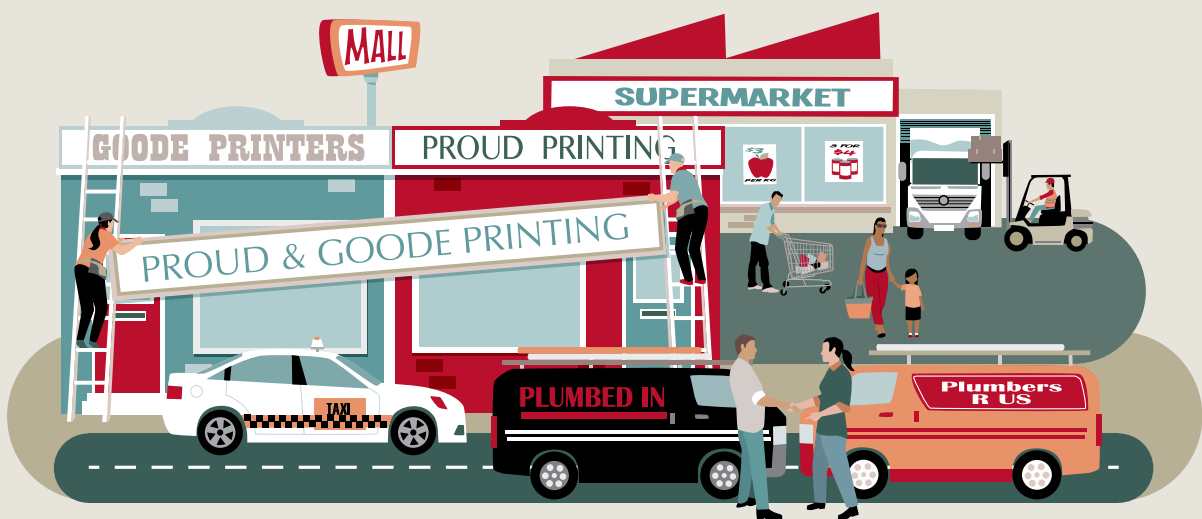


# Competition Assessment Guidelines



## Introduction

- 1 Competition can be described as the process of rivalry between businesses to win and retain customers. It creates incentives for businesses to reduce costs and prices, improve the quality of goods and services and develop and introduce new products, services and technologies. Competition in markets is a key driver for greater value, innovation and productivity, and therefore of better outcomes for New Zealanders.
- 2 The behaviour of businesses and government can affect the level of competition in markets. For example, when public officials set standards, impose licensing requirements, grant exclusive rights or contracts, or otherwise make decisions allocating resources, they are making decisions that influence how markets in New Zealand will operate.
- 3 Government policy and action in markets is often motivated by important goals other than the promotion and/or protection of competition, such as promoting better health, safety and environmental outcomes and fulfilling commitments to Te Tiriti o Waitangi. Government can also affect the incentives or ability of businesses to compete and can therefore impact consumers, productivity, growth, efficiency and innovation in markets. Sometimes it may be necessary to reduce competition to implement a particular policy. This can create a tension between meeting the policy goal and maintaining competition in markets.
- 4 These guidelines are intended to help public officials factor competition into their analysis of policies and initiatives that change markets. They can help to identify competition issues early on and support approaches that maintain or promote competition in the achievement of policy goals, where it is feasible.
- 5 In this guide, 'policy' and 'policies' are used broadly to refer to actions by government entities/ public officials which can materially change how markets work, rather than to describe legislative policy development.
- 6 New Zealand's competition regulatory system aims to promote the long-term benefit of consumers by:
  - promoting competition
  - protecting competition
  - regulating the outcomes consistent with competition in markets with little or no competition.
- 7 The Ministry of Business, Innovation and Employment (MBIE) has primary responsibility for maintaining, monitoring and improving the competition system.
- 8 The Commerce Commission is responsible for enforcing laws relating to competition to ensure that businesses retain strong incentives to compete. In sectors where competition is limited, the Commission has regulatory responsibilities to ensure that consumers are not disadvantaged by a lack of competition. The Commission also contributes to the development and implementation of the competition regulatory system.

