



COVERSHEET

Minister	Hon Andrew Bayly	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Competition Settings Review Release of Discussion Document Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986	Date to be published	5 December 2024

List of documents that have been proactively released

Date	Title	Author
November 2024	Competition Settings Review Release of Discussion Document Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986	Office of the Minister for Commerce and Consumer Affairs
13 November 2024	Competition Settings Review: Release of Discussion Document ECO-24-MIN-0261 Minute	Cabinet Office
September	Competition Settings – Opportunity to Review New Zealand’s Competition Settings to Lift Productivity	Office of the Minister for Commerce and Consumer Affairs
25 September 2024	Competition Settings – Opportunity to Review New Zealand’s Competition Settings to Lift Productivity ECO-24-MIN-0206 Minute	Cabinet Office

Information redacted

YES / NO (please select)

Any information redacted in this document is redacted in accordance with MBIE’s policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Policy Committee

Competition Settings – opportunity to review New Zealand’s competition settings to lift productivity

Proposal

- 1 This paper seeks agreement to progress a review of New Zealand’s competition settings to improve competition and lift productivity across New Zealand’s economy.

Relation to government priorities

- 2 I propose to review New Zealand’s competition law framework, set out in the Commerce Act 1986 (**the Commerce Act**), to enhance competition and help deliver the Government’s objective of rebuilding the economy, decreasing the cost of living and lifting productivity.¹

Competition can lift productivity and improve consumer outcomes

- 3 Competitive and dynamic markets are critical to economic productivity and the welfare of New Zealanders. Competition incentivises firms to compete and innovate, producing goods and services at a price and quality that consumers demand.
- 4 Competition law and policy needs to keep pace with market developments to address and deter conduct that harms competition. Competition agencies must also have the right expertise and governance arrangements to make timely and effective decisions.

OECD recommends improving competition settings

- 5 The OECD’s 2024 Economic Survey of New Zealand reported that weak competition is a major contributor to New Zealand’s low productivity levels.² Effective competition settings are important for overcoming the disadvantages of New Zealand’s small size and distance from international markets by ensuring that firms are subject to competitive pressure to grow and export. Competitive markets also attract overseas firms to enter New Zealand markets and, in doing so, drive productivity. The OECD made recommendations for improving New Zealand’s competition law settings.
- 6 In August 2023, the Australian Government announced a review of its competition laws, policies and institutions to ensure they remain fit for purpose. These reforms are focussed on settings that increase productivity, reduce the cost of living and/or lift wages.

¹ The Commerce Act is New Zealand’s primary competition law and covers business competition. The Commerce Commission (the Commission) is responsible for enforcing the Commerce Act.

² OECD Economic Surveys: New Zealand 2024: https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-new-zealand-2024_603809f2-en

- 7 I propose to review New Zealand's overall competition law settings to ensure they promote competitive, dynamic markets. I want to ensure firms compete on a level playing field and are incentivised to grow and enter new markets.

Improved economy-wide competition settings reduce the need for complex sectoral interventions

- 8 Improving overall competition settings can promote competition across all sectors of the economy, reducing the need to focus on individual sectors. Over recent years, reforms to promote competition have focussed on sector-specific investigations followed by complex sectoral interventions in markets such as retail groceries, retail fuel, and residential building supplies. A number of these studies have identified government regulation as being a barrier to new entrants.
- 9 I am keen to ensure that New Zealand's competition settings deter and prevent anti-competitive mergers and business conduct. More effective competition settings can avoid the need for future complex regulatory interventions after harm to competition and the economy has already been done.

A Competition Strategy can support Government's vision of lifting productivity

- 10 I propose to review New Zealand's competition settings that apply across all sectors of the economy. I want to ensure that:
- we have the right settings in place to prevent mergers that result in a substantial and enduring lessening of competition;
 - all firms have incentives to compete rigorously; and
 - our competition regulator, the Commerce Commission, (**the Commission**) can make effective and timely decisions.
- 11 The following three workstreams are central to the review:
- *Commerce Commission governance arrangements* – ensuring the Commission's governance arrangements are fit for purpose, with a focus on ensuring the Board promotes good commercial outcomes in its statutory decision making.
 - *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 behaviour between firms with market power.

