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BusinessNZ
THE VOICE OF BUSINESS

7 February 2025

Competition Policy Team
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Dear Sir/Madam

Re: Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986

Background

I am writing to you regarding the discussion document entitled *Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986* (referred to as 'the Discussion Document').

BusinessNZ has previously submitted on various issues relating to the Commerce Act, including targeted reviews into specific aspects of the Act, and we welcome this opportunity to submit on sections of the Act that have not been reviewed for over 20 years. We believe that while fostering increased competition is a key objective, equal priority must be given to maintaining our competitiveness as an international investment destination.

BusinessNZ believes that when examining issues of competition relevant to a small and isolated country such as New Zealand, competition is not a numbers game, and the number of competitors alone says little about the intensity of competition between them. In addition, while the long-term interest of consumers is paramount, this is best served by competition policy that supports innovation and productivity, creating increased choice and quality at competitive prices. Any kind of short-term focus might intend or appear to create immediate benefits for consumers but at the cost of

business investment in new products and services, making a loss for consumers and the wider economy the potential long-term outcome.

We note that the Discussion Document seeks feedback on the merger control regime and anti-competitive conduct provisions, alongside proposed new tools like industry codes to enhance the Commerce Commission's ('The Commission') ability to promote competition. BusinessNZ strongly supports policies that ensure competition flourishes in New Zealand, as long as the correct tools are used and the policies deliver economy-wide benefits.

However, we take the view that the Discussion Document does not clearly identify the problem or gap to be solved by expanding the Commission's toolset for merger control and anticompetitive conduct. For example, are there mergers that the Commission has been unable to examine but believes it should have using given its current toolset? From BusinessNZ's perspective, there needs to be a clear and identifiable gap in the toolset the Commission has before it gets more. If the Commission is not fully using and maximising the potential of its existing toolset then that is a different problem that is not solved by any of the proposals in the Discussion Document.

Also, we believe it is imperative that such tools are applied proportionately and in a manner that accounts for wider objectives. Competition is not an end in itself, it is instead a mechanism for enhancing consumer welfare. Simply put, if an alternative policy decision is made that better enhances consumer welfare, competition tools should not be used to undermine this outcome

The Discussion Document asks a series of questions in relation to potential changes to the Commerce Act. Rather than answer each question individually, we have outlined some overall thoughts for the various sections of the report.

1. Overview and Context of the Review

The State of Competition in New Zealand

BusinessNZ disagrees with the view in the Discussion Document that market-based studies provide the best indicators of competition. BusinessNZ has long held the view that such studies are an intrusive and costly power that can lead to regulated industries and increased regulation of the economy overall without delivering long-term benefits to consumers. Therefore, they should be used with great care.

As BusinessNZ outlined in 2015 when we submitted on the initial policy discussions regarding introducing market studies into this country, several concerns we had about market studies being introduced have now come to pass.

We mentioned back then that an investigation by the Government into an area of competition can be organically generated without the need for a centralised structure. Any government agency tasked with conducting a market study will invariably be tempted to include some form of recommended regulatory change, in keeping with the inconsistent and often haphazard way in which regulation has been developed in New Zealand over time.

We also pointed out that centralising a market studies requirement would not only lead to yearly studies to justify public sector staff and resources, but also to certain sectors being investigated for the sake of it and others being reinvestigated within a relatively short timeframe. Realistically, there are only a few industries that are large and complex enough for the Government to investigate through a market studies process. This means that if the goal is one major study a year, sectors will almost be able to deduce when they will be the next cab off the rank. In New Zealand's small market we are likely to see a repeating cycle of market studies where the cycle begins again with a reinvestigation into earlier studies, whether they are justified or not.

Also, for many of these sectors the case for any market study is questionable. For example, telecommunications, energy and banking are subject to continuous market monitoring already, which for telecommunications is by the Commission itself.

