI Guidelines\)](#)
- [Criminal Prosecution Guidelines](#)
- [Document production Guidelines](#)
- [Enforcement Response Guidelines](#)
- [Model Litigant Policy](#)
- [Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance](#)
- [Mergers and Acquisitions Guidelines](#)
- [Cartel Leniency Policy and Guidelines](#)
- [Competitor Collaboration Guidelines](#)
- [Transparency Statement – model standards for information gathering](#)
- [Authorisation Guidelines¹](#)
- [Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance](#)
- [Guidelines for quantitative analysis](#)
- [How to use quantitative analysis in your merger analysis](#)

In Court proceedings, the NZCC is subject to legislation and procedural rules governing Court processes such as the admissibility of evidence, calling of witnesses, and disclosure.

These Acts include:

- [District Court Rules 2014](#)
- [High Court Rules 2016](#)
- [Criminal Procedure Act 2011](#)
- [Search and Surveillance Act 2012](#)
- [Evidence Act 2006](#)
- [Criminal Disclosure Act 2008](#)

iii. *Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*

The NZCC maintains a regularly updated webpage which details all of our [policies and guidelines](#) to assist parties under investigation to understand how we operate and the processes we follow. As noted above, all relevant investigation and enforcement policies are publicly available. Please see links above.

¹ These guidelines are currently out for consultation and so are draft. For further information please refer to: <https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand/consultation-on-updated-authorisation-guidelines-and-application-forms>

- iv. *Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*

All employees, including contractors of NZCC are subject to the [Code of Conduct for the State Services](#) which outlines that New Zealand public servants must be fair, impartial, responsible and trustworthy.

While the NZCC does not determine breaches of the legislation it enforces, the NZCC does make decisions about the use of some of our powers, for example, to compulsorily acquire information. The NZCC follows the policies and procedural rules outlined above in exercising these powers.

As stated in the CCI guidelines², we aim to undertake all our investigation work in accordance with the following principles. We:

- are objective, fair, and impartial
- aim to be as open and transparent as we can be
- investigate in a timely way
- handle information responsibly
- are accountable for our decisions

If parties are dissatisfied with the way the NZCC has handled an investigation or matter, there is an established process to make a [complaint](#). Once a complaint has been made, it is assigned to a senior staff member and the NZCC aims to respond to the complaint within 20 working days of receiving it.

When responding to complaints, the NZCC will make adhere to established five Complaints principles. These are: accessibility – making it easy for Persons to complain, act fairly in response to the complaint and in a manner which is consistent with [the Ombudsman’s Effective Complaint Handling Guide](#), be responsive, be efficient and treat any personal information relating to the complaint as confidential.

If parties are dissatisfied with the NZCC’s response to their complaint, then they can ask the NZCC to reconsider. Persons also have the right to raise concerns with the [New Zealand Ombudsman](#). We also recognise that we may be judicially reviewed in respect of decisions, or that we may be the subject of civil court proceedings for. The grounds for judicial review are broad, but generally relate to promoting good governance and decision making by public bodies. For example, if a party considered the NZCC had made a decision that affected their rights or interests without properly consulting them, they could seek judicial review of the NZCC’s decision. A court could then order a remedy, such as requiring the NZCC to reconsider its decision.

² Pages 7-8 https://comcom.govt.nz/data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf

- v. *Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

In addition to our Guidelines above, the NZCC has shorter statements on our approach to enforcement proceedings and investigations. For example, [‘What happens when you do not comply with the law’](#) and [‘When a consumer or competitor raises a complaint’](#), both of which can be found in the ‘Business’ section of our website.

