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Targeted Review of the Commerce Act 1986

Submission in response to MBIE consultation paper

17 February 2025

Introduction

1 This submission responds to MBIE's consultation paper 'Promoting competition in New Zealand - A targeted review of the Commerce Act 1986'.

2 We have also contributed to a joint submission alongside MinterEllison, Russell McVeagh and Webb Henderson on issues 2 to 5 in the consultation paper. This submission responds to the remaining issues in the consultation paper.

3 No part of this submission is confidential.

4 We would welcome the opportunity to discuss this submission with you at your convenience. Our contacts are:

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Privacy of natural persons

Issue 1: the 'substantial lessening of competition' test

5 We support retaining the current SLC test, without the amendments proposed in the consultation paper. Our concerns with the proposed amendments fall into four categories:

5.1 problem definition;

5.2 legislative design;

5.3 how the Act balances the risk of false positives and false negatives; and

5.4 unintended consequences.

6 As we observed in our joint submission, there are a number of features of the merger control regime in New Zealand that are important to understanding its effectiveness.

7 First, the SLC test itself is principled and flexible. It describes clearly and succinctly what the section 47 prohibition is aiming to achieve. The concept of an SLC is well-understood in both law and economics and therefore coherently draws together the disciplines that comprise the practice of competition law and policy. Jurisprudence and regulatory practice in New Zealand and overseas based on the SLC, or similar, tests have produced a conceptual framework and set of analytical and quantitative methods that enable the proposition to be tested empirically. It has, in our opinion, been successful as a replacement for the pre-2001 test that focused on obtaining or strengthening a "dominant position". That more prescriptive approach, which tended to lend itself to elaboration through a "dictionary approach" rather than as an economic concept, was replaced because it was viewed as setting too high a bar and being insufficiently clear in its scope and intent.

8 Second, the threshold for intervening in a merger in New Zealand is low. Section 47 prohibits mergers that have the "likely" effect of "substantially" lessening competition. A "substantial" lessening of competition is a lessening of competition that is real, of substance or more than nominal. Contrary to the ordinary understanding of the term "substantial", the lessening in competition need not be large.

9 A substantial lessening in competition is "likely" if there is a real and substantial risk, or a real chance, that it will occur. It need not be more likely than not. Accordingly, a merger may be prohibited even where there is a less than 50% probability of a merely "more than nominal" effect on competition.

10 The Act is therefore predicated on a precautionary principle: that it is better to err on the side of prohibiting a pro-competitive or competitively neutral transaction than to allow an anti-competitive transaction to proceed.

11 Third, as we explained in our joint submission, the overwhelming majority of transactions that could plausibly raise competition issues are assessed by the Commission through the voluntary clearance process or via courtesy letters. There does not appear to be a material number of non-notified transactions that ought to have been notified and, in our experience as advisors, acquirers in both domestic and international deals participate conscientiously in the clearance process. That is a significant feature of merger control in New Zealand because in a clearance the onus is on the applicant to "satisfy" the Commission that the transaction is not likely to substantially lessen competition. So not only is the threshold for a decline relatively low, but uncertainty is construed against the applicant. This is another element of the precautionary approach to merger control in New Zealand.

12 Fourth, the Commission has an effective market monitoring and enforcement programme, which incentivises market participants to seek advice and then, if appropriate, engage with the Commission. The Commission has a strong record of successful enforcement action.

13 What that background in mind, we do not see a clear case for amending the substantial lessening of competition test for the reasons set out below.

A. Problem definition

14 MBIE's consultation paper suggests there might be two reasons to amend the SLC test:

14.1 if the test does not, in its terms, capture the full range of mergers that are in fact anticompetitive; and/or

14.2 if it is unclear (and therefore ineffective at prohibiting anticompetitive mergers).

15 In our view, the test is neither unclear nor does it fail to capture the full range of anticompetitive mergers.

16 We are not aware of examples of transactions that the Commission considers ought not to have proceeded but which it was either required to clear or could not reasonably oppose. The Commission has also been successful in defending its decisions on appeal and in its enforcement proceedings in court. That suggests there is not a gap in the law.

17 Commentators have pointed to transactions that have occurred in the past as a reason to amend the law. The Minister, for example, has pointed to Progressive's acquisition of Woolworths in 2001 and ANZ's acquisition of the National Bank in 2003 as indicative of

deficiencies in the Act.[1] Progressive's acquisition was determined under the pre-2001 "dominance" test and is therefore not a useful indicator of the merits of the current SLC test.[2] Whatever you might think about the merits of the ANZ/National Bank acquisition, the fault did not lie with the legal test. The Commission determined – as a matter of fact – that the acquisition was unlikely to substantially lessen competition.[3] It is unlikely the Commission in 2003 would have reached a different view had the test included the amendments proposed in this consultation.

