PANORAMIC

MERGER CONTROL

New Zealand

LEXOLOGY

Merger Control

Contributing Editor

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Freshfields

Generated on: July 14, 2025

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Merger Control

UPDATE AND TRENDS

Key developments of the past year

Contributors

New Zealand

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QUICK REFERENCE TABLE

The table below is for quick reference only.

Voluntary or mandatory system?	Voluntary; however, mergers cannot be cleared or authorised retrospectively, and the Commerce Commission (NZCC) may investigate non - notified mergers that it considers could substantially lessen competition in a New Zealand market.
Notification trigger/filing deadline	Filing and clearance must be undertaken pre - closing. The NZCC has defined concentration indicators that it uses to identify mergers that are less likely to cause competition concerns, but stresses that these are initial guides only and that a merger not exceeding such indicators may still substantially lessen competition.
Clearance deadlines (Phase I/Phase II)	Target time frame is 40 working days from filing, but the NZCC can request extensions. According to the NZCC's most recent statistics, in the financial year ending June 2024, the average time taken for the NZCC to reach a decision for clearances is 69 working days, but this will depend on complexity and opposition.
Substantive test for clearance	The NZCC must be satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market.
Penalties	Up to NZ$500,000 for individuals and up to the higher of NZ$10 million, three times the commercial gain of the contravention or (if that cannot be ascertained) 10 per cent of group turnover for companies.
Remarks	Not applicable.

Law stated - 1 March 2025

LEGISLATION AND JURISDICTION

Relevant legislation and regulators
What is the relevant legislation and who enforces it?

New Zealand's merger control legislation is contained in Part 3 of the Commerce Act 1986 (the Act). New Zealand's competition law regulator is the Commerce Commission (NZCC). The NZCC adjudicates on applications for clearance, or authorisation, of mergers and can take enforcement action in the courts. Interested third parties can also enforce the Act directly.

Law stated - 1 March 2025

Scope of legislation
What kinds of mergers are caught?

The Act prohibits any person (including bodies corporate) from acquiring assets of a business or shares if that would, or would be likely to, substantially lessen competition in a market in New Zealand.

The phrase 'assets of a business' is not defined and, therefore, could include any asset owned by a business; however, this has historically been interpreted to refer to a collection of assets sufficient to run a business or business division.

The term 'acquire' includes both legal and beneficial acquisition, including entry into an agreement to acquire assets or shares that is not conditional on clearance or authorisation.

Partial acquisitions of shares can be caught, and there is no de minimis transaction, asset or turnover value threshold.

Law stated - 1 March 2025

Scope of legislation
What types of joint ventures are caught?

Joint ventures involving an acquisition of assets or shares can be caught by the merger control provisions. Joint ventures that do not involve the acquisition of assets or shares can be caught by the restrictive trade practices prohibitions contained in Part 2 of the Act.

Law stated - 1 March 2025

Scope of legislation
Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of 'control' in the Act's general merger control regime. Acquisitions of assets of a business or shares, including minority or partial acquisitions, may breach the Act where:

- the acquirer will be able to 'directly or indirectly . . . exert a substantial degree of influence over the activities of the other' (interpreted as being able to bring real pressure to bear on the decision-making process of the target); and
- that influence is likely to substantially lessen competition in the market.

The NZCC considers that the ability to exert a substantial degree of influence can arise at any level of shareholding. The NZCC does not provide indicative thresholds in its Mergers and Acquisitions Guidelines (the M&A Guidelines) given that other factors, such as the spread of shareholding, will be relevant to determining whether an individual shareholder has the necessary degree of influence. Other case-specific factors will also impact this assessment, including an individual shareholder's influence on management or policy.

The NZCC previously investigated the acquisition of 19.99 per cent of the shares in a listed company and blocked the proposed acquisition of 22.5 per cent of the shares in a listed company (where there was also a cooperation agreement between the parties).

There is an additional process that may be triggered where an overseas person acquires a controlling interest in a New Zealand company.

Law stated - 1 March 2025

Thresholds, triggers and approvals

What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are no asset or turnover thresholds. The test is simply whether the acquisition of assets of a business or shares will or would be likely to substantially lessen competition in a market in New Zealand.

The M&A Guidelines include post-merger market share concentration indicators that are used to 'identify those mergers that are less likely to raise competition concerns'. These are:

- where the merged firm's post-merger market share is less than 40 per cent in a non-concentrated market (where the three largest firms post-transaction have a combined market share of less than 70 per cent); and
- where the merged firm's post-merger market share is less than 20 per cent in a concentrated market (where the three largest firms post-transaction have a combined market share of 70 per cent or more).

The NZCC stresses these are 'only initial guides' and that a 'merger not exceeding these indicators may still substantially lessen competition'. For this reason, the NZCC no longer refers to these indicators as 'safe harbours' as it considered that the term indicated a 'degree of safety that did not exist'. Accordingly, market share measures remain insufficient in and of themselves to establish whether a merger is likely to have the effect of substantially lessening competition.