## Purpose

- 9 The purpose of this guidance is to assist public officials to identify any potential competition issues and, where appropriate, mitigate them when developing policies or initiatives which may change how markets are structured or the dynamics between businesses. The [Quick Guide](#)<sup>1</sup> provides a summary of these guidelines for ease of use. These guidelines can be used by officials without specialised economic or competition knowledge to implement policies that maintain or promote competition, where it is feasible. These guidelines are informed by our own experience and international best practice.<sup>2</sup> The guidelines complement the information available on MBIE’s website on its [Assessing Competition Impacts](#) page.<sup>3</sup>
- 10 A competition assessment tool is included in this guidance, with examples of competition considerations to consider in the:
  - early development of initiatives which may change how markets are structured
  - review of existing policies and regulation
  - evaluation of the competitive impacts of initiatives and action in markets.

If you would like to discuss the guidelines or a particular initiative please contact the Commerce Commission’s Competition Branch by email, [competition@comcom.govt.nz](mailto:competition@comcom.govt.nz), or MBIE at [competition.policy@mbie.govt.nz](mailto:competition.policy@mbie.govt.nz).

### Competition assessment at a glance

The process below can help to identify competition implications early in the development and review of government policy and action in markets.

#### **Step 1: Identify the policy goals**

Consider the goals the policy aims to achieve.

#### **Step 2: Assess the impact of the policy options on competition**

Consider whether the new or existing policy option has the potential to limit:

- the ability for businesses to enter, exit or expand from markets
- the ability and incentive for businesses to compete
- the ability for consumers to choose
- competitive neutrality in markets.<sup>4</sup>

#### **Step 3: Identify alternative approaches to address policy goals, if necessary**

If any parts of the policy or initiative negatively impact competition, consider whether there are less restrictive alternatives or other mitigating measures that could be put in place.

#### **Step 4: Implement the best alternative**

Where possible, adopt the option that best achieves the policy goal while minimising negative competition impacts or distortions.

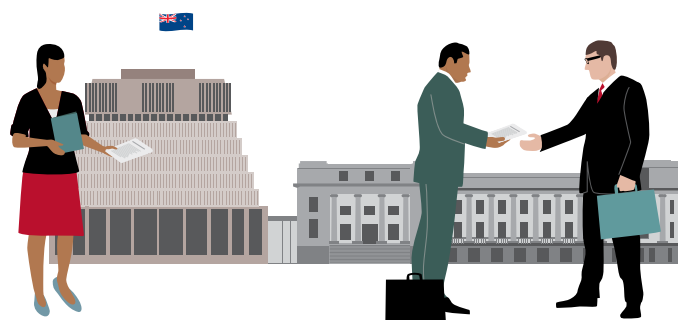
#### **Step 5: Monitor and review**

Monitor implementation and make amendments as required. Carry out a post-assessment review to build understanding of competition impacts and inform future decisions.

1. <https://comcom.govt.nz/about-us/our-policies-and-guidelines/competition-assessment-guidelines>
2. OECD “Competition Assessment Toolkit” (2009) available at <https://www.oecd.org/competition/assessment-toolkit.htm>; Competition Bureau Canada “Strengthening Canada’s economy through pro-competitive policies: A step-by-step guide to competition assessment” (August 2020) available at <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04546.html>
3. <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/assessing-competition-impacts-supporting-you-in-doing-regulatory-impact-assessments/>
4. Competitive neutrality means businesses should be able to compete based on their merits without competitive advantage from regulation or government ownership.