18 As MBIE notes, the Commission has blocked a range of transactions raising different types of competition theories of harm, including acquisitions of nascent competitors (*Warehouse*) and vertical integrations (*Sky/Vodafone*). The Commission has also blocked transactions in smaller local markets, or where the market impact was arguably minimal in scale. For example, the Commission declined clearance for *AlphaTheta/Serato*, even though Serato's New Zealand turnover was relatively minimal, and blocked a tiny four-to-three acquisition relating to waste collection services in the Nelson local area.[4] The Commission also blocked the acquisition of the radiology business of a sole practitioner in Hamilton.[5]

19 One's view of the merits of these decisions has less to do with the formulation of the legal test and more to do with the way the Commission analysed the evidence and the factual conclusions it reached. The Commission can get the facts wrong, or rely on assumptions that don't pan out, but that does not mean the SLC test is deficient.[6] Indeed, the SLC test prohibits all anticompetitive mergers by definition. Where reasonable people can reasonably disagree is whether a given transaction is or is not likely to lessen competition, having regard to all the facts.

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1 NBR, *ComCom needs more flexibility when assessing M&A, Bayly says* (13 February 2025): https://www.nbr.co.nz/politics/government-wants-a-commercial-focus-on-acquisitions/.

2 Progressive filed its clearance application one day before the SLC test entered into force. The Commission and Progressive agreed the old dominance test applied, but Foodstuffs applied to the High Court for a declaration that the new SLC test applied (on the basis that the new test was in force at the point the Commission would make its determination). The Privy Council ultimately agreed that the dominance test applied and the acquisition was cleared on that basis.

3 Commerce Commission, *Decision No. 507, ANZ Banking Group (New Zealand) Limited v NBNZ Holdings Limited* (25 September 2003).

4 *Can Plan/Nelmac*. The clearance application was withdrawn, but only after the Commission published a Statement of Unresolved Issues.

5 *Hamilton Radiology Limited and Medimaging Limited* [2013] NZCC 7.

6 For example, MBIE's consultation refers to research showing that the Commission has relied on the likelihood of entry in a number of cases in which entry did not eventuate. Amending the legal test will not improve the calibration of the Commission's forecasts. In any event, the fact that entry did not occur does not mean the Commission was wrong to grant clearance. Relying on entry means the Commission is satisfied the merging parties would be constrained from raising prices by the threat of entry or actual entry. The absence of entry is consistent with the merging parties refraining from increasing prices above the competitive level.

B. Legislative design

20 A virtue of the Commerce Act, in contrast to the Australian Competition and Consumer Act, is that it is based on principles rather than prescription. A feature of Australian legislative style generally is the tendency to prefer greater prescription and to address policy matters by further codifying legal requirements. The weaknesses of that style are that:

20.1 a highly prescriptive approach reduces flexibility and may inadvertently prevent the Commission from intervening in circumstances where it ought to, and where a more principles-based Act would permit it to;

20.2 the Act is confusing and inaccessible for all but the most specialised practitioners;

20.3 the Act is less responsive to changing market conditions, technologies, etc; and

20.4 once a prescriptive approach has been adopted, it is difficult to modify policy settings without adding more prescription. (Our Overseas Investment Act is an example of the legislative design challenges that emerge when an Act is frequently modified to address specific concerns).

21 In the particular context of the SLC test, a benefit of the current formulation is that it focuses attention on a factual assessment of the relevant markets and the likely competitive impact of the transaction, rather than towards a legal assessment of the precise meaning of the legal test. This was specifically one of the weaknesses of the old dominance test: it invited an extensive but ultimately barren legal discussion about the meaning of the term "dominance" and the various synonyms that might help to elaborate its meaning.

22 The virtue of the SLC test, in its simplicity, is that there is relatively little scope (particularly after 24 years of application) for disagreement about the meaning of the words. Instead, merger control in New Zealand is essentially an exercise in evidence-gathering, empirical analysis and fact-finding. That is worth preserving.

C. False positives / false negatives

23 As discussed above, the SLC test (and the requirement to "satisfy" the Commission of the merits of clearance) is conservative. The Commission may decline clearance, and the courts can prohibit a transaction, even where the probability of an SLC occurring is explicitly less than 50%.

