

Submission Form

The Ministry of Business, Innovation and Employment invites feedback on its Discussion Paper *‘Promoting competition in New Zealand – A targeted review of the Commerce Act 1986’*

We welcome your feedback

This is the Submission Form for responding to the Discussion Paper released by the Competition Policy team at Ministry of Business, Innovation and Employment (MBIE) *‘Promoting competition in New Zealand – A targeted review of the Commerce Act’*. The Ministry of Business, Innovation and Employment welcomes your comments by **5pm 7 February 2025**

Please make your submission as follows:

1. Please see the full Discussion Paper to help you have your say. There is also a summary version.
2. Please read the privacy statement and fill out your details under the ‘Submission information’ section.
3. Please fill out your responses to the questions in the tables provided. Your submission may respond to any or all of the questions. Questions which we require you to answer are indicated with an asterisk (*). Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. If you would like to make other comments not covered by the questions, please provide these in the ‘General Comments’ section at the end of the form.
4. If your submission contains any confidential information, please:
 - a. State this in the cover page and/or in the e-mail accompanying your submission.
 - b. Indicate this on the front of your submission (eg, the first page header may state “In Confidence”).
 - c. Clearly mark all confidential information within the text of your submission.
 - d. Set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (OIA) that you believe apply.
 - e. Provide an alternative version of your submission with confidential information removed in both Word and as a PDF, suitable for publication by MBIE.
5. Before sending your submission please delete this first page of instructions.
6. Submit your submission by:
 - a. Emailing this form as both a Microsoft Word and PDF document to the Competition Policy team at competition.policy@mbie.govt.nz; or
 - b. Posting your submission to:
Competition Policy team
Ministry of Business, Innovation and Employment
15 Stout Street
PO Box 1473
Wellington 6140

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

Release of Information

Please note that submissions are subject to the OIA and the Privacy Act 2020. In line with this, MBIE intends to upload copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission unless you clearly specify otherwise in your submission. MBIE will take your views into account when responding to requests under the OIA and publishing submissions. Any decision to withhold information requested under the OIA can be reviewed by the Ombudsman.

Privacy statement

Your submission will become official information, which means it may be requested under the Official Information Act 1982 (OIA). The OIA specifies that information is to be made available upon request unless there are sufficient grounds for withholding it.

Use and release of information

To support transparency in our decision-making, MBIE proactively releases a wide range of information. MBIE will upload copies of all submissions to its website at www.mbie.govt.nz. Your name, and/or that of your organisation, will be published with your submission on the MBIE website unless you clearly specify you would like your submission to be published anonymously. Please tick the box provided if you would like your submission to be published anonymously i.e., without your name attached to it.

If you consider that we should not publish any part of your submission, please indicate which part should not be published, explain why you consider we should not publish that part, and provide a version of your submission that we can publish (if we agree not to publish your full submission). If you indicate that part of your submission should not be published, we will discuss with you before deciding whether to not publish that part of your submission.

We encourage you not to provide personally identifiable or sensitive information about yourself or others except if you feel it is required for the purposes of this consultation.

Personal information

All information you provide will be visible to the MBIE officials who are analysing the submissions and/or working on related policy matters, in line with the Privacy Act 2020. The Privacy Act 2020 includes principles that guide how personal information can be collected, used, stored and disclosed by agencies in New Zealand. Please refrain from including personal information about other people in your submission.

Contacting you about your submission

MBIE officials may use the information you provide to contact you regarding your submission. By making a submission, MBIE will consider you to have consented to being contacted, unless you clearly specify otherwise in your submission.

Viewing or correcting your information

We may share this information with other government agencies, in line with the Privacy Act 2020 or as otherwise required or permitted by law. This information will be securely held by MBIE. Generally, MBIE keeps public submission information for ten years. After that, it will be destroyed in line with MBIE's records retention and disposal policy. You have the right to ask for a copy of any personal information you provided in this submission, and to ask for it to be corrected if you think it is wrong. If you'd like to ask for a copy of your information, or to have it corrected, please contact MBIE by emailing competition.policy@mbie.govt.nz.

Submission information

(Please note we require responses to all questions marked with an *)

Release of information

Please let us know if you would like any part of your submission to be kept confidential.

