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Time for a pitstop – a diagnostic of NZ's merger control processes[1]

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Introduction

Merger control plays a key role not only in the competition regulation ecosystem, but also the M&A and investment environment.

Mergers can give rise to tremendous efficiencies and public benefits. They can allow, for example, a start-up to get access to significant funding for research and development that it would never be able to get on its own. They can also open doors for New Zealand-based companies to access new markets. And they can enable exiting founders to reap the rewards of their hard work and move on to the next challenge, at the same time provide inspiration for others to follow in their footsteps.

A predictable and efficient M&A ecosystem makes New Zealand an attractive place to do business. The Commission forms an important part of this ecosystem, alongside other regulators such as the Overseas Investment Office (**OIO**), the Takeovers Panel and Financial Markets Authority (**FMA**).

It is generally accepted that the vast majority of M&A activity is not anticompetitive.[2] However, a small percentage of mergers do impact competition, and their effects can be significant and long-lasting. Merger control is necessary to prevent such mergers, or to put in place appropriate safeguards (remedies) that prevent or mitigate their effects.

Merger control therefore needs to walk the line between allowing non-harmful mergers to proceed, while at the same time ensuring that harmful mergers do not (or proceed only with appropriate measures to address competition concerns).

In walking this line, it is not just the end result that matters – the process for getting there is equally important. Thus, according to the International Competition Network (**ICN**) Merger Working Group (**MWG**) *Recommended Practices for Merger Notification*

[1] I am grateful to John Land for his comments on a draft of this paper, and to the Commission's Official Information Act (**OIA**) and Mergers teams for their work on responding to a multi-pronged OIA request.
[2] See, for example, Australian Competition and Consumer Commission (**ACCC**), *Treasury – Competition Taskforce, Merger Reform – Consultation Paper – ACCC Submission*, January 2024, at [4.2].

and Review Procedures (**Recommended Practices**),[3] merger control should promote effectiveness, efficiency, predictability and transparency:[4]

> *"… Effectiveness, efficiency, transparency and predictability are fundamental attributes of a sound merger control regime, and these objectives should be pursued at all stages of the merger review process. During the investigative stage, achieving these objectives can be facilitated by adopting procedures that address recurring issues encountered by the competition agency and merging parties in the merger review process and by adopting practices designed to focus the investigation on relevant legal and factual issues as promptly as possible and to resolve any perceived competitive concerns expeditiously.*
>
> *… These objectives can best be achieved if there is a frank and open dialogue between the competition agency and the merging parties. The cooperation of the merging parties is a key factor in the competition agency's ability to pursue these objectives most effectively."*

Put succinctly, merger control processes should:

1. deal with recurring issues;
2. focus on legal and factual issues to resolve any concerns expeditiously; and
3. promote frank and open dialogue between the competition agency and the merging parties.

This paper

This paper examines New Zealand's merger control processes in light of the above framework. The paper is divided into four parts. Parts 1 and 2 follow the sequence of a clearance process from courtesy letter through to SOUI.[5]

- Part 1 examines the pre-filing and phase 1 stages of the merger clearance and authorisation processes. It covers 'courtesy letters', 'call-ins', pre-notification and SOPIs.
- Part 2 discusses the processes for more complex merger assessments, and some of the key issues that arise. It covers Statements of issues (**SOI**s) and Statements of Unresolved Issues (**SOUI**s), confidentiality and access to file.

[3] 2018.

[4] Recommended Practices at VI A, p.18. In reforming Australia's merger control system, the Australian Government has said that it expects the new system will enhance efficiency, predictability and transparency: Australian Treasury, *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy*, 10 April 2024, p. 4.

[5] Of course, the minority of clearance applications begin life as a courtesy letter. I touch on precisely how many later in the paper.

- Part 3 is a very short section that examines the Commission's merger control KPIs, as detailed in its Statement of Performance Expectations.[6]
- Part 4 concludes.

The paper finds that, while there are aspects of New Zealand's merger control processes that are working well (eg the courtesy letter process), there are opportunities for improvement. In particular, the processes for assessing complex mergers (those that proceed past an SOI) and granting access to confidential information could be made more streamlined and predictable, respectively.

[6] Commerce Commission, *Statement of Performance Expectations 2025/26*.

PART 1 – PRE-FILING AND PHASE 1 ENQUIRIES

The informal courtesy letter/call-in regime

Nestled in the 158th footnote, on the 52nd page of the Commission's Merger Assessment Guidelines (**MAGs**), is a reference to an aspect of New Zealand's regime whose import belies its lowly positioning: the informal 'courtesy letter' process:[7]

> *"The Commission sometimes receives 'Courtesy Letters' from an acquirer advising the Commission about a proposed merger but explaining why the acquirer considers no competition concerns arise from the proposed merger. These letters allow parties to pre-empt any queries that the Commission might have about the merger."*

This process, where merger parties write a short submission to the Commission and inform it about a proposed transaction (hopefully) in lieu of a clearance application, is an invaluable part of New Zealand's merger regime.

The Commission may conduct market enquiries upon receiving a courtesy letter, but these are often more targeted than in a clearance process. There are also no formal information requirements. After a (typically) short review period, the Commission will either tell the merger parties that it does not intend to investigate further, or it will 'encourage' merger parties to apply for clearance.[8]

The courtesy letter process has several advantages. First, it gives merger parties increased certainty (predictability) about the risk of regulatory intervention. While the Commission says that it cannot provide comfort or indemnity for a potential breach of section 47 of the Commerce Act (**Act**), in practice it will not re-open an investigation in the absence of misleading evidence, a complaint or a significant market development. Thus, it offers a middle way for businesses between self-assessing and hoping they are not investigated and going through a potentially unnecessary and resource-intensive clearance process.

