

Merger Control 2024

13th Edition

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Overview of merger control activity during the last 12 months

Part 3 of the Commerce Act 1986 (**Act**) contains the merger control provisions in New Zealand. Under section 47, the Act prohibits the acquisition of business assets or shares if it would have the effect or likely effect of substantially lessening competition (**SLC**) in any New Zealand market(s). The Act also establishes a voluntary notice regime under which parties may seek a clearance or authorisation of a proposed acquisition from the Commerce Commission (**NZCC**), the independent regulatory body in New Zealand.¹

Clearance or authorisations cannot be granted retrospectively after a merger; therefore, it is prudent for parties to weigh up any risks of not seeking the NZCC's approval, as the NZCC may choose to investigate the merger and exercise its broad enforcement powers, including issuing proceedings against the parties.

On 5 May 2022, the maximum penalty for a breach of section 47 increased from \$5 million to the greater of: \$10 million; or either three times the value of any commercial gain resulting from the contravention, or if the commercial gain is not readily ascertainable then 10% of the defendant's turnover (including any interconnected bodies corporate) for each accounting period in which the contravention occurred.²

The NZCC publishes comprehensive merger statistics yearly, dating back to the 2000/2001 financial year.³ A snippet of the past three financial years is provided in a table below:

Financial Year	20/21	21/22	22/23
Clearances (section 66)			
Total applications decided	8	21	9
Unconditional clearance	6	11	7
Clearance with divestment undertaking	2	3	2
Declined	0	0	0
Withdrawn	0	7	0
Statement of Issues issued	4	10	5

Financial Year	20/21	21/22	22/23
Statement of Unresolved Issues issued	0	3	2
Authorisations (section 67)			
Total applications decided	0	0	0

The unreported figures for 23/24 show 14 total clearance applications decided, with all cleared except one, which was withdrawn.

Overall, the number of clearances has trended downwards over the last 20 years, with a spike during COVID-19. This may reflect the NZCC's increased pragmatism, with increased "informal comfort" over recent years, a practice that has waxed and waned over time.

Authorisations are generally rare, given higher costs and longer decision-making time. However, an authorisation application was recently filed in April 2024, which is the first authorisation application since 2018.

In the last 12 months, there have been some high-profile clearance applications, such as the application by Foodstuffs North Island to acquire Foodstuffs South Island (a proposed grocery merger which would be a 3:2 on the bi-side by two separate cooperatives that already share branding), which has attracted a large number of submissions and significant media attention.

Investigations into non-notified mergers became a priority for the NZCC in 2018–2019, and have remained a priority, with an increasing number of proceedings being filed. In December 2023, the NZCC filed proceedings against Alderson Logistics Limited and Supa Shavings (2022) Limited for its non-notified merger, alleging that the merger substantially lessened competition for the supply of chicken and goat bedding in the Waikato region.⁴ These proceedings remain before the Court and no judgment has been released.

New developments in jurisdictional assessment or procedure

The NZCC recently updated and revised its Mergers and Acquisition Guidelines (in 2022) and its Authorisation Guidelines (in 2023). These guidelines provide useful information about the NZCC's process in considering a clearance or authorisation application, and the information the NZCC will consider in assessing each application.

The main amendments were to the process section of the guidelines, and to incorporate the divestment and failing firm guidelines into the broader merger guidelines. The NZCC has flagged potential changes to the guidelines to reflect growing concerns around buyer power, as it develops its analytical framework for these issues (see below).

While merger notification is not mandatory, if an application is made then the deal cannot complete until clearance has been granted, otherwise there is a high risk of prosecution. The NZCC has been more interested in "gun-jumping" and ensuring that parties are not in practice continuing to compete in the lead-up to completion.

The average length of time for the NZCC to reach a decision has increased substantially over recent years, potentially reflecting the increased level of informal comfort being given and the fact that experienced counsel tend to advise that parties seek formal clearance only for more complex mergers.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

New Zealand, because of its small size, has concentrated markets, often with a small number of competitors. This can increase the potential for competition law issues to arise in a merger context, even where no issues may arise internationally.

The NZCC received market study powers in 2017. Since then, it has conducted four market studies, one in each of the following sectors:

- wholesale fuel supply;
- supply of building products;
- grocery industry; and
- personal banking services.

Both the fuel market study and the grocery market study resulted in industry-specific regulation being enacted, which is now monitored and enforced by the NZCC. The banking market study has not yet been concluded, so we are yet to see whether specific regulation will follow that market study.

The NZCC's approach to market definition has traditionally been to consider market effects on a narrow market definition, but the definition in the Act expressly states that it is a matter of "fact and commercial common sense".⁵

Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Overall analysis has been consistent, but we note that in recent years there has been an increased focus on demand-side market power and using a platform, or two-sided market, analysis. There has also been increased focus on non-horizontal mergers and the effect that these will have on competition.