Ultimately, a cycle of market studies that is more about a regular work programme than a clearly identified problem can inhibit, rather than promote competition and its flow-on effects towards economic growth. Ideally, BusinessNZ believes that the Ministry for Regulation should have some form of input regarding the choices and requirements for any future market studies, so that a high bar is set before any take place.

Recommendation: The Ministry for Regulation has some form of oversight role regarding the choices and requirements of future market studies.

Australia's competition policy reforms

The Discussion Document outlines the current review being undertaken by the Australian Government of their version of the Commerce Act, which involves a two-year rolling review of competition laws, policies and institutions, focused on ensuring they remain fit for purpose.

This review includes the Australian merger regime, with the Australian Government aiming to simplify and strengthen their merger settings. We note the Discussion Document points out that while alignment of competition laws between New Zealand and Australia can have benefits through reducing compliance burdens, facilitating cooperation between regulators, and enabling institutions in each jurisdiction to earn from each other, this does not automatically mean adopting the same laws and processes. BusinessNZ agrees.

Overall, the business community supports moves that lead to closer economic relations between the two countries, but we have always taken the view that any form of harmonisation should only occur if there is a clear net economic benefit to New Zealand. We are increasingly of the view that the debate around trans-Tasman harmonisation has become too simplistic in regard to regulatory change and as a consequence tends to overlook some fundamental differences when endeavouring to decide what should or should not be considered for harmonisation.

Australia's recent competition law reforms, especially those related to mergers, are still new, with yet to take effect. Since these changes introduce untested elements, New Zealand has the advantage of observing their impact over time. Therefore, we believe that the Government monitor which reforms prove effective and which ones add cost and complexity without delivering real benefits to consumers.

Overall, we see no reason why some form of healthy tension cannot exist to New Zealand's advantage if we believe our laws ultimately provide a better outcome than Australia's.

Recommendation: Any alignment of competition laws between New Zealand and Australia should only be considered when there is a clear and significant net economic benefit to New Zealand. Also, New Zealand should wait to see how Australia's reforms are implemented and their effects before deciding which aspects to adopt.

2. Mergers

Overall, BusinessNZ believes New Zealand's current regulations in relation to mergers have generally served the country well and are well-understood and appropriate, given the vast majority of mergers do not raise competition issues. While we are open to investigating the need to improve the regulatory framework around mergers, at the same time, assessing the competitive effects of a merger can become a complex and contested matter. Therefore, any proposed changes need to be well-understood, flexible and low-cost, given that most mergers do not raise competition concerns.

The Discussion Document outlines five major areas for review regarding mergers. BusinessNZ wishes to comment on a few of them.

a) The substantial lessening of competition test

The Discussion Document explores whether New Zealand should adopt Australia's test for assessing mergers - specifically, whether a transaction *"creates, strengthens, or entrenches"* market power - citing creeping acquisitions as justification. However, it also acknowledges that the Commission has successfully managed concerns using existing laws and procedures.

If the issue is businesses bypassing regulatory clearance for multiple transactions within a sector, alternative solutions like mandatory notification or a call-in regime could be considered. Since Australia's approach is still untested, New Zealand should take a "wait and see" approach to assess its effectiveness. A key concern both in Australia and under the Government's proposal is that regulators could block transactions without proving they substantially lessen competition.

b) Substantial degree of influence

Options considered in the Discussion Document represent a move towards updating the substantial lessening of competition test, with the likely outcome that the Act

would prohibit certain mergers and acquisitions based on the additional consideration of these effects. Yet the Discussion Document notes that across the Tasman, certain types of acquisitions do not appear to be adequately captured under Australia's merger laws. For instance, 'creeping acquisitions,' where a number of acquisitions of small competitors may collectively substantially lessen competition, but in isolation do not. Also, 'nascent competitors,' that may not currently bring a substantial lessening of competition but may pose a serious competitive threat in the long-term.

BusinessNZ is uneasy about the balance between the additional powers the proposed changes would give the Commission, versus the extent of the problem. There needs to be strong evidence that the current regime is unworkable and has clearly led to adverse effects on New Zealand's competitive landscape. We believe the Discussion Document lacks that level of evidence to provide a clear pathway for change.