From the Commission's point of view, the process gives it a more complete picture of the pipeline of upcoming acquisitions, which is invaluable when it is trying to manage a portfolio of non-discretionary work and limited resources. This allows it to deploy resources more effectively and efficiently.

Finally, it benefits the regime as a whole because it keeps the channels of communication open between the Commission and the business and advisor communities, helping to promote the frank and open dialogue espoused by the ICN. In

[7] May 2022.
[8] Read: face a high chance of interim injunction proceedings if they do not.

certain circumstances, even in very sensitive industries, the Commission can even provide informal comfort on a confidential basis.[9] [10]

By the numbers

The MAGs say that the Commission “sometimes” receives these letters but, looking at the statistics, “frequently” might be a better descriptor. In the past five financial years to July 2025, the Commission has typically received around 20-30 courtesy letters each year. That is, on average, two courtesy letters for each merger application the Commission assessed in that time.[11]

Of the 104 letters received, the Commission ‘called in’ about 15% of them. Of the 13 where applications were registered, approximately 60% went to SOI stage.[12] This suggests that, most of the time, the Commission is calling in deals that deserve a closer look.

Table 1 – Call-in letters from FY21 to FY25

Financial year	Courtesy letters received	Called in	Application registered	Cleared without SOI	Cleared after SOI	Declined	Withdrawn
2020/21	9	3	3	2	1		
2021/22	29	6	4		2		2
2022/23	18	3	3	2	1		
2023/24	19	2	2		1	1	
2024/25	29	2	1	1			
TOTAL	**104**	**16**	**13**	**5**	**5**	**1**	**2**

Source: Commission data. The data relate to the financial years within which the relevant courtesy letters were submitted. This is why, for example, the one decline is listed in FY23/24 when the decline decision itself occurred in FY24/25.

Assessment

The evidence suggests that the process is well-understood and is working well. It removes uncertainty for merger parties and their advisors, which promotes predictability. It is also efficient, in that it is a less resource-intensive avenue for certain

[9] For a recent example of a confidential informal clearance, see Sky TV’s NZX market announcement of its acquisition of Discovery NZ Limited: “Sky and Discovery NZ gave the Commerce Commission confidential advance notice of the transaction. The Commission looked at the commercial circumstances and advised the parties that it did not intend to consider the acquisition further.” – Sky New Zealand, “Sky to acquire Discovery NZ”, 22 July 2025, p.2.

[10] The ACCC has recently announced that under the mandatory system it will not be providing informal guidance for transactions that are not notified, which I think is a missed opportunity. See ACCC, *Merger Reform: Frequently Asked Questions*, 2 July 2025, p.2.

[11] The Commission determined 57 clearance application and one authorisation application in the five financial years to 30 June 2025. The authorisation application was cleared rather than authorised.

[12] Although the data does not disclose it, from memory in the two withdrawn applications a decision to issue an SOI had been taken.

mergers. Effectiveness is subjective and harder to measure, but an SOI approximately 60% of the time indicates that the Commission is more often than not calling in cases that deserve a closer look.

Given the significance of this practice, there is a strong argument that it deserves greater prominence in the MAGs. Indeed, if the Commerce Act is amended to give the Commission formal call-in powers, the Commission will need to issue guidance.[13] But it should issue guidance with or without amendments to the Act, including in relation to:

1. the test, threshold or relevant factors that the Commission uses or considers when making decisions about calling in an acquisition;
2. indicative timing; and
3. information that should be included in a courtesy letter.

The Pre-notification process

The Commission strongly encourages merger parties to engage in a pre-notification process before filing a clearance application,[14] and in most cases merger parties do engage. Pre-notification allows the parties to give the Commission a deal/industry 101 and facilitates open dialogue between the parties. It also gives the Commission (and merger parties) a chance to get ahead of the 40 working day curve, and hit the ground running from day one of the assessment process. This gives both parties a better shot of reaching a clearance decision (if that is the final decision) within 40 working days.

