



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HIKINA WHAKATUTUKI



# Regulatory impact statement

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**Targeted review of the Commerce Act 1986:  
Market studies**

# Agency disclosure statement

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This regulatory impact statement (RIS) has been prepared by the Ministry of Business, Innovation and Employment.

It provides an analysis of options to provide a government agency with a formal power to conduct market studies, in line with the recommendations from the Productivity Commission's report entitled *Boosting Productivity in the Services Sector*. It does not explore other potential institutional changes that could be made to promote competition in the New Zealand economy.

It is difficult to quantitatively assess the costs and benefits of a market studies power. This is because it is generally action that is taken following a market study that results in benefits, rather than the empowering provision itself. In addition, most of the costs of a market studies power relate to the costs faced by private businesses in providing government with information and submissions in the course of a particular market study. This is difficult to predict in the context of an empowering provision.

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# 1 Status quo and problem definition

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## Background

1. In May 2014, the Productivity Commission set out a number of recommendations in a report entitled *Boosting Productivity in the Services Sector*. This included a recommendation that the Commerce Commission be given a market studies power. This RIS addresses that recommendation.
2. The term “market study” refers to detailed research by an institution into a particular market, or markets, where there are concerns that the market could be functioning sub-optimally. Market studies functions provide a means of identifying what is going on in a market and why. Unlike a competition investigation, it is not the actions of a specific company that are the focus of a market study, but the structure and behaviour of the market itself. Market studies can allow the identification of factors that are preventing, restricting or distorting competition, efficiency, and/or consumer welfare in that market.
3. Market studies are performed by the vast majority of competition authorities. A 2015 OECD survey of competition authorities found that out of the 62 competition authorities that responded, only New Zealand and Chile did not possess market studies powers. Market studies provide governments with an in-depth understanding of how sectors and markets work, and can be conducted whenever concerns on the functioning of a market arise. This could be a result of factors such as firm behaviour, market structure or consumer conduct amongst others.
4. Among other things, a market study could consider:
  - a. the profitability of market players;
  - b. rates of innovation;
  - c. barriers to entry; and
  - d. customer satisfaction.
5. The findings of a market study are generally published in a report. The report may dispel views that a market is restricted or distorted, giving the market a “clean bill of health”. Or it may confirm market problems, and suggest solutions. Reports may include:
  - a. recommendations for action by others, such as deregulation of a market, reform of its institutions, the introduction of some form of business self-regulation, or the improvement of information dissemination amongst consumers or suppliers; and/or
  - b. commitments by the agency undertaking the study to provide information and guidance to businesses or consumers in a market, or to take enforcement action.
6. Box One (below) provides a high-level outline of three market studies that have been carried out overseas.

## Box One: Examples of market studies carried overseas

### UK – Retail Banking

This study found that, despite product innovation and new entry, there is weak customer response to price and quality differences between banks, reducing incentives to compete. The Competition and Markets Authority has proposed the following remedies:

- banks must make information about their prices, services, and quality standards available to third-parties to enable better, personalised comparisons;
- banks must give customers periodic prompts to consider switching banking providers.
- improvements to the current account switching service; and
- customers must be automatically warned if they go into overdraft.

### Ireland – General Medical Practitioners

This study found that existing contracting practices favour existing GP practices and protect them from competition from newly-qualified GPs. GPs were restricted in how they could advertise and hospital doctors faced unnecessary restrictions in transferring to private GP practices. This limited innovation and price competition. The Ireland Competition and Consumer Protection Commission recommended that:

- government contracting practices which protect established GP practices from competition from newly-qualified GPs should be altered;
- payments to GPs should be decided unilaterally by the Government, not on the basis of agreement with the doctors' union;
- a fast-track GP training programme should be introduced for doctors who have completed relevant hospital-based training; and
- unnecessary restrictions on advertising by GPs should be removed.

### Canada – Self-regulated professions

This study by the Canadian Competition Bureau found that self-regulated professions (specifically accountants, lawyers, optometrists, pharmacists and real estate agents) often maintain substantial entry restrictions, restrict mobility between provinces, limit the scope of practice, restrict advertising, prescribe the method of remuneration, and prohibit certain business structures. The Canadian Competition Bureau considered that these practices limited competition and raised the price of professional services. It recommended that:

- entry qualifications should not exceed the minimum that will ensure consumer protection;
- mutual recognition of qualifications should be expanded;
- restrictions on scope of practice should be subject to a careful cost-benefit analysis;
- restrictions on comparative advertising should be removed;
- fee guidance on remuneration should be avoided; and
- restrictions on multi-disciplinary practices should be removed.