We would also like to point out that the Commission already has substantial discretion as to how it applies the substantial lessening of competition test. However, the Discussion Document does not explain why creeping acquisitions, for example, cannot be considered within existing legislative frameworks.

As mentioned above, we consider the debate around trans-Tasman harmonisation has become simplistic, tending to overlook some fundamental differences when endeavouring to decide what factors should or should not be considered for harmonisation.

We add, too, that Australia does not always get it right. Australia's approach to competition law has typically been more restrictive than New Zealand's, and Australian lawyers and commentators have observed at various points in time that New Zealand's approach may be more workable and understandable than the overly prescriptive approach often adopted in Australia.

We do not believe that adopting more prescriptive law is the best course of action to take, and instead support retaining the status quo for now. Given the planned changes in Australia do not commence until the start of 2026, it would be better to wait so that New Zealand can observe whether this is the right course of action, and so that all parties involved can gain a better understanding of any trans-Tasman implications.

Recommendation: That the status quo regarding mergers and acquisitions is retained until such time as the success of Australia's ***changes*** *can be determined.*

c) Assets of a business

The Discussion Document outlines another area of the merger regime that could be improved with greater clarity: the definition and treatment of "assets of a business." The current definition within the Commerce Act is unclear, creating uncertainty for various acquisitions, including machinery, licenses and undeveloped land where it is unclear how that land will be used.

In Australia, a major concern with changing the definition of "assets of a business" was that it would require clearance for routine asset acquisitions, unnecessarily slowing business operations and adding extra costs. This could also burden regulators with reviewing thousands of transactions that pose no real risk of substantially lessening competition.

While the Australian Amendment Bill has provided greater clarity around the concept of "asset" by going into greater detail, the Discussion Document points out that this level of specificity may be unnecessary in New Zealand given the voluntary merger clearance regime that already exists. BusinessNZ agrees. We see little need to make significant changes to the definition if other mechanisms provide a way to address the problem. Also, we believe a high bar needs to be maintained for any changes to definitions given the possibility of unintended consequences and/or potential legal disputes.

BusinessNZ is not wholly against the idea of amending section 47 to refer simply to "assets," or to amend the definition of "assets." However, we would want to see a high proportion of submitters making the clear case that such changes would help alleviate the uncertainty surrounding acquisitions. In short, we would not want to see change for the sake of it.

Recommendation: A status quo approach is adopted, unless a high proportion of submitters make a clear case that such changes to the definition of "assets" would help alleviate the uncertainty surrounding acquisitions.

d) Mergers outside the clearance process

As the Discussion Document notes, since 1990 the clearance regime under the Commerce Act has operated on a voluntary basis, which sees merger parties applying to the Commission for clearance but can also elect to proceed with a merger without first obtaining a clearance. However, this latter move can also bring court proceedings and the imposition of pecuniary penalties. To minimise such proceedings, changes to the maximum pecuniary penalties for anti-competitive mergers were increased in 2022.

Although New Zealand is one of the few OECD countries with a voluntary merger regime, as stated in the Discussion Document, *"New Zealand's voluntary mergers regime appears to be working well."* However, the 2022 OECD Economic Survey of New Zealand recommended granting the Commission a 'call-in' power to order merger parties to apply for clearance, which could come in various forms.

While it can be useful to consider such recommendations to ensure our competition laws are as effective and efficient as possible, in this instance BusinessNZ takes the view that if it's not broken, don't try and fix it. There is little sense in trying to introduce up to three different additional powers to the Commission in relation to non-notified mergers when the status quo has not led to any notable adverse outcomes. This is

particularly the case when the administering of the current regime involves relatively simple procedures such as educating businesses on the benefits of clearance.

Recommendation: The status quo option for the merger clearance process continues.

e) Behavioural undertakings

We note that the 2024 OECD Economic Survey of New Zealand recommends allowing the Commission to accept behavioural undertaking, which are commitments by merging parties to modify their post-merger behaviour to address competition concerns while allowing the merger to proceed.