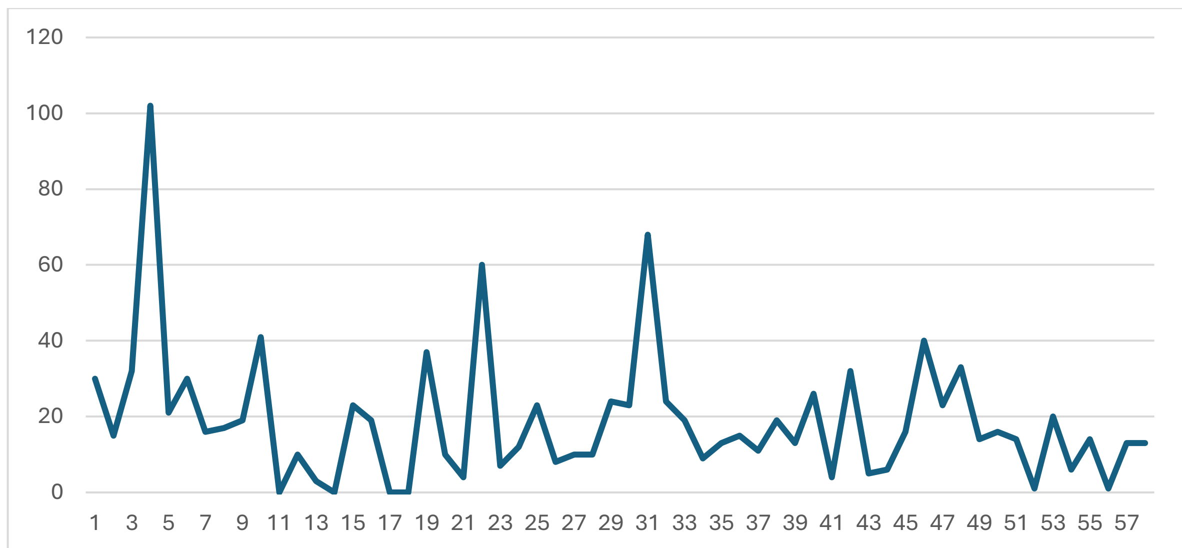
By the numbers

Over the past five financial years, the vast majority of the 58 merger applications decided entailed a pre-notification period of longer than a week. So, most merger parties are engaging with the process in a meaningful way.

The average length of the pre-notification period over the same period has been 20 working days, but reduces to 17 working days if outliers over 60 working days are excluded. This is quicker than many other jurisdictions, such as the European Union, which can take far longer.[15]

[13] Under this proposal, the Commission would be able to require parties to apply for clearance if it becomes aware of a potentially anticompetitive merger. See: Ministry of Business, Innovation & Employment, *Promoting competition in New Zealand – A targeted review of the Commerce Act 1986*, December 2024, Issue 4.
[14] MAGs at [6.5].
[15] It will be interesting to observe how long pre-notification takes under the new Australian regime, where phase 1 will be 30 working days.

Figure 1 – Pre-notification periods FY21 to FY25 (working days)



Source: Commission data

Assessment

Assessing the performance of the pre-notification process is challenging because it is confidential, and timing can be affected by the merger parties themselves (especially in international mergers). However, the process seems to have settled into a groove and is used in a meaningful way most of the time. This suggests that most merger parties see some value in it or at least do not see it as causing significant harm.

The process could perhaps be improved if the Commission provided some guidance about expected timeframes from receiving a draft to registration of the application. Currently the only reference to timing is the request to provide the Commission with a draft clearance application at least one week before the pre-notification meeting. Guidance (or even reporting) on timing would better assist practitioners and merger parties as they plan their deals. The current run rate seems to be about three weeks from draft application to registration (excluding outliers over 60 working days), so perhaps that could be adopted.

The SOPI

Once pre-notification is complete, the application is registered and a non-confidential version is published on the Commission's website. Under both the clearance and authorisation processes, the Commission calls for submissions in a SOPI.

The stated purpose of the SOPI is to increase transparency, provide interested parties with an opportunity to make submissions, and gather further information that may assist the Commission's inquiries.[16]

[16] MAGs at [6.105].

The SOPI contains a significant amount of technical information: the merger test, the approach to market definition, the counterfactual and potentially relevant 'theories of harm'. It also summarises the arguments made by the merger parties and highlights areas where the Commission would like to receive further information.

The Commission aims to publish this within 5 working days of the review commencing.[17] SOPIs tend to be between 8-12 pages in length.[18]

By the numbers

In practice, the SOPI takes longer than 5 working days to publish. In the 24/25 financial year, the average time taken to publish the SOPI was 13 working days. In many cases, the Commission receives no or few submissions in response to the SOPI.

Assessment

In many cases SOPIs are being published well into phase 1 enquiries, much later than the indicative 5 working day timing in the MAGs. If a SOPI is published on working day 15, for example, then by the time any submissions are received (assuming they are on time), the statutory clock is at 25 working days. Given staff papers are due to Commissioners (decision-makers) at least a week out from the decision meeting, this leaves little time for the case team to analyse and follow-up on submissions, and little time for merger parties to respond, before staff papers are due.

An alternative approach

One way to increase the effectiveness and efficiency of the SOPI would be to re-position it from being a document that primarily communicates what the Commission intends to investigate, to being one that more explicitly and directly solicits information from market participants.

Across the Tasman, the ACCC publishes a 'market enquiries' letter at the start of its public enquiries that is more in this mould. Rather than being a statement of the ACCC, the market enquiries letter is (currently) sent from the relevant General Manager at the commencement of the ACCC's public process.

In contrast with the SOPI, which signposts areas where the Commission would like to receive information throughout the document, the market enquiries letter contains a single section with direct questions for market participants (grouped by category or market participant where appropriate).

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[17] MAGs at [6.28].

[18] FY24/25 average was 12 pages, FY23/24 average was 8.

In my view, publishing a document like this on the same day that the application is registered would elicit better market feedback and in a more timely fashion. It would also be more efficient because the document can be used as a basis for RFIs.[19]

[19] Indeed, while I was drafting this section a client was sent a market enquiries letter from the ACCC and asked to respond to it as an RFI.

PART 2 – COMPLEX PHASE 2 AND 3 INVESTIGATIONS

Statements of Issues and Unresolved Issues

If the Commission is not satisfied to clear (or authorise) a merger after an initial round of enquiries, it will publish a document outlining its preliminary competition concerns. For clearances this document is an SOI, and for authorisations it is a draft determination.[20] The Commission calls for further submissions and cross-submissions and gathers further information from merger parties and market participants.

