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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'] ☒ Yes ☐ No
2.	What is your name?* Buddle Findlay (Authors: Susie Kilty, Tony Dellow, Anna Parker, Hannah Lee, Emily Tyler, Georgia Callaghan, Hugo Schwarz, David Laxon, Josh Kemp Whimp)
3.	Do you consent to your name being published with your submission?* ☒ Yes ☐ 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 Please note this will not be published with your submission.* Privacy of natural persons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 Please note this will not be published with your submission.* Privacy of natural persons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?* ☐ Individual (skip to 8) ☒ Organisation
7.	If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation. ☒ Yes, I am authorised to make a submission on behalf of my organisation
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. Buddle Findlay
9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one. ☒ 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:

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.
	We consider that the 'substantial lessening of competition' test in section 47 of the Commerce Act 1986 (**Commerce Act**) is (subject to our comments below) robust and suitable to promote the long-term benefit of consumers in New Zealand. We do not consider that amending the test to align with the proposed reforms in Australia will improve the effectiveness of New Zealand's merger control regime. The Discussion Paper identifies that it is unclear whether the previous changes to section 47 have captured a wider range of harmful mergers, implying that a concern with the current test is that mergers have been cleared that have harmed competition. We agree with the view expressed in the Discussion Paper that this reflects the difficulty in conducting a forward-looking analysis on the potential impacts of a merger on competition, as opposed to a failing in the test. The assessment of potential competitive effects of a proposed merger is necessarily forward-looking. It is impossible to create a forward-looking test that rests on the New Zealand Commerce Commission (**Commission**) correctly predicting competitive effects of proposed mergers on every occasion. While *ex post* reviews may identify that a merger harmed competition in ways not foreseen at the time it was cleared and provide useful learnings for the Commission in how it undertakes its assessment, that does not indicate a change in the test is needed. Indeed, we highlight that there is another feature of a forward-looking assessment that is not raised in the Discussion Paper: the decline of clearance for mergers that would have had no effect on competition or even potentially procompetitive effects. Again, this is something that cannot be known at the time a proposed merger is assessed due to the forward-looking nature of the assessment. However, an aspect of the 'substantial lessening of competition' test that we do recommend MBIE consider examining is the operation of the 'satisfaction' test. Currently, notified proposed mergers will only be cleared if the Commission is satisfied that the merger is not likely to substantially lessening competition. Where the Commission is not sure about the effect of a merger, the default position is that the clearance is declined. The 'satisfaction' test was considered as part of the recent Australian reforms (and it was noted that New Zealand is the only jurisdiction with this type of test). A change to the New Zealand form of the test was ultimately rejected by the Australian Government.

	The way the test operates significantly increases the burden of proof on all merging parties, even when the merger is unlikely to harm competition, which imposes additional costs and risks on all mergers. By declining to give clearance where there is uncertainty about the future (for example, in new or emerging markets), mergers will be declined even if they are benign or may have resulted in pro-competitive effects. The operation of the test is, in our view, an example of what the Prime Minister described in his recent State of the Nation speech as New Zealand's "culture of no", which he views as holding the New Zealand economy back. We therefore recommend MBIE consider amending section 47 so that the Commission may only decline clearance if it is satisfied that a merger will have, or is likely to have, the effect of substantially lessening competition in a market. Where the Commission is uncertain, it should grant clearance.
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.
	No comment.
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.
	No comment.
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.
	We do not consider that such clarifications are necessary. More specifically: • In relation to creeping acquisitions, as a starting point, we would expect that the majority of such acquisitions would fall outside the concentration indicators. In such cases, it is likely that the merging parties would make a clearance application. For a creeping acquisition that technically falls within the concentration indicators, the Commission's Mergers and Acquisitions Guidelines are very clear that those concentration indicators are an initial guide only. It emphasises that the fact of a proposed merger exceeding the concentration indicators will not mean the merger will necessarily be anti-competitive (which we agree is the correct approach).