Given other countries have these in place, BusinessNZ agrees it is useful to examine whether they should also be allowed in New Zealand. However, any investigation into this needs to clearly outline both the costs/risks, as well as the savings/benefits for the country as a whole. While page 21 of the Discussion Document outlines a number of risks and costs, it does not clearly express what the benefits or savings could be. To remedy this, a number of arguments for their inclusion in merger laws typically include the following points:

- Flexibility in addressing competition issues: Behavioural undertakings allow regulators to tailor remedies to specific competitive concerns without blocking mergers outright that may have substantial benefits, such as efficiencies or innovation.

- Preservation of market dynamics: By requiring parties to commit to actions like maintaining supply levels, pricing structures or market access, behavioural undertakings can mitigate anti-competitive risks while preserving competitive conditions in the market.

- Encouragement of pro-competitive outcomes: Behavioural undertakings can foster fair competition by ensuring that the merged entity does not engage in practices like discriminatory behaviour or foreclosing rivals, thereby promoting long-term consumer benefits.

- Facilitation of cross-border mergers: In global markets, behavioural undertakings can accommodate the complexities of multinational mergers, providing a practical solution when structural remedies are not feasible or effective.

One of the more common risks/costs associated with behavioural undertakings that the Discussion Document highlights is the potential cost to the Commission, given robust monitoring and enforcement mechanisms to ensure compliance can be resource-intensive. While we would expect any government department to take into consideration the internal cost of any policy proposals, Governments should consider more than just their own costs when implementing policy changes because these changes often have wide-ranging implications for the country as a whole. Ignoring these broader positive effects risks creating policies that may save money for the

government in the short term but result in either stagnation or significant long-term economic harm.

The Commerce Act review devotes the most options for discussion in the chapter on mergers. This is likely because as stated on page 9 of the Discussion Document, *"improvements to merger settings would enhance the Commission's ability to scrutinise mergers to stop problematic market structures from forming. Effective merger review can reduce the need for future interventions including complex sector-specific regulation."* In short, there is significant upside if the Commission is able to significantly improve the merger law landscape.

Furthermore, the Discussion Document points out that circumstances where the Commission has declined a merger due to its inability to accept behavioural undertakings are limited at the margin. However, by allowing mergers to proceed under conditions that address competition concerns, such as commitments to maintain fair pricing, ensure supply access, or refrain from discriminatory practices, they make it easier for firms to navigate regulatory approval.

In addition, this flexibility can encourage businesses to pursue mergers that might otherwise be deemed too risky or difficult to get approved. While the extent to which behavioural undertakings can lead to more mergers depends on other factors such as the effectiveness and credibility of enforcement mechanisms and the overall regulatory environment, they can increase the number of approved mergers by providing a clearer pathway for businesses to undertake such proceedings.

Overall, BusinessNZ believes that behavioural undertaking should be given further consideration by the Government. While we understand funding matters may cause issues within the Commission for this option, this could be worked through over time and help send a clearer message to the business community that the pathway towards mergers is relatively easier.

Recommendation: Behavioural undertakings are given further consideration ***in New Zealand's merger law landscape.***

3. Anti-competitive conduct

a) Facilitating beneficial collaboration

In terms of examining and possibly enhancing processes around facilitating beneficial collaboration, BusinessNZ agrees that there is an opportunity to provide further clarity to allow such collaboration to take place. However, any potential changes need to be pragmatic and workable.

The Discussion Document outlines several major structural challenges facing the economy that require novel and coordinated solutions, including technological innovation, supply chain issues, and broader public interest objectives. Because of this, the need for clear, low cost and swift processes by the Commission are integral to ensure businesses that apply for Commission authorisation meet these challenges.

BusinessNZ has no specific evidence to contribute regarding the full extent of this problem. However, if other submitters provide additional evidence that this is an issue on top of what other businesses have already outlined to the Government, we would presume this is an area where further options may need to be considered.