Law stated - 1 March 2025

Thresholds, triggers and approvals

Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Merger filings in New Zealand are voluntary. Parties can (but are not obliged to) seek clearance or authorisation of a proposed merger but there is no statutory obligation to do so; however, if:

- a merger has been implemented or is no longer conditional on NZCC approval, it cannot then be cleared or authorised retrospectively; and
- parties reach that point without obtaining NZCC approval, the NZCC may choose to open an investigation, and it has a range of enforcement options at its disposal.

Law stated - 1 March 2025

Thresholds, triggers and approvals

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The merger control prohibitions in the Act extend to acquisitions outside New Zealand 'to the extent that [the acquisition] affects a market in New Zealand'.

Accordingly, an offshore merger involving two or more major suppliers of a product or service to New Zealand may be caught by the Act irrespective of whether either party has a physical presence or subsidiary in New Zealand.

However, the practical ability of the New Zealand authorities to enforce orders made against offshore companies may limit the recoverability of penalties from foreign firms.

To address such limits regarding acquisitions by Australian businesses, New Zealand has legislation (the Trans-Tasman Proceedings Act 2010) and a mutual enforcement treaty with Australia that effectively removes the bar on the NZCC enforcing penalties against Australian companies and directors.

In respect of acquisitions by businesses from other countries, the NZCC may seek remedies where an 'overseas person' acquires a controlling interest in a New Zealand company through an acquisition outside New Zealand ('controlling interest' is defined as control of the board or the ability to control more than 20 per cent of the voting rights, issued shares or dividend entitlements). The NZCC can apply to the High Court within 12 months of the acquisition for a declaration that the acquisition will substantially lessen competition in a market in New Zealand.

If the High Court makes such a declaration, it may make an order requiring that the New Zealand company cease carrying on business in New Zealand, or dispose of shares or assets. Contravention of any such declaration is subject to the same penalties as a breach of the merger control provision (the difference being that the penalties are enforceable against the New Zealand company rather than the overseas acquirer).

Law stated - 1 March 2025

Thresholds, triggers and approvals

Are there also rules on foreign investment, special sectors or other relevant approvals?

Foreign investment in New Zealand is governed by the Overseas Investment Act 2005, (OIA) under which consent is required if an overseas person proposes to directly or indirectly:

- acquire a qualifying interest (being a freehold interest or a leasehold (or equivalent) interest for a term of 10 years or more) in sensitive land (ie, non-urban land greater than five hectares, residential land and other parcels of land that are classified as sensitive owing to their special characteristics), including through acquiring a more than 25 per cent indirect interest in the securities of an entity that directly or indirectly has a qualifying interest in sensitive land;
- acquire a more than 25 per cent interest in significant business assets, being a New Zealand business or business assets, where the consideration provided for the New Zealand business, or the gross value of the assets of the New Zealand business, exceeds NZ$100 million; or
- establish a business in New Zealand where the business is carried on for more than 90 days in any year and the total expenditure expected to be incurred, before commencing the business, in establishing the business, exceeds NZ$100 million.

In respect of investments in significant business assets, the Overseas Investment Office (OIO) will grant consent if it is satisfied that the investor meets the investor test, which involves considering certain character and capability criteria to determine whether the relevant entities and persons are suitable to own or control those New Zealand assets.

For investments in sensitive land, in addition to meeting the investor test, the investor must usually also satisfy the benefit test, meaning that the transaction must be likely to result in a net benefit to New Zealand when taking specific economic, environmental and other benefit factors into account.

Investments in residential land, forestry, farmland and fishing quotas have differential treatment under the consent regime.

In addition, all applications for consent may also be subject to the national interest test, which empowers the OIO and the relevant minister to consider whether the investment is contrary to New Zealand's national interest. The test mandatorily applies to investments in certain strategically important businesses and to investments by non-New Zealand government investors.

Even in cases where OIO consent is not required under the significant business assets or sensitive land pathways, investors still need to consider whether the transaction involves New Zealand land or assets that are used in a strategically important business. If so, the transaction may be subject to mandatory or voluntary notification to the OIO for review to determine whether it is likely to pose significant risks to New Zealand's national security or public order. Any transaction involving a qualifying investment in a strategically important business that is not mandatorily or voluntarily notified by the investor can be called in for review by the OIO in conjunction with the relevant minister.

If a transaction is deemed to present risks to New Zealand's national interest, national security or public order under either of the above tests, the investment may be blocked, unwound or have conditions imposed.

