Promoting competition in New Zealand – A targeted review of the Commerce Act 1986

DECEMBER 2024

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful

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The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the issues raised in this document by 5pm on **07 February 2025**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at: https://www.mbie.govt.nz/have-your-say/seeking-feedback-to-improve-competition-in-new-zealand. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to competition.policy@mbie.govt.nz.
- mailing your submission to:

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Please direct any questions that you have in relation to the submissions process to competition.policy@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on this review. We may contact submitters directly if we require clarification of any matters in submissions.

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Minister’s foreword

As Minister of Commerce and Consumer Affairs, I am focussed on ensuring New Zealand’s core competition settings are working well. Maintaining a robust competition system in New Zealand helps ensure businesses compete on a level playing field and face few barriers when entering markets and growing their business.

The main purpose of our competition regime, as set out in the Commerce Act 1986, is to deliver long term benefits to New Zealand consumers. Businesses that actively compete are incentivised to offer goods and services at lower prices and at the quality and range that consumers want, leading to increased innovation. This innovation serves to increase economic productivity and results in increased living standards for all New Zealanders.

This Government is focused on rebuilding the economy, decreasing the cost of living and lifting productivity. Launching a review of our competition settings plays an important part in the delivery of these economic priorities. Much of the Commerce Act has not been reviewed for over 20 years, while the Australian Government has recently announced the ‘fifth wave of competition reform’. It is crucial that New Zealand’s competition settings remain agile, responsive and fit for purpose for the long-term benefit of consumers.

The purpose of this discussion document is to seek feedback on New Zealand’s current merger control regime and anti-competitive conduct provisions in the Commerce Act. I am also consulting on several possible new provisions that could increase the Commerce Commission’s agility to promote competition or competitive outcomes. These new provisions include the ability to influence business behaviour through industry codes, similar to those used by Australian regulators, and several technical amendments.

Our merger regime and anti-competitive conduct provisions help prevent businesses gaining a large share of a market to the likely detriment of consumers and allows the Commerce Commission to take action when businesses act to harm competition. I want to ensure the Commerce Commission is well equipped with the tools it needs to ensure competition flourishes in New Zealand.

I welcome discussion on the topics in this paper, or any other Commerce Act issues, and invite discussion and submissions from a wide range of stakeholders.

Chapter 1: Overview and context of the review

Introduction

Competitive and dynamic markets are critical to economic productivity and the welfare of New Zealanders. Effective competition settings are particularly important in a small, geographically isolated economy like New Zealand, which can make markets less subject to competition from overseas firms. Lower levels of competition mean that firms can face weaker incentives to innovate, improve efficiency, and provide better services at lower prices to consumers.

The Commerce Act 1986 (**Commerce Act** or **Act**) is New Zealand's primary competition legislation, administered and enforced by the Commerce Commission (**Commission**). The Act's purpose is to promote competition for the long-term benefit of consumers. It sets out the generic competition settings that apply to anti-competitive conduct (**Part 2**), mergers and acquisitions (**Part 3**) and the Commission's clearance and authorisation processes (**Part 5**), all of which are the focus of this discussion paper.

The Government is reviewing the Commerce Act to ensure our competition settings remain fit for purpose. This is the first time many of these provisions have been reviewed in over 20 years and coincides with major reforms of competition law underway in Australia. The aim of this review is to enhance competition to help deliver the Government's objectives of rebuilding the economy, decreasing the cost of living and lifting productivity.

This discussion paper focuses on:

- Reviewing the merger control regime – ensuring the Commission has tools to prevent or remedy all mergers that are likely to substantially lessen competition.
- Modernising tools to address anti-competitive conduct – ensuring the Commission has up-to-date tools to address anti-competitive conduct between firms with market power.

Context for the review

This review is in the context of:

- International concerns about increasing market concentration, increases in price-cost margins and declines in business dynamism that may be attributable to declines in competition.[1] [2]
- Recent Commission market studies which have identified markets dominated by a few large businesses as being a contributing factor to a reduction in competition, and which have required costly sector-specific interventions.

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1 Elevated inflation and declining productivity are also driving concerns.

2 Australian House of Representatives Standing Committee on Economics (2024) Inquiry into promoting economic dynamism, competition and business formation (available here: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Economicdynamism/Report)

- The 2024 OECD Economic Survey of New Zealand, which recommended strengthening the merger regime in the Commerce Act, and monitoring reforms underway in Australia. Maintaining regulatory alignment of competition laws between Australia and New Zealand, where that makes sense for New Zealand, can promote certainty for businesses operating across the trans-Tasman market.

- The Australian Government initiating a Competition Policy Review. In Australia, concerns have been raised about markets becoming increasingly concentrated and merger reform has been identified as a priority issue, resulting in proposed legislative change.

These are discussed further below.

The state of competition in New Zealand

Market-based studies provide the best indicators of competition. The Commission's market studies in the land transport fuel, residential building supplies, retail groceries and personal banking sectors have found that markets in these sectors are not working well for consumers. Mergers in these sectors have contributed to concentrated markets, and a heightened risk of coordination.

Measuring competition at an economy-level is more challenging due to data limitations and methodological issues (eg statistical 'industry classifications' are not reliable proxies for the competition concept of 'markets'). Research by the New Zealand Productivity Hub in 2019 gives measures for the state of competition in New Zealand industries. Over the period 2001 to 2016, results were inconclusive at an economy-wide level, with the strength of competition in some industries increasing and some declining over time.[3]

2024 OECD Economic Survey of New Zealand

The 2024 OECD Economic Survey of New Zealand final report made a series of findings and recommendations that could strengthen the state of competition in New Zealand. It suggested that policy settings could be made more pro-competitive and used to offset the challenges posed by New Zealand being a small, geographically isolated market. It reported that New Zealand's productivity level remains, "markedly below the OECD frontier."[4]

Australia's competition policy reforms

In August 2023, the Australian Competition Review was launched, to be led by a Competition Taskforce and the Australian Treasury. The Australian Competition Review is a two-year rolling review of competition laws, policies and institutions focused on ensuring they remain fit for purpose. It is focusing on reforms that would increase productivity, reduce the cost of living and boost wages.[5]

One of the initial priorities is reform of the merger regime in the Australian Competition and Consumer Act 2010 (**CCA**). The prohibition against anticompetitive mergers in the CCA is closely aligned with the same prohibition in the Commerce Act, but with procedural differences which had caused challenges for the Australian Competition and Consumer Commission (**ACCC**). The Australian

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[3] New Zealand Productivity Hub (2019). *Competition in New Zealand: highlights from the latest data – Research note 2019/3* (available here: https://www.treasury.govt.nz/sites/default/files/2024-05/pc-rp-nzpc-competition-in-new-zealand-highlights-from-the-latest-data.pdf)

[4] OECD. (May 2024). *OECD Economic Surveys: New Zealand 2024.* https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-new-zealand-2024_603809f2-en, Page 47.

[5] Australian Treasury, Competition Review, (more information is available here: https://treasury.gov.au/review/competition-review-2023)

Government has agreed to a package of reforms aimed at simplifying and strengthening the merger settings. On 10 October 2024, the Australian Government introduced the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (**Australian Amendment Bill**) to the Australian House of Representatives. The Australian Amendment Bill has passed through all Parliamentary stages and is to commence on 1 January 2026[6]

Australia is our most important trading partner, with two-way trade of goods and services accounting for $29 billion in 2022. It is the first export market many New Zealand companies look to, to grow. For Australia, New Zealand is its second largest source of tourists, fourth largest investment destination, and top export destination for Australian small and medium enterprises (**SMEs**).

Alignment of competition laws promotes a Single Economic Market within New Zealand and Australia. It does this by reducing the compliance burden for businesses operating in both jurisdictions, facilitating cooperation between regulators to address anticompetitive conduct that crosses borders, and enabling institutions in each jurisdiction to learn from each other to promote better regulatory outcomes. However, alignment does not necessarily mean adopting the same laws and processes. For example, New Zealand's small size, can increase regulatory costs per capita and so a full assessment is needed before regulatory change is made.

Scope of this discussion paper

The discussion paper is structured as follows:

Chapter	Issues
Chapter 2: Mergers	a. The substantial lessening of competition test b. Substantial degree of influence c. Assets of a business d. Mergers outside the clearance process e. Behavioural undertakings
Chapter 3: Anti-competitive conduct	a. Facilitating beneficial collaboration b. Anti-competitive concerted practices
Chapter 4: Code or rule-making powers and other matters	a. Industry codes or rules b. Modernising court injunction powers c. Protecting confidential information d. Minor and technical amendments to the Commerce Act

While this paper sets out our initial views and seeks feedback on these specific issues, we welcome feedback on how New Zealand's overall competition settings are working.

[6] Australian House of Representatives (2024), *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (available here: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7257)

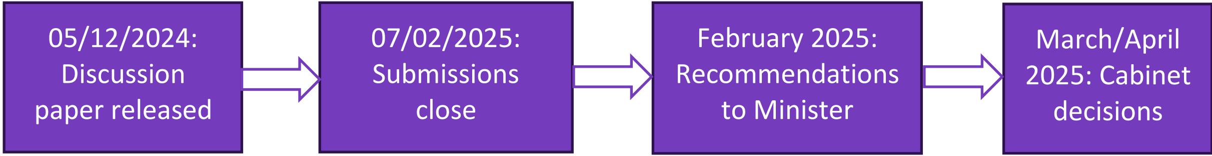
Criteria for assessing options

Any options or proposals for change to the Commerce Act will be measured against the following criteria:

- **Effectiveness**: The potential for each policy option to promote competition for the long term benefit of New Zealand consumers.
- **Practicality**: The cost and simplicity of each policy option.
- **Certainty**: The potential for each policy option to allow stakeholders to predict how regulation will apply, so they can prepare for how that regulation might affect them.
- **Flexibility**: The extent to which each option allows the regime to adapt to changes in markets.
- **Regulatory efficiency**: The extent to which each option enables the regime to provide appropriate levels of regulatory scrutiny while minimizing regulatory burden.