	Either way, consolidation strategies that cause material changes to market concentration or otherwise harm competition are already prohibited by section 47. At the point in time where an acquisition is likely to have the effect of substantially lessening competition in a market (because, for example, the acquiring entity already has market power following a number of smaller acquisitions in previous years), then that acquisition will breach section 47. The fact of prior acquisitions having occurred may provide a rich data source for analysing the potential effects of the acquisition then in contemplation. The Legislation Design and Advisory Committee Legislation Guidelines provide that legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. It is not clear that these proposals are necessary given creeping acquisitions are already within scope of the existing test. The proposed changes risk reducing clarity in the legislation, creating confusion and uncertainty for businesses, and increasing complexity and costs for the regulator. • It is not necessary to clarify or make explicit that the 'substantial lessening of competition' test includes creating, strengthening, or entrenching market power. As mentioned in the Discussion Paper, the courts have already confirmed that the 'substantial lessening of competition' test involves a change along the spectrum of market power. As set out above, legislation should only be made where it is necessary and is the most appropriate means of achieving the policy objective. This clarification is not necessary as it is already covered by the existing test.
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.
	While we acknowledge that aligning the Commerce Act with Australia's competition laws has advantages (for example, because it promotes certainty for businesses operating across both jurisdictions), those advantages alone do not justify amending the Commerce Act in the manner suggested, especially given the risks and costs associated with amending legislation discussed above. We also note, if New Zealand's competition laws are amended to align with Australian law, it will be challenging to ensure that this continues. There is a misalignment between the two jurisdictions in terms of the relative frequency in which competition laws are changed (given Australian competition policy settings appear to come under pressure more frequently compared with New Zealand). To better achieve the purpose of the Commerce Act, we consider the basis on which laws should be changed is to improve economic efficiency (expressed in the Commerce Act as the long-term benefit of consumers) rather than to achieve alignment with Australian law.

6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	No comment.
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.
	We agree that 'substantial degree of influence' is a difficult threshold to define. While the 'substantial degree of influence' test may not capture all of the circumstances in which a firm may influence the activities of another due to the manner in which it is interpreted, that is reflective of the complex nature of the issue rather than an issue with the test itself. Determining effective ownership and control is complex, and requires consideration of a range of factors. A non-definitive test provides the flexibility for the Commission to undertake that assessment. We do not think that the introduction of explicit criteria or bright lines would achieve the goal of removing uncertainty or subjectivity from the 'substantial degree of influence' assessment. This is illustrated by New Zealand's overseas investment regime. The Overseas Investment Act 2005 seeks to set bright lines to determine the level of ownership and control that an overseas investor has. One factor is whether an overseas investor has the right to exercise or control the exercise of more than 25% of the voting power at a meeting (see section 6(4)). However, the Overseas Investment Office has interpreted this as not only capturing positive control, but also negative control, saying: "*We will also carefully examine any arrangement that gives an overseas investor negative control, such as a right of veto, which appears to be greater than what their ownership interest might suggest*" (LINZ, PeriOIOdical Statement, April 2019) So, while on its face the ownership and control definition appears to be a bright-line, the manner in which it is interpreted and applied by the regulator is broader (which has created uncertainty for investors). We also consider that establishing a list (non-exhaustive or otherwise) of considerations to account for when determining whether a firm will obtain a "substantial degree of influence" would prove difficult due to the various ways in which companies can exercise influence over one another.

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.
	We do not consider that the Commerce Act should be amended in the manner proposed. To the extent that parties are unsure about how the 'substantial degree of influence' test applies to their specific transaction, they can consult the Commission's Merger and Acquisition Guidelines or engage with the Commission directly.
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?
	We are inclined to agree that the term "assets of a business" in section 47 is unclear. For example, it is unclear whether undeveloped land should be deemed an asset of a business where it is unclear how that land will be used, or the extent to which partial acquisitions are captured by section 47.
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?
	We consider that amending the provision to simply refer to "assets" and deleting "of a business" may improve clarity. This may help avoid the complexities about the independent operation of the business being a qualifying criterion for the application of section 47. That said, we do not consider this aspect for reform as a material issue, given that conduct not captured by section 47 will be caught by section 27. If "of a business" is omitted as a qualifier, we recommend that the definition of assets be refined, so that any acquisition of an asset (for example, stock or inventory) is not captured by section 47. For example, section 4(4) of the Competition and Consumer Act 2010 (Cth) in Australia has an ordinary course of business exception, with the recent merger reforms in Australia clarifying that the exception does not apply if the asset is land or an interest in land, or a patent or interest in a patent (meaning Australia's merger provisions would apply to land and patent acquisitions).

Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	We agree with the MBIE that New Zealand's voluntary merger regime appears to be working well, and that a change to a mandatory and suspensory merger regime is not required. We understand that mandatory and suspensory notification regimes are more common across other jurisdictions. However, we consider that the current voluntary merger regime works effectively, and firms are generally highly motivated to seek clearance. Our experience as legal advisors is that investors/potential merging parties seek advice about whether a proposed merger is likely to be permitted (or not prohibited) under the Commerce Act, including diligently considering the concentration indicators published in the Commission's Mergers and Acquisitions Guidelines. Where a proposed merger falls outside the concentration indicators, our experience is that investors/potential merging parties would be extremely cautious about proceeding without seeking clearance. We also observe that investors, facing the regulatory costs of obtaining clearance as well as other regulatory costs in New Zealand, may decide they prefer an alternative destination for their capital. Accordingly, we do not consider that amending the current voluntary merger regime to a mandatory and suspensory regime will improve the promotion of competition in markets for the long-term benefit of consumers within New Zealand. In fact, introducing such a regime will increase compliance costs for mergers that do not raise issues under section 47, and likely have a chilling effect on investment in New Zealand.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	As above.

