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RE: PROMOTING COMPETITION IN NEW ZEALAND – A TARGETED REVIEW OF THE COMMERCE ACT 1986

Amazon New Zealand Pty Ltd and Amazon Web Services (AWS) New Zealand Ltd (collectively, Amazon) welcome the opportunity to comment on the Ministry of Business, Innovation & Employment (MBIE)'s consultation on *Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986.*

AWS and Amazon in New Zealand

AWS has been operating in New Zealand for over a decade, with offices in Auckland and Wellington, and employing over 150 staff. AWS is planning to launch our new AWS Auckland Region in 2025, adding to existing investments in an Auckland-based AWS Local Zone, supporting local high-skilled tech jobs. The New Zealand AWS Region will be powered with 100% renewable energy at launch, supported by our Power Purchase Agreement (PPA) with Mercury Energy's Turitea South windfarm. Amazon has committed to reaching net-zero carbon emissions globally by 2040 under The Climate Pledge, 10 years ahead of the Paris Agreement.

AWS is a key supporter of the New Zealand Government's technology aspirations for advancing digital transformation and economic growth, including supporting our New Zealand customers to go global using AWS technology. We offer New Zealanders cloud training and certification programs, including AWS Skill Builder and AWS re/Start, a cohort-based workforce development program that prepares individuals for technology careers. We're working towards providing cloud training opportunities for 100,000 New Zealanders over five years.

Among our New Zealand customers are iconic businesses such as Air New Zealand, Kiwi Bank, Xero, Bank of New Zealand and Vector. "Cloud-native" companies like Education Perfect, Sharesies, Halter and Uneeq are using AWS technology both at home and globally. We work closely with our in-country partners, such as Datacom, Spark, One.NZ, The Instillery and Fronde to bring the full value of cloud technology to customers.

Amazon launched Prime Video in New Zealand in December 2016, and expanded access to our Amazon.com.au store to New Zealand customers in June 2021, providing consumers with access to millions of products.

In terms of the review of the Commerce Act 1986, a strong, fair and transparent competition framework benefits consumers and it inspires business confidence for more innovation, investment and talent to flow to

New Zealand. We support the New Zealand Government's objective of lifting productivity and ensuring a healthy competition system.

Please see our specific comments on the discussion document at Annex 1, with a focus on chapters one and two.

Kind regards

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Head of Public Policy, ANZ
Amazon Web Services

Annex 1: Amazon Comments on MBIE discussion paper *Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986*

Comments on Chapter One: Alignment with the Australian competition framework

We welcome the overall intention of pursuing alignment with aspects of Australian's competition law regime to support Trans-Tasman cooperation and better business and consumer outcomes for both countries, bearing in mind MBIE's position that "alignment does not necessarily mean adopting the same laws and processes". Noting New Zealand's relatively smaller size compared with Australia, and therefore that regulatory costs per capita may be higher, there are indeed instances where New Zealand may be better placed taking its own approach. We believe it is beneficial for New Zealand to maintain an attractive investment profile globally by presenting an easy-to-understand and legally predicable framework.

We recommend the New Zealand Government continue to carefully assess which of the Australian reforms are appropriate for New Zealand's economic setting, regulatory capability and conduciveness to investment and innovation.

New Zealand has time to pause and observe how the Australian reforms play out

The reforms to Australia's competition law, specifically the Australian merger law reforms, are very recent, and some have not yet commenced. The Australian reforms introduced certain novel aspects into its competition laws, and those reforms have not been utilised yet or tested in any material way. For example, there are concerns in Australia that the merger notification thresholds are too low and therefore the volume of merger clearance applications will negatively impact clearance timeframes.

New Zealand is in the enviable position of being able to see how the Australian reforms play out over time. We support New Zealand taking some pragmatic steps toward greater harmonisation in areas where the proposed reforms can be shown through experience to deliver legal certainty for businesses and can be shown to benefit consumers.

As the recent Australian reforms play out, we recommend that the New Zealand Government takes the opportunity to observe which of their reforms work well and which reforms add cost and complexity without necessarily delivering consumers real tangible benefits. This can then inform the New Zealand Government's proposed reforms.

Comments on Chapter Two: Mergers

The Australian Government has just passed substantial reforms to its merger control laws. In any merger control regime, certainty and predictability is critically important. In particular, any company considering large investments in a jurisdiction needs a clear understanding of how the regulator will approach merger control questions. For example, how overseas transactions will be treated for the purposes of any transaction thresholds or the regulator's approach to investments in a New Zealand company which fall short of control.

Companies typically avoid investments in a jurisdiction where they cannot easily develop a well-informed view about the competition tests and requirements that will apply to them.

Scope of the regime

In Australia, during its merger consultation, significant concerns were raised by various parties, including the Australian Law Society, think tanks and academics about the scope of the proposed regime. Specifically, there were concerns that the very broad notification thresholds and definition of control (as originally proposed) would lead to a large volume of unnecessary notifications, impacting the competition authority's review timelines, increasing compliance costs for business and ultimately resulting in a chilling effect on transactions (and therefore investment) in Australia.

We support the conclusion in the discussion document on page 18 that the New Zealand merger regime is working well on the whole, and is right-sized for New Zealand's economy. Major changes to bring in a mandatory and suspensory regime in New Zealand are not needed. In respect of the three matters raised in the document, we note the following:

First, stay and hold-separate powers: The consultation raises whether the regulator should have the power to suspend the completion of an acquisition without needing to apply to court for an interim injunction. Such a power would place a very substantial discretion in the hands of the regulator. Given the consequences of suspending a transaction, such a step should not be discretionary but rather a power exercised by the courts. In a court proceeding both parties have an opportunity to review the same evidence and to put all the relevant information before the court. This ensures all parties have the same information and provides an appropriate check on the power to injunct a transaction.

