Matthews Law
COMPETITION · REGULATION · POLICY · STRATEGY

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Submission on proposed review of Mergers and Acquisitions Guidelines

1. Thank you for the opportunity to give high-level feedback on issues the Commerce Commission (**Commission**) should consider in its proposed review of the Mergers and Acquisitions Guidelines (**MAGs**) and its Advisory Note on the use of quantitative analysis in merger analysis (**Advisory Note**).

2. Matthews Law is a specialist competition law firm providing top-tier service on contentious and non-contentious matters for local and international clients since 2013. Multijurisdictional matters are a focus for us. We are active in the International Bar Association, American Bar Association, and Inter-Pacific Bar Association. We have also represented NZ as an NGA at the International Competition Network. Combined, our partners have more than 50 years' experience in merger control, including work offshore coordinating multijurisdictional mergers.

3. We support the proposed review and, while we consider the MAGs to be an excellent guide, agree that it needs updating to reflect changing law, economic theory, and practice.

4. Our submission discusses:

    a. Development of theories of harm

    b. Concentration indicators

    c. A de minimis threshold

    d. Legal update & clarity

    e. Evidentiary considerations for failing firms and recognition of 'flailing firms'

    f. Clarifying the informal & clearance processes.

5. We also comment briefly on a possible "streamlined authorisation" process.

6. The current quantitative analysis, with its coverage of important tools such as critical loss analysis and diversion ratios, has been valuable. We encourage the Commission to get input from external economists it receives reports from regularly, as it develops this Advisory Note. (As an initial point, it may be useful to incorporate these concepts more into the MAGs.)

7. We look forward to engaging further with the Commission.

Development of theories of harm

8. As different approaches to assessing mergers emerge, including internationally, we consider it would be beneficial for the Commission to develop its approach to mergers including the theories of harm that it considers when considering mergers. The US agencies have obviously recently done this to reflect the case law, and the economic theories they use when assessing harm. Below we note some areas we would like to see developed more.

9. We make some initial comments below but are happy to comment further as the review continues.

Unilateral market power and coordinated effects

10. We wonder if assessing mergers through the lens of either unilateral market power or coordinated effects captures all theories of harm the Commission considers (or wishes to).

11. We note that the US 2023 guidelines comment (footnote 17, emphasis added)[1]:

> *The competitive harm from the elimination of competition between the merging firms, without considering the risk of coordination, is sometimes referred to as unilateral effects. The elimination of competition between the merging firms* ***can also lessen competition with and among other competitors****. When the elimination of competition between the merging firms leads them to compete less aggressively with one another, other firms in the market can in turn compete less aggressively, decreasing the overall intensity of competition.*

Demand side market power

12. There is an increasing focus internationally on demand side market power considerations and the impact of mergers of competing buyers. This is an area where we believe it would be helpful for the Commission to provide some additional guidance about how it will consider demand-side market power considerations in its merger analysis.

13. In the Commission's Statement of Issues for the proposed Foodstuffs North Island / Foodstuffs South Island merger, the Commission recognised that Chapter 4 of the MAGs may need to be updated, in particular to reflect:[2]

> *the growing economic consensus around the distinction in buyer-side markets between applying a 'monopsony power framework' and a 'bargaining framework'.*

Nascent competitors / killer acquisitions

14. We expect the Commission may wish to consider when small mergers can have outsized effects. Creeping acquisitions may also be something it wishes to give guidance on. It seems interesting now that it abandoned its past concern at the potential loss of "mavericks".

15. We note the precedent set in the Court of Appeal in *NZ Bus and Infratil v Commerce Commission* that competitive impact may be "minor" but can nonetheless constitute a substantial lessening of competition.[3]

Sensitive industries

16. There may be industries that the Commission has concerns about. It may be useful for it to highlight these.

Non-horizontal mergers

17. Given that non-horizontal factors are more of a consideration and noting that the Commission has declined mergers on non-horizontal grounds, we consider that more guidance on non-horizontal mergers would be useful, including commentary on when and how the Commission may be concerned at vertical mergers leading to foreclosure.

[1] Antitrust Division | 2023 Merger Guidelines | United States Department of Justice
[2] Statement of Issues Foodstuffs North Island / Foodstuffs South Island (4 April 2024) at [37].
[3] *New Zealand Bus Limited and Infratil Limited v Commerce Commission* [2007] NZCA 502 Wilson J at [270] and [272].