Of the five options that the Discussion Document outlines to facilitate beneficial collaboration under the Commerce Act, we are not at this stage explicitly against any of these options. However, at the same time we are conscious of new processes in this space that seek further information from businesses, which if not well considered and done in consultation with the business community could extend out to information that is not directly relevant to the issue at hand.

In terms of our views on the specific options, Option 4 regarding empowering the Commission, on its own initiative, to make class exemptions, seems to be one way in which to provide a broader solution to positively affect a number of businesses at the same time.

Given costs, we see value in option 5 that seeks to provide an exception for small business from the Commission fee payable to apply for authorisation. However, given there is no formal definition of what is considered a small business, we would expect the Commission to examine existing exemptions in the commercial and broader regulatory areas to ensure it broadly fits with other regulations. Also, given the Discussion Document states that *"the parties would still bear the cost burden of satisfying the Commission that the arrangement should be authorised",* it reiterates to us that clear and streamlined processes are essential to ensure the cost burden for small businesses does not become a barrier to applying for the exemption in the first place.

Recommendation: Government undertakes further work to facilitate beneficial collaboration under the Commerce Act, if this is supported by other submitters.

b) Anti-competitive concerted practices

Unlike issues relating to facilitating beneficial collaboration, BusinessNZ does not see a clear need to consider options regarding perceived issues relating to anti-competitive concerted practices.

Apart from the Discussion Document stating that it is difficult to assess the extent to which this form of co-ordinated conduct is an issue, we are concerned that its introduction may lessen New Zealand's overall market strength. We note that in Australia under the ACCC there has only been one enforcement action since the prohibition was introduced there in 2018. Given Australia's economy is roughly more than seven times larger than New Zealand, on balance it would seem very rare to see an enforcement action taking place on this side of the Tasman.

From our perpsective, the Commission is seeking broader powers over "facilitating practices," a vague area with no clear definition, effectively letting it decide what qualifies. This could lead to scrutiny of routine, legitimate activities, such as trade groups opposing regulations or businesses updating shareholders on pricing.

We believe the proposal lowers the bar for investigations, allowing the Commission to potentially infer anti-competitive behaviour without concrete evidence. This risks overreach, treating normal commercial decisions as anti-competitive without justification.

Elaborating on the point above, we are concerned what the introduction of the prohibition will do to the standard practices/services undertaken by a number of our industry associations that are members of BusinessNZ.

Industry associations typically operate as neutral, collective entities that are in a unique position to aggregate and anonymize data. This helps mitigate the risks of misuse or direct competition concerns. By serving as intermediaries, they can ensure that sensitive information is handled on a confidential basis, maintaining trust among members.

Furthermore, industry associations have expertise and a broad understanding of the sector, which allows them to manage and analyse data in a way that benefits the industry as a whole. Their role in fostering collaboration and addressing shared challenges enables them to handle sensitive information responsibly for purposes like benchmarking or policy advocacy, which are often key reasons why businesses become members in the first place.

The Discussion Document takes the view that such communication between industry associations and members is an example of 'tacit collusion,' where parties have communicated commercially sensitive information with each other to limit competition between them. BusinessNZ questions this view given the real intent by almost all industry associations would typically be to evaluate members' performance relative to peers in a neutral and aggregated manner. This helps their sector as a whole by fostering continuous improvement and competitiveness. At a macro level, various industry associations performing this task would most likely provide a sizeable and ongoing enhancement in economic standing. Therefore, on balance, this would likely provide a stronger net economic benefit to the country than a prohibition that is difficult to assess the extent of and typically sees little in the way of enforcement action.