24 A theoretically optimal test would prohibit only those mergers that *actually* lessen competition, while allowing competitively neutral and pro-competitive transactions to proceed. But a counterfactual SLC analysis requires the Commission to make a forecast of the likely impact of a transaction against a background of uncertainty. There is accordingly a risk of regulatory error when evaluating

transactions and our policy settings acknowledge that risk, erring on the side of prohibition in order to minimise the probability of approving a transaction that lessens competition.

25 Implicitly, the policy of the Act therefore assumes that the costs of regulatory error are asymmetric to consumers; that the loss of efficiency in blocking procompetitive transactions is outweighed by the consumer surplus benefits of avoiding anticompetitive transactions. A balanced test, in contrast, would interpret "likely" in the SLC test as "more likely than not" so the risk of regulatory error is symmetric (i.e. the Commission is as likely to decline a pro-competitive transaction as it is to approve an anti-competitive transaction).

26 We consequently think concerns regarding the ability of the Commission to intervene in markets are misplaced. In fact, the Act is skewed towards intervention. That has been our experience of the Commission's approach to merger control in recent years. The Commission tends to construe facts and evidence conservatively, concluding that mergers should not proceed in circumstances where a balanced assessment would favour granting clearance. We are therefore very reluctant to see a legislative signal that the Commission should be more interventionist than it already is.

D. Unintended consequences

27 Finally, any change in the test introduces uncertainty as to how it will be interpreted and applied by the Commission and the courts, and therefore the risk of unintended consequences. Albeit the consultation paper characterises these proposals as more clarificatory than evolutionary in nature, the courts rightly expect that a change in the statutory language effects a change in the legal test.

28 The current SLC test benefits from extensive New Zealand case law which has delivered a clear and settled legal test. We would be reluctant to abandon that certainty.

29 Introducing additional prescription increases the risk that transactions that would have been cleared under the current test are blocked as a result of the courts interpreting the amended language. Equally, there is a risk that transactions that would have been blocked under the current test are allowed to proceed for the same reason. In short, while we understand the desire to clarify the intent of the test, we see significant risks to amending the Act if the intent is that the test should not fundamentally change.

What are your views on the effectiveness of the current merger regime in the Commerce Act?

30 We assess the merger regime in terms of how effectively it delineates between anticompetitive transactions and competitively neutral or procompetitive transactions. As discussed above, our view is that, if anything, the Commission errs on the side of blocking transactions where the likelihood of an SLC is low.

31 Reasonable people might reasonably disagree on whether that is an appropriate application of the statutory threshold for a decline. But it is clear that the test deliberately incorporates a degree of conservatism.

What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand?

32 This is a question of how the Act balances the risk of false positives against false negatives. The Act errs on the side of prohibition, which means it is more likely that a competitively neutral transaction will be blocked than an anticompetitive transaction allowed to proceed.

33 Blocking a competitively neutral transaction represents a potential loss of efficiency and a reduction in total welfare. Conversely, allowing an anticompetitive transaction to proceed represents a loss of consumer surplus. Implicitly the legal test assumes the costs of getting it 'wrong' are asymmetric to consumers: that the loss of consumer surplus from allowing an anticompetitive transaction exceeds the forgone efficiency gains of preventing a pro-competitive or neutral transaction.

34 Strengthening the test implies a greater probability of Commission intervention, further skewing the test towards prohibiting competitively neutral or pro-competitive transactions. Importantly, that welfare loss is ultimately borne, at least in part, by consumers in the form of lower productivity, innovation and so on. In other words, it is not reasonable to assume that continuing to tilt the merger test towards intervention will benefit New Zealanders.

Has the 'substantial lessening of competition' test been effective in practice in preventing mergers that harm competition?

35 Yes. We are not aware of transactions the Commission believes it ought to have blocked but could not given the prevailing legal test. We contrast that with the recent amendments to section 36, where the Commission was able to point to specific cases which, it believed, involved abuse of market power in circumstances where it felt it could take no enforcement action.

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?

36 It is important the Commission is able to effectively enforce against serial acquisitions that lessen competition but we do not think the proposal to amend the SLC test to allow the Commission to assess the cumulative effect of completed transactions is the right solution. And we think there are significant risks of unintended consequences.

37 As we understand it, the concern is that in the case of serial acquisitions the Commission may struggle to demonstrate that the marginal transaction has a "substantial" effect on competition, in circumstances where an analysis of the broader roll-up strategy would lead the Commission to conclude that, looked at in the round, competition is likely to be lessened. For example, if the target of the marginal acquisition is relatively small.