## Status Quo

7. At present, no agency is explicitly tasked with performing market studies in New Zealand. However, several public bodies may undertake research that could be classed as a market study.

## Commerce Commission

8. The Commerce Commission has several quasi-market studies functions:
  - a. **Part 4 of the Commerce Act** permits the Commerce Commission to investigate markets in which there is little or no competition, with a view to assessing whether economic regulation is required. This is a relatively narrow power, as it is largely confined to natural monopolies or near-monopolies.
  - b. Under **section 25 of the Commerce Act**, the Commission may disseminate information on its functions and powers, and the purposes and provisions of the Act. This allows the Commission to undertake advocacy and outreach functions to encourage compliance and greater awareness of the benefits of competition. Under this section, in order to gauge the levels of competition law awareness in the relevant sector and customise an outreach approach to its needs, the Commission may undertake research to gain a better understanding of sector participants. For example, in 2010 the Commission gathered information about building contractors' views and experiences of anti-competitive, cartel and collusive behaviours to inform its advocacy approach in dealing with the construction sector.
  - c. **Section 9A of the Telecommunications Act 2001** requires the Commerce Commission to monitor competition in, and the performance of, telecommunications markets. In doing so, the Commission may conduct inquiries, reviews and studies into any matter relating to the telecommunications industry or the long-term benefit of end-users of telecommunications services within New Zealand. For example, in 2012, the Commission prepared a report on the uptake of high-speed broadband services.
  - d. Under **section 6 of the Fair Trading Act 1986**, the Commission can undertake studies and publish reports and information regarding matters affecting the interests of consumers. For example, in 2015, the Commission released a report on the operation of the mobile trader industry. However, the courts have ruled that broad market studies which consider competition issues cannot be undertaken under this power, because they involve interests beyond those of consumers, including those of competing traders.

## Other agencies

9. In addition, several other agencies have what can be considered to be partial market studies powers:
  - a. The **Productivity Commission** was established in 2010 to provide advice to the Government on improving productivity in New Zealand. It may hold inquiries and report on productivity-related matters, on referral by Ministers. Productivity Commission inquiries have the potential to be much wider than market studies (for example looking at tertiary education and local government regulation), although several studies so far, including the Housing Affordability and International Freight Services inquiries, have included market study components.
  - b. The **Electricity Authority** has the power under the Electricity Industry Act 2010 to carry out and make publicly-available reviews, studies and inquiries into any matter relating to the electricity industry.

- c. The **Reserve Bank** and **Financial Markets Authority** have various powers relating to financial markets, including information-gathering and dissemination, monitoring, research and inquires.
- d. While not formally empowered to do so, **government agencies** may undertake reviews and studies that have core elements of a market study. These may differ in their complexity, and in whether they are published. One recent example was the residential construction sector market study undertaken by MBIE in response to the Productivity Commission's report on Housing Affordability.
- e. The **Inquiries Act 2013** provides for public or ministerial inquiries for the purpose of investigating and reporting on any matters of public importance. The Act would allow for ad-hoc taskforces to be set up to look into market competition and related issues. It also provides mandatory information-gathering powers.

## Problem definition

10. New Zealand's competition laws are generally well-regarded internationally. For example, the World Economic Forum's 2016/17 Global Competitiveness Report ranks New Zealand second in the world for the effectiveness of our antimonopoly policies. Nevertheless, there is evidence that the level of competition in the New Zealand economy is low relative to other high-income economies.<sup>1</sup> Recent MBIE research<sup>2</sup> also suggests that there is significant variation in competition intensity between different industries.
11. The fact that our overall prohibitions against anticompetitive conduct appear to be working well,<sup>3</sup> combined with evidence of low competition in various areas of the New Zealand economy, indicates there remains a problem with New Zealand's existing institutional structure for promoting competition. Outside of a few sector-specific regulators, no agency has a specific mandate to undertake proactive activity to *promote* competition in low-competition areas of the economy, rather than just *punish* anticompetitive conduct. A consequence of this is that many sectors of the economy rarely – if ever – benefit from a robust, external examination of their structure, conduct, and performance. This has the potential to have a corresponding negative impact on outcomes for consumers.
12. A recent example of this problem in action is the Commerce Commission's consideration of the merger between Z Energy and Chevron in the fuel market. The Commission, under the Commerce Act, was limited to examining whether the merger would substantially *lessen* competition in a market. It was not able to examine whether the *existing* level of competition in the market was optimal.
13. While some entities – such as government departments or the Productivity Commission – can already undertake market studies on an ad-hoc basis, we consider that, as currently established, they may not be best-placed to undertake such studies in all instances. For example:
  - a. they may not have the expertise or deep understanding of markets possessed by the Commerce Commission;

