



**Australian Competition and Consumer Commission and
New Zealand Commerce Commission**

COOPERATION PROTOCOL FOR MERGER REVIEW

August 2006

The Australian and New Zealand economies are highly integrated through considerable cross border trade of goods and services and movement of labour and capital. Trans-Tasman business activity enhances competition in the markets of each country and facilitates the efficient allocation of resources for the benefit of Australian and New Zealand consumers. Cooperation between the Australian Competition and Consumer Commission (ACCC) and New Zealand Commerce Commission (NZCC) is desirable to reduce the compliance costs to trans-Tasman business activity, reduce the transaction costs to the agencies in applying their competition laws, and increase the effectiveness of competition laws in each country. Such cooperation is also desirable as a general principle, consistent with both governments' shared objective of streamlining the trans-Tasman business environment.

This document outlines a protocol for cooperation between the ACCC and NZCC in relation to merger review.¹ The ACCC and the NZCC will seek to apply this protocol to the greatest possible extent, consistent with their priorities, aims, functions and respective laws, interests and enforcement responsibilities, when they:

- (a) review the same merger transaction;
- (b) exchange information for use in a merger review being conducted by either agency; or
- (c) otherwise exchange information with the aim of assisting the respective agencies in carrying out their merger review processes and functions.

This protocol formalises a number of practices which are already routinely employed by the ACCC and NZCC and builds on current good practice by setting out further opportunities and mechanisms for cooperation between the agencies. Cooperation may include coordination of agency processes, the sharing of merger party and third party information held by each agency, sharing agency analysis and assessment of transactions and, from time to time, gathering information on behalf of the other agency.

¹ Cooperation between the ACCC and NZCC already takes place under the 1994 Cooperation and Coordination Agreement between the two agencies, as well as under agreements between the ACCC, NZCC and various other agencies.

This protocol acknowledges both the similarities in, and the differences between, the legislative context and merger review processes in Australia and New Zealand. In reviewing merger transactions under the *Trade Practices Act 1974* in Australia and the *Commerce Act 1986* in New Zealand both the ACCC and the NZCC can have enforcement and adjudicative roles. Neither regime has mandatory pre-merger notification thresholds; accordingly, both jurisdictions rely on business, the legal and advising communities and the general public being well informed of merger laws, processes and analytical approaches. Both agencies have the capacity to authorise merger transactions on public benefit grounds. On the other hand, differences between the regimes include the level of formality of merger review with Australia being characterised by an informal review process; whereas New Zealand operates under a formal regime for clearances. This protocol has sufficient flexibility to allow for differences in approach while capitalising on opportunities for coordination and information sharing. This protocol applies to all classes of merger reviews conducted by the respective agencies and would include mergers that are the subject of either formal or informal processes, and also facilitates coordination and cooperation of investigations of non-notified mergers in both jurisdictions.

In the event that this protocol requires either agency to behave in a way that is contrary to the agency's priorities, aims, functions or governing legislation, or it is otherwise determined that it is not in the interests of the agency to comply with this protocol in respect of a specific merger review, the priorities, aims, functions, relevant governing legislation and interests of the agency will take precedence.

Objectives

1. This protocol is designed to assist cooperation in merger review between the ACCC and the NZCC. The practices set out in this protocol are intended to facilitate the effective and efficient performance of functions by the ACCC and the NZCC; to promote fully informed decision-making on the part of both agencies; and to lessen the possibility of differences between the agencies in the application of their competition laws where these differences are not the result of statutory provisions or case law. The protocol will also benefit businesses by improving the regulatory environment, reducing the burden on merging parties and third parties and increasing the overall transparency of merger review processes.
2. A particular objective of this protocol is to enhance coordination and information sharing between the ACCC and NZCC in relation to merger transactions involving trans-Tasman or global businesses subject to review in both Australia and New Zealand. While recognising that the competition effects relevant to merger analysis on each side of the Tasman may differ depending on the merger transaction and the relevant markets in question, it is considered that, where the ACCC and the NZCC are reviewing the same transaction, both agencies have an interest in

minimising procedural conflicts, and reaching outcomes based on complete information and, insofar as possible, non-conflicting outcomes (except where differences arise due to differences in market circumstances, competition effects or statutory requirements).