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.
	If the Commission notifies merging parties that it has concerns about a proposed merger (whether before or shortly after completion), our experience is that the parties take that notification very seriously. If the Commission has concerns about a proposed merger following its investigation, it will ask the merging parties to defer completion or, if completion has already occurred, integration. Our observation is that completing, or integrating, in these circumstances would not typically be expected to occur, including because it would expose the merging parties (ie, the vendor as well as the purchaser) to penalties under the Act. In our view, the 'stay and/or hold-separate' and 'call-in' powers would add an additional layer of bureaucracy to a process that is already effective in practice. We also do not support the proposed 'company-specific mandatory notification' power. Overseas experience demonstrates that mandatory reporting requirements can be costly, burdensome, and ineffective. New Zealand is a small market, and (in our experience) firms have a compliance-focused mindset and open engagement with the Commission. Mergers by firms with substantial market shares that may cause competitive harm are already highly likely to be the subject of specialist Commerce Act advice and a clearance application under the current voluntary regime. Requiring certain firms to report all mergers in the unlikely event that such firms do not seek clearance for a merger that may cause competitive harm would be an ineffective use of resources.
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?
	We do not oppose the Commission being able to accept behavioural undertakings, but we consider that they are unlikely to be used in practice other than in rare circumstances. As highlighted above, assessing mergers involves a forward-looking analysis. We consider enabling the Commission to accept behavioural undertakings would make this assessment more difficult. The Commission would need to feel comfortable with predicting (with reasonable certainty) what the competition issues are, and

	assessing what behavioural undertakings would address those issues and how long those behavioural undertakings would be required for. In our experience as legal advisors, investors are initially enthusiastic about the idea of behavioural undertakings. As the Commission will likely take an incredibly cautious approach to accepting behavioural undertakings, there is the potential for resources to be wasted in attempting to negotiate behavioural undertakings that the Commission is never going to accept (noting here that the existing structural undertakings/divestments regime is already an iterative process). Accordingly, any amendment to the Commerce Act enabling the Commission to accept behavioural undertakings should be accompanied by very clear guidance on the circumstances in which behavioural undertakings may be accepted. Also, we note that the Commission would need to be in a position to modify behavioural undertakings to suit market conditions as they evolve. The Commission would then be at risk of becoming the de facto regulator of an otherwise unregulated industry.
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.
	No comment.
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?
	We do not consider that the options proposed will have the desired effect of facilitating beneficial collaboration under the Commerce Act. • Option 1: The Commission's guidance already carries substantial weight. While we do not oppose the proposal to make it more explicit that the Commission has a role in issuing guidance, we do not consider that this will have a more than incremental effect on the reliance businesses currently place on the Commission's guidance. We also do not consider it will have a more than minimal effect on how the Commission's guidance is considered by the courts. • Option 2: We agree that, in principle, the issuing of binding rules to create safe harbour from prohibitions could provide additional comfort to businesses that proposed beneficial collaborative conduct will not breach the Commerce Act.

	However, we are sceptical about the ability to formulate them in a robust way that will result in actual increases in beneficial collaboration. In our view, the Commission would be very hesitant to provide safe harbour without a comprehensive investigation and analysis of the relevant markets and potential impact on competition (such as what occurs during the authorisation process). The resources that will be required for the Commission to be able to do this, and be comfortable with making a binding ruling, are likely to be reasonably substantial. • Options 3 and 4: We are not strongly for or against the proposal to introduce a statutory notification regime for specified classes of arrangements, or class exemptions that authorised certain classes of conduct. However, we do not consider that these changes would facilitate beneficial collaboration more than the existing statutory exception/authorisation regime currently does. • Option 5: We think that an exception for small businesses from paying an authorisation application fee would be beneficial for businesses who are wanting to engage in beneficial collaboration, but it is unclear to us whether this would have the effect of facilitating additional beneficial collaboration because small businesses will still incur costs in preparing an authorisation application (which can be substantial).
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	As above.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	No comment.
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?
	We address questions 19 and 20 together in this response, as our answers to both overlap.

In our view, "concerted practices" should not be explicitly prohibited in the Commerce Act. The fundamental standard to prove anti-competitive conduct should continue to involve a 'meeting of the minds'.