## Section One: Why promoting competition is important

- 11 The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers. Competition is one of the drivers of well-functioning markets and can contribute to the wellbeing of New Zealanders and the economy by:
- encouraging businesses to lower costs and prices and provide a better range of quality products and services to their customers
  - encouraging businesses to invest efficiently and innovate
  - empowering consumers by increasing their choice of products and services and encouraging businesses to provide information for consumers to make good purchasing choices
  - contributing to New Zealand's economic growth and international competitiveness by encouraging New Zealand's resources to be used in the most valuable way
  - constraining market power which can lead to unreasonably high profits for businesses and less choice for consumers
  - encouraging businesses to invest in sustainable inputs and employ environmentally-friendly production methods if they can gain a competitive advantage, for example to meet consumer demand for environmentally-friendly products or services or to cut costs
  - encouraging a range of businesses to thrive, including those that meet the needs of different consumer groups, for example, Māori, Pacific and other ethnic communities.
- 12 Public officials are tasked with achieving objectives that are often motivated by goals other than the promotion and/or protection of competition and sometimes restrictions on competition may be necessary and appropriate to achieve certain goals.
- 13 A competition assessment carried out in the early stages of the development of an initiative or action can identify which elements, or provisions, may impact competition and whether the extent of the restrictions, or distortions, identified are strictly necessary to achieve the end policy goal.



## Section Two: Policies that may impact competition

- 14 This section looks at the types of policies that may impact competition. Broadly speaking, these include policies that could impact:
- the ability of businesses to enter, expand and exit from markets
  - the ability and incentive to compete
  - the ability of consumers to choose
  - competitive neutrality in markets.

### *The ability of businesses to enter, exit and expand into markets*

- 15 In competitive markets businesses can easily enter, expand, or exit. Businesses have incentives to earn profits by winning and retaining customers. Competitive markets retain these incentives but ensure that businesses are not able to earn sustained levels of high profits unless they continue to meet consumer needs. This is because the profits create incentives for other businesses to enter and expand to win their share of the profits and for inefficient businesses to leave the market.
- 16 Many restrictions on entry, expansion, and exit may fall outside the control of public officials, such as high capital requirements, economies of scale, or lack of access to distribution channels. Other restrictions, however, may result from government policies, such as:
- grants of exclusive rights or contracts to produce a certain product or service
  - establishing a licence or permit requirement
  - zoning restrictions
  - setting standards
  - trade-related barriers.
- 17 Some of these policies may be driven by public interest goals, such as health and safety considerations, environmental outcomes or fulfilling commitments to Te Tiriti o Waitangi. However, if they are stricter than needed to achieve the policy goal, they can unnecessarily reduce consumer choice, or create artificial scarcity that raises prices.
- 18 Limitations on access to necessary inputs can also restrict entry and expansion in markets, as it may raise costs for certain businesses.

### **Example: Restrictive licensing**

In Dublin, Ireland, the number of taxis was restricted through a licensing system. The resulting taxi shortage meant that on popular nights for going out, people would sometimes have to wait hours to get a taxi home. Following a court decision striking down the licensing limits, the number of taxi licences increased by more than 300%, with a substantial decline in waiting times at the most popular hours for travel.

### ***The ability and incentive of businesses to compete***

- 19 Policies and regulations may affect the ability of businesses to compete vigorously in a market and may reduce their incentives and ability to lower prices, increase quality, choice and innovation, or to become more productive.
- 20 Examples include policies and regulations that specify a minimum quality of goods or standard of service that all businesses must meet. Minimum standards can protect consumers from poor quality goods and services. However, if standards are set too high, they may create barriers for entry, raise production costs or advantage some businesses over others.
- 21 Other policies may require businesses to publish information about prices, outputs or sales. These policies may increase the amount of information available to businesses about their competitors and their strategies. This may make it easier for businesses to accommodate each other's behaviour and facilitate conduct such as leader-follower pricing.
- 22 Some regulatory regimes may restrict advertising, create rules that prevent discounting or impose unnecessarily strict qualification/standards/testing requirements. Such regimes may reduce the ability of businesses to enter or expand in a market and unfairly advantage some businesses over others. They may also reduce the amount of information available to consumers to inform their choice.

#### **Example: Advertising restrictions for professional services**

Some professional associations advocate for advertising restrictions on the basis that they prevent wasteful spending on advertising, therefore ensuring that costs (and prices) are maintained at a lower level. It is also argued that advertising in markets for professional services can cause a negative spiral of lower price and lower quality products, affecting the dignity of a profession.

However, advertising generally benefits consumers by allowing them to find and compare offers from competing businesses and then make well-informed choices, which has the effect of stimulating competition between suppliers.

