

# 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'*

## 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.

I would like my submission (or identified parts of my submission) to be kept confidential because  
[Insert text]

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

### Personal details and privacy

1.	I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue* [To check the boxes below Double click on box, then select 'checked'] <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
2.	What is your name?*
	Brian Scarpelli
3.	Do you consent to your name being published with your submission?*
	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
4.	What is your email address? Please note this will not be published with your submission.*
	Privacy of natural persons
5.	What is your contact number? Please note this will not be published with your submission.*

	Privacy of natural persons
6.	Are you submitting as an individual or on behalf of an organisation?*
	<input type="checkbox"/> Individual (skip to 8) <input checked="" type="checkbox"/> <b>Organisation</b>
7.	If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation.
	<input checked="" type="checkbox"/> <b>Yes, I am authorised to make a submission on behalf of my organisation</b>
8.	If you are submitting on behalf of an organisation, what is your organisation's name? Please note this will be published with your submission.
	<b>ACT   The App Association</b>
9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.
	<input type="checkbox"/> Law Firm <input type="checkbox"/> Consumer organization <input type="checkbox"/> Consultancy <input type="checkbox"/> Think-Tank <input checked="" type="checkbox"/> <b>Advocacy group</b> <input type="checkbox"/> Business/Private Firm <input type="checkbox"/> Contractor/SME <input type="checkbox"/> Registered charity <input type="checkbox"/> Non-governmental organisation <input type="checkbox"/> Academic Institution <input type="checkbox"/> Central government <input type="checkbox"/> Iwi, hapū or Māori organisation <input type="checkbox"/> Academic/Research <input type="checkbox"/> Other. Please describe:

## 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.	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.
	<b>Please find ACT   The App Association’s views on this question appended.</b>
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.
	<b>Please find ACT   The App Association’s views on this question appended.</b>
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.
	<p><b>MBIE should be wary of proposals for “substantial lessening or prevention of competition” (SLPC) doctrines within its Commerce Act. Legitimate concerns persist about the potential adoption of a per-se approach to alleged anti-competitive conduct. The approach of stating conduct that may be potentially “capable” of causing any potential effect on competition would upend many years of antitrust law and would create negative effects on consumers. We urge MBIE to undertake a strict economic analysis of how a per-se approach may impact innovation domestically and abroad. The New Zealand government should be mindful to avoid framing innovative and business-friendly conduct as anti-competitive. SLPC factors should be concise to the welfare standard and legal precedence in Canadian antitrust suits.</b></p> <p><b>We also incorporate our views elaborating on emerging technology-driven markets and competition, which are contained in our appended views.</b></p>
4.	Should the ‘substantial lessening of competition’ test be amended or clarified, including for:
	<ol style="list-style-type: none"> <li>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?</li> <li>Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)?</li> <li>In relation to just the merger provisions or wherever the test applies in the Commerce Act?</li> </ol>

	If so, how? Please provide reasons.
	<p><b>MBIE should be wary of proposals for “substantial lessening or prevention of competition” (SLPC) doctrines within its Commerce Act. Legitimate concerns persist about the potential adoption of a per-se approach to alleged anti-competitive conduct. The approach of stating conduct that may be potentially “capable” of causing any potential effect on competition would upend many years of antitrust law and would create negative effects on consumers. We urge MBIE to undertake a strict economic analysis of how a per-se approach may impact innovation domestically and abroad. The New Zealand government should be mindful to avoid framing innovative and business-friendly conduct as anti-competitive. SLPC factors should be concise to the welfare standard and legal precedence in Canadian antitrust suits.</b></p> <p><b>We also incorporate our views elaborating on emerging technology-driven markets and competition, which are contained in our appended views.</b></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.
	<p><b>MBIE should be wary of proposals for “substantial lessening or prevention of competition” (SLPC) doctrines within its Commerce Act. Legitimate concerns persist about the potential adoption of a per-se approach to alleged anti-competitive conduct. The approach of stating conduct that may be potentially “capable” of causing any potential effect on competition would upend many years of antitrust law and would create negative effects on consumers. We urge MBIE to undertake a strict economic analysis of how a per-se approach may impact innovation domestically and abroad. The New Zealand government should be mindful to avoid framing innovative and business-friendly conduct as anti-competitive. SLPC factors should be concise to the welfare standard and legal precedence in Canadian antitrust suits.</b></p> <p><b>We also incorporate our views elaborating on emerging technology-driven markets and competition, which are contained in our appended views.</b></p>
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	<b>Please find ACT   The App Association’s views on this question appended.</b>
<b>Issue 2 – Substantial degree of influence</b>	
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.