Proposed process and timeline

As set out in the timeline below, submissions close on 20 December 2024. MBIE will then analyse all submitter feedback and provide advice to the Minister of Commerce and Consumer Affairs. The Government will then decide whether changes should be made to the Commerce Act.



Chapter 2: Mergers

New Zealand's merger regime

Part 3 of the Commerce Act deals with anticompetitive mergers and Part 5 contains the merger review provisions. Section 47 of the Commerce Act prohibits any person from acquiring the assets of a business or shares, if that acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

The Commerce Act provides two pathways for a merger to proceed:

- The prospective merger parties may apply to the Commission for 'clearance' (s 66). A clearance is a binding determination by the Commission that it is satisfied the merger is unlikely to substantially lessen competition. A clearance may be granted subject to undertakings by the parties to dispose of assets or shares.

- The prospective merger parties may apply to the Commission for 'authorisation' (s 67). An authorisation is a binding determination by the Commission that, despite the merger being likely to lessen competition, it is satisfied that the benefits to the public of New Zealand are such that the merger should be permitted to go ahead. In practice, the Commission makes this assessment by balancing the benefits and detriments of the proposed merger.

As these pathways are voluntary, parties may self-assess that the proposed merger is unlikely to substantially lessen competition and proceed at their own risk. Many acquisitions proceed on this basis, raising no competition concerns. The Commission also operates an informal courtesy letter process, where parties can notify it of the proposed merger to seek an informal view.

If a merger proceeds without a clearance or authorisation, and the Commission has concerns, the Commission (or any third party) can seek an injunction from the court to prevent the merger from going ahead. In addition, on application of the Commission, the court may impose pecuniary penalties for a breach or attempted breach of the prohibition against anticompetitive mergers (s 83), and/or an order for divestiture if the merger has taken place in the last two years (s 85).

Why we are looking at merger issues

Market structures, including the number and size of participants and the ease of entry and exit, are key determinants of market performance. Most mergers support the effective operation of markets through allowing the parties to achieve increased efficiencies, such as reducing transaction costs, sharing risk and capabilities, and obtaining scale economies.

However, mergers can harm competition through increasing the merged parties' market power and their ability to increase prices and/or reduce quality of goods and services. A merger could also increase the likelihood of a smaller number of large firms coordinating their activities for their mutual benefit rather than competing for the benefit of consumers. This can reduce innovation, output, range of goods and services supplied and may increase prices.

Improvements to merger settings would enhance the Commission's ability to scrutinise mergers to stop problematic market structures from forming. Effective merger review can reduce the need for future interventions including complex sector-specific regulation. We have identified some specific issues in the merger regime for review.

Issue 1 – The 'substantial lessening of competition test'

The 'substantial lessening of competition test' in the anticompetitive merger prohibition (s 47) requires a forward-looking analysis comparing the likely state of competition if the merger proceeds (the factual) with the likely state of competition if it does not (the counterfactual). The elements of 'substantial' and 'lessening competition' are defined as meaning 'real or of substance' and 'including hindering or preventing of competition', respectively.

In assessing the effect on competition in a market, the Commerce Act requires that reference must be had to all factors that affect competition, including competition from goods or services supplied by persons not resident or not carrying on business in New Zealand (s 3(3)). The Commission's Merger and Acquisitions Guidelines outlines the framework that it applies.[7]

Why are we looking at this?

The 'substantial lessening of competition test' was introduced in 2001, replacing the previous test of 'creating or strengthening a dominant position' (**the dominance test**). The policy intent was:

- To capture a wider range of mergers that harm competition. This includes mergers where the merging parties do not have the high market share required to be found to be 'dominant', or where the merger may make it easier for coordination to occur in the affected markets.
- To align with other prohibitions within the Act relating to anti-competitive agreements, so that mergers were subject to the same substantive test as arrangements between parties that were less than a merger.
- To align with Australia's merger test to support a single economic market.

The merger test has been in place for over 20 years. It is timely to assess whether it is achieving its policy intent and continues to be fit for purpose for the foreseeable future. This assessment is also made in the wider context of ensuring our competition settings are fit for purpose.

Discussion

The evidence of whether the 'substantial lessening of competition test' has met the policy intent of capturing a wider range of harmful mergers is mixed for the first 10 years of its operation. Research analysing the first decade following the reform concluded the Commission applied a similar standard to the previous dominance test for single firm market power. The Commission was willing to support mergers from 'two to one', with reliance on claims of potential entry or expansion and countervailing buyer power.[8]

[7] Commerce Commission (May 2022). *Mergers and acquisition guidelines* (available here: https://comcom.govt.nz/__data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-May-2022.pdf)

[8] Pickford, Michael (2011). *Merger regulation in New Zealand: Did the change from dominance to a substantial lessening of competition make a difference?* 19 Competition and Consumer Law Journal 2. See also Michael Pickford, *A comparison of merger regulation in New Zealand and the United States* (2012). 20 Competition and Consumer Law Journal 95.

More recent Commission *ex post* reviews of selected merger cases looked at whether forward assumptions the Commission may have relied on in assessing the proposed merger eventuated.[9] [10] Some of the findings in these reviews are:

- The likelihood and extent of potential entry and expansion is commonly overstated by market participants.
- Market participants tend to overestimate the ability and likelihood of third parties to exercise countervailing buyer power.
- Dynamic markets may require alternative analytical frameworks for defining relevant markets and assessing likely competitive effects.

These reviews highlight the challenges in conducting a forward-looking assessment in dynamic markets. These challenges extend to the complexities of assessing the likely risk of increased coordination in concentrated markets. While these challenges exist, they do not of themselves indicate a failing in the competition test.

In April 2023, the 'substantial lessening of competition' test was extended to also apply to the prohibition against a single firm with substantial market power engaging in conduct to harm competition (s 36). This test now applies to all three classes of prohibitions under the Commerce Act, which enhances the coherence of the provisions and promotes business certainty.

The Australian Competition Review included an in-depth review of its merger regime and the performance of the 'substantial lessening of competition test'. It concluded that the following types of acquisitions do not appear to be adequately captured under Australia's merger laws:

- Creeping or serial acquisitions (a series of small acquisitions which individually do not result in material changes to market concentration, but form part of an overall consolidation strategy).
- Acquisitions by incumbents of nascent competitors (i.e. by a leading company in its industry of a firm who may potentially pose a serious competitive threat to that leading company).
- Expansions into related markets, including by digital platforms. This includes where the acquisition enhances the competencies of the merger parties even though they operate in separate markets. For example, a merger that leads to a consolidation of control over data (eg, Google/Fitbit).

We are exploring whether similar concerns arise with the application of the 'substantial lessening of competition test' in New Zealand. Specifically:

- In relation to creeping acquisitions, like many overseas jurisdictions, New Zealand has also seen serial or roll-up strategies in some sectors, such as veterinary and funeral-related services. Such strategies can result in supply efficiencies and benefits for consumers, but there is a risk that over time an unchecked series of consolidation will harm competition. Section 3(7) of the Commerce Act allows for aggregation of other conduct or arrangements

[9] Csorgo, Lilla and Harshal Chitale. (2017). *Targeted ex post evaluations in a data-poor world*, New Zealand Economic Papers,, Vol 51, No 2, pages 136-147. The Commission relied on new entry in 17 markets of the 40 evaluated, and entry occurred in 12 of those. Some of the reasons for why entry did not occur included changes in source market conditions for imports and investment choices (opportunity cost) for potential entrants.

[10] Commerce Commission, (2023). *Ex-post merger review report 2023/24* (available here: https://comcom.govt.nz/__data/assets/pdf_file/0022/344830/Ex-post-merger-review-report-29-February-2024.pdf

by the relevant parties when assessing certain anti-competitive arrangements or conduct. The introduction of a creeping acquisition provision for the merger regime would create consistency in the approach to applying the 'substantial lessening of competition' test across the merger and anti-competitive conduct provisions.

- In relation to entrenchment of market power, New Zealand courts have confirmed that the substantial lessening of competition test involves a change along the spectrum of market power.[11] The Commission has successfully blocked mergers involving nascent (ie potential future) competition, such as Woolworths and Foodstuffs proposed acquisition of the Warehouse in the grocery sector. In addition, it has successfully blocked vertical mergers where the parties operate in related markets (eg SkyTV and Vodafone and, more recently, Alpha Theta Corporation and Serato). The Australian reforms have codified what is the New Zealand position in this regard, but it may be useful to explicitly clarify this in the Commerce Act.

We are considering the following options, along with any options suggested by submitters:

- **Maintaining the status quo** – The Commission's Merger and Acquisitions Guidelines reflect lessons learned and new case law under the current legislative settings.

- **Targeted alignment with the proposed reforms in Australia** – Under this option, the Commerce Act could be amended as follows:

    - To clarify and make explicit in the Commerce Act that the 'substantial lessening of competition test' includes 'creating, strengthening, or entrenching a substantial degree of market power in a market'. This amendment could apply in relation to mergers only (as per the Australian Amendment Bill) or throughout the Act wherever this test applies.