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<sup>1</sup> See, for example, Chapter 4 of: MBIE (2016). *What we know (and don't know) about economic growth in New Zealand*. Retrieved from [http://www.mbie.govt.nz/publications-research/publications/economic-development/What-we-know-and-dont-know-about-economic-growth-full-report.pdf/at\\_download/file](http://www.mbie.govt.nz/publications-research/publications/economic-development/What-we-know-and-dont-know-about-economic-growth-full-report.pdf/at_download/file)

<sup>2</sup> See MBE (2016). *Competition in New Zealand Industries: Measurement and Evidence*. Retrieved from: <http://www.mbie.govt.nz/publications-research/publications/economic-development/competition-in-new-zealand-industries.pdf>

<sup>3</sup> See the *Targeted Review of the Commerce Act 1986: section 36 and the taking advantage of market power* RIS for an assessment of how this aspect of the Commerce Act is working.

- b. they do not have mandatory information gathering powers, which could undermine the efficacy of a market study in some instances.
14. It is difficult to quantify the scale of the problem associated with New Zealand's current institutional structures for promoting competition. Nevertheless, we consider that the scale of the problem is sufficient to warrant the development and assessment of options to better-support the promotion of competition in specific industries.

## 2 Objectives

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15. The overall outcome sought by competition policy in New Zealand (as reflected in the Commerce Act 1986) is to promote the long-term benefit of consumers. In applying this to the issue of market studies, we consider that the following objectives are appropriate:
  - **Objective A:** the government understands the level of competition in individual markets and can identify ways of promoting competition in these markets; and
  - **Objective B:** firms are not unduly burdened by government's work to understand and promote competition.
16. While both objectives are important, we assign a higher weighting to Objective A. This is because we consider it likely that the long-term benefits to the economy as a whole from the government's work to understand and promote competition are likely to exceed the short-term cost burden faced by firms involved in this work.



# 3 Options and impact analysis

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17. There are many potential ways in which a market studies power can be designed. Variables include:
  - a. the scope of the market studies power;
  - b. which agency undertakes the study;
  - c. who initiates the study;
  - d. whether an agency has information gathering powers;
  - e. the nature of action that could be taken in response to a market study; and
  - f. funding issues.
18. This RIS assesses the status quo, plus two alternative packages.

## 3.1 Option One – Status Quo

### 3.1.1 Outline of Option One

19. Under this option, government agencies including the Commerce Commission, Productivity Commission, Electricity Authority, and MBIE would continue to have some ability to undertake partial market studies within existing funding arrangements. Existing constraints on these market studies powers will remain. These differ between agencies, but include:
  - a. a lack of mandate;
  - b. a lack of expertise to undertake studies;
  - c. a lack of funding; and/or
  - d. a lack of information-gathering powers.

### 3.1.2 Benefits and costs of Option One

20. The main benefit of this option is that firms would not have to participate in any additional government studies or investigations (relative to business-as-usual). This means that uncertainty and compliance costs for businesses would not increase. There would also be no additional cost to government.
21. The main cost of this option is a forgone benefit, in that the benefits to the economy that could result from a market study and the changes it produces (such as lower prices or greater innovation) will not be realised.

### 3.1.3 Overall assessment of Option One

22. Overall, we consider that the costs of Option One (in terms of forgone benefit) exceed the benefits (in terms of avoided costs).
23. In terms of the objectives, Option One *partially* meets Objective A, in that the government has a number of partial market studies powers at present which it can use to understand competition in markets to an extent. However, we consider that these powers are not adequate. Option One performs well against Objective B, by not imposing any additional burden on firms.