The NZCC maintains a publicly available [case register](#) which includes:

- enforcement outcomes such as judgments, enforceable undertakings, and public warning letters;
- merger clearances, authorisations and investigations, including the publication of written reasons on merger decisions;
- anti-competitive agreement authorisations;
- competitor collaboration clearances;
- selected open investigations.

d) Investigative Process

- i. *Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*

Our CCI Guidelines state that our investigation work is undertaken based on being as open and transparent as possible and investigating in a timely way.³

Specifically, as soon as it is reasonable to do so in the context of an investigation, a staff member will contact an investigated party to let them know that an investigation has been opened, the nature of the complaints or concerns being investigated, and an indicative timeframe.⁴

- ii. *Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*

For investigations, after the initial communication is made, the NZCC aims to provide an investigated party with regular progress updates during the investigation when able to do so, and upon request.⁵

³ Pages 7 and 9 of https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf.

⁴ Pages 13-14 of https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf.

⁵ *ibid.*

Our CCI Guidelines state that we take reasonable steps to provide investigated parties with a chance to comment on or provide evidence about the complaints or concerns that are being investigated. This will generally take the form of an evidential interview, although in some cases the NZCC may seek or agree to receive comment in other forms.⁶ Parties or lawyers representing them may also provide submissions and expert reports to the NZCC during the course of the investigation.

The NZCC's [Mergers and Acquisitions Guidelines \(MAG\)](#), outline the process followed by which NZCC when considering applications to grant clearances for mergers and acquisitions which may substantially lessen competition under the s 66 of the Commerce Act or investigations into mergers that may substantially lessen competition under s 47 of the Commerce Act.

Similarly, the [NZCC's Authorisation Guidelines](#) set out the NZCC's approach to assessing authorisations. Firms can apply to the NZCC for authorisation of an agreement or transaction which would breach the Commerce Act (including cartel conduct) but has some other public benefit to New Zealand that outweighs its detriment.

In addition to examining information and documents, we may also carry out or receive quantitative analysis to assist our decision making. NZCC has overarching [Guidelines for Quantitative Analysis](#) which outline the high-level principles that apply to quantitative analysis used in decision making. The NZCC has also published an [advisory note](#) explaining the types of quantitative analysis we might conduct internally or receive from parties.

If parties choose to engage external experts to carry out the quantitative analysis, parties may wish to ask the expert to refer to, and be bound by, the [High Court Rules](#) on providing expert evidence.

- iii. *Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

As outlined in our CCI Guidelines,⁷ the NZCC may ask parties to supply it with information voluntarily, or the NZCC may issue a compulsory notice requiring the supply of information under section 98 of the Commerce Act,⁸ if it is necessary or desirable to do so for the purposes of the investigation.

Examples of when the NZCC may consider it necessary desirable to compulsorily acquire information include:

- parties are under a legal obligation, such as an obligation of confidence, and feel unable to assist us unless they are compelled;
- parties feel they are unable to supply information voluntarily for other reasons, and feel more 'protected' by a compulsory notice from us – they cannot be criticised (say by their employer, colleagues, customers or suppliers) for being made to help our enquiries;

⁶ Page 13 https://comcom.govt.nz/data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf

⁷ Page 16-17 https://comcom.govt.nz/data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf

⁸ Where information refers to documents, business records, explanations of conduct, witness evidence, and other matters of fact or impression that may be relevant to an investigation.

- where the NZCC requires information within a timeframe it considers an investigated party would not meet voluntarily; or
- the NZCC will issue a compulsory notice if we anticipate that there is a real risk of non-compliance or the supply of misleading or incomplete information.

Every compulsory notice for information will set out, amongst other information:

- A brief summary of the matter under investigation;
- The information that must be provided;
- How the information is provided, including guidance on how to supply electronically stored information; and
- A timeframe within which the information is provided.

In addition, the NZCC is able to provide compulsorily acquired information and investigative assistance to recognised overseas regulators that it has entered into a cooperation agreement with. The NZCC has published [guidelines](#) relating to such requests for information. The NZCC must provide notice to affected persons as soon as practicable after providing the information unless particular circumstances apply.⁹

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

In line with the NZCC's principle of investigating in a timely way, every investigation and decision is undertaken as promptly as possible. Due to the varying nature and complexity of our investigations, and the competing demands on our resources, there is no uniform or typical investigation duration.