Other theories of harm

18. The Foodstuffs North Island Statement of Issues notes that the Commission is "considering the extent to which a substantial lessening of competition may occur whether or not there is a reduction in volume or output."[4]

19. We recommend the Commission also consider more guidance on if / when merger could lead to enhanced barriers to entry, enabling parties to maintain market power.[5] This picked up on the Misuse of Market Power Guidelines, which notes one of the ways conduct can be harmful is:[6]

> *Conduct by a firm with substantial market power can make the conditions for entry more difficult where the firm has the ability to influence the creation or maintenance of regulatory barriers. This may reduce the constraint that entry places on the firm with substantial market power. This could include standard setting, where standards exclude actual or potential competitors.*

Concentration indicators

20. The MAGs state that a merger is unlikely to require a clearance application if:[7]

    a. the three largest firms in the market have a combined market share of less than 70%, and the merged firm's combined market share is less than 40%; or

    b. the three largest firms in the market have a combined market share of 70% or more, and the merged firm's combined market share is less than 20%.

21. We note that agencies in other jurisdictions have recently provided clarity on concentration indicators. The US Merger Guidelines have a rebuttable presumption of illegality where a merger will significantly increase concentration in a highly concentrated market, using the Herfindahl-Hirschman Index (HHI). Canada has also made amendments to its Competition Act where a merger is presumed to be anti-competitive if it significantly increases concentration or market share under the HHI.[8]

22. We do not suggest that these be adopted in New Zealand, however in reviewing the MAGs we suggest that the Commission consider whether:

    a. The current concentration indicators are still fit for purpose; and

    b. Whether there are other ways of measuring mergers (eg whether it will reduce the number of large players from 4 to 3 or 3 to 2.)

23. For example, in its analysis of Mercury's application for clearance to acquire Trustpower's retail business, the Commission discussed that:[9]

> *With the Proposed Acquisition, the merged entity would have a 65.2% share and the number of competitors with at least 5% market share would reduce from four to three. In terms of the three-firm*

[4] Statement of Issues Foodstuffs North Island / Foodstuffs South Island (4 April 2024) at [40].
[5] Commerce Commission Misuse of Market Power Guidelines (March 2023), available here: Misuse-of-Market-Power-Guidelines-March-2023.pdf (comcom.govt.nz).
[6] Commerce Commission Misuse of Market Power Guidelines (March 2023) at [118.2].
[7] Commerce Commission Mergers and Acquisition Guidelines (May 2022) at [3.51].
[8] Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Guide to the June 2024 amendments to the Competition Act (Canada)
[9] Mercury NZ Limited and Trustpower Limited's retail business [2021] NZCC 16 at [96].

concentration ratio, this would increase from 77% to 84.4% post-acquisition (an increase of 6.9%). Post-Acquisition, the supply of retail electricity in the Tauranga region would become more concentrated.

24. This is more consistent with the analysis commonly applied by practitioners, and it would be helpful to get more information on how the Commission assesses these and similar matters (eg to clarify if it would consider whether it may wish to review a 4:3 merger, and what concerns it may have, and in what circumstances it might be concerned this may breach s 47).

A de minimis threshold

25. As the Commission knows there has recently been public advocacy that the sale of Serato[10] ought not to have been challenged / declined on competition grounds due to its limited NZ turnover, which is claimed to be *de minimis*.[11]

26. We do not have all the facts about that merger. But in our experience the Commission has investigated in detail or required clearance applications (and even at least one authorisation application), when the application of a *de minimis* threshold would arguably have indicated this was unnecessary.

27. We have been concerned for some time that the Commission has not engaged in discussion about this.

28. We **submit** that the Commission should consider (and ultimately adopt) a de minimis threshold.

29. We consider that:

    a. This would be consistent with its *Enforcement criteria*[12] and *Enforcement Response Guidelines*[13] (and a failure to do so is arguably inconsistent with those guidelines).

    b. It would assist with increasing public confidence that the Commission is prioritising the right matters that make the most sense. (Noting there are broader concerns that the Commission may not be picking the "hard" cases.[14])

    c. It would be consistent with usual commercial cost / benefit approaches, especially when the Commission and public are having to prioritise expenditure.

    d. Most significantly, would seem to recognise the materiality required for a *"**substantial**" lessening of competition"* and we consider consistent with the Commerce Act's purpose (*"the long-term benefit of consumers*").