38 As a starting point, it is important that any version of the test keeps the focus on the lawfulness of the marginal transaction, rather than allowing the Commission to retrospectively impugn earlier transactions that would otherwise, if examined in isolation, be considered lawful. It would unreasonably undermine investor confidence if the Commission could, after the fact, determine that transactions that have already occurred are unlawful in light of the acquirer's intent to pursue further transactions in the sector.[7] We also do not think it would be appropriate for the Commission to be able to treat a sequence of separate transactions as if they were a single transaction and then find them all unlawful on the basis of their combined effect.

39 Second, when it examines the marginal transaction, the Commission is already able to assess the impact of transactions that have already occurred, whether they be transactions undertaken by the acquirer or transactions by other parties that have affected the market structure. That is no more than to say that the Commission examines the effect of the marginal transaction in light of the existing market structure, which includes the impact of transactions that have already occurred. That also includes understanding the impact of transactions that have occurred more than three years prior.

40 Third, it is appropriate that the test prohibits the marginal transaction only if that marginal transaction would be likely to result in a substantial lessening of competition. We say that for two reasons:

40.1 As MBIE notes, a substantial lessening of competition involves a change along the spectrum of market power. As market concentration increases, so does market power but, as a very general principle, that change in market power is not linear. Market power consists of the ability to act free from competitive constraint. So, for example, a reduction in the number of competitors from six to five in a market is unlikely to increase market power because the remaining firms are not materially less constrained by competition.[8] On the other hand, a reduction from three to two is more likely to result in an increase in market power. That means that, in the context of serial acquisitions in the same market, it is the impact of the marginal acquisition that matters, because it is only at the point that the marginal acquisition crosses a threshold of market power that the prohibition

[7] We acknowledge the Commission continues to have a jurisdiction to take enforcement action in relation to a completed transaction within the statutory limitation period. But there is a difference between saying: (i) completed Transaction A looked at in isolation was unlawful and should not have proceeded, and (ii) completed Transaction A is unlawful in light of the acquirer's intent to now pursue Transaction B.

[8] Ignoring other contributing factors to market power, as a simplifying assumption for purposes of illustrating the point.

should kick in. It follows that, if the Commission cannot demonstrate a sufficient increase in market power in relation to the marginal transaction, the transaction should be free to proceed.

40.2 The degree of change in market power required by the SLC test is also relevant to how the Commission assesses the marginal transaction in a series of transactions. As discussed above, a lessening of competition is "substantial" if it is more than nominal but it need not be large. The threshold is deliberately conservative. Consequently, the requirement to demonstrate a "substantial" lessening of competition is not an unduly onerous burden on the Commission.

41 Fourth, the Commission already enforces against serial acquisitions. For example, it has undertaken successful enforcement action against Wilson Parking in relation to local parking markets and it is currently assessing a clearance application from Altano to acquire Matamata Veterinary Services. We do not see any evidence that the Commission is unable to intervene in serial acquisitions.

42 Finally, the risk of unintended consequences is significant. We are principally concerned about two possibilities:

42.1 that the amendment will create, or be seen to create, a statutory presumption against roll-ups. The main reason that roll-ups occur is that they are efficient. They tend to take place in sectors that are highly fragmented, with limited scale efficiencies, constrained capital and duplicated costs. Roll-ups allow for investment in the quality and consistency of service, productivity gains that flow through to consumers in the form of more competitive pricing and greater focus on innovation. We agree it is important that the Commission has the power to intervene to ensure that serial acquisitions do not drive out competition, but the existing law is adequate to that task. Conversely, we think there is a real risk that a court would view this amendment as either creating a statutory presumption against achieving scale via a roll-up strategy, or creating a special category of merger review that is limited to roll-ups.

42.2 If the legislation specifies that, when applying the SLC test, the Commission can look back three years at transactions in the same sector by the same acquirer, that may invite an inference that the Act implicitly precludes the Commission from taking into account the effect of transactions:

(a) undertaken by the same party earlier than three years prior;

(b) undertaken by other parties in the same sector that affect market structure; or

(c) by the same party in adjacent or vertically related markets.

43 There are other mechanisms that are worth exploring to clarify the Commission's approach to assessing serial acquisitions within the scope of the current SLC test. For example:

43.1 The Government can issue a policy statement under s 26 of the Act directing the Commission to have regard to the competition effects of serial acquisitions, if it is concerned that this is not currently a sufficient focus of the Commission. The Minister's annual Letter of Expectations is another vehicle to communicate the Government's policy concerns in this area.