Ultimately the NZCC's investigations are bound by statutory limitation periods on when the NZCC may bring proceedings. The limitation varies depending on the conduct. For example, pecuniary penalties under the Commerce Act for cartel conduct must be brought within three years of when the conduct was discovered or ought reasonably to have been discovered. Penalty proceedings in relation to merger control must be brought within 3 years of the matter giving rise to the contravention, but proceedings for divestment orders must be brought within 2 years of the contravention.

The NZCC publishes an annual [Statement of Performance Expectations](#) which outlines how performance and outputs will be assessed in that year. For investigations key measures include:

- Number of Commerce Act matters completed;
- Percentage of competition investigations decided within 18 months of the investigation being opened; and
- percentage of investigations involving a court action, statutory undertaking or negotiated settlement response, meeting our internal process quality standards.

⁹ Pages 7-8 of https://comcom.govt.nz/_data/assets/pdf_file/0021/60618/Guidelines-for-Overseas-Requests-for-Compulsorily-Acquired-Information-and-Investigative-Assistance-Oct-2013-2.pdf

In relation to administrative proceedings, the NZCC is subject to statutory time limits. For applications relating to a potential merger, the NZCC must reach a decision on whether the merger is likely to substantially lessen competition within 40 working days.¹⁰

For authorisations of anti-competitive conduct, the NZCC must reach a decision on whether the potential public benefits of the conduct outweigh any competitive harm within 60 working days (for mergers that substantially lessen competition) or 120 working days (for anti-competitive agreements).¹¹

These timeframes can be varied by consent of the applicants. The NZCC annually publishes [trade practices and determination statistics](#) and [merger determinations and enforcement statistics](#). [NZCC's annual report](#), also details performance for the past year.

In line with the [NZCC's model litigant policy](#), the NZCC is required to deal with litigation promptly and efficiently and without causing unnecessary delays or expense, and to seek to have cases resolved as early as is appropriate and on such terms as are appropriate.

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

The NZCC recognises that much of the information we receive is private, commercially sensitive, or confidential. We take steps to preserve the confidentiality of such information and to provide the appropriate protections against disclosure unless we are required to do so by law.

All our policies and guidelines relating to confidential information are ultimately based on the below principles. Our policies seek to place the above law in a particular context. See for example our [Competition and Consumer Investigation Guidelines](#).

There is a requirement under section 5 of the Official Information Act that official information shall be made available on request unless there is good reason for withholding it.¹²

'Good reasons' under the Official Information Act include: that the information was provided under an obligation of confidence, and the release may prejudice the future supply of information; that the information would unreasonably prejudice the commercial position of a person; the information is privileged; or to protect privacy of individuals. These reasons are subject to an overriding public interest test. That test considers whether the public interest in the release of the information outweighs the interest in keeping the information confidential.

¹⁰ Commerce Act 1986, ss 67(3) and 67(4).

¹¹ Commerce Act 1986, s 61(1A).

¹² Section 5, Official Information Act 1982.

There is also an exception for information that would prejudice the maintenance of the law, or the investigation or detection of offences. This is generally used to protect confidential information relating to ongoing investigations.¹³

The NZCC also has certain obligations under the Privacy Act 1993. The Privacy Act is similar to the Official Information Act, but protects and regulates the disclosure of personal rather than official information. The Privacy Act only applies to information about individuals, not companies. Accordingly some of the 'good reasons' noted above in regard to the Official Information Act do not apply where an individual is requesting personal information about themselves under the Privacy Act 1993. The NZCC may also be required to withhold personal information under certain provisions of the Privacy Act.

The NZCC decides in the first instance what information will be released; however, this may be appealed to a specialist body, or the general courts. The NZCC may receive submissions from relevant parties.

The starting point in civil and criminal court proceedings is that information relevant to the allegation must be disclosed to the defendant, and that court hearings (including any evidence referred to) are conducted on a public basis. However, there are exceptions for confidential information (particularly commercially sensitive information), and privileged information.¹⁴ For example, it is common for the commercial data which comprises the underlying evidence for a particular breach of an Act (which may be provided by, for example, customers or competitors of the defendant) to only be provided to the lawyers or expert (economic) witnesses of the defendant, and not to the defendant company itself or the public. What information is confidential is usually agreed between the NZCC and the defendant, but it may be determined by the court after submissions from all parties.