The OIA is currently undergoing reform, with new legislation expected to be in place by the end of 2025. The proposed reforms aim to give more confidence and certainty to foreign investors and would include changes such as:

- consolidation of the existing core tests (investor test, benefit to New Zealand test and the national interest test) into a single modified national interest test to apply to all in scope transactions aside from residential land, farmland and fishing quota;
- a starting assumption that an investment transaction can proceed unless there are national interest risk factors identified;
- a new 15 day fast-track consent assessment process for most investments;
- wider acknowledgement of the benefits investment can provide to New Zealand's economy, including having regard to whether a national interest risk may be offset by the benefits of the transaction; and
- strengthening the government's ability to intervene on the rare occasion that a transaction is not in the national interest

Law stated - 1 March 2025

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As notification is voluntary, no sanctions apply for failing to file. However, mergers cannot be cleared or authorised retrospectively, and the Commerce Commission (NZCC) may investigate non-notified mergers that it considers could substantially lessen competition in a New Zealand market.

In the past few years, the NZCC has continued to investigate and take enforcement proceedings against non-notified mergers. In 2019, the NZCC challenged First Gas Limited's acquisition of certain gas distribution assets in the High Court and, in 2020, the NZCC agreed to settle High Court proceedings against Wilson Parking for acquiring certain car park leases (with Wilson Parking agreeing to divest some car park leases as part of that settlement). In July 2022, the High Court ordered software company Objective Corporation Limited to pay a NZ$1.54 million penalty in relation to its non-notified acquisition of Master Business Systems Limited. In December 2023, the NZCC filed proceedings relating to Alderson Logistics Limited's non-notified acquisitions of Supa Shavings and Mooreys. These procedures are ongoing.

According to the NZCC's most recent statistics, in the financial year ending June 2024, the average time taken for the NZCC to reach a decision for clearances is 69 working days. There has been one completed merger authorisation in the past three years, albeit the NZCC

granted clearance not authorisation. The past three authorisation applications have taken between 66 and 221 working days for the NZCC to reach a decision.

Law stated - 1 March 2025

Filing formalities

Which parties are responsible for filing and are filing fees required?

Applications for clearance or authorisation of a merger are made by the acquirer. The fee is NZ$3,680 to seek clearance or NZ$36,800 to seek authorisation (including goods and services tax).

Law stated - 1 March 2025

Filing formalities

What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Commerce Act 1986 (the Act) provides the NZCC with 40 working days to decide on clearance applications and 60 working days for authorisation applications, but in practice the NZCC can, and frequently does, seek extensions. If applicants do not agree to such an extension, the application is deemed to have been declined if the NZCC has not made a decision by the deadline. This means that, in practice, merging parties always agree to extensions sought by the NZCC.

For cases determined during the NZCC's financial year ending June 2024 the NZCC took on average 69 days to make a clearance determination. There is more variability with respect to how long the NZCC takes to reach an authorisation application decision. The past three merger authorisation applications have taken between 66 and 221 working days for the NZCC to reach a decision.

As the NZCC cannot grant clearance or authorisation retrospectively, any proposed merger that might give rise to competition issues should be made conditional on NZCC approval and should not complete until approval is obtained.

Law stated - 1 March 2025

Pre-clearance closing

What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Mergers cannot be cleared or authorised retrospectively, so a transaction agreement must remain conditional on regulatory approval until clearance or authorisation is obtained.

If the NZCC believes a merger (that is no longer conditional) may breach the Act, it can investigate and, if necessary, initiate proceedings. The maximum penalty for mergers that

breach the Act is the greater of NZ$10 million, three times the commercial gain of the contravention or (if that cannot be ascertained) 10 per cent of group turnover (or NZ$500,000 for individuals). The High Court can also impose injunctions and make divestiture (and other) orders. If the NZCC was considering a clearance or authorisation application at the time of completion, it would close that clearance investigation and open an investigation into a potential breach.

In 2008, the Court of Appeal upheld penalties for breach of the merger provisions of the Act (***New Zealand Bus Ltd v Commerce Commission*** [2008] 3 NZLR 433). The acquirer had filed for clearance, but subsequently withdrew its application and completed the acquisition. The NZCC brought proceedings, alleging that the acquisition was likely to substantially lessen competition, and the High Court ordered the acquirer to pay a penalty of NZ$500,000. Two directors of the vendor were found liable as accessories for agreeing to waive the clearance condition.

Accordingly, both acquirers and vendors need to be aware that, while merger clearance remains voluntary, for potentially problematic mergers:

- seeking clearance may be the safest option; and
- withdrawing a clearance application and completing a transaction is likely to be high risk.

Until closing, merger parties are treated as separate businesses for the purposes of the Act's restrictive trade practices prohibitions. Therefore, any integration between parties prior to closing gives rise to gun-jumping risks under the restrictive trade practices prohibitions. In 2010, the NZCC successfully prosecuted two pathology businesses for agreeing not to compete pending a proposed merger (***Commerce Commission v New Zealand Diagnostic Group Ltd and Ors*** HC Auckland CIV 2008-404-4321, 19 July 2010). The High Court imposed penalties of NZ$65,000 and NZ$35,000, respectively. Those fines would likely be significantly higher in today's context (and intentional cartel conduct is now a criminal offence as of April 2021).