## 3.2 Option Two – Full market studies power

### 3.2.1 Outline of Option Two

24. Under this option, the mandate of the Commerce Commission would be expanded. In addition to its existing partial market studies powers, it would be given a broad power to undertake inquiries, reviews, and studies in relation to any aspect of the structure, conduct and performance of any market or markets within New Zealand.
25. Either the Commerce Commission or the Minister of Commerce and Consumer Affairs could initiate a study. The initiating party would need to prepare and make public terms of reference outlining:
  - a. the reasons for initiating a study;
  - b. the scope of the inquiry to be undertaken;
  - c. any requirements or proposals concerning consultation or co-operation; and
  - d. the date by which the Commerce Commission must/will submit any final report.
26. Upon completion of any inquiry, review or study, the Commerce Commission would be required to submit a final report to the Minister of Commerce and Consumer Affairs, and make that report publicly available. The Minister would not be required to formally respond to any Commerce Commission study, although in practice it is expected that the Minister would be likely to do so.
27. The Commerce Commission would have the ability to require a person to supply information or documents or give evidence, as provided for under section 98 of the Commerce Act.
28. Modest additional funding, in the form of a separate market studies appropriation, would be sought for the Commerce Commission as part of a budget process.

### 3.2.2 Benefits of Option Two

29. Relative to the status quo, we consider that Option Two has the advantage of facilitating comprehensive, proactive studies into individual markets to a much better extent. It would have the advantage of better facilitating the diagnosis of market problems, and potentially the identification of regulatory barriers to competition. In time, this greater understanding of markets would have the potential to drive significant economic benefits as the adoption of recommendations for change – likely both regulatory and non-regulatory in nature – leads to improved market performance and, in turn, better outcomes for consumers.
30. As an indicator of the potential scale of benefits, in the UK, market studies (and their outcomes) were estimated to produce an economic benefit of £576.6 million across three years from 2012-15.<sup>4</sup> Taking into account the difference in the size of the two economies and the exchange rate, using this measure, equivalent interventions in New Zealand could be expected to have a

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<sup>4</sup> Competition and Markets Authority. (2015). *CMA impact assessment 2014/15*. Retrieved from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447017/CMA\\_impact\\_assessment\\_2014-15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447017/CMA_impact_assessment_2014-15.pdf). Market studies (also known as market investigations) in the UK are significantly broader than what is proposed in Option Two, in that the Competition and Markets Authority can take action itself through imposing structural or behavioural remedies on the market.

benefit of \$62 million dollars over three years.<sup>5</sup> Costs in this study were not quantified. Other estimates of the benefits arising from individual market studies in the UK include:<sup>6</sup>

- a. **Doorstep selling:** Sales growth of £57 million a year, and reductions in consumer detriment of £8.5 million a year, due to changes to consumer protection regulations that resulted from the market study.
  - b. **Care homes:** The evaluation concluded that “the overall benefit to cost ratio... associated with the [UK] market study seems unquestionably to be well in excess of the 5:1 target”.
  - c. **Entry regulation into pharmacies:** Modest changes to entry regulations were estimated to produce yearly benefits of between £24.7 million and £32.8 million, compared with £12.5 million of additional costs, as well as numerous extra non-quantifiable benefits.
31. In terms of the specific design features of Option Two, we consider that it has the benefit of:
- a. allowing the government agency with the greatest competition expertise and understanding of the functioning of markets – the Commerce Commission – to undertake studies;
  - b. supporting the Commerce Commission to gain a complete picture of a market in question through the ability to use information gathering powers if required;
  - c. allowing the Commerce Commission a degree of independence to initiate studies that it considers are likely to be in the public interest, while also allowing Ministers to commission studies relating to strategically important issues of the day;
  - d. supporting accountability of Ministers and the Commerce Commission through a transparent commissioning and reporting process; and
  - e. limiting the likelihood of low-value studies being undertaken through a modest budget appropriation (to be determined separately through a subsequent process).
32. There is a risk that not all market studies would have significant benefits, in terms of identifying improvements that could be made to markets. However, we consider that even a market study that did not identify ways of improving market performance would have benefit in itself, by:
- a. reassuring relevant stakeholders and the wider public that a market is performing well; and
  - b. potentially avoiding costly and unnecessary government intervention in a market.

### 3.2.3 Costs of Option Two

33. Any market study has costs, both in terms the direct cost to the government of undertaking a market study, and the costs to businesses from participating in a study. However, because our intention is that the funding for market studies would be modest, the number of market studies undertaken is likely to be low. This means that the costs imposed on the economy as a whole – while not negligible – are likely to be limited.
34. In terms of its specific design, Option Two could increase costs to businesses by allowing the Commerce Commission to use its mandatory powers to make potentially significant information requests from them. It is difficult to quantify the cost of mandatory information-gathering requests to firms. Nevertheless, we include the following anecdotes as indicators:

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<sup>5</sup> This involves dividing by 16 based on the differing size of the UK and New Zealand 2015 nominal GDPs, and multiplying by the prevailing exchange rate (0.58 NZD/GBP as at 14 October 2016).