    - To provide that acquisitions by the acquiring party in the past three years for target firms supplying or acquiring the same goods or services may be combined when assessing the competition impact of the current acquisition (ie creeping acquisitions).

  These changes would make more explicit for businesses the approach the Commission will take when applying the substantial lessening of competition test. They will also give the Commission a power to take into account the cumulative effect of acquisitions within a short timeframe, and specify what it will consider when applying the test in these circumstances.

  The changes will also support the objective of maintaining a Single Economic Market with Australia. Since July 2019, 71 per cent of merger clearance applications received by the Commission involved a least one party (either directly or indirectly) having a presence in Australia. Over the same period, about 22 per cent involved merger transactions also considered by the ACCC under its informal merger review.

Questions for consultation

1. What are your views on the effectiveness of the current merger regime in the Commerce

[11] Air New Zealand Ltd and Qantas Airways Ltd v Commerce Commission and ORS HC AK CIV 2003- 404-6590 (May 2004).

Act? Please provide reasons.

2. What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.

3. Has the 'substantial lessening of competition' test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.

4. Should the 'substantial lessening of competition' test be amended or clarified including for:

    a. Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services?

    b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)?

    c. In relation to just the merger provisions or wherever the test applies in the Commerce Act?

    If so, how? Please provide reasons.

5. How important is it for the 'substantial lessening of competition' test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.

6. How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?

Issue 2 – Substantial degree of influence

Section 47 prohibits acquisitions that substantially lessen competition. If the acquisition relates to a takeover or full merger between the parties, there is a clear transfer of control of the acquired business or assets. The acquired firm ceases to act independently, as the merged parties are no longer distinct. However, this assessment is more complicated in the cases of partial acquisitions of shares or assets below the level that results in persons becoming 'interconnected' bodies corporate as defined in s 2(7) of the Commerce Act.

The Commission's Mergers and Acquisitions Guidelines outline that mergers can sometimes involve a firm (directly, indirectly or jointly) acquiring partial control of a target firm or assets.[12] Such mergers can result in a substantial lessening of competition when they give the acquirer a "substantial degree of influence" over the target firm's business decisions, and that influence can be used to harm competition.

Why are we looking at this?

The Commission proceeds on a case-by-case assessment of the extent of influence between relevant businesses to establish if an acquisition contravenes the prohibition. The Act treats any two entities

[12] Refer footnote 6.

that are interconnected bodies (as defined) as being the same actor. That is, any two bodies are to be treated as “interconnected” if:

- One of them is a subsidiary of the other (with ‘subsidiary’ defined in section 5 of the Companies Act relating to majority control of composition of the board, voting rights, shares and rights to dividends)
- Both of them are subsidiaries of the same body corporate or are interconnected with bodies corporate that are interconnected.

However, criteria or bright lines for assessing a ‘substantial degree of influence’ are not prescribed, and there is only very limited guidance in s 47(4).

The New Zealand High Court considered the meaning of ‘substantial degree of influence’ in *Commerce Commission v New Zealand Bus Ltd* (2006).[13] It looked at parties’ shareholdings, rights to appoint directors, the historical basis of the relationship between the companies and any significant financial links. In that case, the court concluded that an acquirer’s existing 26 per cent shareholding in a target company, accompanied by the right to appoint one of four directors of the target company, was not sufficient to establish that the acquirer was able to exercise a substantial degree of influence over the target company for the purposes of the transaction.

In practice, the Commission can (and does) look beyond simple shareholding percentages to the underlying facts and what the acquisition means for competition. The fact that two firms are not associated or not interconnected does not mean that the Commission cannot take a lesser relationship into account. For example, the Commission was not inhibited in investigating Vero’s completed acquisition of 19.9 per cent shareholding in Tower under the merger prohibition in s 47. This investigation was closed when Vero subsequently sold its shareholding to Bain Capital.[14]

We are exploring whether the Commerce Act could provide more clarity on this issue. For example, the Act could set out criteria or bright lines for assessing the degrees of influence, which are used by other jurisdictions with administrative merger regimes. This may provide more certainty to businesses and the Commission.

Discussion

The proposed Australian merger reforms include changes to the scope of regulated acquisitions, focusing on acquisitions “…that provide control or the ability to materially influence the acquired business or are capable of affecting the competitive structure of a market”[15]. “Control” of a body corporate is defined by reference to Australian corporation law as the capacity to directly or indirectly determine the policy of the body corporate in relation to one or more matters. Matters to be considered include:

- The practical influence the person can exert (rather than the rights it can enforce).
- Any practice or pattern of behaviour affecting the policies of the body corporate (even if it involves a breach of an agreement or a breach of trust).

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[13] Commerce Commission v New Zealand Bus Ltd. (2006). 11 TCLR 679, 8 NZBLC 101,774 (HC)

[14] Vero Insurance New Zealand Limited; Tower Limited (2018) https://comcom.govt.nz/case-register/case-register-entries/vero-insurance-new-zealand-limited-tower-limited

[15] Exposure Draft Explanatory Materials - Treasury Laws Amendment Bill 2024: Acquisitions, 2.5

In comparison, s 26 of the United Kingdom Enterprise Act 2002 distinguishes three levels of interest that result in the merger parties ceasing to be distinct. These are if there is a:

- Material influence by the acquirer over the policy of the target entity (usually requires at least a 25 per cent shareholding, influence at the board, or an ability to exert financial control).

- De facto control, where the acquirer does not have a controlling interest in a company, but is nonetheless able to unilaterally determine a company's policy by influencing shareholder votes. It can also include "…situations where an investor's industry expertise might lead to its advice being followed to a greater extent than its shareholding would seem to warrant".[16]

- Controlling interest, where the acquirer has more than 50 per cent of the voting rights in a company. This would be equivalent to the Commerce Act concept of being 'interconnected'.

In Singapore, the Competition Act defines "control" for the purposes of a merger as "the ability to exercise decisive influence"[17]. The Competition and Consumer Commission of Singapore generally deems this to exist if an acquisition involves 50 per cent of voting rights. Where an acquisition involves 30-50 per cent of voting rights, there is "a rebuttable presumption that decisive influence exists".

These are indicative thresholds only, and lower levels of voting rights could constitute control in certain circumstances. For example, acquiring a minority shareholding can give the acquirer decisive influence when they can veto strategic decisions, such as major investments and the appointment of senior management. Singapore competition law also includes the concept of de facto control, which is assessed on a case-by-case basis.

We are considering the following options, as well as any options suggested by submitters:

- **Status quo –** the Commerce Act does not include any bright lines to assist in the assessment of the degree of influence between businesses (that are not interconnected) as part of the competition assessment of a merger. The Commission must be satisfied that a proposed merger (including any change in influence between the parties) is unlikely to substantially lessen competition before it may grant clearance.

- **Include explicit criteria to supplement the test of 'substantial degree of influence' –** this could involve the Act making explicit the factors that should be considered when assessing a substantial degree of influence, for example any veto rights over strategic decisions such as a company taking on debt / getting more capital that could stunt their potential growth. The purpose of this change is not to introduce a threshold, but to make clear the matters to be considered in applying test.

Questions for consultation

7. Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.

8. Should the Commerce Act be amended to provide relevant criteria or further clarify how to

16 Ibid, 4.33.

17 Merger Control Laws and Regulations Report (2024). Singapore (iclg.com).

assess a substantial degree of influence? If so, how should it be amended? Please provide reasons.

Issue 3 – Assets of a business

Another aspect of the merger regime that could benefit from more clarity is the treatment of "assets of a business". Section 47 prohibits acquisitions of "assets of a business" or shares that would or would be likely to substantially lessen competition. The terms 'assets' and 'business' are defined in s 2(1) as follows:

- "assets" includes intangible assets.
- "business" means any undertaking "that is carried on for gain or reward; or in the course of which goods or services are acquired or supplied otherwise than free of charge".

Why are we looking at this?

The phrase "assets of a business" in the Commerce Act is unclear. It could refer to any assets held by a business (eg inventory in a shop) or it could require a focus on the activity to which the assets relate and whether the assets are capable of operating as a business concern.[18] This interpretation creates uncertainty for acquisitions of assets, such as machinery, licences or quotas, or undeveloped land where it is unclear how that land will be used.

Discussion

The definition of 'assets' and 'business' in the Commerce Act do not provide clarity on the scope of assets captured by s 47, particularly when a party is looking to make a partial acquisition of assets.

Some statutes explicitly state when the prohibition in s 47 applies to remove any uncertainty. For example, s 138 of the Radiocommunications Act 1989 provides that management rights in relation to radio frequencies and spectrum licences are deemed to be 'assets of a business' for the purposes of the Commerce Act. We consider that this case-by-case approach is unsatisfactory.

If an acquisition of an asset did not relate to 'a business' activity, this may mean that the acquisition would be subject to Part 2 of the Act dealing with contracts, arrangements or understandings that substantially lessen competition (s 27). However, the prohibitions in Part 2 of the Act would not engage the Commission's merger clearance regime, and remedies available for contraventions of anticompetitive arrangements do not include the option of a divestment order (as provided in s 85).