3. The different merger review processes in each jurisdiction combined with the absence of pre-merger notification thresholds, means that effective inter-agency cooperation between the ACCC and the NZCC will depend to a considerable extent on the cooperation and goodwill of the merging parties and, to a lesser extent on third parties. In particular, cooperation will be most effective when the merging parties (and third parties, as appropriate) allow the agencies to share information where the disclosure of that information would otherwise be subject to confidentiality restrictions.
4. The ACCC and the NZCC recognise that many considerations will influence confidentiality waivers and transaction timing and/or notification decisions and that these decisions are within the discretion of merging parties or third parties as the case may be. Accordingly, any decision by any merging party or third party to not abide by requests or recommendations by the respective agencies pursuant to this protocol will not prejudice the conduct or the outcome of each agency's independent merger review.
5. In addition, an agency should not be expected to delay the release of its decision pending the other jurisdiction reaching a decision, unless continued coordination is warranted to address common substantive or remedial issues.

Notification of merger transactions

6. Unlike most jurisdictions around the world, neither the Australian nor the New Zealand merger regime is characterised by mandatory pre-merger notification thresholds. The effective operation of merger laws in each jurisdiction is therefore dependent on business, the legal and advising communities and the general public being well informed of merger laws, processes and analytical approaches. Each agency also has a role to play in improving the effectiveness of merger laws through advising the other when it becomes aware of merger transactions which may involve trans-Tasman operations or otherwise impact on a market affecting the other jurisdiction.
7. Accordingly, subject to confidentiality issues, each agency should endeavour to notify the other when it becomes aware of a merger transaction which may affect competition in the markets of the other jurisdiction, regardless of whether the agency which becomes aware of the transaction in the first instance intends to conduct a review of the transaction. The initial points of contact for notification under this

paragraph shall be the General Manager, Mergers and Asset Sales Branch, at the ACCC and the Manager, Market Structure Group, at the NZCC.

8. Where an agency becomes aware of a merger or acquisition which is likely to occur or has occurred in the other jurisdiction but does not intend to conduct a review of the transaction, the agency should, subject to confidentiality issues, advise the other agency of the merger or acquisition. The nature and extent of any further cooperation in respect of the transaction will be determined on a case by case basis.
9. In circumstances where either agency is advised by a merging party of a confidential merger or acquisition proposal likely to affect both Australia and New Zealand, that agency should contact the merging party to seek approval to advise the other agency that it has become aware of the proposed transaction. In the event that approval to advise the other agency is not forthcoming, the agency should advise the merging parties that they should consider discussing with the other agency the process for notifying and reviewing merger transactions.

Dual review of merger transactions

Cooperation on particular transactions

10. At the start of any merger review which involves a transaction likely to affect both Australia and New Zealand and where it appears that a review by one or both agencies is likely and that cooperation between the agencies may be beneficial, each agency should nominate an appropriate point of contact in respect of the review and a timeframe for any follow up contact should be established.
11. In determining the level of cooperation likely to be beneficial, relevant considerations include:
 - (a) whether the merging parties have businesses in, or otherwise supply goods and services to markets involving, both Australia and New Zealand;
 - (b) whether there are likely to be competition effects in both Australia and New Zealand;
 - (c) similarity of potential competition effects in the two jurisdictions; and
 - (d) compatibility of the processes for review of that transaction by the agencies.
12. The ACCC and NZCC may, during the course of conducting a merger review, reassess the nature and extent of cooperation at any time having regard to the abovementioned factors and the benefits of ongoing coordination. If a change in the level of coordination is desired by either agency, that agency will notify the other agency to discuss the nature and extent of further cooperation. Depending on the nature of any

change in the level of coordination, it may be appropriate to advise the merging parties or third parties that this has occurred.

Timing

13. In the case of merger transactions to be reviewed by both the ACCC and NZCC, cooperation is most effective when the review timetables of the competition agencies run more or less in parallel, recognising the differences in the processes of the ACCC and the NZCC and the particular facts of any transaction.
14. In appropriate cases, the reviewing agencies may offer the merging parties the opportunity to confer with relevant ACCC and NZCC staff jointly to discuss timing and other process issues. Discussions of this nature are likely to be most beneficial if held shortly following the public announcement of the merger transaction and prior to either jurisdiction agreeing to a proposed timetable for review with the merging parties. During such discussions, the ACCC and NZCC will consider ways to synchronise the timing of the Australian and New Zealand reviews, to the extent possible under the laws of each jurisdiction. The ACCC and the NZCC will endeavour to coordinate plans for review of these transactions, including key stages of a merger review, to the extent possible under the laws of each jurisdiction.