Some further restrictions apply under the Commerce Act to information shared with other regulators. In particular, compulsorily acquired information may not be shared with other regulators unless we have a formal co-operation agreement with that regulator.¹⁵

Where the NZCC wishes to share voluntarily provided confidential information with an overseas regulator, we will seek a waiver from the person who supplied us with the confidential information before sharing or discussing the information with another agency.

Our CCI guidelines¹⁶ state that we may request that 'public' copies of documents or information are provided, with the sensitive or confidential material redacted. The NZCC will also consider whether the information can be tested during the investigation by asking questions based on the confidential information, but without disclosing the information itself.

In some investigations, it may be possible to share confidential information within only a small, restricted circle and on terms that impede wider disclosure. For example, in some cases the NZCC

¹³ See ss 6, 9, Official Information Act 1982.

¹⁴ See ss 69 – 70 Evidence Act 2006 and Part 8, Subpart 1, High Court Rules 2016. For criminal matters see ss 16 – 18 of the Criminal Disclosure Act 2008.

¹⁵ See ss 99B – 99P of the Commerce Act 1986. See also our [Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance](#).

¹⁶ Page 32 of https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf

can obtain solicitors' undertakings from the lawyers for certain parties, and those lawyers will be able to view information but their client will not.

The NZCC will not disclose any information considered to be commercially sensitive in a media statement, public investigation report, or in response to a request, unless there is a countervailing public interest in doing so in a particular case. Such cases are likely to be rare.

The NZCC has published a Transparency Statement that outlines:¹⁷

- what information we collect and how we collect it;
- how we ensure the information gathering is lawful and reasonable;
- how we use information;
- when we share information;
- how we may engage external security consultants; and
- how the information we hold is subject to the Official Information Act (1982).

The NZCC has the power to issue confidentiality orders under section 100 of the Commerce Act where we consider it necessary or desirable to do so to protect the integrity of an investigation. These orders protect specific information or documents from being published, communicated, or given in evidence. It is a criminal offence to breach a confidentiality order.

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Members of the Commission

The [Conflicts of Interest Policy](#) for Members sets out our approach to the disclosure of members interests and the management of any conflicts of interests that arise in the course of our work.¹⁸

The policy includes:

- principles explaining the way that members must perform their work;
- our disclosure procedure; and
- how we manage these interests.

Employees and Contractors

The [Code of Conduct for the State Services](#) outlines that all New Zealand public servants must be fair, impartial, responsible and trustworthy. In addition, both employees and contractors are subject to NZCC's internal conflict of interest policy, whereby staff are required to identify and declare interests that could lead to a conflict, these include owning shares in an entity or having a personal obligation to entities being investigated.

¹⁷ <https://comcom.govt.nz/about-us/our-policies-and-guidelines/transparency-statement>

¹⁸ https://comcom.govt.nz/_data/assets/pdf_file/0022/63814/Commission-Conflicts-of-Interest-Policy.pdf

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions*

Most of the Commission's enforcement proceedings are judicial proceedings, and therefore subject to the statutory and common law rules and procedures of the relevant court in which the proceedings are brought. The Courts and the NZCC are also bound by the relevant legislation, such as the Criminal Disclosure Act 2008, and the Criminal Procedure Act 2011. These rules and legislation include requiring notice to be given to defendants of the allegations made against them and disclosure of relevant information to defendants in a timely manner. These statutory rules are intended to fulfil, and are interpreted in light of, the right to justice and the right to certain minimum standards of criminal procedure.¹⁹ For example, criminal proceedings can only be commenced by the filing of a charging document. The charging document must contain various details about the alleged offending. The filing of charging document triggers a timetable by which the prosecutor must provide initial disclosure of certain documents, followed by full disclosure of a wide array of relevant material.