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

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[To check the boxes above: Double click on box, then select 'checked']

Personal details and privacy	
1.	<p>I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue*</p> <p>[To check the boxes below Double click on box, then select 'checked']</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
2.	<p>What is your name?*</p> <p>Chris Ash</p>
3.	<p>Do you consent to your name being published with your submission?*</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
4.	<p>What is your email address? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
5.	<p>What is your contact number? Please note this will not be published with your submission.*</p> <p></p>
6.	<p>Are you submitting as an individual or on behalf of an organisation?*</p> <p><input type="checkbox"/> Individual (skip to 8)</p> <p><input checked="" type="checkbox"/> Organisation</p>
7.	<p>If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation.</p> <p><input checked="" type="checkbox"/> Yes, I am authorised to make a submission on behalf of my organisation</p>
8.	<p>If you are submitting on behalf of an organisation, what is your organisation's name? Please note this will be published with your submission.</p> <p>Accident Compensation Corporation</p>
9.	<p>If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.</p>

- ☐ Law Firm
- ☐ Consumer organization
- ☐ Consultancy
- ☐ Think-Tank
- ☐ Advocacy group
- ☐ Business/Private Firm
- ☐ Contractor/SME
- ☐ Registered charity
- ☐ Non-governmental organisation
- ☐ Academic Institution
- ☐ Central government
- ☐ Iwi, hapū or Māori organisation
- ☐ Academic/Research
- ☒ Other. Please describe: Crown entity

Responses to questions

The Competition Policy team welcomes your feedback on as many sections as you wish to respond to, please note you do not need to answer every question.

Mergers	
Issue 1 – the substantial lessening of competition test	
1.	<p>What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.</p> <p>ACC has observed significant supplier concentration in health markets. New Zealand's competition settings appear to be insufficient for the purposes of scrutinising horizontal supply chain acquisitions and mergers in a manner that promotes long-term competition in these markets.</p> <p>ACC can provide further information to MBIE from ACC's contract repository to demonstrate these market dynamics.</p> <p>Note our related broader comments in the General Comments section on increased regulation in health markets.</p>
2.	<p>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.</p>
3.	<p>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.</p>
4.	<p>Should the 'substantial lessening of competition' test be amended or clarified, including for:</p> <ol style="list-style-type: none"> 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? Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? In relation to just the merger provisions or wherever the test applies in the Commerce Act? <p>If so, how? Please provide reasons.</p>

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	
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 assess effective control? If so, how should it be amended? Please provide reasons.
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.	<p>If you consider there is a problem, how should the phrase be amended? For example, by:</p> <ul style="list-style-type: none"> 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.	<p>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:</p> <ul style="list-style-type: none"> 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?
Anticompetitive 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.
	<p>ACC only has a limited statutory exemption under section 305 of the Accident Compensation Act for the joint purchasing of emergency transport services (with Health New Zealand). Any other potential collaborative activity is restricted and insufficiently facilitated by the current competition settings.</p> <p>ACC aspires to work closely and effectively with other funding and commissioning agencies across the health system to support all injured New Zealanders to have a quicker and sustainable return to work, and to see rehabilitation delivered more efficiently with improved value for money.</p> <p>The current competition law settings constrain and discourage ACC and other relevant agencies from collaborative commissioning, funding and contracting in a manner that can improve outcomes, reduce price, and improve market certainty for suppliers and other stakeholders. They do this by creating significant uncertainty for ACC when considering collaborative activities with other agencies. Each co-commissioning, collaborative activity and joint purchasing opportunity has to be assessed on its individual merits, with time and resources necessary to understand whether and/or how the current settings can enable or restrict that activity. This drives inefficiency, uncertainty and stifles co-commissioning, collaboration and innovative commissioning models. In ACC's view, the settings should instead enable and promote long-term, system wide collaboration by ACC with other related agencies in the health and social sector for the public benefit.</p>
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?
	The Commerce Act (or another legislative instrument) could potentially enable and support long-term, system wide collaboration by ACC with other related commissioning and funding agencies in the health and social sectors.

17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	We submit that an express statutory authority for ACC and other agencies to beneficially collaborate would be the most effective approach.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	<p>That ACC and other agencies may beneficially collaborate exempt from the Commerce Act anti-competitive conduct prohibitions on public benefit grounds. This would enable strategic, system wide and long-term collaborative commissioning and contracting arrangements to be explored and implemented without the existing constraints and uncertainty (or the additional time and resource required to be factored in to, on a case by case basis, assess risks, requirements and potentially seek authorisation from the Commerce Commission).</p> <p>Ultimately this will enable and support ACC and other agencies to achieve better commissioning outcomes at improved value for money.</p>
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?
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	

21.	<p>Do you consider that industry codes or rules could either:</p> <ul style="list-style-type: none"> a. Fill a gap in the competition regulation regime or b. Provide a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.
22.	<p>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?</p>
23.	<p>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?</p>
	<p>Consider overseas, including the United Kingdom, experience in greater regulation of the health sector</p>
Issue 9 – Modernising court injunction powers	
24.	<p>Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons</p>
Issue 10 – Protecting confidential information	
25.	<p>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.</p>

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 the Commerce Act	
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?
Any other issues	
30.	Are there any other issues that you would like to raise?