Australian competition law simply prohibits acquisitions of shares or assets of a person or corporation that substantially lessen competition.[19] The Australian Amendment Bill has made it clear that the concept of "asset" includes any kind of property, as well as legal or equitable rights that are not property, such as goodwill, intellectual property rights, or contractual rights such as leases. This allows the law to focus on the "substance of what is being acquired or disposed of, rather than the

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[18] Mark Berry and Anne Riley, *Beware the new business acquisitions provisions in the Commerce Amendment Act 1990*, (1991) 21 Victoria University Wellington Law Review.

[19] Competition and Consumer Act 2010. (2010). s 50.

legal form".[20] However, this level of specificity may be unnecessary in New Zealand given our voluntary merger clearance regime.

We are considering the following options, as well as any options suggested by submitters:

- **Status quo –** The term "assets of a business" in the Act has created uncertainty, and will likely continue to do so in future without a legislative amendment.
- **Amend section 47 to refer simply to "assets" –** This would provide businesses, the Commission and other stakeholders with more clarity as to the scope of assets, and therefore transactions, that fall within the mergers regime. It could also help deter anti-competitive practices such as land banking.
- **Amend the definition of "assets"** – Along with removing the wording "of a business" from sections 46 and 47, the interpretation section of the Commerce Act (s 2) could provide a more detailed definition of "assets", such as that set out in the Australian Amendment Bill.[21]

Questions for consultation

9. Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?

10. If you consider there is a problem, how should this phrase be amended? For example, by:

    a. referring simply to "assets"? or

    b. further defining "assets" in the Commerce Act? If so, how?

Issue 4 – Mergers outside the clearance process

Since 1990, the clearance regime under the Commerce Act has operated on a voluntary basis. Merger parties may apply to the Commission for clearance of any proposed merger. A clearance gives legal immunity to the merger parties for a period of 12 months to merge without risk of liability under the Commerce Act.

Merger parties may also elect to proceed with a merger without first obtaining clearance. In such cases, the Commission (or any other party) may bring court proceedings to injunct anticipated mergers or seek divestments or damages in relation to completed mergers. The Commission can also seek the imposition of pecuniary penalties for breaches or attempted breaches of section 47.

To increase deterrence of anti-competitive mergers proceeding outside the clearance process, the Commerce Amendment Act 2022 increased the maximum pecuniary penalties for anti-competitive mergers to $10 million or three times the illegal gain, or if the illegal gain was unknown, 10 percent of annual turnover.

[20] Ref 2.27.

[21] Refer Australian Amendment Bill, clause 51ABN Acquisition of assets, page 25.

Why are we looking at this?

The Commission has an active enforcement programme for non-notified mergers.[22] While the Commission has successfully blocked some mergers, investigating a merger outside of the clearance process and taking an enforcement proceeding presents challenges.

For example, where a merger is moving quickly or involves non-public companies, the Commission may not be aware of an anticompetitive acquisition before it completes, nor may it have gathered sufficient evidence to apply to the court for an injunction to stop it completing. Time is critical because mergers involve permanent structural changes to industries. If a merger has completed, it can be difficult to unwind through divestments and, even if divestment is achieved, competition may have been significantly impaired in the interim. There is a strong public interest in ensuring harmful mergers are blocked before they are implemented.

The 2022 OECD Economic Survey of New Zealand noted these challenges and risks. It recommended granting the Commission a 'call-in' power to order merger parties to apply for clearance whenever the Commission sees a risk the proposed merger could substantially lessen competition. It recommended that this call-in power should be complemented with a power to halt the integration of the merger parties until the Commission had completed its investigation.

We are exploring whether it would be useful for the Commission to have more powers to investigate and deal with mergers that operate outside the clearance process.

Discussion

New Zealand is one of the few OECD countries with a voluntary merger regime. The Australian Amendment Bill provides for a formal mandatory and suspensory clearance regime administered by the ACCC. Thismeans that prospective mergers that exceed certain thresholds would need clearance from the ACCC before closing, and parties will be legally prohibited from closing notifiable transactions unless the ACCC grants clearance (or authorisation). The notification thresholds will be set by legislative instrument, and may include different thresholds, such as for the major supermarkets.

We consider that a change to a mandatory and suspensory merger regime in New Zealand is not required as the current voluntary merger regime is working well. While some potentially anti-competitive mergers may be implemented without the Commission's knowledge, the Commission has an effective mergers intelligence function that detects the vast majority of non-notified mergers in its monitoring or through complaints. There is also a well-developed and understood informal 'courtesy letter' process, whereby prospective merger parties can notify the Commission of proposed mergers and the Commission can give an indication of whether it considers the proposed acquisition requires further scrutiny. Over the last five years, the Commission made decisions on 60 clearance applications, ranging from eight to 21 decisions in any year.

The voluntary regime allows the Commission to focus on those prospective mergers that are self-assessed as posing the greatest risks to competition. No minimum thresholds are stipulated preventing the Commission from looking at smaller acquisitions, which is a concern in other jurisdictions. It also has the benefit of flexibility, allowing the Commission to calibrate its resources appropriately depending on the size and complexity of the transaction. Based on overseas experience, we anticipate that the Commission would require significant additional resources to

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[22] Commerce Commission case register, '*merger investigations*', [Commerce Commission - Case register (comcom.govt.nz)]

operate a mandatory regime given the number of 'technical' filings (ie applications that fall within filing thresholds but do not raise competition issues) it would likely receive.

Competition authorities in overseas jurisdictions have additional powers to investigate mergers that operate outside their administrative merger processes:

- The United Kingdom merger regime provides for voluntary notification of proposed mergers, but this is supported by the United Kingdom Competition and Markets Authority (**CMA**) having additional powers to stay a prospective merger and/or require merger parties to 'hold separate' their assets for a period while the CMA investigates.[23]
- In Germany, the Bundeskartellamt (German Federal Cartel Office) is empowered to impose an obligation on a company to notify it of any of its acquisitions in certain sectors of the economy. Prior to issuing such a request, the Bundeskartellamt must have conducted a sector inquiry in one of the economic sectors affected and be satisfied that future mergers by this company could significantly restrict competition in these sectors.
- In the United States, a transaction does not have to be of a significant size for the Department of Justice or Federal Trade Commission to be able to challenge it under antitrust laws. The threshold is if either the FTC or DoJ believes a deal would substantially lessen competition. However, mergers over a certain size must be notified and will be reviewed.[24]

We are considering the following options, along with any options suggested by submitters:

- **Status quo –** New Zealand's voluntary mergers regime appears to be working well. The Commission should continue its monitoring and enforcement regime, including educating businesses on the benefits of clearance.
- **Amending the Commerce Act to confer additional powers on the Commission in relation to non-notified mergers** –Three options are being considered, and one or more of them could be introduced:
    - **Stay and/or hold-separate powers –** This would allow the Commission to suspend the completion or implementation of a potentially anti-competitive merger without needing to apply to court for an interim injunction.
    - **Call-in powers –** This would allow the Commission to require parties to apply for clearance if it becomes aware of a potentially anti-competitive merger, e.g. through its monitoring.
    - **Company-specific mandatory notification power** – This would allow the Commission to require certain companies with substantial market power or over a certain size to notify the Commission of any acquisitions. This mandatory notification power, by itself, would not have suspensory effect.

23 Competition and Markets Authority (2021). *Interim measures in merger investigations:* Interim measures in merger investigations (publishing.service.gov.uk)

24 Under the Hart-Scott-Rodino Act, the FTC and DoJ review most of the proposed transactions that affect commerce in the United States and are over a certain size, and either agency can take legal action to block deals that it believes would "substantially lessen competition." Although there are some exemptions, for the most part current law requires companies to report any deal that is valued at more than $101 million to the agencies so they can be reviewed: https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review

Questions for consultation

11. What are your views on how effectively New Zealand's voluntary merger regime is working?

12. Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.

13. What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options:

    a. A stay and/or hold separate power

    b. A call-in power

    c. A mandatory notification power for designated companies.

Issue 5 – Behavioural undertakings

Behavioural undertakings are effectively commitments that merger parties make as part of a review of their prospective merger about how they will behave post-merger to remedy possible competition concerns. The differ from structural undertakings, which are commitments to dispose of assets or shares to address competition concerns as part of the merger.

Behavioural undertakings fall into two broad categories:

- Measures that facilitate horizontal rivalry by:
    - Limiting foreclosure of the market by placing constraints on tying or bundling of products and preventing the use of long term or exclusive contracts;
    - Restricting the effect of vertical relationships on competition, and such measures may relate to mandating access for downstream competitors to key inputs and regulating the price, terms and conditions of that access; and
    - Changing buyers' behaviour through such things as requiring disclosure of information to consumers or by requiring the use of open tenders.
- Measures to control outcomes and ensure efficiency gains of the merger are passed on to consumers. Such measures may include controls on the price, output and quality of products provided by the merged entity.[25]

Why are we looking at this?

Unlike comparable overseas jurisdictions, the Commission is only able to accept undertakings to dispose of assets or shares from merging parties to address competition concerns. This restriction

[25] International Competition Network Merger Working Group (2005) *Merger Remedies Review Project*: *Report for the fourth ICN annual conference.*

applies in the merger clearance and authorisation setting, and in resolving legal proceedings in relation to enforcement merger investigations.

The 2024 OECD Economic Survey of New Zealand recommends allowing the Commission to accept behavioural undertakings. It identifies concerns that the Commission's inability to accept behavioural undertakings may result in it preventing some potentially beneficial mergers from proceeding subject to those behavioural undertakings. It gives examples of acquisitions of startups or nascent competitors by a larger firm or cross-border mergers where the Commission could focus on New Zealand-specific measures or accept and enforce undertakings accepted by overseas competition regulators to allow the merger to proceed.