Workstream One: Commerce Commission governance arrangements

- 12 This workstream focusses on the Commission as New Zealand's primary competition agency and regulator of essential infrastructure monopolies. The Commission has seen rapid growth in its regulatory responsibilities over recent years, expanding to fulfil functions in retail groceries, land transport fuel, and retail payments.
- 13 I propose to carry out a review of the Commission's governance arrangements to ensure the Board continues to have the right breadth of expertise and structure to

support both effective and efficient governance and decision-making. I am particularly keen to ensure the Board has the commercial expertise required to promote good commercial outcomes.

- 14 As a first step, I intend to carry out a review under section 132 of the Crown Entities Act 2004 drawing on the key elements of a Performance Improvement Review (eg independent lead reviewers) and other tools for exemplary governance.³
- 15 I want the review to ensure New Zealand has a world class competition and consumer regulator that is well-positioned to make a real impact on markets for the benefit of New Zealander consumers.
- 16 Similar trends have been seen overseas; for example, the United Kingdom Government has given the Competition and Markets Authority (CMA) increased functions and reviewed its governance arrangements to achieve faster and more effective action. The competition review underway in Australia also seeks to ensure that its competition institutions are fit for purpose.

Workstream Two: Reviewing the merger control regime

- 17 Following the OECD's recommendations, I propose to review New Zealand's merger settings. Mergers that harm competition can reduce innovation, the range of goods and services available, and increase prices. Improvements to merger settings will help ensure all mergers that harm competition can be scrutinised by the Commission.
- 18 This will help mitigate the pattern of markets becoming increasingly concentrated across the economy. It will also reduce the need for future interventions including complex sector-specific regulation. One of the key areas of the current reforms in Australia is clarification of the legal test for how mergers are assessed. The reforms are intended to strengthen the regulator's ability to scrutinise:
 - creeping acquisitions – allowing an assessment of the competition effects of serial or creeping acquisitions (i.e. a series of small acquisitions by a large firm over a short period of time).
 - mergers that create, strengthen or entrench a position of substantial market power. The current regime prohibits a merger that is likely to substantially lessen competition. The expansion of the test is intended to add additional scrutiny to mergers involving large, dominant firms and a fuller assessment of the competitive effects they create, for example in the case of “killer” acquisitions of start-ups (i.e. acquiring small potential competitors and closing them down).
- 19 Under the Single Economic Market, New Zealand and Australia have a long history of aligning business laws. Regulatory alignment on key competition settings creates regulatory certainty for businesses working across New Zealand and Australian markets.
- 20 I am keen to assess whether New Zealand can benefit from adopting changes made to Australia's mergers regime without creating undue administrative burdens on business. I also want to ensure businesses are confident in providing commercially sensitive information to the Commission during the merger review process.

³ Section 132 of the Crown Entities Act 2004 provides for the responsible Minister to review the operations and performance of a Crown entity at any time.

Workstream Three: Modernising tools to address anti-competitive conduct

- 21 The Commerce Act prohibits anti-competitive agreements between firms that harm competition. We have an opportunity to learn from international best practice and explore updates to the Commerce Act that ensure New Zealand's competition law keeps pace with market developments.
- 22 Several overseas jurisdictions, including Australia and the United Kingdom, prohibit practices involving practices that do not involve a formal agreement but nevertheless harm competition. These practices are often referred to as 'price signalling' which involves collusion on future behaviour for example precise times when businesses plan to increase prices. These practices can have the same effect as price fixing, however, price signalling may not be caught by the current Commerce Act provisions.
- 23 I recognise that cooperation between firms can often result in significant public benefits. These benefits can accrue when competitors engage in joint ventures or coordinate on industry-wide issues to benefit consumers (e.g. banks working together to tackle scams).
- 24 I propose reviewing whether our laws could be clearer on when collusion between firms is likely to harm competition so that firms that want to cooperate for the right reasons can do so with confidence.
- 25 I also propose to consider the benefit of providing an industry rule-making power in the Commerce Act. This would allow the Commission to introduce industry rules to remedy market failures such as setting terms for access to essential facilities and providing information to consumers to remove barriers to switching. This would give the Commission more agility to remedy market failures without needing to resort to a full market investigation followed by legislation.