In civil matters, the NZCC must file a 'statement of claim' in the relevant court and serve it upon the defendant. The statement of claim is a document setting out the allegations and the essential legal and factual matters which underly the allegation. The filing of the statement of claim triggers various discovery obligations under which both the NZCC and the defendant must provide relevant information to each other.

The NZCC also acknowledges and complies with obligations under the New Zealand Bill of Rights Act 1990.²⁰ Specifically, everyone who is subject to criminal proceedings will be informed at the time of the alleged violations or claims against them and the reason for it.²¹

¹⁹ Sections 27, 36, and 25 of the [Bill of Rights Act 1990](#)

²⁰ Section 24 and 25 of the [Bill of Rights Act 1990](#)

²¹ Section 23(1) of the [Bill of Rights Act 1990](#)

- iii. *Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

We note the NZCC's ability to conduct administrative proceedings is limited. For example, the Commission may make determinations on potential anti-competitive mergers or restricted trade practice agreements. But such determinations are made only with the consent of the applicants and are non-binding on the applicants. Ultimately, the Commission can only prevent an anti-competitive merger or agreement by judicial proceedings.

The Commission has issued guidelines outlining its procedural process in relation to administrative proceedings. See the [Mergers and Acquisitions Guidelines](#) and [Authorisation Guidelines](#) referred to above.

Ultimately, the Commission is bound by s 27(1) of the NZ Bill of rights Act that "Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law." Parties may seek review of any such decision through the courts. Parties also have specific statutory appeal rights in the case of clearance and authorisation decisions.

i) Representation by Counsel and Privilege

No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.

During an investigation, the NZCC can conduct voluntary or compelled interviews of persons. The NZCC allows counsel to be present at voluntary interviews.

In compelled interviews,²² the New Zealand Bill of Rights Act 1990 provides that everyone who is detained shall have the right to consult and instruct a lawyer without delay.²³

There are few limitations the NZCC may place on this fundamental right. The NZCC may require the person to answer questions put to them, and not have counsel answer on their behalf. The NZCC may exclude lawyers acting for non-parties to the interview (such as lawyers acting only for the employer of the interviewee). As noted above the NZCC may issue confidentiality orders in respect of interviews, for example over the questions asked and the answers given, until the NZCC has completed interviews of multiple persons. Such orders may prevent counsel acting for multiple interviewees from discussing the questions and answers of previous interviewees with their client.

Following an investigation, if the NZCC brings proceedings against a party, that party has common law and statutory rights which entitle it to counsel of its choosing, either as part of their right to natural justice, or minimum standards of criminal procedure.²⁴ This process is regulated by the Court and the NZCC has little to no ability to deny a person counsel of their choosing.

²² Under s 98(1)(c) of the Commerce Act 1986.

²³ See Section 23(b) of the New Zealand [Bill of Rights Act 1990](#), in regard to the rights of a person detained in a compulsory interview

²⁴ See ss 24, 25, 27 of the New Zealand Bill of Rights Act 1990

- i. *Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*

Persons in New Zealand have statutory and common law rights to procedural fairness.²⁵ These rights include the common law right of *audi altarem partem* – ‘to hear the other side’. The precise procedures and obligations are not prescribed, and instead must be determined in the context.

Accordingly, our policies and guidelines outline various opportunities for parties to submit on substantive and procedural issues.²⁶ For example, the NZCC’s obligations are more formal when making administrative decisions in a quasi-judicial role for merger applications than during a cartel investigation, as the NZCC must bring proceedings against a cartel in a Court, where parties will have a full opportunity to submit on any substantive or procedural issues.

Briefly, in merger and authorisation decisions, the NZCC will provide persons with a number of opportunities to comment on issues throughout our merger process. The NZCC may also call a conference of all interested parties, if necessary. In cartel and other investigations, parties will be interviewed. The NZCC will usually respond to any procedural and substantive issues raised during an investigation.

²⁵ Most notably, the right to justice under s 27 of the New Zealand Bill of Rights Act 1990.