Law stated - 1 March 2025

Pre-clearance closing

Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Foreign-to-foreign mergers that close before obtaining clearance are subject to the same potential sanctions as domestic mergers. However, in practice, there are limits on the ability of New Zealand authorities to enforce orders made against offshore companies; therefore, there is an additional process for the NZCC to seek remedies in respect of acquisitions by overseas persons.

Although the NZCC has not, to date, used these powers, it has opened investigations into foreign-to-foreign mergers since the introduction of these powers in 2017.

Law stated - 1 March 2025

Pre-clearance closing

What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The NZCC does not have jurisdiction to clear any merger after closing. Accordingly, the New Zealand aspect of the merger would need to remain conditional until clearance is obtained if clearance is advisable.

Law stated - 1 March 2025

Public takeovers

Are there any special merger control rules applicable to public takeover bids?

No; however, in practice, the NZCC applies lower thresholds for finding a 'substantial degree of influence' for public companies than for private companies (the NZCC's Mergers and Acquisitions Guidelines indicate that a shareholding of 10 per cent could give rise to a substantial degree of influence if 'the balance of the shareholding in the firm is a mix of smaller shareholders').

The Takeovers Code (the Code) also applies to listed companies. The Code is administered by the Takeovers Panel, which is separate from the NZCC. The Code is far-reaching and should be considered carefully in relation to public company acquisitions.

Law stated - 1 March 2025

Documentation

What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There are prescribed application forms for both clearances and authorisations. The forms require information concerning the transaction, the parties, the rationale, the markets, etc. Economic evidence is often advisable for more complex clearance cases. For authorisation applications, economic analysis of public benefits and detriments is invariably required.

The applicant must also provide the documents bringing about the merger and ancillary agreements, and documentation prepared for or considered by senior management and directors that sets out the rationale for the merger, analyses the merger or competitive conditions, and includes the business plans, annual reports and management accounts.

Although there are no sanctions for not providing all required information, until the NZCC is satisfied it has received all required information, it will not register the application.

There are sanctions for deliberately providing incorrect information, including deliberately misleading the NZCC about the existence of requested information as it is an offence under the Act to deceive or knowingly mislead the NZCC. Companies found in breach can be fined up to NZ$300,000, and individuals up to NZ$100,000.

Law stated - 1 March 2025

Investigation phases and timetable

What are the typical steps and different phases of the investigation?

There are no formal phases to a clearance process mandated by statute. However, the NZCC has published guidance setting out its expected process and timelines for clearance applications.

Prior to formal filing, merger parties are encouraged to contact the NZCC as early as possible to inform it of potential applications and engage in pre-notification consultation. This typically enables the NZCC to plan ahead, which can help expedite the process. The NZCC generally expects a substantially developed draft alongside supporting documents at least a week prior to pre-notification consultations. The NZCC will generally advise whether parties need to supplement their application with further information before it would be willing to register a formal filing.

Once the NZCC registers a formal filing, a media release is published on its website to announce that it has received the application. Subsequently, the NZCC's indicative time frames are as follows, although these can (and in practice, do) vary depending on complexity and opposition:

- By working day five, the NZCC aims to publish a draft investigation timeline on its website, alongside a statement of preliminary issues. This sets out the issues that the NZCC intends to explore and invites submissions from third parties, which are typically due by working day 15.
- The NZCC aims to complete initial interviews and information gathering by working day 30.
- By working day 40, the NZCC is required to either reach a determination or obtain an extension. If the NZCC has not granted clearance by working day 40, it will seek an extension and, if it is not satisfied at that stage that the transaction would not likely substantially lessening competition, publish a statement of issues setting out the issues it is continuing to investigate by working day 50. Both the merger parties and third parties are able to submit responses, which are typically due by working day 65.
- If the NZCC has not granted clearance by working day 90, it will likely issue a statement of unresolved issues, setting out the issues that it considers as not having been satisfactorily addressed. Merging parties and third parties will then have until approximately working day 110 to make submissions.
- Following submissions on the statement of unresolved issues (working day 130 or beyond), the NZCC will decide to either grant or decline clearance.

Law stated - 1 March 2025

Investigation phases and timetable

What is the statutory timetable for clearance? Can it be speeded up?

The Act provides the NZCC with 40 working days to decide clearances and 60 working days to decide authorisations; in practice, the NZCC often seeks extensions. If applicants do not agree to an extension, it is open to the NZCC to simply fail to make a determination in the prescribed time frame, in which case the application is declined. This means that merging parties, in practice, virtually always agree to extensions sought by the NZCC.

According to the NZCC's most recent statistics, in the financial year ending June 2024, the average time taken for the NZCC to reach a decision for clearances is 69 working days. There has been one completed authorisation in the past three years, albeit the NZCC granted clearance not authorisation. The past three merger authorisation applications have taken between 66 and 221 working days for the NZCC to reach a decision.