General Comments:

ACC is a Crown entity and statutory corporation continued by the Accident Compensation Act 2001 (**Accident Compensation Act**). ACC delivers Aotearoa New Zealand's accident insurance scheme. ACC's purpose is to improve lives every day through a focus on prevention, care, and recovery for all people in Aotearoa New Zealand who are affected by injury.

ACC funds and commissions services in health and related markets to the value of around \$4.3b per year. ACC is a buyer in markets in which other agencies (including Health New Zealand, Whai Kaha - Ministry of Disabled People and Pharmac) also commission and fund the same, similar and related types of services and goods. ACC aspires to work closely and effectively with other funding and commissioning agencies and more broadly across the health system to support all injured New Zealanders to have a quicker and sustainable return to work, and see rehabilitation delivered more efficiently with improved value for money.

The current settings are a barrier to beneficial collaboration

However, New Zealand's current competition law settings are currently proving to be a barrier to beneficial collaboration by ACC with other agencies. ACC only has a limited statutory exemption under section 305 of the Accident Compensation Act for the joint purchasing of emergency transport services with Health New Zealand.

Any other potential collaborative activity is constrained and insufficiently facilitated by the current competition settings. The current settings create significant uncertainty for ACC when considering collaborative activities with other agencies. Each co-commissioning, collaborative activity and joint purchasing opportunity has to be assessed on its individual merits, with time and resources necessary to understand whether and/or how the current settings can enable or restrict that activity. This drives inefficiency, uncertainty and stifles co-commissioning, collaboration and innovative commissioning models. In ACC's view, the settings should instead enable and promote long-term, system wide collaboration by ACC with other related agencies in the health and social sector for the public benefit.

These limitations on collaborative activity impact on the ACC's ability to support all injured New Zealanders to have a quicker and sustainable return to work, and see rehabilitation delivered more efficiently with improved value for money. The prevailing competition law settings impact other agencies seeking to achieve related and similar objectives to deliver better public services and realise value for money. These current competition law settings also impact suppliers and markets by reducing coordination and system effectiveness between agencies. This makes it more difficult for suppliers to do business with government on a commercially practical basis and reduces the value they can offer us. This fragmented and single agency commissioning and contracting approach has, in our view, also contributed to reduced supplier investment in health infrastructure. The current competition settings also stifle innovation within the health sector which would otherwise encourage rehabilitation services to be delivered more efficiently with improved value for money. There is also a cumulative, net cost to the public health system that arises from the existing settings.

We submit that an express statutory authority for ACC and other agencies to beneficially collaborate, on public benefit grounds, exempt from the Commerce Act anti-competitive conduct prohibitions. This would enable and support ACC to more effectively commission services to better support all injured New Zealanders to have a quicker and sustainable return to work, and see rehabilitation delivered more efficiently with improved value for money.

NZ's health markets exist without a regulator and New Zealand should consider overseas regulator models to improve commissioning outcomes

New Zealand's health market features market concentration and monopolies, a noteworthy geographic distribution of suppliers, transparency deficits, price confrontation between commissioners and suppliers, disproportionate sector lobbying influence, and opaque private sector infrastructure investments. These market dynamics also contribute to the pressures on the New Zealand public health system. In these health markets, the competition regulatory system appears to not be fit for purpose and is not sufficiently agile or responsive for the benefit of our clients.

ACC has observed significant supplier concentration in health markets. New Zealand's competition settings appear to be insufficiently scrutinising horizontal supply chain acquisitions and mergers in a manner that promotes long-term competition in these markets.

ACC can provide further information to MBIE from ACC's contract repository to demonstrate these market dynamics.

New Zealand is also not keeping up with international best practice for regulating and promoting competition in the health markets. Overseas jurisdictions, including the United Kingdom via the NHS England and NHS Improvement competition regulatory functions, provide evidence for how increased health market regulation can improve competition, quality and effectiveness, streamline processes, promote innovation, ensure transparency and accountability, and ultimately benefit the public health and broader healthcare system.

ACC submits that a review into New Zealand's competition settings should assess increased influence and regulation specifically in health markets in a manner that is 'right sized' for New Zealand. Greater health market regulation could promote long-term competition and enables ACC and other agencies to more effectively commission and deliver better public services for clients and realise improved value for public money.

Thank you

We appreciate you sharing your thoughts with us. Please find all instructions for how to return this form to us on the first page.