The Discussion Paper refers to a 'gap' of coordinated conduct between competitors designed to avoid competition, where a court is unable to conclude that the parties involved had reached an 'understanding'. We are doubtful that such a gap exists in practice, given the broad interpretation the courts have given "understanding" under the current section 27. In our view, coordination that is designed to avoid competition inherently involves some sort of meeting of minds or mutual understanding between the parties involved in the coordination, and will already caught by section 27.

The Discussion Paper refers to price signalling (disclosing price intentions to a competitor) as an example of behaviour that could be deemed to be an anti-competitive concerted practice. However, the line between price signalling and simply raising prices in response to market trends is not easy to determine. Businesses can contemporaneously put up prices without reaching a prior arrangement – indeed, that is typically how markets work.

We struggle to see how the prohibition would operate in practice, particularly in relation to the public sharing of pricing information. It is a core function of business that pricing information is shared with customers. A concerted practices prohibition (like the one in Australia) would feasibly capture the public sharing of information (which is a normal business practice) if it has the likely effect of substantially lessening competition, which is not something that would be known by the businesses at the time.

The detriments of amending the Commerce Act to prohibit concerted practices would outweigh any benefits. It will create uncertainty for businesses and increase their compliance costs, all of which may have a chilling effect on business more generally. Given section 36 already prohibits firms with substantial market power from engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition, the introduction of such a prohibition will only affect smaller players (who will be the most impacted by a lack of uncertainty and increased compliance costs).

We also point out that the unilateral conduct of smaller players is typically less likely to result in substantial lessening competition (due to their lack of market power), and question whether the problem that a concerted practices prohibition aims to address is a real one.

It also seems unnecessary to have a prohibition that will prevent businesses from attempting to form an understanding with their competitors that will substantially lessen competition, as competitive harm only occurs if the competitor decides to coordinate (in which case, the conduct will be caught by section 27). For more serious anti-competitive conduct, section 30 already captures attempts at engaging in cartel conduct.

In summary, there are a range of negative outcomes that we foresee occurring if a prohibition on concerted practices is introduced, with the only seeming benefit

	being potentially capturing conduct of businesses that do not have substantial market power from attempting to coordinate with competitors in an anti-competitive way (which, as above, does not seem to be a real problem that justifies the uncertainty that would arise from trying to address it).
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?
	See above.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	Do you consider that industry codes or rules could either: a. Fill a gap in the competition regulation regime or b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.
	No comment.
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?
	No comment.
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?
	No comment.

Issue 9 – Modernising court injunction powers	
24.	Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons
	We support the suggested amendments to the injunction provisions in the Commerce Act to reflect modern practice set out on page 34 of the Discussion Paper. While we do not have concerns about the operation of the current injunction provisions in the Commerce Act, we agree that there is benefit in broadening the actions a court can take to prevent conduct that may harm competition.
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.
	We acknowledge that the Commission has a difficult role in maintaining the balance between protecting commercially sensitive information and meeting its legal obligations, including its obligations under the Official Information Act 1982. We are frequently asked by clients whether information submitted to the Commission will be kept confidential. Based on our experience, we have high confidence in the Commission's approach to confidential information and consider that the Commission strives to keep commercially sensitive information confidential where appropriate and reasonable. For example, the Commission uses undertakings to share confidential information with advisors of participants that are going through a Commission process (frequently, when the Commission is considering a merger clearance application). A breach of an undertaking may be enforced through the courts as a breach of contract (although, the status and importance of an undertaking given by a lawyer subject to legislated rules of professional conduct adds an extra enforcement angle). That said, we agree with the proposed refinements to section 100. Further improvements to protect confidential information in the form of legislative change will be useful to enable the Commission to continue to take a robust approach to protecting confidential information that is consistent with its role as regulator.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	In addition to the changes described in the Discussion Paper, we suggest adding the ability to extend or delay a section 100 order. Currently under section 100(2), an order prohibiting publication or communication of information expires at the conclusion of the Commission's investigation or inquiry. We consider that amending section 100(2) to permit the Commission to extend or delay the expiry

	could be beneficial to alleviate concerns around the confidentiality of commercially sensitive information.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	We do not consider that any detriments would arise from strengthening the confidentiality order provisions in section 100. The Commission will retain discretion about whether to make orders under section 100 (or take other action in relation to protecting confidential information, such as undertakings). Accordingly, any risks that the principle of availability may be degraded due to increased withholding of confidential information can be mitigated by the Commission's appropriate use of its discretion.
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
	We do not have any comments on the proposed technical amendments to the Commerce Act set out on pages 37 to 39 of the Discussion Paper.
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
	No.
Any other issues	
30.	Are there any other issues that you would like to raise?
	No.

General Comments: