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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by New Zealand**

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This document reproduces a written contribution from New Zealand submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.  
More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm](http://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm)

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## *New Zealand*

### **1. Introduction**

1. This paper is a written contribution to the Competition Committee's call for country contributions to the roundtable on access to case files and protection of confidential information, to be discussed at the WP3 Roundtable in December 2019.
2. The Commerce Commission is New Zealand's competition agency. There is no specific regime to provide access to the Commerce Commission (Commission)'s files or to deal with access to confidential information. However, the Commission is subject to a broader information disclosure regime set out in the Official Information Act 1982. This legislation has a principle of availability, meaning that unless there are (statutorily mandated) reasons to withhold the information, when requested, it should be released. This principle permeates all of the Commission's competition functions. However, it is tempered where the release of information would prejudice those functions, or the party supplying the information.
3. The Commission is also subject to Court procedural rules relating to disclosure of information when it brings enforcement proceedings or a merger or restrictive trade practice clearance or determination is appealed.
4. This paper sets out a brief background to New Zealand's competition law regime and the Official Information Act regime. It then sets out the Commission's approach to providing access to the file in its various activities, and to what extent confidential information can be provided to interested parties. Finally, the paper briefly comments on when and how the Commission might share information with other agencies in New Zealand and also overseas.

### **2. Background of New Zealand competition law regime**

5. New Zealand has what is essentially a prosecutorial regime for anti-competitive business acquisitions and conduct. However, the Act provides for clearance and authorisation by the Commission, of mergers and certain other types of practices and agreements.
6. In respect of mergers, section 47 of the Act prohibits acquisitions that would have, or would be likely to have, the effect of substantially lessening competition (SLC) in a market in New Zealand. The SLC test compares the likely state of competition if the merger proceeds with the likely state of competition if the merger does not proceed. This is equivalent to asking whether the merger confers market power such that prices can be raised above competitive levels, or non-price factors such as quality or service can be reduced below competitive levels.<sup>1</sup> The Commission and third parties may file proceedings before the High Court to enforce section 47.

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<sup>1</sup> Mergers and Acquisitions Guidelines (2013). Available at <http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/>

7. New Zealand has a voluntary merger clearance regime, under which parties can apply to the Commission for clearance. If a merger receives clearance, section 47 is deemed not to apply to the merger for a period of one year.<sup>2</sup> The onus is on the applicant to satisfy the Commission that the merger is unlikely to substantially lessen competition. If the Commission is not satisfied, or if it is left in doubt<sup>3</sup>, then clearance is not granted.<sup>4</sup> These decisions are also subject to review by the Courts if appealed.

8. New Zealand also has a voluntary authorisation regime. The Commission grants authorisation for a merger if it is satisfied that the merger will be likely to result in such a benefit to the public that it should be permitted, despite any SLC. Again, the onus is placed on the applicant to satisfy the Commission that such benefits would flow from the merger. The authorisation regime therefore widens the consideration of the effects of the merger to include the public benefits and detriments that may arise. All merger specific efficiencies, including productive efficiencies which accrue solely to the producer, are considered under this test.<sup>5</sup>

9. With respect to restrictive trade practices there are three relevant sections of the Act:

- section 27 prohibits agreements that have the purpose, effect or likely effect of substantially lessening competition in a market. Similar to a merger decision it includes a counterfactual analysis of the effect or likely effect;
- section 30 is a per se prohibition of cartel conduct (price fixing, bid rigging, market sharing and market allocation); and
- section 36 prohibits taking advantage of substantial market power for an anti-competitive purpose. This includes conduct such as predatory pricing, refusal to supply and/or exclusive dealing.

10. The Commission has the ability to authorise anti-competitive agreements that may otherwise breach the Act if the Commission is satisfied that the public benefit of the agreement or practice outweighs the detriment arising from the loss of competition.<sup>6</sup> Parties can also apply for clearance for a collaborative activity exception which, if granted, provides the parties with certainty that their joint activity does not breach either the Act's cartel provisions or the prohibition on agreements that SLC.<sup>7</sup>

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<sup>2</sup> Section 96 Commerce Act 1986.

<sup>3</sup> The Commission can be left in doubt if it is unable to exclude a real chance of a substantial lessening of competition. The source of doubt is irrelevant. There is no significant difference between uncertainty associated with deficiencies in the evidence and uncertainty associated with the impracticality of predicting future events.

<sup>4</sup> In *Commerce Commission v Woolworths Ltd & Ors* (2008) 12 TCLR 194 (CA) at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that the Commission should make factual assessments using the balance of probabilities.

<sup>5</sup> Authorisation Guidelines (2013). Available at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0012/91011/Authorisation-guidelines-July-2013.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0012/91011/Authorisation-guidelines-July-2013.pdf).

<sup>6</sup> Section 58 Commerce Act.

<sup>7</sup> Section 65A Commerce Act.

### 3. Access to information and the Official Information Act 1982

11. There is no specific mandated access regime in relation to the Commission's competition functions. There are, however, ways in which interested parties can request access to information.

12. All information that the Commission receives is subject to the Official Information Act 1982 (OIA). The Commission's approach to its obligations under the OIA is set out in its Investigation Guidelines.<sup>8</sup>

13. The OIA provides a legal basis for anyone to request information that the Commission holds.<sup>9</sup> A request does not need to be received under the OIA for it to be treated as one – that is, the form of the request is not vital. The Commission will assess the request and can release information that, in its assessment, should be made publicly available.

14. The OIA has an overriding principle of availability,<sup>10</sup> which the Commission adheres to throughout merger and restrictive trade practices investigations.

15. The principle of availability means that the Commission should release information to the public unless there are administrative, conclusive or good reasons not to. Conclusive reasons to withhold information include where release of it would prejudice an ongoing Commission investigation or would be in contempt of court.<sup>11</sup> In all other instances, the Commission must undertake a balancing exercise to determine whether the information should be released.

16. The balancing exercise requires the Commission to weigh the reasons for withholding the information against the public interest in the release of the information. Under the principle of availability, the information may only be withheld if the potential harm from releasing it is greater than the public interest in disclosure.

17. The Commission recognises that there may be good reason to withhold certain information under the OIA, for example where that information is confidential and would unreasonably prejudice the supplier or subject of the information.<sup>12</sup> The nature and scope of confidential information, and the role it plays in the OIA regime, is discussed further below.

18. Where an OIA request relates to information provided to the Commission by a third party, the Commission will consult with the party as to whether there are good grounds to withhold the information. Ultimately, however, the decision whether to release the information is the Commission's.

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<sup>8</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf)

<sup>9</sup> The OIA defines who can make a request: A New Zealand citizen or permanent resident, a person who is in New Zealand, or a body corporate incorporated in New Zealand or that has a place of business in New Zealand (s 12(1)(a)-(e)).

<sup>10</sup> Section 5 OIA.

<sup>11</sup> Section 6.

<sup>12</sup> s 9(2)(b) and (ba).

#### 4. Access to the file: competition investigations and enforcement actions

19. The Commission undertakes to be an objective, fair and impartial organisation. To that end, it seeks to make as much information available as possible during its processes.

20. The Commission's Investigation Guidelines set out its investigation process for restrictive trade practices investigations and section 47 merger investigations. The Guidelines set out that there are limits to the Commission's ability to be open and transparent during ongoing investigations. In general, investigations are not conducted in the public eye and it may, in some cases, be necessary to investigate confidentially. Information disclosure must be balanced against the need to avoid prejudicing a confidential investigation. Consequently, the Commission may not always be able to comment on a matter that it is investigating. The Commission does, however, maintain a public case register of its investigations subject to confidentiality. This can include the parties (although they are not generally disclosed, particularly for restrictive trade practice investigations), the status and outcome of the investigation and links to any public documents.

21. Generally, investigative outcomes are made public shortly after completion of the investigation. In some circumstances the investigation report is proactively published if there is a matter of considerable public interest and the report would provide a useful educational resource for businesses and the public<sup>13</sup>. There may also be a media release when proceedings are filed and are finalised. In some circumstances a media release may be published when an investigation into an anti-competitive acquisition is opened, or when proceedings are filed.

##### 4.1. Access to information during merger or restrictive trade practice investigations

22. There are different ways in which parties can access confidential information during a restrictive trade practice or merger investigation.

23. First, when the Commission has decided to open an investigation, it will begin to gather information and evidence. This is likely to include issuing voluntary or compulsory document requests, and/or conducting voluntary or compulsory interviews. The majority of this information is not likely to be otherwise in the public domain. The Commission is conscious of the need to ensure that parties can have confidence in its use and retention of information, including its commitment to respecting as far as possible any privacy, confidentiality, or commercial sensitivity attaching to the information.

24. However, the Commission will use this information for the purposes of the investigation for which it was obtained. In most investigations it will test the information received often by putting the information provided by one party to another person for their response.

25. The Commission also has the power to issue confidentiality orders under section 100 of the Act where it is considered necessary or desirable to do so to protect the integrity of an investigation.

26. These orders protect specific information or documents from being published, communicated, or given in evidence. It is a criminal offence to breach a confidentiality

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<sup>13</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf)

order punishable by a penalty of up to \$4,000 for an individual and \$12,000 for a company. Such order can be made over the questions that the Commission asks or conveys, as well as the answers, information, and documents with which it is supplied.

27. Second, as outlined above, anyone can request information under the OIA regime, which may provide them with the information they are seeking.

28. As explained above, there are a number of reasons that the Commission may withhold information from disclosure. For example, where information is confidential and commercially sensitive and there is no strong countervailing public interest in releasing that information, the Commission is likely to decide not to release that information. In other cases the Commission will undertake a balancing exercise to decide whether to disclose the information.

#### **4.2. Immunity applicants**

29. The Commission, applicants, marker and conditional immunity holders and cooperating parties have obligations in relation to confidentiality. The Commission will try to protect to the extent possible confidential information provided by holders of a marker or conditional immunity, and cooperating parties.

30. The Commission may use information we receive from the marker or conditional immunity holder for the purposes of its investigation. If the Commission receives a third party request for disclosure of information, whether under the OIA, a request for discovery in any court, or otherwise, the Commission will to the extent reasonably possible, give the marker or conditional immunity holder an opportunity to make submissions to the Commission regarding the proposed release of the information; and take such action as the marker or conditional immunity holder considers necessary to resist the request.

31. The identity of a party that has been granted conditional immunity may ultimately become public when the Commission issues proceedings against other cartel participants, or when evidence is given in such proceedings. The identity of a cooperating party will ultimately be disclosed if a settlement is reached.

#### **4.3. Whistleblowers**

32. The Commission has an anonymous whistleblowing tool to enable people to report cartels without being identified. The tool is not a way for a party to make a leniency application, rather, it allows members of the public to inform the Commission of potential cartel conduct without fear of negative consequences or reprisals.

#### **4.4. Enforcement proceedings**

33. Where the Commission takes court proceedings, commercially sensitive information (along with all the other relevant information it holds relating to those proceedings) will become subject to the disclosure or discovery requirements of the relevant court. Where necessary to do so (because the information remains commercially sensitive), the Commission is able to use the courts' procedural rules to protect confidential information from public disclosure. The Commission is able to indicate that the inspection of confidential documents be limited to specified persons. Requests can also be made to hold parts of court hearings in private.

#### 4.5. Applications for clearance and authorisation

34. When considering applications for clearance and authorisation, the Commission seeks to be as transparent as possible about its investigation and the issues that it is considering. This includes publishing public versions of applications, submissions and determinations on our website. As part of this process, it is important that parties identify the specific information they consider to be confidential or commercially sensitive and explain the reasons for this request. The Commission will carefully evaluate each assertion of confidentiality or commercial sensitivity.

35. The Commission does not operate an access to file regime. However, it sometimes shares information provided to it by one party with others so that it can test that information to inform its decision. This is an important part of ensuring the applicant and other parties have a fair opportunity to represent their positions and helps ensure the Commission makes robust determinations.

36. The OIA regime also applies to applications for clearance and authorisation, and the same principles apply as in enforcement investigations. As outlined above, the OIA does not require us to release information in certain circumstances, including if there are administrative, conclusive or good reasons for withholding it. For example, some information that parties provide to us is confidential or commercially sensitive and sharing information could cause harm either to the party that provided it or a third party, or impede the Commission's ability to undertake investigations.

37. The OIA enables the Commission to release information subject to conditions that balance the public interest in the information being released against the confidentiality and/or commercial sensitivity of the information. It might use conditions to limit how the information is released. For example, the information may be released by way of a physical data room, or the provision of only the information to specified persons (typically external legal advisers or other experts) who have signed confidentiality undertakings. The OIA also enables the provision of information in a manner which balances the public interest in the information being released against the confidentiality and/or commercial sensitivity of the information. Rather than providing a copy of the information, the Commission might instead allow the requester an opportunity to view the information, or may provide an excerpt, summary, or verbal description of the information.