<sup>6</sup> Office of Fair Trading, cited in Productivity Commission (2014). *Boosting Productivity in the Services Sector*. Retrieved from <http://productivity.govt.nz/sites/default/files/services-inquiry-final-report.pdf>.

- a. One submitter on the issues paper recently received an informal, voluntary information request from the Commerce Commission. The request was 13 questions long. The submitter estimated that the cost of preparing useful and comprehensive answers, and obtaining management sign-off, was in excess of \$20,000.
  - b. One stakeholder told us that it received a mandatory information request from a regulator that required two months' full-time work by seven staff, and resulted in over 200,000 documents being given to the regulator. It noted that it could receive several requests of this nature a year.
  - c. We also heard from a business that was recently subject to a near-year-long Commerce Act investigation from the Commerce Commission. They estimated that their external legal costs of defending the investigation were in the region of \$600,000. This was in addition to internal staff time.
35. Without discounting these anecdotes, we think that these costs would not necessarily be typical for a business involved in a market study. Because market studies focus on the operation of a market, rather than a particular firm, they are likely to be higher-level in nature – and thus requiring less information from a firm – than a typical investigation or supervision activity by a regulator.
  36. For example, a Commerce Act investigation is focussed on proving – to an evidentiary standard required by a court – that a firm has broken the law. In contrast, the tenor of a market study is much less 'negative'. Firms do not need to defend themselves against an allegation. Instead, they might simply be asked to explain how their business model works or provide some information about certain costs that they face. In many cases, this might not be significantly different from a firm's costs in submitting on a standard policy process.
  37. There would be exceptions, such as if the Commission made wide-reaching data requests, but we expect that this would be rare because the High Court has ruled that Commerce Commission information requests must be relevant and capable of withstanding objective scrutiny.<sup>7</sup>
  38. Internationally, we are only aware of one estimate of the cost of market studies. The Business and Advisory Committee to the OECD argued that UK market studies and investigations can generate external costs to a firm of over £4 million, and internal costs of £2.5 million.<sup>8</sup> These costs are likely to significantly overestimate the cost of a market study in New Zealand. This is because market investigations in the UK – the second step in a process following a market study – are significantly broader in scope than the one-step process proposed under Option Two. In particular, in market investigations, the Competition and Markets Authority can take action itself through imposing structural or behavioural remedies on the market – rather than just make recommendations as is proposed under Option Two.
  39. In addition, international experience<sup>9</sup> suggests that formal information gathering powers are unlikely to be used frequently. Based on this, we consider that the benefits that arise from the

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<sup>7</sup> See *Telecom Corp of NZ Ltd v CC* [1991] and *AstraZeneca Ltd v CC* [2008]. In the former, the Court ruled that "It follows that ... the primary right to decide as to relevance under s 98 of the Commerce Act ... reposes in the investigative body or officer but it is incumbent upon the investigative body or officer to show a degree of relevance bearing in mind that in an investigative situation and in the context of the section, the onus must be a very easy one to discharge. Nevertheless it will still be open to the person from whom the information is sought, to seek to establish that the information or the document is not relevant and in the appropriate case the issue may have to be determined by the Court."

<sup>8</sup> OECD. (2008). *Policy Roundtables: Market Studies*. Retrieved from <http://www.oecd.org/regreform/sectors/41721965.pdf>

<sup>9</sup> International Competition Network. (2009). *Market Studies Project Report* at p. 39. Retrieved from <http://www.internationalcompetitionnetwork.org/uploads/library/doc363.pdf>

Commerce Commission having formal information gathering powers are likely to exceed the costs.

40. We do not consider that the possession of information gathering powers would alter the behaviour of firms in respect of the information that they hold. This is because the prospect of a particular firm being the subject of a market study at any given time is very low.

### **3.2.4 Overall assessment**

41. Overall, we consider that the benefits of the option as described above are likely to exceed the costs.
42. In terms of the objectives, Option Two performs strongly against Objective A, by providing Government with a strong institutional framework to support it to understand the level of competition in individual markets and identify ways of promoting competition in these markets. We consider that Option Two meets Objective B – albeit to a lesser extent than Option One – because it provides adequate safeguards (as discussed above) against firms being unduly burdened by market studies.