The best ways to expedite the NZCC's process are to:

- contact the NZCC as early as possible about potential applications and engage in a pre-notification consultation;
- have all required information ready to submit to the NZCC at least two weeks prior to the targeted formal filing date; and
- respond expeditiously to all NZCC information and interview requests.

Law stated - 1 March 2025

SUBSTANTIVE ASSESSMENT

Substantive test
What is the substantive test for clearance?

To grant clearance, New Zealand's Commerce Commission (NZCC) must be satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market. If it is not so satisfied, it must decline to give clearance.

Analytically, this test requires the NZCC to compare the situation if the transaction does not proceed (the counterfactual) against the situation if the transaction does proceed (the factual). In assessing the counterfactual, the NZCC must consider any possible hypothetical that has a real chance of eventuating. New Zealand courts have stated a hypothetical can have a real chance of occurring despite it being less likely than not. This means the NZCC can consider multiple counterfactual outcomes and will compare the factual against the most competitive of these (effectively a worst-case scenario analysis).

There is no separate failing-firm defence in the Commerce Act 1986 (the Act); however, as the NZCC's analysis is forward-looking, parties may argue that at least one of their businesses will leave the market if the transaction does not proceed. The NZCC has accepted such arguments, provided that this can be demonstrated to a satisfactory level of probability. The NZCC's Mergers and Acquisitions Guidelines include an appendix setting out its approach to assessing failing-firm arguments.

Law stated - 1 March 2025

Substantive test

Is there a special substantive test for joint ventures?

No. If a formation of a joint venture involves the acquisition of business assets or shares, it will be analysed in the same manner as any other merger.

However, other aspects of a joint venture relationship, such as any ongoing collaboration, are analysed pursuant to the restrictive trade practices regime in Part 2 of the Act, which prohibits:

- cartel arrangements between actual or potential competitors (such as price fixing, output restriction or market allocation arrangements) (section 30); and
- arrangements that have the purpose, effect or likely effect of substantially lessening competition in a market in New Zealand (section 27).

There is a collaborative activities exception to the section 30 cartel prohibition. The NZCC issued its Competitor Collaboration Guidelines on the application of this exception, which does not provide protection from the section 27 or section 47 prohibition. In November 2023, the NZCC released its Collaboration and Sustainability Guidelines which provide guidance on the situations in which the NZCC considers businesses can collaborate to pursue sustainability goals without breaching competition laws.

Law stated - 1 March 2025

Theories of harm

What are the 'theories of harm' that the authorities will investigate?

Broadly speaking, the NZCC will consider the extent to which an acquisition will increase the risk of:

- unilateral effects, where an acquisition removes a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the combined firm can profitably increase prices (often said to be by 5 per cent or more) without the profitability of that increase being thwarted by rival firms' competitive responses;
- coordinated effects – that is, the scope for an acquisition to increase the potential for the combined firm, along with some of or all the remaining competitors, to (implicitly) coordinate their behaviour so that prices increase in the market; this typically occurs in highly concentrated markets (four or fewer competitors) where the remaining competitors are of a similar size or market share to each other;
- conglomerate effects, where the acquirer's and target's products are complementary or adjacent to one another, such that the acquisition could result in the acquirer having an unmatched portfolio of products it can use to lessen competition in the market by bundling or tying products together across that portfolio;
- vertical input foreclosure, where the acquirer is acquiring a supplier/customer and could cut off access to inputs from its competitors and lessen competition; and
-

vertical customer foreclosure, where the acquirer is acquiring a supplier/customer and could lessen competition by cutting off access to customers from its competitors.

Law stated - 1 March 2025

Non-competition issues

To what extent are non-competition issues relevant in the review process?

The NZCC is an independent Crown entity and is not subject to direction from the government; however, section 26 of the Act provides that when exercising its powers and functions, the NZCC must 'have regard to the economic policies of the [g]overnment' where such policies are provided to the NZCC in writing by the Minister of Commerce and Consumer Affairs and laid before Parliament.

This is a highly transparent process and such statements are rarely issued; however, they have been issued in relation to specific applications before the NZCC. Nevertheless, the ultimate decision remains with the NZCC and, although it must consider such a statement, the statement does not change the competition, or public benefits and detriments, assessment that the NZCC must make.

Besides the potential for a section 26 statement, non-competition issues are not relevant in the clearance context (which focuses on whether there is a substantial lessening of competition).

Parties may also apply for authorisation for a merger where the NZCC can approve a transaction that would otherwise substantially lessen competition where that transaction would be likely to result in public benefits that outweigh the detriments arising from the lessening of competition. Public benefits and detriments have historically been predominantly economic efficiencies.

However, in its 2017 decision to decline the merger of two media organisations, Fairfax New Zealand Limited and NZME Limited, the NZCC took a loss of media plurality into account as a public detriment in its analysis. This consideration was upheld on appeal, so the NZCC's Authorisation Guidelines now set out that 'benefits or detriments can relate to matters such as the environment, health, media or social welfare'.