38. Parties and interested parties can request information under the OIA at any stage of an investigation, and sometimes such requests can slow the progress of an investigation. They can also request information after a merger application has been decided on, or after an investigation has been closed.

39. The court will be provided with confidential and public versions of the file on appeal of a Commission determination. Matters of confidentiality are determined by the Court irrespective of the position taken by the Commission during its investigation. The Court may hold confidential sessions or manage the public hearing such that information can be referred to without needing to cite confidential information.

#### 4.6. Submissions

40. The applicant and any other parties that make submissions during a clearance or authorisation process are requested to provide public versions of their submissions that the Commission can publish on its website.

41. The confidential versions of the submissions are for the Commission's use, but, like all documents the Commission receives, are subject to the OIA. When requested, and where appropriate, the Commission may provide confidential submissions to the applicant's legal and other advisers pursuant to confidentiality undertakings. The undertakings will set out various obligations on the advisers, including to use the information only for the purposes of providing comment on the application, and destroying the information within 20 working days of the Commission publishing its written reasons for its decision.

#### 4.7. Interviews

42. The Commission's usual practice is to conduct interviews during investigations. The Commission will usually record, and will sometimes produce transcripts of, the interviews.

43. These recordings and/or transcripts may be shared with the interviewed party at their request. If a third-party requests copies, the Commission will make an assessment as to whether the interview should be shared in accordance with the OIA principles. Like submissions, these documents may also be shared with counsel or other advisers pursuant to confidentiality undertakings.

#### 4.8. Data and economic analysis

44. The Commission may undertake data gathering and economic analysis to test the theories of harm and to quantify the potential effects of a transaction or the harm arising from anti-competitive conduct. The Commission has published guidelines<sup>14</sup> which identify the key principles for quantitative analysis.

45. Where appropriate, the Commission will share its views and workings with the relevant party, and, as above, may share with third parties where confidentiality undertakings are entered into.

### 5. Sharing of confidential information with other agencies

46. Where the Commission has gathered information that appears to raise concerns under law that another agency enforces, the Commission may advise that agency in general terms of its concern and possible sources of information for its own enquiry. The Commission can also share evidence with specific agencies in certain limited circumstances. This includes considerations such as complying with the Privacy Act 1993 which provides principles around collection, use and disclosure of information relating to individuals.

47. Information gathered as part of a compulsory process can also be shared with overseas regulators which the Commission has a formal cooperation arrangement with, under sections 99B to 99P of the Act. Where information has been voluntarily provided, the Commission will seek a waiver from the supplier of the information before sharing or discussing the information with another agency.

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<sup>14</sup> [https://comcom.govt.nz/data/assets/pdf\\_file/0023/62159/Guidelines-for-Quantitative-Analysis-March-2012.pdf](https://comcom.govt.nz/data/assets/pdf_file/0023/62159/Guidelines-for-Quantitative-Analysis-March-2012.pdf)

48. In terms of international information sharing, the Commission currently has formal, second generation cooperation arrangements with the Australian Competition and Consumer Commission and the Canadian Competition Bureau. This allows the sharing of confidential and investigative assistance for both mergers and restrictive trade practices.

49. New Zealand also has a mutual assistance in criminal matters regime, which will become relevant to the competition law context once the Commerce Act amendments criminalising cartels comes into force in April 2021. The regime allows for New Zealand to request assistance from other countries of the kind that New Zealand can provide for other countries. Any assistance that forms part of a case in New Zealand are subject to New Zealand law, including the Evidence Act 2006.

50. In the mergers context, where an acquisition forms part of an international transaction, the Commission requests that the applicant provide reciprocal confidentiality waivers to allow the Commission to discuss the application with other specified regulators.<sup>15</sup> This will assist the Commission's consideration of the transaction and the ability to liaise with other agencies.

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<sup>15</sup> See the template waiver included in the Commission's Notice seeking clearance application: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0031/90877/Notice-seeking-clearance-Application-October-2019.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0031/90877/Notice-seeking-clearance-Application-October-2019.pdf)