We are interested in exploring whether it would be useful to allow the Commission to accept behavioural undertakings relating to the post-merger conduct of the merged entity to address any competition concerns and enable it to grant clearance or authorisation, or resolve enforcement proceedings.

Discussion

It is widely accepted that behavioural remedies are not as effective as structural remedies (ie disposing of assets or shares) in dealing with structural problems like mergers. The competition issues in mergers arise from increases in market power. Behavioural remedies may address one particular means of foreclosing the market or creating barriers to consumer switching, but there are a wide range of behaviours that firms with market power can take to harm competition. Measures aimed at facilitating horizontal rivalry are frequently ineffective.

Some of the other risks and costs involved in allowing for behavioural undertakings include:

- Behavioural undertakings can be difficult to draft so that they are specific enough to be workable and effective, but flexible enough to adapt to changing markets. This is a particular issue in fast-moving markets, technically complex subject matter or those characterised by high levels of innovation.
- Merger parties have incentives (and, in some cases, obligations to their shareholders) to behave in ways contrary to the letter and spirit of behavioural undertakings.
- They require monitoring and impose ongoing costs on the Commission.
- Detection of breaches, and circumstances that justify amending the undertakings, can be difficult.
- Changes in circumstances can require re-visiting the undertakings, which involves cost to all parties and undermines certainty.

Given this, the circumstances where behavioural undertakings have been used overseas are generally limited. Examples include where:

- A divestiture is not feasible or subject to unacceptable risks (e.g. if the target firm is in financial difficulty and there are no alternative buyers) and prohibiting the merger from proceeding is not practical (e.g. where substantial parts of the merging entities operate in various jurisdictions and there are multi-jurisdictional constraints on prohibiting such a merger).
- It supports a divestment remedy.

- The undertakings are expected to be limited in duration, such as due to fast changing technology.

- The merger results in significant efficiencies that will be passed on to consumers, which any structural remedy would substantially reduce, and behavioural remedies are able to preserve those efficiencies.

Our preliminary assessment is that the circumstances where the Commission has declined a merger due to its inability to accept behavioural undertakings is limited and at the margin. These related to:

- Global mergers which are cleared by other relevant overseas jurisdictions, but which are unable to be cleared in New Zealand. In this case there is the associated risk that the target business exits New Zealand. An example is Reckitt Benckiser's 2015 acquisition of Johnson & Johnson, a global deal that received clearance overseas, including in the United Kingdom where it was subject to a licensing arrangement. An equivalent remedy was not available in New Zealand and clearance was declined, leading to Johnson & Johnson discontinuing some of its products in New Zealand.

- Digital platform mergers where competition issues tend to be about access to a platform, data, or information. Such issues often do not lend themselves to being solved by selling assets or shares. For example, some commentators consider that the Sky/Vodafone merger would have been cleared had the Commission been able to accept behavioural undertakings.[26]

However, the fact that the Commission is not required to consider offers of behavioural undertakings as part of its clearance and authorisation procedure, likely reduces the Commission's costs and the duration of these proceedings.

In Australia, the ACCC can accept behavioural undertakings in a merger. These are "…remedies designed to modify or constrain the behaviour of the merged firms, by mandating the price, quality or output of the merged firm's goods or services, or otherwise modifying their dealings with other firms"[27]. These help address the ACCC's competition concerns for a period, but they tend not to be accepted on a permanent basis "due to the inherent risk to competition combined with the monitoring and enforcement burden such remedies create". The Australian Amendment Bill has made some technical modifications to the ACCC's process for considering behavioural undertakings.

If the Commerce Act was amended to allow the Commission to accept behavioural undertakings, it would be necessary to consider a range of operational and funding matters for how the regime would operate. For example, when the Commission may accept and vary a behavioural undertaking, enforcement tools, and funding arrangements.

We are considering the following options, along with any options suggested by submitters:

- **Status quo –** Retaining the prohibition on accepting behavioural undertakings in s 69A and s 74A of the Commerce Act could keep the merger regime simpler since the Commission only needs to consider structural undertakings in assessing mergers.

- **Amend Commerce Act to allow the Commission to accept behavioural undertakings –** As mentioned above, this could allow potential beneficial mergers to be cleared, resulting in

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[26] S Keene, Russell McVeagh, LEANZ Seminar *Lessons from Vodafone/Sky – Do we have the right merger control settings for a small economy?* 21 November 2017.

27 ACCC (2017). *Merger Guidelines*: https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF

efficiencies and other benefits for consumers. We consider it would be most useful in cases where there are no structural remedies available, and when monitoring compliance with the undertaking would not be costly or complex.

- **Amending the Commerce Act to allow the Commission to impose conditions (including accepting behavioural undertakings) as part of an authorisation proceeding only** – This would limit the behavioural conditions to focus on achieving net public benefits in circumstances where the merger is likely to lessen competition.

Questions for consultation

14. Should the Commission be able to accept behavioural undertakings under the Commerce Act to address concerns with mergers? If so, in what circumstances?

Chapter 3: Anti-competitive conduct

Anti-competitive conduct in the Commerce Act

Part 2 of the Commerce Act prohibits certain types of anti-competitive conduct by firms, whether that be single firms acting alone, or multiple firms forming illegal agreements. These provisions help protect consumers from the costs and harm associated with behaviour that limits competition in markets. In particular:

- Section 27 prohibits agreements that have the purpose, effect or likely effect of substantially lessening competition.
- Section 28 prohibits covenants relating to land that have the purpose, effect or likely effect of substantially lessening competition.
- Section 30 prohibits cartel conduct, which involves agreements or covenants among competitors that contain price fixing, market allocation or output restriction clauses.
- Section 36 makes it illegal for a business with a substantial degree of market power to engage in conduct that has the purpose, effect or likely effect of substantially lessening competition in any market.

In the event of an anti-competitive agreement or conduct which may provide a benefit to the public, the Commission can provide authorisation if it is satisfied that the benefit outweighs the lessening of competition. In addition, it can give clearance to collaborative activities in the case of proposed agreements containing cartel provisions.

Issue 6: Facilitating beneficial collaboration

The Commerce Act recognises that businesses sharing information or collaborating with each other is a feature of well-functioning competitive markets. It provides for this beneficial collaboration through targeted prohibitions and exceptions, such as the 'collaborative activity' exception (s 31) and clearance by the Commission for collaborative activities that do not substantially lessen competition (s 65A). If required, authorisation is also available from the Commission on a case-by-case basis if the Commission is satisfied the arrangement has net public benefits (s 58). The application fee for an authorisation is $36,800 (including GST), along with other costs of complying with the Commission's process. Certain arrangements or conduct may also be specifically authorised by another Act of Parliament or Order in Council (s 43 and s 44). This issue considers if further clarity could be provided under the law to allow for beneficial collaborations and conduct.

Why are we looking at this?

Many of the major structural challenges facing the economy require novel and coordinated solutions. These challenges include transitioning to net zero, technological innovation, infrastructure deficits and geopolitical impacts on supply chains and often have broader public interest objectives (eg national security, geopolitical strategy, development).

The existing provisions and processes in the Commerce Act allow for beneficial collaboration, and the Commission has issued comprehensive guidance.[28] The Commission also has an open door for businesses seeking to sound out any proposals. However, we have heard concerns from some in the business community that the provisions relating to collaborative activities in the Commerce Act are uncertain and Commission processes for businesses to manage the Commerce Act risk can be slow and costly, with the associated risk that beneficial collaboration is deterred. Further, applying for Commission authorisation could be a barrier for some small businesses.

Examples of where competitor collaboration can be beneficial include:

- Collective bargaining by small businesses with large firms with market power.
- Emergency planning or responses.
- Industry arrangements to meet net zero targets.
- Industry-wide collaboration to improve outcomes for consumers, such as addressing financial scams.

Discussion

We are interested in views on the nature and extent of this problem and the merits of possible regulatory or non-regulatory options to improve business certainty.

The cartel provisions in the Commerce Act were amended in 2017 to allow for a wider range of beneficial business collaborations, such as franchises or legitimate joint ventures, where likely competitors can cooperate with other and agree matters that are reasonably necessary for the purpose of the collaborative activity. These collaborative activities must not have an anticompetitive purpose nor substantially lessen competition in a market.

In compliance with these provisions, businesses were able to efficiently and effectively respond during the COVID-19 lockdowns, by pooling resources and coordinating. This is just one example of where collaboration may be permitted if directed at outcomes that benefit the businesses' customers or suppliers, rather than lessening competition between them.

Businesses can self-assess arrangements, with the benefit of Commission guidance and/or expert legal advice. Certainty will increase over time as the provisions are considered by the Commission and the courts.

If greater certainty is desirable, the table below outlines some high-level options for consideration, but other options are invited.