30. Such an approach would be consistent with international best practice. For example, the OFT previously used a threshold for markets affected by a merger that it considered too small to be considered sufficiently important to investigate. (In 2007 this was increased from £400,000 to £10 million.)[15]

[10] Commerce Commission - AlphaTheta Corporation, Serato Audio Research Limited (comcom.govt.nz)
[11] New Zealand moves first to reject DJ deal - Global Competition Review
[12] Commerce Commission - Enforcement criteria (comcom.govt.nz)
[13] Commerce Commission - Enforcement Response Guidelines (comcom.govt.nz)
[14] Bayly calls for ComCom to be 'courageous litigator' | interest.co.nz
[15] OFT widens scope of de minimis exemption for mergers - IPBA In-House Briefing - Powered by Lexology Despite there being a built in de minimis threshold for the UK merger test, the CMA still applies https://assets.publishing.service.gov.uk/media/662a433e690acb1c0ba7e5f2/Exceptions_to_the_duty_to_refer_-_consultation_response.pdf

Legal update & clarity

Updating Commission practice and case law

31. Obviously, the MAGs should be updated for the (limited) NZ cases but given these limitations the Commission should consider if there are additional cases it regards as influential, especially from Australia, which could be incorporated.

32. It has also been suggested that the MAGs could be clearer in some cases, ie better distinguish between NZ case law, influential case law, and economic / Commission theories of harm. While the MAGs have excellent case references, in some instances it can be unclear if statements are Commission views, or a clear summary of the law.

What constitutes a business acquisition?

33. We encourage the Commission to revert to greater clarity on the application of section 47 to acquisitions of business assets.

34. Previous versions of the Commission's *Business Acquisition Guidelines* noted its view that even an *acquisition* of a lease (note the operative word) could fall within section 47.

35. Indeed, it made a statement to this effect about proceedings.[16]

> *In 2018 the Commission filed proceedings against Wilson Parking New Zealand Limited in respect of its acquisition of a long-term lease to operate the Capital Car Park in Wellington CBD. The Commission alleged that the acquisition had substantially lessened competition for the supply of car parking in the Boulcott Street area. In 2020 the Commission reached an agreement with Wilson Parking to divest the lease to the Capital Car Park in addition to the leases of the Athol Crescent Car Park and 37 Boulcott Street Car Park, as well as pay a contribution to the Commission's costs."*

36. Yet more recently the Commission seemed unclear if a commercial property acquisition (not a lease acquisition) was caught by section 47 or 27. We are concerned at this inconsistency and remain unclear as to what legal basis the Commission has for this apparent confusion.

37. Such an approach would seem inconsistent with the ACCC approach (eg Woolworths Limited's acquisition of a supermarket site in 2010[17]) and how the OECD understands our law. A 2013 OECD policy roundtable paper described New Zealand as having a wide definition of a merger transaction, "*in principle, capturing any acquisition of shares and assets*".[18]

38. We **recommend** the Commission clarify its position and be consistent in its approach.

Evidentiary considerations for failing firms and recognition of flailing firms

39. The current MAGs outline the Commission's approach to deciding whether a firm is a failing firm, and the evidence the Commission considers useful in considering whether the firm (or division) has ceased operations or will cease operations imminently or probably.

40. However, there are situations which may fall short of meeting the failing firm test, for example where it is accepted that one or more parties will not survive beyond a short period, but the

[16] Commerce Commission - Investigations show Commission's commitment to acting on non-notified mergers (comcom.govt.nz)
[17] https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/woolworths-limited-completed-acquisition-of-a-supermarket-site-at-tura-beach-nsw, ,
[18] https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf at 13, footnote 7.

merger will still not result in a substantial lessening of competition (ie weakened competitor / "flailing firm").

41. The Commission has previously acknowledged a "flailing firm"-type scenario. In clearing the proposed acquisition of a hospital, the Commission acknowledged that: [19]

> *it is likely that one of these hospitals would not continue to operate in the short term. The likely exit of one of these hospitals would mean that there would be little difference in the level of competition between the factual and counterfactual scenarios.*

42. Agencies in the US have previously allowed mergers to proceed based on a "flailing firm" defence. A US judge recently ruled in favour of the merging parties where the flailing firm defence was raised, observing that:[20]

> *LNR's competitive position will further erode to the point where it will most likely close in the foreseeable future, fully eliminating it as a competitor capable of being the subject of a prima facie case. So, like in cases where the weakened-competitor defense has succeeded, CHS / LNR does not have "convincing prospects for improvement".*

43. It would be useful for the Commission to provide more guidance on its approach in these scenarios.

Clarifying the informal & clearance processes

Clarifying the informal process

44. Parties to a transaction may send a 'courtesy letter' to the Commerce Commission. After conducting preliminary analysis and possible market engagement, the Commission may then choose to send a 'no action letter' in response or encourage the parties to seek a clearance if it believes there are competition concerns that need to be considered. The MAGs only acknowledge this process in a footnote.[21]

45. It would be useful to have more clarity about this process in the MAGs given this is a common practice. This could include:

    a. the situations in which the Commission believes that a courtesy letter would be beneficial;

    b. how the Commission views courtesy letters and its intentions for this process;

    c. what the Commission does upon receipt of a courtesy letter; and

    d. whether or not the Commission keeps a record of the courtesy letters received and whether it would consider publishing data regarding the number of courtesy letters received.

Clarifying the Commission's timing and "phase 2" process

46. Under the current law, there is a 40 working day statutory timeframe for the Commission to reach a decision regarding a clearance, and if no notice is given during this time, the Commission

[19] NZCC Decision 620 - Application for Acquisition Clearance: Southern Cross Health Trust and QE Hospital (28 September 2007).
[20] Federal Trade Commission v. Order Community Health Systems, Inc. And Novant Health, Inc. , FTC loses hospital challenge over flailing firm defence.
[21] See Commerce Commission Mergers and Acquisition Guidelines (May 2022) at footnote 158.

is deemed to have declined the merger.[22] Therefore, parties are forced to accept an extension request by the Commission, which happens for many applications.[23]

47. The average time for a decision has progressively increased over time, with the average time in 2022/2023 being 94 working days. [24]

48. We encourage the Commission to consider if it can provide with more guidance, including:

    a. what it considers complex / non-complex mergers;

    b. reasons why, or circumstances in which, an extension of the statutory timeframe may be necessary;

    c. a commitment to clearing non-complex mergers within the statutory timeframe; and

    d. reviewing its guidance about timeframes for complex mergers.

Confidentiality and OIA requests

49. It is important the Commission has access to all relevant information to make fully informed and robust decisions. We are concerned that the current approach to confidentiality and Official Information Act 1982 (**OIA**) requests is deterring merger parties from providing information to the Commission and deterring other market participants from submitting on, or participating in, a clearance or authorisation process. We encourage the Commission to consider if there any ways it can provide parties with more certainty about will and will not be kept confidential (for both formal and informal processes).

50. For example, historically, the Commission kept written submissions both fact and content confidential, and the Commission was comfortable that it could still meet its natural justice obligations to the parties seeking a merger clearance and/or authorisation. The Commission now publishes all submissions on the website, which we consider may be discouraging parties from submitting on the issue if they feel there may be repercussions from the merger parties.

51. While the Commission cannot pre-determine if it will disclose information under the OIA, it previously indicated if information was of a type it would expect to keep confidential, providing potential submitters with important comfort. We encourage the Commission to consider when updating the MAGs to provide a level of comfort for parties in the updated MAGs about the types of information the Commission considers it is more or less likely to disclose under the OIA.

52. We consider there are good reasons under the OIA to withhold confidential information, which the Commission may wish to consider in its review:

    a. to protect information, where making available the information would be likely to unreasonably prejudice the commercial position of the person who supplied the information;[25]

    b. where the making available of the information would be likely to prejudice the supply of similar information or damage the public interest.[26] Parties applying to the Commerce Commission need to have certainty that their confidential and commercially sensitive information will not be disclosed to a direct competitor (or to a person who will use the

[22] Commerce Act 1984, s 66(3) and (4).
[23] Commerce Act 1984, s 66(4).
[24] Merger determinations and enforcement statistics, available here Mergers-determinations-and-enforcement-statistics.pdf (comcom.govt.nz).
[25] Official Information Act 1982, s 9(2)(a)).
[26] Official Information Act 1982, s 9(2)(ba)).

information for the benefit of a direct competitor, such as the competitor's lawyer). If parties do not have confidence that the Commission will protect confidential information or are concerned that the information could be used against them, they will be less likely to provide the information to the Commission.

c. to protect information which is subject to an obligation of confidence to a third party.[27]

53. If there are Ombudsman rulings requiring the current approach, we **recommend** that the Commission explicitly notes and explains this, and / or seeks Ombudsman rulings or guidance to address this, and / or seeks legislative change (if necessary).

54. The Commission has adopted a policy of disclosing confidential information under the OIA to lawyers and (sometimes) experts who sign the Commission's counsel-only confidentiality undertakings. We encourage the Commission to consider this approach as part of its MAGs review, and note:

a. In our view, the recognition that a confidentiality undertaking is required, and that disclosure should be limited to counsel only, is an acceptance that there are good reasons to withhold the information under the OIA. Therefore, the only basis to disclose the information would be if the withholding of that information is outweighed by other considerations which render it desirable in the public interest to make the information available,[28] which we consider would be in limited situations.

b. The disclosure of confidential information, including in some cases highly sensitive commercial information, may disincentivise parties from making submissions or providing information to the Commission. This can result in an asymmetry of information, or the Commission making decisions without access to full and balanced information. There are not just "known unknowns' but also "unknown unknowns".

c. Providing confidential information on a counsel-only basis, and subject to a confidentiality undertaking, should only occur when access is required to the information to enable proper advice to be given to a client and that the need for advice is in the public interest and outweighs the need to protect commercially sensitive information. These situations would be limited. Access should be granted on an even-handed basis.

d. Providing information in this way can create ethical conflicts for lawyers, who cannot disclose the information but must still advise their clients on the best course of action, which could lead to inadvertent or implicit disclosure of the information to clients. We have observed breaches of confidential information.

55. We recommend that the Commission reviews and updates its approach to the disclosure of confidential information received as part of the clearance and authorisation processes.

Providing written reasons in a timely manner

56. Under current guidelines, the Commission notes that although it is only legally required to publish written reasons if it declines a clearance, it will "generally publish reasons to explain our clearance decisions, and to provide guidance to interested parties and future applicants."[29] The Commission notes it will generally not publish written reasons on the day it issues its decision.[30]

[27] Official Information Act 1982, s 9(2(ba)).
[28] Commerce Act 1986, s 9(1).
[29] Commerce Commission Mergers and Acquisition Guidelines (May 2022) at [6.124].
[30] Commerce Commission Mergers and Acquisition Guidelines (May 2022) at [6.125].

57. We appreciate the Commission publishing its written reasons as this provides useful guidance that can be helpful in providing advice on future acquisitions. However, there can be considerable delay in written reasons being provided (eg at least two 2023 determinations have not yet been released) which can undermine the decision and confidence in the decision-making process.

58. We encourage the Commission to consider if it would be possible to provide written reasons for the decision on the day that a decision is announced, or to commit to doing so within a specified time frame.

59. As the Commission acknowledges, "[t]he High Court Rules provide that a party must file any appeal within 20 working days of the date on which the decision is made."[31] Although the Commission notes that "[it] generally indicate[s] to parties that [it] will not oppose a party filing an appeal out of time provided they file any appeal within 20 working days of the date on which [it] publish [its] written reasons", this still either means parties must file without access to the reasons or may only be able to file several months later when the decision is released.

60. While the Commission distinguishes between the decision and its written reasons, this is not a true distinction. A decision cannot be made without reasons and lengthy delay in providing written reasons begs the question as to what information the Commission had before it in making the decision. For example, it is rare for a Court to issue its decision without written reasons and we do not understand the reason for separating these intertwined concepts.

Streamlined authorisation process

61. While a separate point, we **recommend** that the Commission consider re-implementing a potential streamlined approach to authorisation (for both mergers and restrictive trade practices). The Commission previously used this process, which we found helpful.[32]

62. The idea of a fast-track process has been picked up in the Australian Competition and Consumer Commission's (ACCC) Sustainability Collaborations and Australian Competition Law draft guidance, which state: [33]

> *where certain features are present, it may be appropriate to proceed directly to a draft determination, without an initial consultation phase. This can shorten the process, allowing for authorisation to potentially be granted more quickly.*

63. We invite the Commission to take this opportunity to consider whether the Commission should update its processes to include a similar streamlined authorisation process in New Zealand.

Matthews Law
23 July 2024

[31] Commerce Commission Mergers and Acquisition Guidelines (May 2022) at footnote 156
[32] PUBLIC-Decision-735-Refrigerant-License-Trust-Board-Final-Determination.pdf (comcom.govt.nz)
[33] Sustainability collaborations and Australian competition law: a guide for businesses (Draft for consultation – July 2024): https://www.accc.gov.au/media-release/accc-consulting-on-guide-to-sustainability-collaborations.