A study of optician advertising restrictions in the United States found advertising led to significantly lower prices for consumers, on average, without having an average reduction in the quality of service provided. The findings in that case were consistent with the hypothesis that while advertising restrictions can be beneficial in some cases, the primary effect of the advertising restrictions was to prevent competition and keep revenues higher for the profession.

### ***The ability of consumers to choose***

- 23 Well informed consumers, who can easily choose between different options, play a large part in making sure markets are competitive. Consumer choice can provide incentives for businesses to win and retain market share by lowering price and increasing choice, quality, innovation and productivity.

- 24 Switching barriers can restrict consumer choice by causing consumers to stay with existing businesses even if others are offering better products or services at lower prices. Switching barriers include complicated, time-consuming and expensive processes for consumers to switch between businesses, such as lengthy contract terms, high cancellation fees and lack of individual data portability. Switching barriers may also discourage new businesses from entering the market, because it is difficult to win customers from existing businesses. Public officials may consider options to implement initiatives that reduce switching barriers, to improve competition in markets.

### **Competitive neutrality in markets**

- 25 Competitive neutrality means that businesses should be able to compete on their merits without competitive advantages from regulation or government ownership. Policies that favour a particular type of business may reinforce or create advantages for some businesses over others, leading to an unequal playing field for businesses, distorted competition in markets or barriers to new entrants.
- 26 Competitive neutrality may be distorted by regulations, such as “grandparent” clauses or subsidies that assist some businesses more than others.<sup>5</sup> Cost advantages to some businesses over others may support businesses that are relatively inefficient to remain in the market and cause otherwise efficient businesses to exit, unless a cost advantage is the deliberate and legitimate intent.

#### **Example: “Grandparent” clauses**

Grandparent clauses may be introduced with new industry standards or a new regulatory regime, allowing existing businesses to continue operations under older rules or standards permanently or for a certain adjustment period. Where the older standards are lower or less strict than the newer ones, grandparent clauses may create advantages for existing businesses relative to newer ones.

- 27 Competition in markets can also be distorted if government-owned entities have advantages over private companies. Advantages granted to government businesses can include:
- exemption from taxes (such as income tax or land tax)
  - cheaper debt financing
  - the absence of a requirement to make a commercial rate of return on assets
  - exemption from regulatory constraints or costs.

#### **Example: Competitive neutrality**

Callaghan Innovation is a government agency supporting hi-tech businesses in New Zealand. At the direction of the Minister of Science and Innovation, the co-funding guidelines set out how Callaghan Innovation should ensure transparency and competitive neutrality for New Zealand domestic recipients of Callaghan Innovation’s services. In particular, the funding model for contestable services should be broadly consistent with the principle of competitive neutrality to avoid crowding out other public and private providers.

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5. Subsidies can include cash grants, low interest government loans, reduction of specific tax liability or government provision of goods and services at below-market prices. Subsidies can be effective instruments for achieving a wide range of economic and social policy objectives. For example, an initiative that provides cheap government finance to businesses to build an ultra-fast broadband network, as long as they do not offer retail telecommunications services. However, subsidies that apply only to a subset of businesses may undermine competitive neutrality.

## Section Three: Considering competition in the achievement of policy goals

- 28 The process described below can assist public officials to consider competition early in the development and review of government initiatives and actions that materially change markets. The assessment will help to determine whether any restrictions or distortions are necessary and appropriate to achieve the end policy goal.

### ***Step 1: Identify the policy goals***

- 29 Identify the policy goals to be achieved to inform the assessment process. In most cases, the goals will already be decided.

### ***Step 2: Assess the impact of the policy options on competition***

- 30 The next step is to identify if, and how, the policy options or initiatives are likely to effect competition. The Competition Assessment Tool shown in Appendix A can be helpful to guide assessors through the assessment process. It describes potential competition considerations, the effects on competition and provides options for reducing unnecessary restrictions while preserving the overall policy objective. If any competition issues are identified, further analysis may be required. The table is not exhaustive and other competition considerations may be identified during the assessment.