Second, call-in powers: This would allow the regulator to require parties to apply for clearance if it becomes aware of a potentially concerning transaction. In general, this is a good solution for New Zealand as it avoids the overly-expansive approach taken in Australia, but allows the regulator to review relevant transactions.

The key, however, is setting the appropriate conditions and guidance in order to ensure businesses have sufficient certainty around the exercise of the call-in power and that it is not over-used. For example, when and how the regulator will exercise this power? Absent the detail around the conditions and criteria for the exercise of the power, it is difficult to conclusively endorse the merits of such a power.

Third, company-specific mandatory notification powers: It is proposed that certain companies with substantial market power or that exceed a certain size must notify the Commission of any acquisitions. This mandatory notification power, by itself, would not have suspensory effect.

More detail on this proposal is needed. Absent that detail, we note the following: (1) having a call-in power already addresses the risk of non-notification, making a mandatory notification power redundant. (2) It is not clear the basis on which some companies but not others should be subject to the power. (3) Given New Zealand's relative geographic location and GDP, targeting only certain companies seems likely to impact innovation and investment decisions by making New Zealand a difficult regulatory jurisdiction with low predictability for certain named companies. (4) A merger regime should not single out specific companies or services unless a clear process is followed for identifying such companies and there is clear evidence of

competitive harms in those sectors. Before progressing with this power, the New Zealand Government should investigate and consult on which sectors or services pose a concern to determine whether such a power is needed. (5) The purpose of the "substantial lessening of competition" (SLC) test is to ensure each transaction is evaluated against the relevant merger factors and is company agnostic. In this way, pro-competitive transactions even by large companies can be approved if they benefit consumers. Such a power almost creates a presumption that a transaction involving a 'named' company or service is anti-competitive and this could discourage investment and transactions that are ultimately beneficial for consumers.

Substantial Lessening of Competition Test

One feature of the Australian reforms was to expand the SLC test to enable the regulator, in assessing whether conduct amounts to a SLC, to test whether the transaction "creates, strengthens or entrenches a substantial degree of power in the market" ('CSE'). This is a novel addition to the Australian SLC test. Australia ultimately rejected including the CSE test in their anti-competitive 'conduct' rules, and only included the CSE test for mergers.

The MBIE discussion paper considers on page 12 whether the New Zealand Government should also introduce CSE in the New Zealand SLC test, giving creeping acquisitions as the reason supporting the proposed change.

If the concern is that companies are not seeking regulatory clearance for multiple transactions within an industry or sector, that concern can be dealt with through other reforms including a mandatory notification requirement or call-in regime (which is proposed above).

The concern raised in Australia, which applies equally to the New Zealand Government proposal, is that a regulator could find a transaction amounts to a CSE and therefore block a transaction without needing to show the transaction *substantially* reduces competition. On the same page of the discussion document (p. 12), MBIE notes that the Commerce Commission has successfully used existing provisions and procedures to respond to situations of concern as and when these have arisen.

Given how novel the Australia approach is, and noting Australia has not yet published its revised merger guidelines to clarify how it proposes to implement the CSE test, it would be prudent to adopt a "wait and see" approach to observe how this test is applied in Australia. This would allow New Zealand to benefit from real-world examples and the interpretation of this novel test, including how the CSE test integrates with the SLC test.

Should the New Zealand Government decide to proceed with including the CSE phrasing in its framework, our view is that consideration of whether a transaction amounts to CSE should only be included as a merger factor. That is, it could be a factor the authority has regard to (amongst others) when considering whether or not a transaction would likely have the effect of SLC, but the CSE consideration should not form part of the SLC test itself.

Substantial Degree of Influence

MBIE proposes that the regulator could take into account a range of different factors (e.g., directors rights, etc.) in determining the extent of control obtained in a transaction.

As a general principle, having clear legislative guidance and an easy-to-understand test promotes legal certainty for businesses. This enables businesses to make risk-based assessments on where and how to undertake investments. Giving a regulator broad discretion to consider various factors to determine whether a transaction delivers control is unlikely to promote legal certainty, but rather, achieve the opposite. If this proposal is pursued, we recommend it be accompanied by clear, objective legislative standards for what constitutes control, rather than leaving this unclear and subject to discretion.

On this, after much debate, Australia rejected the proposed novel discretionary definition of control originally proposed. Instead, Australia's merger reforms adopted the well understood definition of control set out in Australia's corporations law. New Zealand may wish to consider taking the same approach and utilising the existing and well understood control concept outlined in New Zealand's corporations law.

Assets of a business

In Australia, a significant concern about the recent merger reforms related to changes to the definition of "assets of a business". The issues of concern were: (1) the reforms sought to require clearance for assets that are acquired in the ordinary course of business, thus slowing down ordinary business activity and imposing additional unwarranted costs on business; and (2) the regulator could be required to assess thousands of asset transactions that do not raise a SLC concern. For example, certain investment trusts regularly acquire land for re-development, but there is usually no suggestion that such asset transactions raise competition concerns.

If any similar change is considered for New Zealand, we recommend this follows a substantive consultation with industry to determine whether there is indeed a competition concern that requires law reform.

Behavioural undertakings

In principle, we support the regulator having the flexibility to accept behavioural undertakings in appropriate circumstances. In the context of international transactions, if there is a need for a solution to also address any New Zealand-specific competition concerns, having the flexibility to adopt similar, but locally appropriate, solutions could help to reduce complexity.