If the Commission is not satisfied to grant clearance after this second phase it will publish a SOUI – a statement of the Commission's still unresolved concerns. Under an authorisation process, however, the Commission will proceed directly to a decline decision.

If an SOUI is issued, yet another round of market enquiries is undertaken, and more submissions and cross-submissions are solicited, before the Commission makes a final determination to clear or decline the application.

As the investigation evolves, it is common for theories of harm identified at the SOI stage to fall away as the Commission becomes satisfied that they are unlikely to play out.[21]

By the numbers

Of the 58 merger applications decided by the Commission in the past five years, 33 have gone to SOI stage.[22] Of those 33:

- 16 were cleared unconditionally;[23]
- 4 were cleared with divestments before SOUI stage;[24]
- 6 were withdrawn; and
- 7 went to SOUI.

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[20] There is no requirement for the Commission to publish a draft determination in respect of applications for merger authorisation under section 67 of the Act, but in practice it nearly always does. See Commerce Commission, *Authorisation Guidelines* (June 2023) at [fn105].
[21] Sometimes, although rarely, additional theories of harm will arise.
[22] Including where a decision to issue a SOI was taken but no SOI was published.
[23] This includes Microsoft/Activision, where the Commission expressed preliminary concerns and international remedies were agreed partway through the Commission's assessment.
[24] This includes Ampol/Z, where divestments were offered up-front but the Commission had preliminary concerns about a proposed divestment via initial public offering.

Of the 7 SOUI cases:

- 2 were cleared unconditionally;
- 2 were cleared with divestments;
- 1 was abandoned; and
- 2 were declined.

Figure 2, below, illustrates the proportion of assessments that proceeded to phase 2 when compared with Australia (ACCC) and the United Kingdom (CMA).

Figure 2 – NZ, Australia and United Kingdom proportion of Phase 2 cases (FY21-25)

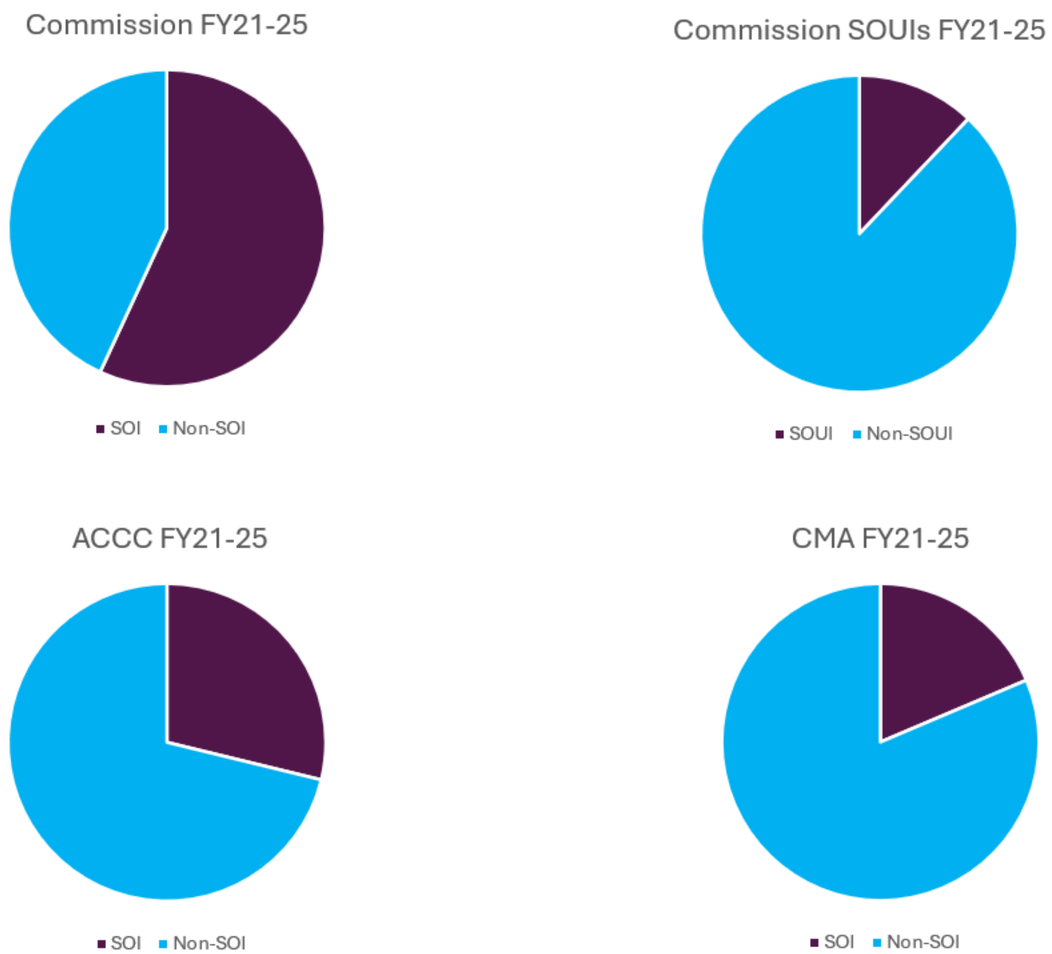
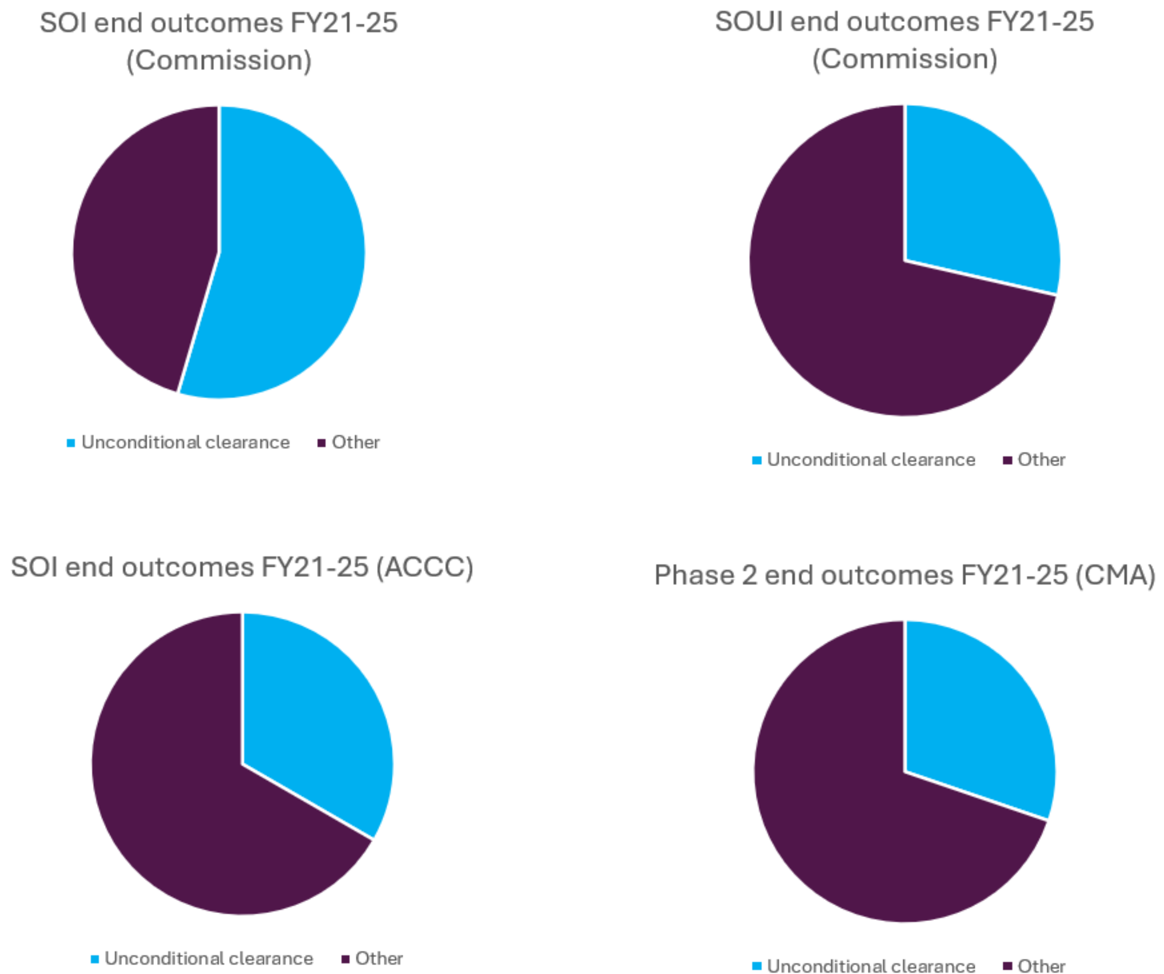