Recommendation: Government maintains the generic prohibitions ***requiring evidence of a 'contract arrangement or understanding' to*** *establish anticompetitive collusion.*

4. Code or rule-making powers and other matters

a) Industry codes or rules

Reason for investigation

We note that page 31 of the Discussion Document states that, "*The 2024 OECD Economic Survey of New Zealand recommended that New Zealand adopt a more flexible and proportionate response to addressing competition concerns. It recommended a gradual escalation of intervention, from reducing barriers to entry to light-handed regulatory approaches.*" From BusinessNZ's perspective, that sounds very similar to our own broad views around how to improve regulation, which is best exemplified by the approach of traveling up the regulatory pyramid only when clearly required. This means considering non-regulatory options first, then moving 'up the pyramid' to generic light-handed options, with more stringent options only if previous policy attempts have been unsuccessful

The Discussion Document considers "*one way to do this is to amend the Commerce Act to enable the making of industry codes or rules to promote competition*". Such codes or rules could be a supplement and/or complement to a market study that the Commission would undertake by providing a tool to influence/address business conduct and/or as an intervention that may not justify a full market study.

However, we do not believe the Discussion Document outlines the proper range of options that are available to the Government when tackling the recommendation by the OECD. As we will outline below, we agree that the establishment of industry codes or rules is one way to adopt a more flexible and proportionate response to addressing competition concerns, but it is not the only way. If we were to examine the regulatory pyramid approach, the least intrusive options at the base include educational tools, while the tip of the pyramid involves hard letter law. However, in between are other options such as agreements, voluntary codes, mandatory codes etc. Any policy process that looks at alternative forms of regulation needs to examine all options, not just a subset that may not offer the best outcome.

Recommendation: Government considers a broader range of options to adopt a more flexible and proportionate response to addressing competition concerns.

How best to use industry codes and rules

As stated above, BusinessNZ supports industry codes and rules as an alternative option to more stringent regulations, but we would like to avoid such options simply becoming the default position to all perceived competition problems, which could lead to a much larger stockpile of regulations that businesses have to comply with.

However, at the same time we note that codes have frequently been used by the Commission to push "market design" outcomes in scenarios where there is little to no evidence of market/competition failure. BusinessNZ believes that for any code to be

required, there should be a very clear threshold test. This could include, among other options:

- Evidence that the market or features of a market are not delivering benefits/ causing harm to consumers
- Evidence that competition will not address these features/deliver benefits in the medium term
- Evidence that an industry code - rather than competition - is capable of doing so

Also, we believe that prework should be required of the Commission to show that a code is actually capable of solving the policy problem.

Overall, we believe that the justification for industry codes and rules needs to be aligned with the identified policy problem. The Discussion Document notes that an industry code or rule-making power could supplement and/or complement the Commission's market studies by providing a tool to address concerns identified within the study. Or an industry code/rule could be used for interventions in sectors that may not justify a full market study.

As we have stated above, BusinessNZ has never supported the current structure of market studies. However, the studies themselves typically involve a substantial amount of resources and engagement from the main players in the market, which culminates in a set of recommendations that have typically been well considered and often include a number of opportunities for submitters to provide their own views and thoughts throughout the process.

We have greater concerns regarding the alternative situation where an industry code/rule was to be implemented in a situation where the Government does not believe a full market study is warranted. Without the correct checks and balances that take place with a market studies process, BusinessNZ believes this alternative situation could simply lead to such codes being overused as a solution to perceived problems without the same level of policy rigour that is typically required.

Recommendation: Industry codes/rules are not considered a default option to a market study.

Issues to consider to allow for industry codes or rule-making

Overall, BusinessNZ agrees with the list outlined on pages 32 and 33 regarding issues that need to be considered when allowing for industry codes or rule-making. We believe this provides a useful starting point to ensure a proper policy process regarding whether an industry code should be considered as the best course of action.

We would like to provide some comments on a few aspects of the list that we believe need further consideration.

Compulsory vs non-compulsory codes

When determining the best course of action for the introduction of a code, we would like to point out that there is a clear difference between compulsory and non-compulsory codes. Further consideration of the benefits and risks of each option should be a part of the Commission's consideration of policy options, but it should not automatically be assumed that a compulsory code is the best or only option for industry codes.