This is consistent with developments in other jurisdictions and the increased focus on big tech and data issues.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

The clearance process in New Zealand does not expressly have a formal two-stage approach. However, the process undertaken by the NZCC involves a determination to either grant clearance, or to prepare and publish a Statement of Issues. A Statement of Issues is issued by the NZCC if it is not currently satisfied that the merger will not substantially lessen competition, and therefore, further investigation is required. This is analogous to phase II investigations for complex mergers in other jurisdictions.

Merging parties have a number of opportunities to participate in the process and provide further submissions or evidence. An applicant can also choose to withdraw their application. The NZCC can (and does) accept divestment remedies to solve identified competition issues with a proposed merger. These can be proposed at any stage in the process.

However, unlike in some other jurisdictions, the NZCC cannot accept any behavioural remedies or undertakings. Therefore, there is less focus in New Zealand on potential remedies.

Key policy developments

In May 2024, the Organisation for Economic Co-operation and Development (**OECD**) released its economic survey on New Zealand. In this survey, the OECD identified that insufficient competition is an important factor in underpinning low productivity, noting the significant market concentration. The OECD recommends that competition policy be strengthened in line with international best practice. In particular, it recommended that in some markets (such as grocery), regulation may not be sufficient and structural solutions, such as break-ups, should be considered.

The OECD also stated that New Zealand would benefit from adapting its competition regulations to the new challenges of market power in digital markets.

We also note that there has been an increasing interest and engagement in the interaction between competition law and sustainability, and whether competition law imposes constraints on collaboration to advance sustainability goals. The NZCC published sustainability guidelines in 2023, but there is no specific legislation or exception to competition law for agreements to advance sustainability objectives or reduce emissions. This remains an area of risk for parties seeking to merge or enter into arrangements.

Reform proposals

The biggest change to merger laws in recent years was the increase in penalty in 2022. However, there have been a number of other recent amendments to the Act since 2017, including changes to the cartel prohibitions, the criminalisation of cartel conduct, changes to the prohibition on unilateral conduct and the introduction of market studies.

Given this backdrop, we do not anticipate any major reform to the Act, and to merger provisions in particular, in the short-medium term.

However, we note that significant reforms of Australia's merger laws were announced in April 2024, including moving from a voluntary notification regime to a mandatory notification regime. Historically, New Zealand's competition laws have followed Australia's, and therefore we will continue to watch closely those amendments and whether it would be appropriate for New Zealand to adopt a similar approach or make some other amendments to its merger control regime.



Endnotes

- 1 The Commerce Act 1986, sections 66 to 69B.
- 2 The Commerce Act 1986, section 83(3)(b).
- 3 Commerce Commission – Mergers and trade practices statistics (<https://comcom.govt.nz/about-us/strategic-planning-and-accountability-reporting/mergers-and-trade-practices-statistics>).
- 4 Commerce Commission – Commission files proceedings against Alderson Logistics Limited over alleged anti-competitive, non-notified merger (<https://comcom.govt.nz/news-and-media/media-releases/2023/commission-files-proceedings-against-alderson-logistics-limited-over-alleged-anti-competitive,-non-notified-merger>).
- 5 The Commerce Act 1986, section 3(1A).



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Alicia Murray is a commercial litigator with over 20 years' experience. Alicia has particular experience in competition law, the Fair Trading Act and other related consumer-focused legislation. Alicia has recently joined Matthews Law, a specialist competition law firm, where she advises clients on all competition law issues, including investigations, mergers and acquisitions and compliance. Alicia has strong court experience and experience with alternative forms of dispute resolution, and has assisted clients with investigations by the NZCC under the Commerce Act, Fair Trading Act and Credit Contract and Consumer Finance Act. She has a depth of experience dealing with regulators and helping clients to navigate complex issues.



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Andy is a partner at Matthews Law, a specialist competition, regulatory and consumer law practice. He is one of New Zealand's most experienced merger control, cartel and NZCC investigation lawyers, with a focus on complex and multijurisdictional matters.


NZ career highlights include:

- successful closing without NZCC clearance for complex mergers and NZCC clearance of various 3:2 and 2:1 mergers (including for the likes of Shell and CSR);
- working (with Gus Stewart) on a successful (and high-profile) non-notified merger for Fulton Hogan, and various other novel matters (including the NZCC's first use of its powers to compulsorily require information on behalf of the Australian Competition and Consumer Commission (**ACCC**), and acting on NZ's record Fair Trading Act case);
- achieving a major reduction in mobile termination rates for 2degrees (a late third entrant telecommunications company);
- the seminal meat companies' price-fixing case;
- the proposed Qantas/Air NZ merger;
- the successful Southern Cross/Aetna merger (the number one and two health insurers with a combined market share of around 85%); and
- the NZ component of the P&O Nedlloyd/Maersk merger.

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- Overview of merger control activity during the last 12 months
- New developments in jurisdictional assessment or procedure
- Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.
- Key economic appraisal techniques applied, e.g., as regards unilateral effects and coordinated effects, and the assessment of vertical and conglomerate mergers
- Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation
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- Reform proposals

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