[28] Commerce Commission, *Competitor Collaboration Guidelines*, January 2018 (available here: https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf) and *Collaboration and Sustainability Guidelines*, November 2023 (available here: https://comcom.govt.nz/__data/assets/pdf_file/0033/335985/Collaboration-and-Sustainability-Guidelines-30-November-2023.pdf)

Options to facilitate beneficial collaboration under the Commerce Act	
Option	**Description**
1	**Make explicit in the Commerce Act that the Commission has a role in issuing guidance** on the interpretation of provisions of the Act, not just dissemination of information about its enforcement approach (s 25). This guidance could be given greater status to assist the courts in interpreting the provisions.
2	**Empower the Commission, on its own initiative, to issue binding rules that create a safe harbour from the prohibitions**.
3	**Introduce a statutory notification regime for specified classes of arrangements** that would operate separate to the Commission's authorisation process. The effect of notification would be to shift the burden of proof, such that the Commission would have to object to (or call-in) the arrangement if it had concerns on competition or public benefit grounds. If there is no objection, the arrangement would be exempt from specified prohibitions under the Act for a period (e.g. three years). For example, the ACCC has a notification process for certain classes of collective bargaining arrangements. This includes collective bargaining that involves businesses that expect to make transactions less than $A3 million over 12 months, and excludes trade unions. The fee for notification is $A1,000.
4	**Empower the Commission, on its own initiative, to make class exemptions** to authorise classes of conduct that may be exempt from any or all prohibitions in the Act. A class exemption could be subject to terms and conditions set by the Commission. It could cover a range of other issues that have arisen under the Commerce Act where an authorisation is not practical, e.g. agreements on sustainability measures, scams or emergency responses. For example, the ACCC has issued a class exemption for small businesses to collectively bargain in Australia, which covers businesses with aggregated turnover of less than $A10 million. Groups complete a one-page notice and provide it to the ACCC, and there is no fee for lodging. There have been around 100 industry groups who have lodged notices under this exemption.
5	**Provide an exception for small business from the Commission fee payable to apply for authorisation** under the Commerce Act. The power to make regulations under s 108 of the Commerce Act already allows for creating exemptions from the requirement to pay the fee. Under this option, the Commerce Act (Fees) Regulations 1990 could be amended to exempt small businesses from this requirement. However, the parties would still bear the cost burden of satisfying the Commission that the arrangement should be authorised.

Questions for consultation

15. Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.

16. What are your views on whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act?

17. What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

18. If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?

Issue 7 – Anti-competitive concerted practices

While businesses sharing information and collaborating is a feature of well-functioning competitive markets, there is a point where that collaboration causes harm and becomes anti-competitive collusion. Cartel conduct is the most egregious form of anti-competitive collusion. Cartel conduct is an unjustified interference of market forces that can cause serious economic harm. It is prohibited under the Commerce Act, and since April 2021, intentional cartel conduct is a criminal offence.

Compared to many comparable overseas jurisdictions (eg Australia, United Kingdom and Europe), there is a further class of harmful coordination that is not currently unlawful under the Commerce Act (which requires evidence of a contract, arrangement or understanding). This 'gap' relates to co-ordinated conduct between competitors designed to avoid competition, where the court is unable to conclude that the parties involved had reached an 'understanding' about the prices to be charged (cartel conduct under s 30) or reached an 'understanding' that the disclosure of information had an anti-competitive purpose or effect (s 27).

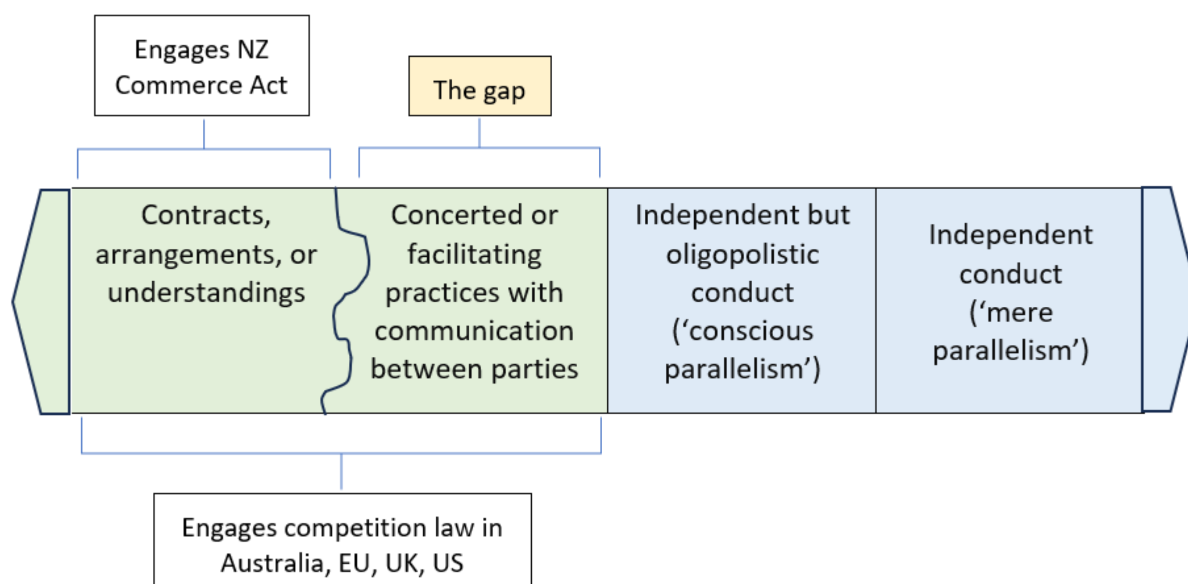
An example of such co-ordinated conduct is 'price signalling' (where a firm discloses their price intentions to a competitor) that has the purpose or likely effect of substantially lessening competition. This could be in a public forum (eg statements made during the earnings calls of public companies or in trade journals) or in a private setting with the competitor.

Why are we looking at this?

New Zealand has many concentrated markets with high barriers to entry. Where these market structures exist, there is a heightened risk of coordinated conduct. An explicit prohibition against anticompetitive concerted practices would ensure the market participants compete on their merits. The case for such a prohibition may be greater given technological advances and increased price transparency, such as through online sales. A generic prohibition of this sort could reduce the need for sector-specific regulation to promote competition.

Discussion

The size of the 'gap' in New Zealand competition law for this form of co-ordinated conduct that is harmful is difficult to assess. See figure below.



New Zealand courts have been willing to infer the existence of an 'understanding'[29] from evidence presented and a finding of 'commitment' by one or more of the parties to act (or refrain from acting) consistent with a consensus reached between them.[30] Unlike for a 'contract', the level of 'commitment' necessary for a finding of an 'understanding' need not be legally binding.

In addition, mere parallel behaviour where competitors independently respond to external factors, such as cost or demand conditions in a market, should not be condemned by competition law. This includes where competitors are aware of each other's activities but independently make decisions in response to each other's pricing and output (ie 'conscious parallelism', such as price following behaviour). In such cases, prices may move in parallel, but there is no communication between the parties to co-ordinate.

We have anecdotal evidence of examples where parties have communicated commercially sensitive with each other to limit competition between them. This communication may be direct or indirect, including through intermediaries such as a trade association, supplier or distributor. Examples of this 'tacit collusion' include:

- Competitors sending price lists or manuals to each other.
- An industry association collecting commercially sensitive information from its members and publishing price forecasts to assist members in staying in step with the market.

The Australian competition law prohibits 'concerted practices' with the purpose, effect or likely effect of substantially lessening competition. Concerted practices is not defined, however, the Explanatory Memorandum to the Bill which amended the CCA to introduce the concept explains that a 'concerted practice' is:

> *any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition.*

[29] Or arrangement

[30] *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25, (2020) 15 TCLR 553

The ACCC has issued guidelines on its enforcement approach to the prohibition.[31] It states that a concerted practice involves replacing or reducing competitive, independent decision-making with cooperation with competitors, such as by communicating and exchanging strategic commercial information. If a party inadvertently receives commercially sensitive information from a competitor, they should take immediate steps to make clear that they do not wish to receive or act upon that information.

Since the concerted practices prohibition was introduced in 2018, the ACCC has had one enforcement action. In November 2022, Lawn Solutions Australia Group Pty Ltd provided a court-enforceable undertaking to address ACCC concerns that it may have engaged in a concerted practice. The turf breeder company was circulating price surveys with requests that growers and resellers set their prices in line with its recommended prices. It also put pressure on individual growers and resellers to increase prices if they sold turf at a price below that recommended.

Some commentators have suggested alternatives to the 'concerted practices' prohibition to increase business certainty. This includes targeting the prohibition to focus on coordination between would-be competitors only, considering the purpose of the conduct, and whether it has likely effect of substantially lessening competition between the parties.[32]

Others have noted that the prohibition is only a partial solution to the emerging challenge of algorithmic collusion on pricing. If algorithms are used to facilitate communication and enforcement of coordination strategies, then that conduct may engage the prohibition. However, if the algorithms are used to unilaterally set prices or market strategies based on the actions of other market participants (but with no communication between the parties), this conduct is unlikely to be caught despite raising the risk of significant harm to consumers.[33]

We are considering the following options, along with any options suggested by submitters:

- **Status quo –** Maintain the generic prohibitions requiring evidence of a 'contract, arrangement or understanding' to establish anticompetitive collusion.

- **Align with the Australian prohibition to explicitly prohibit concerted practices that substantially lessen competition –** This would address the 'gap' in our competition law in dealing with tacit collusion in concentrated markets. Only practices that substantially lessen competition would engage the provision. This option would further align with Australia's competition law to promote business certainty.

- **Adopt a customised prohibition focused on the conduct that facilitates coordination** – A new prohibition could target the anti-competitive conduct that arises from harmful forms of tacit collusion, such as sharing of commercially-sensitive information without appropriate safeguards. However, this would require careful wording to ensure it did not deter pro-competitive forms of collaboration, as there can sometimes be legitimate reasons for competitors to exchange commercially sensitive information (eg as part of due diligence of potential acquisitions).