Non-competition factors might also arise through the operation of the Treaty of Waitangi, given the NZCC's stated commitment to support future-focused Māori–Crown relationships through taking a good-faith, collaborative approach to engagement with Māori.

Law stated - 1 March 2025

Economic efficiencies

To what extent does the authority take into account economic efficiencies in the review process?

When considering a clearance application, the only question is whether the merger has the effect of substantially lessening competition in a market. The test implies some consideration of efficiencies within the affected market or markets, as it is a net effects test.

However, the NZCC considers it to be rare that efficiencies would be sufficient to outweigh what would otherwise be a substantial lessening of competition. Accordingly, a merger that relies on efficiencies is better dealt with under the authorisation regime.

Law stated - 1 March 2025

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers
What powers do the authorities have to prohibit or otherwise interfere with a transaction?

New Zealand's Commerce Commission (NZCC) cannot unilaterally prohibit a transaction, declare the Commerce Act 1986 (the Act) has been breached or impose penalties. It can, however, bring an action in the High Court seeking remedies such as:

- an injunction preventing a proposed merger;
- a declaration that a merger breaches (or would breach) the Act;
- an order for divestiture of assets or shares; or
- penalties in the amount of up to the higher of NZ$10 million, three times the commercial gain of the contravention or (if that cannot be ascertained) 10 per cent of the group turnover per offence for bodies corporate and NZ$500,000 per offence for individuals.

The Act also gives the NZCC broad powers of investigation, and failure to comply with any compulsory NZCC request can give rise to penalties of up to NZ$300,000 for a company and NZ$100,000 for an individual.

Law stated - 1 March 2025

Remedies and conditions
Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The NZCC can accept undertakings to divest assets or shares in the context of either a formal clearance or authorisation application, or an investigation of a merger (where the parties have not sought clearance or authorisation). The NZCC cannot accept behavioural undertakings in relation to mergers.

Law stated - 1 March 2025

Remedies and conditions

What are the basic conditions and timing issues applicable to a divestment or other remedy?

If given in the context of a formal clearance or authorisation process, a divestment undertaking may be proposed as part of the initial application or as an amendment, but must be offered prior to the NZCC's final determination. If an undertaking is accepted by the NZCC, it is deemed to form part of the application. Typically, merging parties will then have six months (or sometimes up to 12 months) to fulfil the undertaking. Potential acquirers of assets or shares do not have to be identified at the time the undertaking is given, but must ultimately be approved by the NZCC.

If an acquirer of assets or shares does not fulfil a divestment undertaking by the specified date (which is negotiated with the NZCC), the parties lose the benefit of the clearance. If the NZCC is satisfied that there is a contravention of an undertaking, it can apply to the High Court for a divestment order or pecuniary penalties.

Outside of a formal clearance or authorisation process, the NZCC also has a separate power to accept a written undertaking to dispose of assets or shares. Again, if the NZCC considers that a person has breached such an undertaking, it may apply to the High Court for orders directing the person to comply with the undertaking, or pay to the Crown an amount reasonably attributable to the breach or any consequential relief that the High Court considers appropriate.

Law stated - 1 March 2025

Remedies and conditions

What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The NZCC can apply to the High Court for a declaration if an overseas person acquires a controlling interest, either directly or indirectly, in a New Zealand body corporate through an acquisition outside New Zealand. The NZCC has not yet used these powers (introduced in 2017), although it has investigated foreign-to-foreign mergers since then, including one where it is understood that a divestment remedy was provided to the NZCC to resolve its concerns.

Law stated - 1 March 2025

Ancillary restrictions

In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The NZCC can only give clearance for the acquisition itself. Ancillary restraints will be governed by the restrictive trade practices provisions of Part 2 of the Act, which prohibit cartel provisions or arrangements that have the purpose, effect or likely effect of substantially lessening competition in any market.

There is an exception to these restrictive trade practices prohibitions for covenants in business acquisition agreements that are 'solely for the protection of the purchaser in respect of the goodwill of the business'. This provides an exception for restraints imposed on vendors that are reasonable in both scope and duration to protect the goodwill being acquired.

Law stated - 1 March 2025

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

Are customers and competitors involved in the review process and what rights do complainants have?

New Zealand's Commerce Commission (NZCC) seeks information from competitors, suppliers and customers to test the information provided by the applicant. It publishes a public version of the application on its website to enable third parties to make submissions.

In addition, during its clearance process, the NZCC publishes statements on its website outlining the issues under consideration to allow interested parties the opportunity to submit. It will typically upload a non-confidential version of any third-party submission to its website to allow the merger parties to respond.

If an acquisition occurs in the absence of a clearance or authorisation, both the NZCC and interested parties have the ability to apply to the High Court for relief. At that stage, the usual Court rules relating to disclosure and documents apply.