Figure 3 shows the proportion of phase 2 cases that were ultimately cleared (including post-SOUI) compared with these jurisdictions.

Figure 3 – NZ, Australia and United Kingdom phase 2 outcomes (FY21-25)

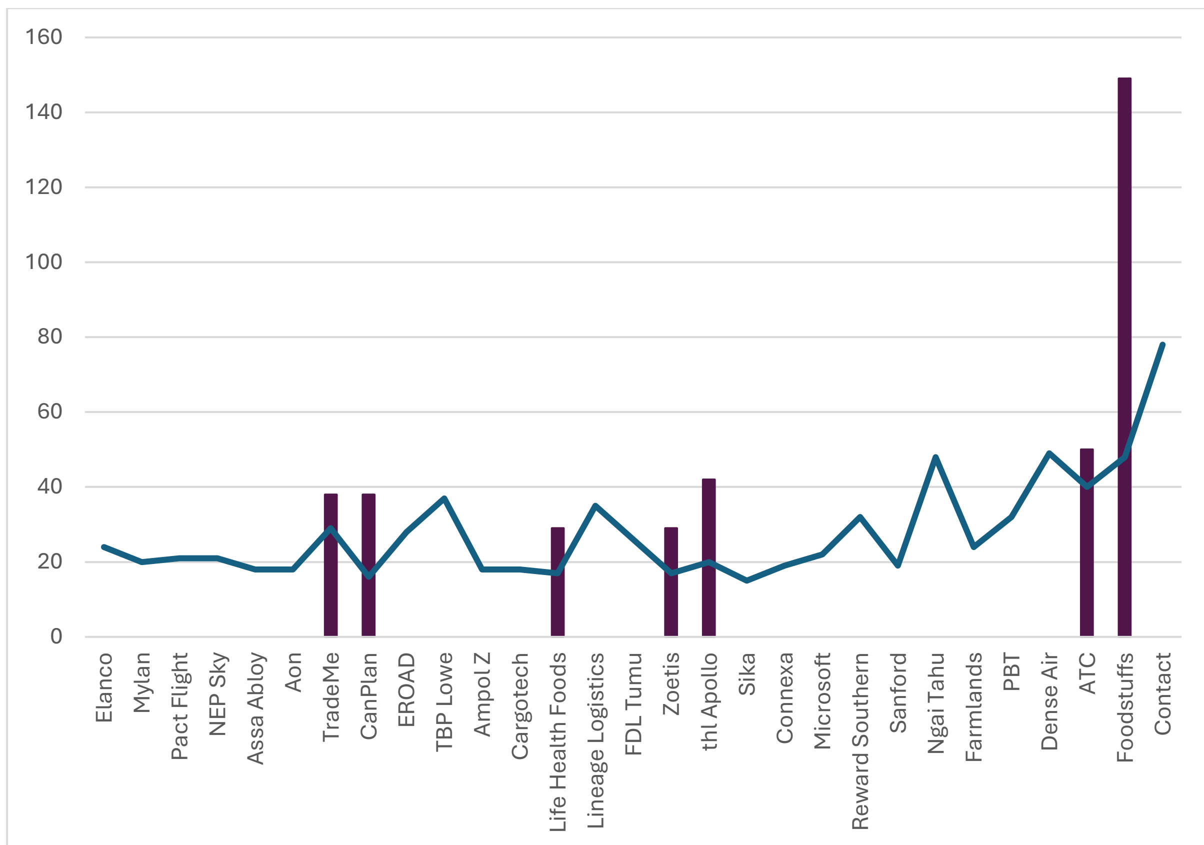


In the same period, each of the SOUIs published were longer than the preceding SOI, and in some cases a lot longer. For example, the SOUI on the Foodstuffs North Island/Foodstuffs South Island merger was 149 pages long and the SOI was 50.

The average length of SOIs and SOUIs has also been trending upwards.[25]

[25] FY21: 21.5 pages; FY22: 23.4 pages; FY23: 19.4 pages; FY24: 32.3 pages; FY25: 55.3 pages.

Figure 4 – Length of SOIs and SOUIs FY21 to FY25 (pages)



Source: Commission data. Blue line = SOI; magenta line = SOUI

Evaluation

The MAGs say that "A Statement of Issues aims to clearly outline [the Commission's] concerns and invite the applicant, target and interested parties to provide further information relating to those concerns."[26]

Of the SOUI, the MAGs say that "[a] Statement of Unresolved Issues provides the applicant with a further opportunity to allay [the Commission's] concerns, such as by way of proposed divestment undertakings. It also gives the target and interested parties a further opportunity to provide information relating to these concerns."[27]

Notwithstanding the description of the processes in the MAGs, what has developed in recent years is a system where the Commission publishes two quite different documents. The first contains preliminary competition concerns (the SOI) and the second is effectively a draft determination (the SOUI). The SOUI is routinely longer than the SOI, which seems at odds with the role it is supposed to play in narrowing issues down.

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[26] MAGs at [6.109].
[27] MAGs at [6.110].

The SOUI represents the third occasion when the merger parties and market participants are told what the theories of harm are, and the third time that they are given an opportunity to make submissions.

This may be transparent (in terms of publishing increasing amounts of information), however in terms of whether it is a practice "designed to focus the investigation on relevant legal and factual issues as promptly as possible and to resolve any perceived competitive concerns expeditiously" I would suggest that there are more efficient, yet as effective, ways to do so.

The Commission also issued (or decided to issue) an SOI in almost 60% of the applications that it assessed in the past five years. However, in over half of these cases it subsequently determined to give unconditional clearance.

Each merger assessment is different, and it is challenging to make comparisons between them, particularly in a voluntary regime. However, unconditionally clearing that percentage of mergers where preliminary concerns are expressed could suggest that the threshold for issuing an SOI may be too low, and/or that more work could be done in phase 1 to clear some of these mergers without the need for a lengthy and resource-intensive phase 2 (or phase 3) enquiry.[28]

This is supported by the comparisons with Australia and the United Kingdom, where the percentage of applications that proceeded to phase 2 is significantly less, and the proportion of applications that are unconditionally cleared is lower. In the surveyed period, the Commission assessed less than half the matter subjected to a public review by the ACCC, yet issued an SOI in just three fewer instances.

An alternative approach

New Zealand's clearance regime is unusual among merger control regimes in having a three-phase system. Comparator jurisdictions such as Australia, the United Kingdom and Europe operate a two-stage process with one key document that sets out the competition authority's provisional competition concerns before a final decision is taken.

Moreover, the clearance regime also differs from the Commission's merger authorisation process. Under that process – where the substantive assessment involves not only a competition assessment but also an assessment of likely detriments and benefits flowing from a merger – the Commission issues a single draft determination if it has competition concerns. The Commission's indicative timing for authorisations is that

[28] This percentage could have increased or decreased had the withdrawn applications proceeded to their conclusion. It can be tempting for some to chalk up abandoned deals as 'wins', and some applications may well have ultimately been declined or cleared with remedies. Equally, though, they may have been unconditionally cleared – we will never know. And a withdrawn application can also be a 'loss' if process delays are the cause.

this will be published on working day 45-55; for a clearance indicative timing is working day 50.

An alternative system, which would bring New Zealand into line with other jurisdictions – and more into line with its own merger authorisation process – would be for the Commission to publish a single document around working day 50 and then proceeding with its enquiries in a targeted fashion, focused solely on working through the issues with the merger parties and third parties, as required, for the remainder of the process.