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[31] ACCC, *Guidelines on concerted practices*, 2018 (available here: https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Concerted%20Practices.pdf)

[32] Beaton-Wells, Caron, and Brent Fisse (May 2015), *Submission on the Final Report of the Competition Policy Review* (Harper Review), 22 May 2015. (available here: https://brentfisse.com/wp-content/uploads/2020/07/Beaton-Wells-and-Fisse-_Submission_Final-Report_250515_FINAL.pdf)

[33] Gilbert + Tobin, AI Price Wars: Algorithmic collusion or competition 'at speed'? July 2023 (available here: https://www.gtlaw.com.au/knowledge/ai-price-wars-algorithmic-collusion-or-competition-speed)

Questions for consultation

19. What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?

20. Should 'concerted practices' (eg, when firms coordinate with each other with the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?

Chapter 4: Code or rule-making powers and other matters

Issue 8: Industry Codes or Rules

Industry codes refer to a set of rules or standards of conduct for an industry, and generally cover the relationship between industry participants or their relationship with customers. The widespread use of the term 'code' covers a spectrum from mandatory government regulations to voluntary self-regulatory codes. Within this spectrum are a range of delegated legislative instruments, with varying degrees of government involvement, compliance obligations (eg 'opt-in') and public/private enforcement.

Why are we looking at this?

The 2024 OECD Economic Survey of New Zealand recommended that New Zealand adopt a more flexible and proportionate response to addressing competition concerns. It recommended a gradual escalation of intervention, from reducing barriers to entry to light-handed regulatory approaches. Other jurisdictions are also exploring the use of more flexible and timely tools to address structural competition problems.[34] We consider one way to do this could be to amend the Commerce Act to enable the making of industry codes or rules to promote competition.

We consider there is a gap that could be filled by industry codes or rules to promote competition. For example, industry codes or rules could be a flexible and efficient tool to address barriers to competition or harmful conduct in concentrated sectors where current competition tools are known to be insufficient. For example, an industry code or rule making power could supplement and/or complement the Commission's market studies by providing a tool:

- To influence/address business conduct or market features that have been identified in a market study as lessening competition rather than needing to address these matters in primary legislation.
- For intervention in sectors that may not justify a full market study.

Discussion

Industry codes or rules have been used in other jurisdictions and some sector-specific regimes to help improve competition settings by:

- Helping rectify imbalances in bargaining power along the supply chain.
- Facilitating competition in markets.
- Promoting consumer choice and switching.
- Controlling market outcomes.

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[34] Report for the European Commission by Mario Draghi, *The Future of European Competitiveness*, September 2024, Part B: In-depth analysis and recommendations, pages 303-304 re Introduce a 'New Competition Tool' (NCT) in four areas. https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en

Industry codes or rules aim to achieve competition settings by:

- Setting terms for access to essential facilities necessary to compete in a particular sector.
- Setting or requiring policies or standards for interconnection or supply.
- Setting minimum contract terms to support transparent and fair competition, such as limiting exclusivity or comparative pricing provisions unless justified.
- Empowering consumers to exercise informed choice and remove barriers to switching.
- Setting information requirements for disclosure to the public, potential users and/or to support monitoring by the Commission.
- Requiring participation in an alternative dispute resolution mechanism.

For example, a code-making power under the Telecommunications Act 2001 has been used for a variety of purposes, including to set access codes for regulated services, retail service codes, a copper withdrawal code and number portability code.

In Australia, Part IVB of the CCA allows industry codes to be prescribed consistent with the CCA's purpose. These regulations must declare a code to be a mandatory or voluntary, and may prescribe pecuniary penalties. The ACCC is responsible for enforcement of these codes, and can seek court orders for statutory damages or (if specified) pecuniary penalties, and issue infringement notices and public warning notices.

Codes have been used in Australia to remedy a range of market failures, including unfair business conduct, access to essential facilities and information asymmetry for consumers and businesses. There are currently nine mandatory codes and one voluntary industry code prescribed under the CCA (with the Food and Grocery Code soon to become mandatory).

If we were to amend the Act to provide an empowering provision to allow for industry codes or rule-making, we would need to consider the following:

- In each case, whether secondary, rather than primary, legislation is the most appropriate mechanism to use. Matters of significant policy and principle should be included in primary legislation with oversight from Parliament. The Legislation Design and Advisory Committee has set guidelines for when delegated legislation may be appropriate.[35] This includes that the subject matter is technically complex, or requires flexibility due to technological change, or requires input from experts (such as a regulator).
- Any statutory pre-requisites for making or amending codes or rules, such as consultation and thresholds that must be met before the Minister may recommend a code become regulations.
- The extent of involvement of the Commission or other groups in the developing the industry code or rules (eg should a recommendation of the Commission to the Minister be a mandatory requirement).
- The nature of obligations to comply with the code or rule (eg mandatory, opt-in or operating as a safe harbour).

35 Legislation Design and Advisory Committee. (2021). *Legislation Guidelines.* www.ldac.org.nz.

- Whether mandatory industry codes or rules are consistent with the Government policy on regulation.[36]
- The public enforcement and sanctions, and alternative dispute resolution.
- The fiscal impacts on the Crown, such as apportionment of costs for administering and enforcing the code or rules.
- Post-making safeguards, such as disallowance by Parliament, sunset clauses or scheduled reviews.

We are considering the following options, along with any other options submitters suggest:

- **Status quo:** The Commerce Act currently contains provisions enabling the Commission to protect competition. Market studies provide a means for in-depth studies to inform the case for further intervention in markets where necessary. Part 4 of the Commerce Act provides a process to impose economic regulation to promote outcomes consistent with competitive markets. Further sector-specific regulation to promote competition requires the development of primary legislation.
- **Allow for industry codes or rules to be prescribed in the Commerce Act:** This could help to fill the gaps in the current competition regulatory system by providing a flexible and agile tool to promote competition. It could help address barriers to competition in concentrated markets in a more timely and resource efficient manner to promote better outcomes for New Zealanders.

Questions for consultation

21. Do you consider that industry codes or rules could either:

    a. fill a gap in the competition regulation regime or

    b. provide a more efficient and appropriate response to addressing sector-specific competition issues rather than developing primary legislation?

    Please provide reasons.

22. If you think that industry codes or rules could fill a gap, what class of matters or rules could be included in an industry code or rules?

23. If the Commerce Act is amended to provide for the making of industry codes or rules, what matters would be important to consider in the design of the empowering provisions in the Act?

36 For example, *Government Expectations for Good Regulatory Practice*, April 2017, (available here: https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf).

Issue 9: Modernising court injunction powers

Part 6 of the Commerce Act sets out powers of the court to grant an injunction, on application of the Commission or any other person. The court may grant an injunction in relation to:

- Contraventions of Part 2 of the Act (anti-competitive conduct) (s 81).
- Contraventions of Part 3 of the Act (anti-competitive mergers or contraventions of undertakings) (s 84).
- Contraventions of price-quality paths under Part 4 of the Act (s87C).

Injunctions provide a timely and cost-effective mechanism for the Commission and other persons to address anti-competitive conduct or mergers and obtain remedies. Injunctions may be standalone or in combination with other sanctions, such as pecuniary penalties or damages.

Why are we looking at this?

The injunction powers in the Commerce Act do not reflect modern practice. For example, injunctions for contravention of Part 2 only allow the court to stop the harmful conduct. Most of the sector-specific regimes that the Commission is responsible for, allow for both restraining and performance injunctions (eg s 48 and s 49 of the Retail Payment System Act 2022). Updating the court injunction provisions will support the objectives of this review to provide for modern tools to address anticompetitive conduct, and give greater protection for private parties damaged by that conduct.

Discussion

Behavioural undertakings and industry codes or rules are examples of behavioural measures to mitigate or remedy potential competition harms. The inability of the court to order performance injunctions in relation to Part 2 conduct is a gap in the tools to remedy competition harms. Circumstances where performance injunctions could be used include:

- To limit or remedy any harm to competition by a firm with substantial market power.
- To provide the court a means to ensure future compliance.
- In cases where monetary penalties or damages are unlikely to be effective (eg in the case of impecunious defendants).

Modernising the injunctions provisions would also provide an opportunity to standardise the provisions across the legislation that the Commission is responsible for. Standardised provisions would simplify the Commission's enforcement activities and promote business compliance.

We are considering the following options, along with any other options submitters suggest:

- **Status quo** – Maintain the existing injunction provisions in the Commerce Act.
- **Amend the injunction provisions in the Act to reflect modern practice –** The injunction provisions could draw on modern provisions in more recent legislation that the Commission is responsible for, including providing for performance injunctions.

Questions for consultation

24. Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons.

Issue 10: Protecting confidential information

The Commission often relies upon businesses voluntarily supplying it with information to enable it to perform its functions effectively. Often this information is commercially sensitive. In managing the use of this information, the Commission seeks to balance parties' rights and expectations as to the confidentiality of information they are supplied against:

- The need to carry out its functions effectively and efficiently, including testing the information provided.
- Its legal obligations under the New Zealand Bill of Rights Act 1990, the Privacy Act 2020 and the Official Information Act 1982 (**OIA**), including the principle of availability of information (ie information shall be made available unless there is good reason for withholding it (s5 of the OIA)).[37]

Why are we looking at this?