Law stated - 1 March 2025

Publicity and confidentiality

What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Once an application is received by the NZCC, it will issue a media release announcing the fact of the application, the parties' identities and a link to the public version of the application document (confidential or commercially sensitive information, including the parties' estimates of market share, is excluded from the public version).

Subsequently, the NZCC will publish on its website any statement of preliminary issues, statement of issues, statement of unresolved issues and final decision, and public versions of any further submissions (from the parties or third parties).

As a public body, the NZCC is subject to the Official Information Act 1982, meaning any person can request information held by the NZCC, which includes any information submitted as part of a merger process. Under the Official Information Act's principle of availability, such information should be disclosed unless there is a good reason not to do so (such as where disclosure would disclose a trade secret or unreasonably prejudice the commercial position of the provider or subject of the information). The NZCC will consider requests for

information in line with its obligations under the Official Information Act. The NZCC has a good track record of protecting genuinely confidential or commercially sensitive information.

Additionally, as of May 2022, the NZCC is able to share any information it holds, including information acquired in the merger approval process, with other government agencies or statutory entities, subject to appropriate confidentiality obligations.

Law stated - 1 March 2025

Cross-border regulatory cooperation

Do the authorities cooperate with antitrust authorities in other jurisdictions?

The NZCC regularly cooperates with overseas regulators regarding merger applications and has a particularly close relationship with the Australian Competition and Consumer Commission (ACCC). The two regulators coordinate through the formal cross-appointment of commissioners, including by having the NZCC cross-appointee appointed to the panel deciding ACCC decisions that involve both Australia and New Zealand (and vice versa).

Additionally, the NZCC has statutory powers to enter into cooperation agreements with its overseas counterparts to enable it to share compulsorily acquired information and perform searches for the purposes of assisting an overseas regulator. Unless such a cooperation agreement has been entered into, confidential information provided to the NZCC cannot be shared with another regulator without a waiver from the provider of the information, as New Zealand's domestic confidentiality and privacy laws will continue to apply. To date, the NZCC has entered into formal cooperation agreements with the ACCC and the Canadian Competition Bureau.

The NZCC is also a member of the International Competition Network and maintains contact with overseas regulators through that network. In 2020, the NZCC signed a multilateral mutual assistance and cooperation framework with authorities in Australia, Canada, the United Kingdom and the United States to enhance international cooperation on competition enforcement. This allows for the sharing of public information and investigative information to the extent permitted by law or by waiver of confidentiality and the coordination of investigative activities.

In 2023, the NZCC entered into a new initiative, the Pacific Island Network of Competition Consumer and Economic Regulators. This initiative includes regulators from New Zealand, Australia, the Cook Islands, Fiji, French Polynesia, Kiribati, New Caledonia, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. Through the initiative, regulators will be able to share information and intelligence.

Law stated - 1 March 2025

JUDICIAL REVIEW

Available avenues

What are the opportunities for appeal or judicial review?

Appeals of clearance or authorisation decisions made by New Zealand's Commerce Commission (NZCC) may be made to the High Court by giving notice of appeal within 20 working days of the date of the NZCC's decision or within such further time as the Court allows. Appeals proceed by way of rehearing. Persons entitled to bring an appeal are:

- the applicant;
- the target; and
- for authorisations, any person who has a direct and significant interest in the application (provided that they participated in the NZCC's process prior to its decision).

Third parties cannot appeal an NZCC clearance decision but can judicially review the clearance process.

The High Court, on appeal, can confirm, modify or reverse the NZCC's determination, or exercise any powers that could have been exercised by the NZCC. The Court can also direct the NZCC to reconsider, either generally or in respect of specified matters, the matter to which the appeal relates. Parties can subsequently appeal a High Court decision to the Court of Appeal and, if leave to appeal is granted, to the Supreme Court.

Law stated - 1 March 2025

Time frame

What is the usual time frame for appeal or judicial review?

Appeals may be made to the High Court by giving notice of appeal within 20 working days of the date of the NZCC's decision.

It is difficult to assess the usual time frame for appeals against the NZCC's merger determinations as there have been very few. The most recent appeals to be heard in both the High Court and Court of Appeal were those of media organisations Fairfax New Zealand Limited and NZME Limited against the NZCC's decision to decline their application for clearance or authorisation to merge:

- The NZCC declined the application on 3 May 2017.
- The parties filed a notice of appeal on 26 May 2017, and the High Court hearing was held from 16 to 27 October 2017.
- On 18 December 2017, the High Court issued its judgment, in which it upheld the NZCC's decision.
- On 22 February 2018, the High Court granted leave to appeal its decision to the Court of Appeal.
- The hearing was held from 5 to 8 June 2018.
- On 26 September 2018, the Court of Appeal issued its judgment, upholding the NZCC's decision.