## **3.3 Option Three – Constrained market studies power**

### **3.3.1 Outline of Option Three**

43. Option Three is similar to Option Two, except in two respects:
  - a. Only the Minister of Commerce and Consumer Affairs could initiate a market study.
  - b. The Commerce Commission’s information gathering powers under section 98 of the Commerce Act would not extend to its market study function – that is, it would rely on voluntary provision of information by those subject to a study.

### **3.3.2 Benefits of Option Three**

44. Relative to the status quo, Option Three has similar benefits to Option Two. It also has the arguable benefits of:
  - a. Ensuring that any market studies are relevant to the Government of the day.
  - b. Providing businesses with confidence that they will not be subject to ‘fishing expeditions’. This is because, by not giving the Commerce Commission an information gathering power in respect of market studies, the Commerce Commission will not be able to gather information as part of a market study to use for enforcement purposes.
45. However, we consider that the overall benefits of Option Three are lower than for Option Two because:
  - a. It removes the ability of the Commerce Commission to independently initiate market studies. This could mean that, from time to time, areas of the economy that may warrant a market study would not receive one.
  - b. The efficacy of the Commerce Commission’s market studies could be hampered by the lack of information-gathering powers. While some submitters would provide the agency with information regardless of whether a formal information gathering power exists or not, others would choose not to participate in a study, or limit the information they provide. This could lead to the Commerce Commission drawing conclusions and making recommendations based on anecdotal and/or incorrect information, potentially hampering the usefulness of the study.

### **3.3.3. Costs of Option Three**

46. The costs associated with Option Three are likely to be slightly lower than Option Two. This is because some businesses may choose not to participate in market studies or provide information on request.

### **3.3.4 Overall assessment**

47. Like Option Two, we consider that the benefits of Option Three are likely to exceed its costs. However we consider that the net benefit of Option Three is lower than for Option Two.
48. In terms of objectives, we consider that Option Three achieves Objective A, albeit to a lesser extent than Option Two. This is because the additional safeguards imposed under Option Three may limit the government's ability to fully understand and promote competition. It achieves Objective B to a greater extent than Option Two because firms that do not want to provide information to government as part of a market study will not have to.

# 4 Conclusions and recommendations

49. Table One assesses the options against the objectives set out above. As noted above, we give greater weighting to the first objective.

**Table One: Assessment of options against objectives**

Objective	Option One: Status Quo	Option Two: Full power (Preferred Option)	Option Three: Constrained power
Government understands the level of competition in individual markets and can identify ways of promoting competition in these markets.	✓	✓✓✓	✓✓
Firms are not unduly burdened by government’s work to understand and promote competition.	✓✓✓	✓	✓✓

50. Both the benefits and costs of Options Two and Three are uncertain. Nevertheless, in this instance, we do not consider the uncertainty to be a reason in itself to retain the status quo. Essentially, this is because:
- a. introducing a market studies power does not, in itself, create any real cost or uncertainty for business;
  - b. the funding and procedural limitations placed on the Commerce Commission under both Option Two and Three will significantly mitigate the risk of high-cost, low-value market studies taking place; and
  - c. we consider that that the costs of a market study to a particular firm are likely to be considerably lower than the costs of engaging with a regulator in respect of investigation of compliance with an Act; and
  - d. any recommendations arising from a market study will be subject to their own cost-benefit analysis.
51. In line with this, MBIE’s preferred option is Option Two – a full market studies power given to the Commerce Commission, supported by modest additional funding. As noted above, we consider that the benefits of a market studies power are likely to outweigh the costs. This view was shared by the Productivity Commission in its 2014 report.
52. We consider that Option Two performs best against Objective A of the government understanding the level of competition in individual markets and being able to identify ways of promoting competition in these markets. Over time, we expect that the findings and actions resulting from these studies will provide benefits for consumers, and the economy as a whole. Sections 3.2.2 and 3.2.4 outline in more detail our assessment of why we think that Option Two performs best against Objective A.
53. At the same time, while the costs for firms involved in a market study will be higher than the status quo, and marginally higher than Options Three, we consider that the safeguards inherent

in Option Two meet the Objective B of not unduly burdening firms through government's work to understand and promote competition. Sections 3.2.3 and 3.2.4 outline in more detail our assessment of why we consider that Option Two sufficiently meets Objective B.