We are aware that some businesses are reluctant to voluntarily provide commercially sensitive information to the Commission if it could be released to a competitor or another business with which they have a business relationship. For example, suppliers to the major grocery retailers may be reluctant to provide information about the major grocery retailer that would damage their relationship. We are exploring whether further regulatory change is desirable. Options for non-regulatory change would be at the Commission's discretion.

Discussion

Our preliminary view is that the OIA strikes the right balance between protecting confidential information and providing for the public interest in its release. In particular, the OIA recognises that there may be good reason to withhold confidential information, such as if:

- The release would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.
- It is necessary to protect a trade secret.
- Its release would unreasonably prejudice the commercial position of the person to which the information relates.
- It is necessary to protect information subject to an obligation of confidence, and the information's release would be likely to prejudice the supply of similar information, or

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[37] Commerce Commission, *Competition and Consumer Investigation Guidelines*, 2018 (available here: https://comcom.govt.nz/__data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf)

information from the same source, and it is in the public interest that such information should continue to be supplied.[38]

The first ground is a conclusive reason for withholding information. The other three grounds must be balanced against the public interest in promoting transparency and enabling participation of interested parties in Commission proceedings, and promoting public confidence in the Commission's work. The Commission must also be able to test the veracity of the information provided to it as part of its proceedings and may use contractual arrangements to impose terms and conditions on the parties to whom the information is shared. If the requestor is the party that is the subject of the Commission's proceedings, natural justice considerations would also be relevant to the release of the information to that person.

The Commission also has an anonymous whistleblowing tool to enable people to report cartels without being identified. It recognises there are situations where someone may be reluctant to come forward for fear of negative consequences or reprisals. This tool gives people in these situations a safe and secure way to report the behaviour and engage in communications with us while remaining anonymous.[39]

During an investigation, inquiry (including market study) or an assessment of an application for clearance or authorisation, the Commission also may make confidentiality orders under s 100 of the Commerce Act prohibiting the disclosure of specified information given to or obtained by the Commission. These orders have the effect of disapplying the OIA in relation to the specified information during the term of the order (ie they are not indefinite). It is a criminal offence to breach a confidentiality order, punishable by a fine of up to $4,000 for an individual and $12,000 for a body corporate.

We are considering the following options, along with any other options submitters suggest:

- **Status quo**: The Commission continues to manage access to commercially sensitive information consistent with its legal obligations and powers. Parties that are dissatisfied with a decision of the Commission with respect to an OIA request have a right of complaint through the Commission's internal complaints procedure and to the Ombudsman.

- **Strengthen confidentiality orders (s 100)**: Enhancements may include:

  - Explicitly enabling the Commission to use s 100 orders to provide restricted access to information specified in the order subject to terms and conditions. This would strengthen the Commission's ability to test confidential information on a restricted basis with specified external parties (such as legal or economic experts).

  - Increasing maximum penalties available for breaches of s 100 orders to a fine not exceeding $100,000 for individuals and $300,000 in other case (to align with penalties in s 103).

  - Providing that a single s 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. This would enable the Commission

[38] Office of the Ombudsman, August 2019, *Guide: Commercial Information* (available here: Commercial information: A guide to sections 9(2)(b) and 9(2)(i) of the OIA and sections 7(2)(b) and 7(2)(h) of the LGOIMA | Ombudsman New Zealand

[39] Reporting Cartel Conduct. https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct

to issue a single order in relation to, for example, all confidential information that it holds in relation to a clearance or authorisation application.

Questions for consultation

25. Do you consider that the Commission effectively maintains the balance between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability? Please provide reasons or examples.

26. What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.

27. What are your views on strengthening the confidentiality order provisions in s 100 of the Act?

Issue 11: Minor and technical amendments to Commerce Act

During our regular monitoring of the Commerce Act, we have identified the following minor and technical matters that could be addressed. These are outlined below and we invite comment.

#	Provision	Status quo	Proposed change	Reason for change
1	Section 65A-D – Addressing shortcomings in the collaborative activity clearance regime	The Commerce (Cartels and Other Matters) Amendment Act 2017 reformed the cartels regime in the Commerce Act, including introducing a new collaborative activity clearance in ss 65A-65D. These provisions enable parties to voluntarily apply to the Commission for clearance if they propose to enter a contract, arrangement or understanding that may contain a cartel provision relating to a collaborative	Introduce new provisions enabling the Commission to exercise the following powers in relation to collaborative clearance applications, to address existing limitations: • The ability to specify to whom a collaborative activity clearance applies, including any future parties that might join the agreement. • The ability to specify a time period for which a collaborative activity clearance applies before a	This proposal is likely to broaden the situations where clearance can be given and have favourable impacts for businesses. The regime's current shortcomings, risk the Commission declining to grant clearance for marginal collaborative activities as it is unable to satisfy itself that the s 65A(2) thresholds are met. This may result in the non-progression of efficiency-enhancing collaborative activities, or collaborative activities without competition detriments. While parties have a right of appeal, the associated time and cost may prove prohibitive for many.

#	Provision	Status quo	Proposed change	Reason for change
		activity, and where that provision does not substantially lessen competition.	further clearance is required (noting clearances currently apply in perpetuity unless revoked by the Commission under s 65D).	
2	Sections 98A(1) and (2) – Modernising search warrant powers	The search warrant powers under the Act currently authorise searches of "any place", rather than the more modern reference to "place, vehicle or thing", as used in the Search and Surveillance Act 2012.	Amend the relevant search powers by changing drafting from "any place" to "a place, vehicle or thing", aligning with other legislative search powers.	This inconsistency between the Commerce Act and the Search and Surveillance Act may be problematic when dealing with searches of things such as vehicles, post boxes, phones and data in online storage environments and may, in some cases, prevent the Commission from obtaining a remote search warrant. This may become more problematic as markets become more digitalised.
3	Sections 62(6) and 69B – Clarifying conferences can be held online and across multiple dates	Sections 62(6) and 69B empower the Commission to hold a conference for authorisations and clearances on a "date, time, and place".	Amend ss62(6) and 69B to clarify that conferences can be held online and held across multiple dates.	These provisions do not currently reflect the realities of practice, noting conferences often run online and over many dates.
4	Section 102 - Extending power to serve notices in accordance with Court directions	The Act specifies that service of notices must be to the person or by leaving, sending or emailing to their last known residence or business address. It does not empower the Commission to serve notices in	Amend s 102 to include the power to: • serve notices in accordance with a Court's directions; and • apply to a Court for such directions.	Other regulatory agencies have the power to serve notices in accordance with directions of a Court. These powers can be used to authorise service on overseas parties, individuals who are avoiding service, or to allow for service via online means (such as social media). This power would be useful if the Commission had to serve a notice

#	Provision	Status quo	Proposed change	Reason for change
		other circumstances and in accordance with the directions of a Court.		urgently, and this will likely become more relevant as industries become more digitalised and businesses move away from working at a single office.

Questions for consultation

28. What are your views on these proposed technical amendments to the Commerce Act?

29. Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?

30. Are there any other issues that you would like to raise?

List of abbreviations

ACCC	Australian Competition and Consumer Commission
Australian Amendment Bill	Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024
CCA	The Competition and Consumer Act 2010 (Australia)
CMA	Competition and Markets Authority (UK)
The Commission	New Zealand Commerce Commission
EC	European Commission
EU	European Union
FMA Act	Financial Markets Authority Act 2011
MBIE	Ministry of Business, Innovation and Employment
Mergers	Depending on the context, this term is used to refer to mergers and acquisitions of shares or assets of a business
OIA	Official Information Act 1982
OECD	Organisation for Economic Co-operation and Development
SME	Small and Medium Sized Enterprise
TFEU	Treaty on the function of the European Union

Recap of Questions

<table>
<tr><th></th><th>Mergers</th></tr>
<tr><td></td><td>Issue 1 – the substantial lessening of competition test</td></tr>
<tr><td>1</td><td>What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.</td></tr>
<tr><td>2</td><td>What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.</td></tr>
<tr><td>3</td><td>Has the ‘substantial lessening of competition’ test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.</td></tr>
<tr><td>4</td><td>Should the ‘substantial lessening of competition’ test be amended or clarified, including for:
a. Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services?
b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)?
c. In relation to just the merger provisions or wherever the test applies in the Commerce Act?
If so, how? Please provide reasons.</td></tr>
<tr><td>5</td><td>How important is it for the ‘substantial lessening of competition’ test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.</td></tr>
<tr><td>6</td><td>How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?</td></tr>
<tr><td></td><td>Issue 2 – Substantial degree of influence</td></tr>
<tr><td>7</td><td>Do you consider that the current test of ‘substantial degree of influence’ captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.</td></tr>
<tr><td>8</td><td>Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.</td></tr>
</table>

	Issue 3 – Assets of a business
9	Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?
10	If you consider there is a problem, how should the phrase be amended? For example, by: a. referring simply to "assets"? or b. should the definition of "assets" in the Commerce Act be further refined?
	Issue 4 – Mergers outside the clearance process
11	What are your views on how effectively New Zealand's voluntary merger regime is working?
12	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
13	What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options: a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.
	Issue 5 – Behavioural undertakings
14	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
	Anti-competitive conduct
	Issue 6: Facilitating beneficial collaboration
15	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
16	What are your views on whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act?
17	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

18	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	Issue 7 – Anti-competitive concerted practices
19	What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?
20	Should 'concerted practices' (eg, when firms coordinate with each other for the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?
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	Any other issues
30	Are there any other issues that you would like to raise?

Te Kāwanatanga o Aotearoa
New Zealand Government

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