Law stated - 1 March 2025

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record
What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The identification and investigation of non-notified mergers have become a publicly stated priority of New Zealand's Commerce Commission (NZCC) ever since it identified an increase in such mergers in 2018. Consequently, there have been several non-notified mergers across all industries and sectors that have been investigated, resulting in enforcement action or requiring commitments from merger parties to resolve NZCC concerns. As at March 2025 the NZCC has one investigation into a non-notified acquisition open.

Approximately every four years, the NZCC publishes a statement of intent, which provides insight into its overall direction and strategic objectives for the forthcoming period. In the NZCC's previous statement of intention and media releases, the NZCC has indicated that an enduring priority for the NZCC is identifying and investigating non-notified mergers. Reflecting this, since 2020, the NZCC has:

- obtained a divestment undertaking from Wilson Parking, following its non-notified acquisition of an additional car park lease in Wellington – Wilson Parking also agreed to pay NZ$500,000 towards the NZCC's costs;
- opened an investigation into Beijer Ref AB's non-notified acquisition of Heatcraft New Zealand Limited, being an acquisition in the refrigeration and air conditioning equipment industry – the investigation was closed without further action in December 2020;
- opened an investigation into the non-notified acquisition of Wallace Group GP Limited by interests associated with Glenninburg Holdings Limited, both involved in the animal rendering industry – this investigation was closed without further action in May 2022;
- filed proceedings in relation to Objective Corporation Limited's non-notified acquisition of Master Business Systems Limited, alleging that the acquisition substantially lessened competition in certain building software markets – the High Court imposed a NZ$1.54 million penalty in relation to the acquisition in July 2022; and
- filed proceedings in relation to Alderson Logistics Limited's acquisitions of Supa Shavings and Mooreys, alleging that the transactions substantially lessened competition in the chicken and goat bedding market in the Waikato. These proceedings are ongoing.

Law stated - 1 March 2025

Reform proposals
Are there current proposals to change the legislation?

In December 2024, the government announced that the Ministry of Business Innovation and Employment would carry out a review of the Commerce Act, including whether the current

merger regime under Part 3 of the Commerce Act effectively prevents anticompetitive transactions. The proposed reforms that are being considered include:

- clarifying that the 'substantial lessening of competition' test includes 'creating, strengthening, or entrenching a substantial degree of market power in a market' (which would result in alignment with the new Australian test);
- a prohibition on 'creeping' or 'serial' acquisitions by providing that all of the acquiring party's acquisitions in the past three years may be combined when assessing the competitive impact of the current acquisition;
- clarifying the 'substantial degree of influence' test for partial acquisitions;
- granting the NZCC the power to require:
    - specific parties to apply for clearance; or
    - certain companies with a substantial market power to notify the Commission of any acquisition; and
- allowing the NZCC to accept behavioural undertakings.

At the time of writing, the review is still in the early stages of reform, with the government due to make its decision on what (if any) changes should be made to the Commerce Act later in 2025.

Law stated - 1 March 2025

UPDATE AND TRENDS

Key developments of the past year
What were the key cases, decisions, judgments and policy and legislative developments of the past year?

After opening an investigation in January 2023, the New Zealand Commerce Commission (NZCC) filed proceedings in December 2023 in relation to Alderson Logistics Limited's acquisitions of Supa Shavings and Mooreys, alleging that the acquisition substantially lessened competition for the supply of chicken and goat bedding in the Waikato region. The outcome of this case is yet to be determined.

In March 2024, the NZCC published its review of, and learnings from, previous merger applications which the NZCC had either cleared, authorised or declined between 2014 and 2019. The NZCC found that market participants tend to overstate the likelihood of entry and expansion, and overestimate the ability and likelihood of third parties to exercise countervailing buyer power. The NZCC also found that dynamic markets may require alternative analytical frameworks for defining relevant markets and assessing likely competitive effects. The NZCC has announced that, going forward, it will undertake ex post reviews of its merger decisions every two years.

In April 2024, the NZCC received its first merger authorisation application since 2018. Evergreen NZ Holdings sought clearance, or in the alternative, authorisation, to acquire ACM Holdings (NZ) limited, its competitor in cash distribution services. The NZCC granted

clearance in October 2024, satisfied that the proposed acquisition would not substantially lessen competition in the relevant markets.

In July 2024, the NZCC declined Alpha Theta and Serato clearance application to merge into one DJ software company. This was the first merger application to be declined in more than six years, and the NZCC concluded that the merged entity would be unlikely to face competitive constraints, likely resulting in unilateral effects.

In October 2024, the NZCC declined Foodstuffs North Island's and Foodstuffs South Island's clearance application to merge into one New Zealand owned national grocery cooperative. The parties currently share ownership of brands including New World, PAK'nSAVE, Four Square and Pams. This was the first declined clearance in which the NZCC cited buyer power and demand-side concerns as the reasons for declining clearance. Foodstuffs have filed a notice of appeal in the High Court.

Law stated - 1 March 2025