# 5 Consultation

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54. In November 2015, MBIE released an Issues Paper entitled *Targeted Review of the Commerce Act*. This Issues Paper examined whether there was a need for a formal market studies power, alongside a consideration of the performance of section 36 of the Commerce Act and the Commerce Commission's alternative enforcement powers.
55. 39 submissions were received on the Issues Paper, including 30 which addressed the issue of market studies. Submissions were evenly divided on whether or not a gap exists at present in New Zealand's institutional settings for promoting competition.
56. Submitters in favour<sup>10</sup> argued that:
  - a. There is benefit in an agency being able to gain a strong, holistic understanding of the operations and competitiveness of a market, outside of a Commerce Act enforcement investigation.
  - b. This understanding would allow an agency to make recommendations to address market problems and barriers to competition, which would ultimately serve to improve the welfare of consumers.
57. Submitters opposed<sup>11</sup> argued that:
  - a. There was no gap in New Zealand's institutional settings at present and that another agency would simply duplicate the functions of the organisations that already have partial market studies powers.
  - b. Creating a market studies power would add to the regulatory burden faced by firms in complying with information requests.
  - c. Market studies were a poor use of government funds, given the risk that any resulting government intervention would have a low, or negative, marginal benefit.
58. Of those in favour of a market studies power being introduced, most were in favour of it being given to the Commerce Commission on the basis of its competition expertise and understanding of markets. However, several submitters argued that such a power should not sit with the Commerce Commission because it would not sit well with its existing investigation and enforcement powers (for example, Commerce Commission enforcement teams could use information acquired during a market study to take action against a participating firm). One submitter argued that the Productivity Commission was the appropriate agency to undertake market studies because it took a wider focus than just competition.
59. Submitters were divided on whether Ministers, the responsible agency, or both, should have the power to initiate a study; and on whether the responsible agency should have compulsory information acquisition powers.
60. MBIE has consulted with the following agencies as part of this policy process: Treasury, the Commerce Commission, the Ministry of Justice, Ministry for Primary Industries, Ministry of Transport, New Zealand Trade and Enterprise, the Electricity Authority, and the Productivity Commission. The Department of Prime Minister and Cabinet has been informed.

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<sup>10</sup> Including 2degrees, the Law Society, the Insurance Council of New Zealand, BNZ, Matthews Law, Chorus, the Food and Grocery Council, Consumer New Zealand, and the Commerce Commission

<sup>11</sup> Including the Building Industry Federation, Orion, Metals New Zealand, DLA Piper, IAG, ANZ, Business New Zealand, Retail New Zealand, Russell McVeigh, Bell Gully and Spark.

61. Treasury agrees with MBIE in supporting a market studies power for the Commerce Commission, and considers that the proposed safeguards should alleviate any concerns about compliance costs or improper targeting of harms. The Commerce Commission supports a market studies power in line with that set out in Option Two, contingent on the Commission receiving adequate funding to perform studies, and having the ability to re-request information gathered in a market study as part of an enforcement investigation. The Productivity Commission and MPI are also supportive of a market studies power. No other agency expressed a view.

## 6 Implementation plan

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62. If the status quo is retained, no legislative change or increase in funding will be required in respect of this issue.
63. If MBIE's preferred option is implemented, it would be done as part of a Commerce Amendment Bill, which could potentially be introduced to Parliament in 2017. Funding for the Commerce Commission would be addressed separately as part of the budget process. No specific communications plan would be envisaged as part of the institutional change, but the initiator of any market study would need to publicly announce the study prior to its commencement.

# 7 Monitoring, evaluation and review

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64. If the status quo is retained, as part of its regulatory stewardship obligations, MBIE will continue to advise Ministers on institutional improvements that could be made to support increased competition across the economy.
65. If MBIE's preferred option was implemented, as monitor of the Commerce Commission, it would have a key role in overseeing any market study, as well as the performance of the Commission as a whole. In addition, MBIE would likely be involved in responding to the recommendations – including an assessment of their costs and benefits – that arise from market studies.
66. Regardless of whether MBIE's preferred option is implemented, MBIE will continue to monitor levels of competition in the economy, as part of its business-as-usual activities. MBIE is working on establishing a cross-government competition research agenda to support this aim. In addition, MBIE will continue to undertake quasi-market-studies itself where necessary, and as capacity permits.