Confidentiality waivers and collection of evidence

15. In both jurisdictions, information used in merger review is usually provided on a voluntary basis and may be commercially sensitive. Waivers of confidentiality provided by merging parties will enable more complete communication between the agencies and the merging parties. This, in turn, is likely to result in more informed, timely and effective decision-making and more effective cooperation between each agency. Additionally, it will serve to reduce the likelihood of inconsistencies in analyses and outcomes, where those differences are not due to differences in market circumstances, competition effects or statutory requirements. Accordingly, as soon as possible following the announcement of a merger transaction that is suitable for cooperation, the agencies should enter into discussions with merging parties with a view to requesting the execution of confidentiality waivers. The agencies should encourage the merging parties to give broad waivers in relation to all the information they submit in the course of the review of the transaction. Where an agency proposes to provide a merging party's confidential information to the other agency, before providing that information, it shall notify the receiving agency that the information is confidential and advise it of any specific limits or conditions imposed by the merging party in its confidentiality waiver. The agency should not transfer the confidential information until the receiving agency has confirmed in writing that it is willing to accept the material on that basis. The ACCC and the NZCC recognise that refusal by merging parties

to give a confidentiality waiver may mean that cooperation will not be possible.

16. In certain circumstances, waivers of confidentiality provided by third parties will enable more complete communication between the agencies and with third parties. Additionally, such waivers may reduce the investigative burden imposed on third parties of interest to both jurisdictions and may facilitate the coordination of requests for additional information or documents and meetings or conferences.
17. If a confidentiality waiver is provided by any party, the agencies commit to maintaining, to the fullest extent possible, the confidentiality of any confidential information provided to them in accordance with this protocol.
18. In gathering evidence that is provided voluntarily, the ACCC and the NZCC should, where appropriate, encourage parties to consider allowing joint ACCC-NZCC meetings with executives and experts commissioned by the parties at appropriate points during the merger review. Alternatively, an agency may, at the request of the other agency, ask questions on behalf of the other agency and, if it does so, before asking such questions, it should advise the parties that this is the purpose for which the questions are being asked and obtain the parties' consent to their responses being provided to the other agency.
19. Joint discussions with merging parties may also be held in circumstances where a confidential merger transaction is likely to affect both Australia and New Zealand and where the merging parties have notified both agencies of the proposed transaction confidentially and given approval for the agencies to discuss the proposed transaction.
20. This protocol does not extend to the sharing between the agencies of information compulsorily obtained under information gathering powers.

Public registers and requests for confidential treatment of information

21. Both agencies maintain public registers of merger authorisation applications, submissions and decisions, and may exclude confidential information from the registers. To the extent practicable, and with the agreement of the relevant party, the agencies should discuss requests for confidentiality made to both agencies in respect of the same information sought to be excluded from the register, and the intended course of action in response to that request.

Competition assessment and evaluation of evidence

22. In the case of merger reviews identified for cooperation between the ACCC and NZCC, each agency should liaise with the other throughout the course of the merger review. This may include sharing publicly available information and, consistent with confidentiality obligations, discussing

the analytical approach and evidence at various stages of the review. For example, views on tentative market definitions, the assessment of competitive effects, efficiencies, theories of competitive harm, economic theories and the empirical and expert evidence required to prove or test such theories may be discussed. Preliminary views on necessary remedial measures and, subject to confidentiality issues, similar past reviews and cases may also be discussed by the agencies. If appropriate, the agencies may also discuss and coordinate information requests to the merging parties and third parties, including by exchanging draft questionnaires to the extent permitted by each jurisdiction's laws and regulations.

Communication between the ACCC and the NZCC

23. The ACCC and the NZCC should, via appropriate points of contact within each agency, contact each other prior to or at key milestones during the course of reviewing a merger transaction that has been identified for cooperation. Key milestones are likely to include: the commencement and finalisation of market inquiries; the release of a Statement of Issues in Australia; the release of a draft determination in relation to an authorisation; any discussions on potential or appropriate remedies; and the issue of a final decision in either jurisdiction. Other significant milestones in a merger review may include key meetings with executives, and, subject to confidentiality requirements, any requests for further information including requests made under formal information gathering provisions contained in the legislation of the respective jurisdictions and the commencement of enforcement proceedings. The ACCC and NZCC may also discuss the selection and briefing of industry, economic and legal experts or advisers.
24. In some cases, discussion may be appropriate between senior officials in the ACCC and the NZCC such as the Chair of the Mergers Review Committee or ACCC Chairman in Australia and the Chair of the relevant Division of the Commission or NZCC Chair in New Zealand. Such discussions are likely to be most beneficial where either the ACCC or NZCC is considering opposing a merger transaction, prior to the initiation of enforcement action or where remedies or settlement of enforcement action has been offered by or are being negotiated with the merging parties.