	<b>Please find ACT   The App Association's views on this question appended.</b>
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.
	<b>Please find ACT   The App Association's views on this question appended.</b>
<b>Issue 3 – Assets of a business</b>	
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?
	<b>Please find ACT   The App Association's views on this question appended.</b>
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"> <li>a. referring simply to “assets”? or</li> <li>b. should the definition of “assets” in the Commerce Act be further refined?</li> </ul>
	<b>Please find ACT   The App Association's views on this question appended.</b>
<b>Issue 4 – Mergers outside the clearance process</b>	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	<b>The App Association's membership consensus is that New Zealand's voluntary merger regime is largely working as intended. Please find ACT   The App Association's views on this question appended.</b>

12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	<b>Generally, we do not consider non-notified mergers to be an issue in New Zealand. Please find ACT   The App Association's views on this question appended.</b>
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: <ul style="list-style-type: none"> <li>a. A stay and/or hold separate power</li> <li>b. A call-in power</li> <li>c. A mandatory notification power for designated companies.</li> </ul>
	<b>Options a-c are very likely unnecessary given the scope of existing law and the state of competition in New Zealand. Please find ACT   The App Association's views on this question appended.</b>
<b>Issue 5 – Behavioural undertakings</b>	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
	<b>Please find ACT   The App Association's views on this question appended.</b>
<b>Anticompetitive conduct</b>	
<b>Issue 6 – Facilitating beneficial collaboration</b>	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
	<b>Please find ACT   The App Association's views on this question appended.</b>

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?
	<b>Please find ACT   The App Association's views on this question appended.</b>
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	<b>Please find ACT   The App Association's views on this question appended.</b>
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	<b>Please find ACT   The App Association's views on this question appended.</b>
<b>Issue 7 – Anti-competitive concerted practices</b>	
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?
	<b>The App Association believes that the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them. Please find ACT   The App Association's views on this question appended.</b>
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?
	<b>The App Association believes that the Commerce Act adequately deters such 'concerted practices'. Please find ACT   The App Association's views on this question appended.</b>
<b>Code or rule-making powers and other matters</b>	

## 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"><li>a. Fill a gap in the competition regulation regime or</li><li>b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.</li></ul>
	<b>Non-mandatory advisory codes/guidance would be helpful in providing insights on MBIE's thinking on emerging issues, including those that are sector-specific. Please find ACT   The App Association's views on this question appended.</b>
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>
	<b>Such industry codes/rules could be developed in response to identified areas where widespread uncertainty is found (e.g., MBIE receives the most questions about a specific sector/topic/etc.). Please find ACT   The App Association's views on this question appended.</b>
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>
	<b>The App Association does not see a need for amending the Commerce Act; however, if such a process is undertaken, we urge that revisions reinforce that MBIE interventions be tied to (1) clear market definitions and (2) targeted action to address well-established harms deriving from clear abuse of a monopoly position in that market. Please find ACT   The App Association's views on this question appended.</b>

## 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>
	<b>The App Association cautions against expanding injunctions powers under the Commerce Act, which appear to be unnecessary based on the functioning of the competition law regime in New Zealand and the state of competition in New Zealand. Please find ACT   The App Association's views on this question appended.</b>

## Issue 10 – Protecting confidential information



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.
	<b>Yes.</b>
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	<b>None; should changes be made related to protecting commercially sensitive information, we urge for the appropriate continued protection of trade secrets and IP.</b>
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	<b>Strengthening the confidentiality order provisions in s 100 of the Act would be helpful in providing certainty to stakeholders, particularly micro, small, and medium-sized entities.</b>
<b>Issue 11 – Minor and technical amendments to the Commerce Act</b>	
28.	What are your views on these proposed technical amendments to the Commerce Act?
	<b>Please find ACT   The App Association’s views on this question appended.</b>
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand’s competition law?
	<b>Please find ACT   The App Association’s views on this question appended.</b>
<b>Any other issues</b>	
30.	Are there any other issues that you would like to raise?

ACT | The App Association greatly appreciates the opportunity to provide our views to MBIE. We welcome the opportunity to meet with MBIE to elaborate on our views and identify other ways that our small business community can be helpful.

**General Comments:**

Please find ACT | The App Association's views on this question appended.

**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.