²⁶ (See also i)(i) and (h) above)

- ii. *Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

New Zealand's common and statutory law recognise various privileges against disclosing information. The most common forms of privilege are over: information that is intended be confidential and made in the course of and for the purpose of requesting or receiving legal advice; or communications and information which were prepared by a party (or their legal adviser) for litigation.²⁷

As noted in our guidelines the Commission does not seek privileged information from parties when making either voluntary requests or when using our statutory powers. Parties may refuse to provide information even where compelled to do so if they have a 'reasonable excuse', which includes that the information is privileged.²⁸

Where the NZCC conducts a search subject to a warrant, we cannot generally take documents that we accept are privileged material. Where we come across documents that we believe are privileged, we will provide an opportunity for that privilege to be claimed. Where we dispute a claimed privilege, we will secure the documents (without further review of them) and provide an opportunity for the party claiming the privilege to specify its grounds. We will try to resolve such disputes by agreement. If we cannot agree to resolve a dispute, we will refer the matter to the Court for its decision.²⁹

j) Decisions in Writing

- i. *Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*

As noted above, generally the NZCC may not make findings or impose prohibitions, remedies, or sanctions under our competition laws. Such matters are dealt with via judicial proceedings.

The NZCC issues written reasons for its merger and authorisation determinations and publishes them on its [website](#).³⁰ The NZCC is required to publish reasons when it declines to grant clearance or authorisation, but we also publish written reasons on our [case register](#) when we approve a clearance or authorisation as well.

The NZCC may choose not to take enforcement proceedings but instead issue a public 'warning letter', which is published online unless good reasons exist not to. Warning letters set out the NZCC's

²⁷ See, for example, s 136, Search and Surveillance Act, 2012, ss 53 – 67, Evidence Act 2006.

²⁸ Commerce Act 1986, s 103.

²⁹ See Competition and Consumer Investigation Guidelines at [211] [212], see generally ss 142 – 146 Search and Surveillance Act 2012.

³⁰ Commerce Act, ss 61(4), 67(5).

view on the reasons why the conduct under investigation may have breached the relevant legislation, but the Commission does not intend to take legal proceedings (including prioritisation of resources). For further information see our Enforcement Response Guidelines. The NZCC will also take reasonable steps to advise complainants and affected parties of the end of the investigation and of any outcome.

In appropriate cases, the NZCC will also make public disclosure of an investigation outcome (including a decision to close the investigation and take no further action), either by media release, website content or otherwise.³¹

- ii) *Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

The Commission's policy on accepting undertakings is set out in the relevant Guidelines.

For mergers, the NZCC may accept undertakings for the divestiture of assets or shares, and take those undertakings into account when reaching a view on whether the transaction substantially lessens competition.³² The NZCC may not accept behavioural undertakings in relation to merger control.

The NZCC may accept all kinds of undertakings (including the payment of compensation to a third party) in relation to enforcement matters, including cartel conduct.³³

Undertakings are published on our website.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

³¹ Our [Enforcement Response Guidelines](#) contain more information on when we publicise enforcement responses, such as warnings and compliance advice letters.

³² See our Merger and Acquisition Guidelines at Attachment F.

³³ See Commerce Act, ss 74A – D.

As noted above, the NZCC has a limited ability to impose any penalty or prohibition for competition law violations. Where the NZCC makes an administrative determination in regard to a proposed potentially anticompetitive merger or agreement, in most cases parties have specific appeal rights conferred by the Commerce Act. For example, merger and authorisation determinations by the Commission may be appealed to the High Court.³⁴

Further, as noted in our CCI Guidelines the NZCC acknowledges and complies with obligations under the Section 27 of the New Zealand Bill of Rights Act 1990, ('Right to justice').³⁵ Specifically:

- Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Such rights may be enforced by way of judicial review in the High Court.

³⁴ Section 91, Commerce Act 1986.

³⁵ Section 27 of the [Bill of Rights Act 1990](#). CCI Guidelines at [40].