Remedies

25. Under relevant Australian legislation, the ACCC has the capacity to accept court enforceable undertakings in respect of merger transactions. Such undertakings may be considered in order to ensure that a proposed merger transaction does not proceed until the ACCC has had sufficient opportunity to conclude an assessment of the transaction or to resolve competition concerns arising as a result of the merger transaction. In the context of considering a merger authorisation application, the ACCC also has the ability to impose conditions on any authorisation granted. In the

case of anti-competitive mergers, the ACCC may apply to the court for pecuniary penalties, an injunction, divestiture or other orders.

26. Under New Zealand legislation, the NZCC may accept undertakings for the divestment of assets or shares. In the case of anticompetitive mergers, the NZCC may apply to the court for pecuniary penalties, an injunction, and divestment orders. The NZCC also has statutory powers to apply for cease and desist orders.
27. The ACCC and the NZCC recognise that the remedies offered by the merging parties or considered appropriate by the respective agencies may not always be identical, in particular because the effects of a merger transaction may be different in Australia and New Zealand. However, it is also acknowledged that a remedy accepted in one jurisdiction may have an impact on the other. The ACCC and the NZCC agree, to the extent possible and consistent with the functions and responsibilities of each, to endeavour to facilitate the compatibility of any remedies accepted. Each agency should advise the merging parties that it may be appropriate to consider waiving any confidentiality requirements in respect of remedies being offered so that they can be exchanged between the agencies. The ACCC and NZCC should advise the merging parties to consider, where appropriate, coordinating the timing of proffering of remedy proposals to both agencies and the substance of those proposals, so as to minimise the risk of unnecessary compliance costs and facilitate implementation of the remedy.
28. Each agency will endeavour to achieve a consistent outcome for competition by discussing mutually compatible remedies. Consistent with any confidentiality obligations, the ACCC and the NZCC should each seek to keep the other informed of remedy offers being considered and of other relevant developments keeping in mind the extent to which remedies may impact on the other jurisdiction's review. Where appropriate, the ACCC and the NZCC should consider sharing draft remedy proposals for information and comments and participate in joint discussions with the merging parties and relevant third parties.

Ongoing cooperation

29. The ACCC and the NZCC also agree more generally to exchange other information and documents to the extent that such exchanges may assist either or both agencies in carrying out their merger review processes and functions. This may include sharing publicly available information and, consistent with confidentiality obligations, discussing procedural and analytical approaches to merger reviews. For example, views on approaches to market definition, the assessment of competitive effects, efficiencies, theories of competitive harm, economic theories and the empirical and expert evidence required to prove or test such theories may be exchanged.

30. More generally, on request, the ACCC and NZCC may share competition assessments in relation to previous merger decisions, subject to any ongoing obligations of confidence to any party.

Public access to official information

31. Both Australia and New Zealand have legislation in place to ensure that the public has access to official information and the privacy of natural persons is protected; in Australia the relevant legislation is the *Freedom of Information Act 1982* and *Privacy Act 1988* and in New Zealand it is the *Official Information Act 1982* and *Privacy Act 1993*. However, the legislation in each jurisdiction also provides for information which is commercially sensitive or otherwise confidential to be withheld from the public in certain circumstances. The ACCC and the NZCC commit to:
- (a) maintain, to the fullest extent possible, the confidentiality of any confidential information provided to them in accordance with this protocol; and
 - (b) to protect, to the fullest extent possible, confidential information provided to them in accordance with this protocol, including requests made pursuant to the abovementioned legislation, subject to the requirements of that legislation.
32. If either agency receives a request from a third party for information provided under this protocol under the relevant legislation, to the extent that it is able to do so, it will contact the other agency to advise that such a request has been received and to discuss the intended course of action.

Status of protocol

33. Nothing in this protocol is intended to create any enforceable rights. Similarly, nothing in this protocol is intended to require the ACCC or the NZCC to act inconsistently with relevant laws. After giving due weight to the general desirability of cooperation as outlined in this protocol, each agency retains the discretion, following consultation with the other agency, to not adhere to any aspect of this protocol where the agency considers that to do so may be inconsistent with its own aims, functions and interests.