### ***Step 3: Identify alternative approaches to address policy goals, if necessary***

- 31 If any parts of the initiative are likely to negatively impact on competition, consider whether there are less restrictive alternatives or other mitigating measures that could be put in place.
- 32 If it is not possible to achieve the policy goal (or tangible outcome) without some restriction or distortion to competition, it might be possible to adopt feasible alternatives that reduce and minimise the identified negative impact on competition. Some examples of less restrictive alternatives for achieving policy goals are described in Appendix A.

### ***Step 4: Implement the best alternative***

- 33 Where possible, adopt the option that achieves the policy goal while minimising negative competition impacts or distortions, where it is feasible.

### ***Step 5: Monitor and review***

- 34 Once implemented, monitor the initiative to understand the intended and unintended effects on competition in the relevant markets. Consider whether amendments should be made. A review may also be necessary to consider new technological or economic developments.

## Conclusion

- 35 Competition is one of the drivers of well-functioning markets and has the potential to contribute to making New Zealanders better off. This guidance can support officials to carry out a competition assessment early on and prevent unnecessary restrictions on competition in the achievement of policy goals. We encourage the wide use of these guidelines and are available to provide further information as required.



# Appendix A: Competition Assessment Tool

A competition assessment should be carried out if a policy or initiative is likely to materially restrict competition. The table below can help to identify competition considerations early on and determine if further assessment is required to reduce unnecessary restrictions in the achievement of policy goals. The examples are not exhaustive and other competition considerations and mitigations may be identified during the assessment.

Competition consideration	How policy can restrict/distort competition	Examples of less restrictive alternatives and/or ways to mitigate competitive harms
<b>The ability to enter, exit and expand into a market</b>	<p>Granting of an exclusive licence/contract to supply a good or service limits the number of participants in a market.</p> <p>Licence or permit requirements make it harder for a new player to enter the market.</p>	<p>Consider a competitive bidding process for the exclusive licence/contract.</p> <p>Consider splitting the licence/contract between multiple businesses where possible, especially if economies of scale/scope are not important.</p> <p>Consider limiting the duration of an exclusive licence/contract to allow for the possibility of future competition.</p> <p>Ensure licence and permit requirements are not more onerous than required.</p> <p>Ensure licences and permits are awarded in a competitive and transparent manner and reviewed frequently.</p>
<b>The ability and incentive for businesses to compete</b>	<p>Minimum standards or service levels/product testing requirements reduce the potential for product differentiation.</p> <p>Required publication of prices/output/sales information increases the amount of information available about competitors and their strategies.</p> <p>Establishing a regulatory regime that imposes restrictions on the ability of businesses to compete, such as advertising restrictions, rules that prevent discounting or qualifications that may restrict entry to the market.</p>	<p>Ensure standard/quality/product testing levels are no stricter than required.</p> <p>Consider information or product disclosure requirements, rather than requiring adherence to strict standards, where appropriate. Alternatively, consider promoting the use of voluntary standards and codes of practice.</p> <p>Publish aggregated information in place of disaggregated information and only make public what is necessary to achieve policy goals.</p> <p>Consider establishing or retaining an oversight function that provides the right to approve, refuse and/or substitute rules that promote anti-competitive behaviour.</p>
<b>Consumer choice and ability to switch between options</b>	<p>Regulation that affects the ability of consumers to choose, or switch, between options.</p>	<p>Ensure any switching barriers, such as lengthy contract terms, cancellation fees, exist only to the extent required.</p> <p>Consider reducing barriers to switching to the extent possible. In addition, consider alternative measures that increase the availability of information to consumers.</p>
<b>Competitive neutrality in markets</b>	<p>“Grandparent” clauses that reward existing businesses, by allowing them to operate under old rules, at the expense of new entrants.</p> <p>Subsidies to some but not all businesses.</p>	<p>Ensure “grandparent” clauses are time-limited rather than permanent and their duration is proportionate to the underlying rationale for the clause being granted in the first place.</p> <p>Where possible, avoid the need for the transition periods requiring “grandparent” clauses.</p> <p>Where subsidies are aimed at maintaining jobs in declining industries, consider worker or regional adjustment programmes to support individuals and businesses adapting to changing market conditions instead.</p>



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