This would fulfil the requirements of natural justice – merger parties and market participants will still have two formal opportunities to understand the potential theories of harm and be heard – and be more efficient than publishing a third document, which takes time and energy from the case team, Commissioners and merger parties (and third parties).

If the suggestions for re-purposing the SOPI, above, are implemented, case teams may also receive better and more timely information from market participants sooner in the process. This should give the Commission a more fulsome evidence base, sooner, and result in a more developed SOI.[29]

Access to confidential information

Under New Zealand's merger control regime there is no formal procedure for the merger parties (or anyone else) to access and review the Commission's case file. Rather, requests for confidential information in applications, submissions, file notes and RFI responses are assessed under New Zealand's official information legislation, the OIA.

Under the OIA there is a presumption that information will be made available unless good reason exists to withhold it.[30] Relevant to the merger control process, good reason will exist where:

- release would prejudice the maintenance of the law;[31]
- withholding is necessary to prevent unreasonable prejudice to legitimate business interests, and this is not outweighed by public interest in release;[32]
- the information was supplied under an obligation of confidence, and this is not outweighed by public interest in release;[33] and

[29] It could even potentially allow time for discussions with merger parties pre-SOI to advance the assessment still further, in something like the 'market feedback letter' given to merger parties by the ACCC.
[30] OIA section 5.
[31] OIA section 6(c).
[32] OIA section 9(2)(b)(ii).
[33] OIA section 9(2)(ba).

- withholding is necessary to protect information that is subject to legal privilege, and this is not outweighed by public interest in release.[34]

OIA requests are handled by the Commission's OIA team, with input from the relevant mergers case team. Pursuant to the Ombudsman's guidelines,[35] the Commission will almost always consult with the person whose information is subject to an OIA request before releasing it. However, while the Commission is obliged to consult, the final decision on release is its to make.

In addition to the OIA, the Commission must also consider whether any confidential information needs to be released to meet its natural justice obligations to the merger parties (and others).

Whether the information is released pursuant to the OIA or for natural justice reasons, it is very common for the Commission to impose conditions on release. Namely, that release be limited to certain, named external advisors (typically lawyers and economists) subject to signed undertakings restricting their use of the information to the purposes of the clearance (or authorisation) application, and requiring them to destroy all copies of the information after the matter is over. They cannot disclose the information to their clients.

The Commission must decide on release as soon as practicable but within 20 working days, but requestors can seek urgency by providing reasons with their request.[36]

By the numbers

Of the 33 SOIs issued or announced by the Commission in the past five financial years, OIA requests were made in 25 of them, and around two-thirds of those requests were post- a decision to issue a SOI. OIA requests are sometimes made in non-SOI cases, but this has been much less common.

According to Commission statistics, in eight of the applications assessed, or approximately 14% of the time, third parties raised concerns about the Commission's ability to protect their confidential information and/or declined to provide information. Six of those matters are from the last financial year and two are from the financial year before. Five of them were in SOI cases.

Evaluation

Access to file is an issue that many competition authorities have grappled with over the years. On the one hand, merger parties (and sometimes third parties) argue that they need to see the evidential basis for the authority's provisional concerns so that they can

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[34] OIA section 9(h). I am unaware of the Commission ever releasing legally privileged information.
[35] Ombudsman, *Consulting third parties*, pp.3-4.
[36] OIA section 12(3).

effectively advocate their position, including in relation to the relative weight of the evidence pointing for and against clearance. How to effectively advocate that (in New Zealand) the Commission should be "satisfied" to give clearance if you have no/limited visibility of the veracity and weight of evidence for and against clearance?

On the other hand, there is a concern that giving access to market participants' confidential information, even on a counsel-only basis, can have a chilling effect on their willingness to take part in the process. This can be an issue where, for example, those third parties hold critical information that cannot easily be compelled in a compulsory notice, such as predictions about how they would react to being foreclosed from accessing an important input.

This is a tension that is increasingly playing out in New Zealand, and one that is now well and truly one of the "recurring issues encountered by the competition agency and merging parties." While the MAGs do provide guidance on how the Commission applies the OIA to information requests, there is general frustration with the process from merger parties, third parties and (at least when I was there) among Commission staff.

- Merger parties dislike the time it takes to receive requested information, which can delay the assessment process.
- Third parties dislike having their confidential information given to the merger parties, even on an external counsel-only basis.
- Commission staff dislike going between the two sides, which is a distraction from doing the substantive work of progressing the assessment (and other work).
- Due to the nature of the OIA, which requires an assessment to be made in the specific context of a request, it can be difficult to predict Commission decisions, and the Commission is unable to give certainty or blanket guarantees about how confidential information will be protected, or to whom it will be disclosed.
- Even where OIA requests are declined, the Commission can – and in certain cases has – released information anyway on the grounds that it is necessary to comply with natural justice requirements.
- The whole process is ripe for gaming by those that benefit from the delays that OIA requests can cause.

In short, the OIA – the primary gateway through which the Commission assesses information requests – is an ill-fitting regime that is poorly designed to cope with the demands of merger control, and the conflicting interests of interested parties.

An alternative approach

The good news is that the Commission may already have the tool that it needs to address this situation: section 100 of the Commerce Act.

Section 100 of the Commerce Act provides that the Commission may make an order prohibiting the publication or communication of any information or document or evidence which is furnished or given or tendered to, or obtained by, the Commission in connection with a merger clearance or authorisation process. The order temporarily removes the information from the OIA regime, but expires 20 working days after the clearance or authorisation process is completed (after which time the OIA applies again).