A case in point is the New Zealand Business Payments Code that BusinessNZ is currently developing. Following the removal of the Business Payments Practices Act 2023, through discussions with the Minister of Commerce and Consumer Affairs, BusinessNZ is tasked with establishing a Voluntary Business Payments Code that relies on self-enforcement by the signatories to it. It is not a prescribed code and is therefore not enforceable in any way.

For this issue, we believe that a voluntary, industry-led code to change payment practices can achieve better outcomes, while limiting the cost to businesses, customers and taxpayers. Overall, the Code we are developing is designed to foster a culture of cooperation, rather than compliance, through businesses working together rather than through government intervention.

Private sector involvement in the development of a code

Any compulsory or non-compulsory code that is developed by the Commission should always include thorough consultation with the sector in its development. All codes should strive to be practical, relevant, and tailored to the specific needs of the industry. Engaging with stakeholders allows for a range of perspectives and expertise, as well as reducing the risk of unintended consequences and ultimately fostering compliance and cooperation.

Context and prevalence of industry codes

As alluded to above where the overuse of industry codes becomes apparent, such sector-specific rules also run the risk of fragmenting the overall competition regime. This could lead to a perception that some sectors are being treated more or less "fairly" than others and could undercut the Commission's role as an objective arbiter of competition in New Zealand.

While we accept that each sector needs to be examined on its own merits as to whether some form of code would best improve competition settings, the Commission would need to be wary of the interrelationship between the various codes so that there is a consistency and transparency around how each code is determined. For instance, two industries that have a number of broad similarities but have very different code structures may spark concerns that one seems to have significantly fewer levels of compliance placed upon them. Therefore, such potential differences would need to be factored in and fully explained to the affected parties by the Commission.

Recommendation: Government does not take a siloed approach to the increased use of industry codes or rules, but rather a broad understanding of all codes to enhance consistency of treatment.

In summary, while BusinessNZ supports the steps Government is taking in this area, these must be for the right reasons and within the context of other options to adopt a more flexible and proportionate response to addressing competition concerns.

Recommendation: Government further investigates allowing industry codes or rules, but as part of a broader suite of options to address the recommendations of the OECD.

b) Modernising court injunction powers

BusinessNZ has no substantive comments on this issue.

c) Protecting confidential information

The general view among the business community is that increased amounts of information have been requested of businesses by the Commission in recent years, particularly since the establishment of market studies. Some of that information is commercially sensitive, which has meant a number of businesses being reluctant to volunteer such information

A lack of trust in the government's ability to protect sensitive data can greatly discourage cooperation between the public and private sector. If businesses fear potential leaks, misuse, or sharing with competitors, this could all harm their competitive position.

Any government department collecting information from individual businesses should prioritise data security, maintain confidentiality, and clearly explain the purpose and benefits of furnishing the information. The fact that a number of businesses are currently reluctant to voluntarily provide commercially sensitive information to the Commission shows that there is a real and significant lack of trust in the Commission from some in the business community.

While the Discussion Document outlines the *"preliminary view that the OIA strikes the right balance between protecting confidential information and providing for the public interest in its release,"* there is obviously still a perception within sections of the business community that the handing over of commercially sensitive information will cause adverse issues for their operations. Therefore, we question whether the status quo should apply in this case as that outcome would likely not see any material change in perceptions. While we have no strong views on the three enhancements in relation to strengthening confidentiality orders (s 100) that have been proposed, we would support steps to ensure a greater level of trust is obtained in protecting commercially sensitive information, while balancing the principle of public availability.

Recommendation: Steps are taken to ensure a greater level of trust is engendered in protecting commercially sensitive information, while balancing the principle of public availability.

d) Minor and technical amendments to the Commerce Act

BusinessNZ has no substantive comments on this issue.

We thank you for the opportunity to comment and look forward to next steps.

Kind regards,

Privacy of natural persons

Katherine Rich
Chief Executive
BusinessNZ