Treaty of Waitangi analysis

- 26 Treaty of Waitangi analysis will be undertaken when exploring the issues under each workstream, and when developing any regulatory proposals. At this stage, no Treaty/ Māori interests, Treaty settlement obligations or unintended impacts on Māori have been identified.

Implementation

- 27 I intend to publish a discussion paper for consultation later this year, refining our understanding of any problems in the current system, and testing potential options to address these. I will seek Cabinet agreement for the publication of this paper and report back to Cabinet in early 2025 with any proposed options for legislative change.
- 28 I intend for any legislative changes to be taken forward in an amendment Bill, to be introduced in Q3 2025, and in place by mid-2026.

Cost-of-living Implications

- 29 The work proposed under this Competition Strategy is expected to contribute to easing of cost-of-living pressures over the longer term. This is because competition puts downward pressure on prices and offers consumers more choice.

Financial Implications

- 30 I intend for the Commission to meet the costs of independent experts commissioned to lead the Performance Improvement-based Review as part of the governance review of the Commission's Board.

Legislative Implications

- 31 I expect the proposed workstreams to result in proposals that would require changes to the Commerce Act 1986.
- 32 At the start of this year, I submitted a bid for category 6 legislation in the 2024 legislation programme for a Commerce (Economic Regulation and Other Matters) Amendment Bill. I now intend to submit a bid in the 2025 legislation programme to reflect the review of New Zealand's competition settings.

Impact Analysis

Regulatory Impact Statement

- 33 There are no regulatory proposals in this paper, but an impact assessment will be completed for any detailed regulatory proposals.

Climate Implications of Policy Assessment

- 34 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not currently apply to this proposal, as the threshold for significance is not met. The CIPA team will be kept updated as regulatory proposals are brought to Cabinet later in the year.

Population Implications

- 35 There are no population implications arising from the proposals in this paper, but an impact assessment will be completed for any detailed regulatory proposals.

Human Rights

- 36 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Use of external Resources

- 37 No external resources were used in preparing this strategy. Independent external experts will be commissioned to lead the Performance Improvement-based Review of the Commission.

Consultation

- 38 The Treasury, Ministry for Regulation, and Public Service Commission were consulted on this paper. The Department of Prime Minister and Cabinet were informed.
- 39 Public consultation will be carried out in Q4 2024 on issues and options related to the proposed workstreams.

Communications

- 40 I propose to issue a media statement announcing the launch of the review of New Zealand's competition settings following Cabinet's approval of a discussion paper for public consultation. If the Performance Improvement-based Review of the Commission's Board is launched before this time, I propose to separately issue a media statement to announce this workstream.

Proactive Release

- 41 I propose to proactively release this Cabinet paper subject to any necessary redactions. This would be done at the time of the media statement announcing the review of New Zealand's competition settings, as provided above.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **agree** to progress the following workstreams to review New Zealand's competition settings:
 - 1.1 a review of the Commerce Commission's board performance and governance arrangements to ensure the Commerce Commission has the right expertise and governance to make effective and timely decisions;
 - 1.2 review the merger regime to ensure the Commerce Commission has the tools required to prevent mergers that create competition concerns;
 - 1.3 review the tools to address anti-competitive behaviour and support a fair playing field for business to keep pace with market developments and provide more certainty to firms on what constitutes anti-competitive collusion;
 - 1.4 review the benefit of providing the Commerce Commission with an industry rule making power as a tool to remedy a market failure.
- 2 **note** that I will bring the following items to Cabinet for further decisions:
 - 2.1 approval to release a discussion paper, setting out issues and options for public consultation in Q4 2024;
 - 2.2 approval for final policy proposals on any changes to competition settings in early 2025;
- 3 **note** that any resulting legislative changes will be progressed through a Commerce Amendment Bill, for which a bid will be submitted in the 2025 Legislation Programme.

Hon Andrew Bayly

Minister of Commerce and Consumer Affairs