Under proposed amendments floated in the Targeted review of the Commerce Act, section 100 of the Commerce Act could be amended to:[37]

- explicitly enable the Commission to use these orders to provide restricted access to information subject to terms and conditions, to "strengthen the Commission's ability to test confidential information on a restricted basis with specified external parties (such as legal or economic experts)"; and/or
- provide that a single section 100 order may cover any specified information or one or more classes of information, including all confidential information provided to the Commission for the purposes of the proceeding.

While these updates would be useful and would make it more explicit that the Commission can issue section 100 orders to test information with third parties, the wording of the consultation document suggests that MBIE considers the Commission may already be able to do this. If this is the case, then it can form the foundation for a more efficient and tailored regime for providing access to information.

What might this regime look like? Detailed regime design is beyond the scope of this paper but, as a starter-for-ten, an access to file regime could have the following attributes:

1. A section 100 order would be issued at the start of the assessment process over all confidential information received or created by the Commission.
2. Access to confidential information would be at the SOI stage – this aligns with when most OIA requests are made.
3. Access would be to the full file – confidential versions of the SOI, submissions, file notes, etc. to align with what the parties would receive in discovery if the matter were ultimately appealed to the High Court.
4. A presumption that access to confidential information be on an external advisor only basis.[38]

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[37] Ministry of Business, Innovation & Employment, *Promoting competition in New Zealand – A targeted review of the Commerce Act 1986*, December 2024, Issue 10. On 14 August 2025, right before this paper was presented at the conference, Minister Simpson did indeed announce amendments would be introduced into the Act that would allow the Commission to better protect confidential information.
[38] Principally lawyers and economists.

5. The Commission could release certain confidential information to third parties on an external advisor only basis if required for it to conduct its assessment or as natural justice requires.
6. The Commission will be able to redact commercially sensitive information in specific circumstances. A genuine fear of retaliation may be one such ground.

There will no doubt be divergent views on the above. If the Commission moves to using section 100 orders more frequently, I expect it will codify this in the MAGs (following a public consultation).

Any regime will need to balance the natural justice rights of the merger parties with protecting confidential information, and this will not fully address third party concerns about providing confidential information to the Commission. But then again, no regime can do this.

What the above regime would be, though, is better tailored to meet the specific needs of New Zealand's merger control regime. It would mark a distinct improvement on the current regime in terms of predictability, transparency and efficiency. It may even result in the Commission receiving more confidential information from third parties, given the increase in certainty about how their information will be treated.

PART 3 – THE COMMISSION'S MERGER CONTROL KPIs

The final part of this paper is very short and looks at the Commission's merger key performance indicators (**KPIs**) to see if they are fit for purpose and whether there is room for improvement.

The Commission has two KPIs for merger clearances: first, make decisions about non-SOI cases in 40 working days or less in 75% of cases; second, publish decline reasons within ten working days of a decision.[39]

Under the timeliness KPI, the Commission is only concerned with non-SOI cases. Once an SOI is published on a matter it no longer forms part of the reportable set. When you consider that over half of all applications have gone to SOI stage in the past five years, this means that the Commission has no KPIs for its most contentious merger matters (unless it declines clearance, but then it only relates to the time it takes to publish reasons).

The Commission could also have a year where, say, two out of four non-SOI cases take longer than 40 working days – and so it 'fails' its KPI – but where this was a better result than if it had gone to SOI (because, for example, it was able to resolve its concerns with just one or two weeks' extra work rather than six or eight in an SOI process).

An alternative to the current timeliness KPI could be to measure how long it takes the Commission to publish certain procedural documents, for example the SOPI, SOI/SOUI and final determination. The timing of publishing documents is one area of the regime that is almost completely under the Commission's control. For example, set a KPI of 10 working days from the time the Commission decides to issue an SOI or makes a final determination.[40]

This, combined with the Commission's published statistics on merger timeliness – which measures such things as average working days to decision in SOI and non-SOI cases[41] – would give a good indication of the Commission's performance on a year-by-year basis and over time.

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[39] See Commerce Commission, *Statement of Performance Expectations 2025/26*, p.19. Note that these are called "targets" rather than "measures" in this document, which is slightly unfortunate in light of Goodhart's Law, which posits that "when a measure becomes a target, it ceases to be a good measure." See Marilyn Strathern, "'Improving ratings': audit in the British University system", *European Review*, Vol. 5 No.3 305–321 (1997), p.308.

[40] Per the earlier discussion, I would make this 1-2 working days for the SOPI.

[41] Available online at: https://comcom.govt.nz/__data/assets/pdf_file/0017/306323/Mergers-determinations-and-enforcement-statistics.pdf. With special thanks to Susan Brown at the Commission for keeping these updated over the years.

PART 4 – CONCLUSION

On the whole, New Zealand's merger control regime appears to be functioning relatively well. The courtesy letter/call-in and pre-notification functions, in particular, appear to be working quite efficiently. There is room for improvement, however. The SOPI could be re-positioned and released earlier in the process to elicit better information, sooner. Moving to a two-phase regime would also be more efficient, and this efficiency would be enhanced by establishing an access to file regime that is more predictable and fit for purpose. And the Commission's KPIs could be updated to apply to all applications, not just to straightforward mergers and publication of decline reasons.

In my view, these amendments would increase the efficiency (and, in some places, the predictability) of the process without impacting its effectiveness and while retaining an appropriate degree of transparency.

MRT
5 August 2025 (updated 18 August 2025)