43.2 The Commission's Merger Guidelines do not currently set out the analytical framework the Commission applies in the case of serial acquisitions. The Commission could further develop its Merger Guidelines to provide more certainty of its approach in this area. Some of the complexities associated with scrutinising serial acquisitions have more to do with process rather the substance of the test. For example, the Guidelines could explain how the Commission proposes to engage with an acquirer that is undertaking several separate small transactions simultaneously, where it is consequently difficult to define the 'marginal' transaction or determine the order in which the competition impacts should be assessed.

B. Entrenchment of market power (e.g. including acquisitions relating to small or nascent competitors)?

44 We have set out earlier in this submission some overall reasons why we do not see a clear case for amending the SLC test. As regards this proposal particularly:

44.1 It appears to be redundant, given that both case law and the Merger Guidelines confirm that a substantial lessening of competition includes the enhancement or preservation of market power (relative to the counterfactual). As we discussed above, any amendment to the legislation introduces a degree of uncertainty. The courts will tend to assume that if the statutory language has changed, that means the test should be construed differently. Clarifying the test is sensible if there is a genuine concern the test is uncertain. That does not appear to be the case here.

44.2 The proposed amendment essentially reintroduces aspects of the pre-2001 test of "creating or strengthening a dominant position". Albeit the proposed language refers to substantial market power rather than dominance, the High Court has held that the terms are essentially interchangeable.[9] Careful consideration should be given before re-importing into the current SLC test statutory language that is essentially the same as that which preceded the SLC test.

[9] *Commerce Commission v Bay of Plenty Electricity* HC WN CIV-2001-485-917 (13 December 2007) at [298]: "in general the question of degree is so slight as to prevent clear enunciation. … We will therefore proceed on the basis that there is no material difference between the two tests…".

C. In relation to just the merger provisions or wherever the test applies in the Commerce Act?

45 We do not support amending the SLC test, and we would also be reluctant to see the test defined differently in the various parts of the Act where it is used. One of the perceived benefits of the recent amendments to s 36 was to align the competition test across all the key operative provisions of the Act to take advantage of clear and settled law. This proposal would undo that alignment. It is difficult to see how the courts could avoid the implication that the SLC test must be interpreted differently in Part 2 versus Part 3 of the Act if the statutory language differs.

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?

46 It is more important that the test is coherent in the particular structure of our Act than that it matches the Australian position. The reality is that there are many differences between the Australian Competition and Consumer Act and our Commerce Act which make it impossible for businesses operating trans-Tasman to take a single unified view of their competition obligations. The CCA is in many respects a highly prescriptive code, whereas the Commerce Act is principles-based and flexible. Compliance approaches therefore necessarily differ.

47 It has been suggested that alignment with Australia is useful as it gives New Zealand courts the benefit of Australian jurisprudence. Our practical experience has been that perceived benefit is more notional than real. We would weight more highly taking an approach to the Commerce Act that is fit for New Zealand purposes.

How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?

48 As we have described above, the SLC test is predicated on a precautionary principle of intervention. Reasonable people could reasonably disagree on the merits of that approach. Our argument is that, given the point of intervention is already set at a low threshold, the costs to consumers of increasing the Commission's powers to intervene are likely to outweigh the benefits.

Issue 6: facilitating beneficial collaboration

Question 15: Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.

49 The collaborative activity exception provides flexibility and is capable of allowing genuinely beneficial collaborations that do not substantially lessen competition. Further, in our experience and as MBIE notes, the Commerce Commission is willing to engage constructively on the application of the exception, which provides an opportunity to test and gain comfort regarding the Commission's

attitude to a collaboration. So, we consider some conditions are in place to facilitate arrangements that may be beneficial and are not anti-competitive.

50 From our perspective, a key challenge is for parties to confront the idea that, by collaborating, they will or might trigger the prohibition on cartel provisions. That is particularly the case given the seriousness of a breach of the prohibition (in particular, that it attracts criminal sanction). Parties can interpret the fact that they may trigger the prohibition as a signal that their conduct is inherently risky and would be viewed adversely. As a result, they can be reluctant even to explore whether and how the collaborative activity exception might apply to them.

51 Two improvements would, in our view, assist to overcome this challenge.

52 First, we consider the scope of the prohibition on cartel provisions could be narrowed. Currently, the prohibition captures collaborations that there is not a reason in principle to scrutinise for anti-competitive collusion. We have observed this scenario most clearly in relation to "restricting output", where the prohibition can be triggered by conduct that is not capable of placing upward pressure on price or, put another way, causing economic harm. We also consider the scenario could arise in relation to market allocating.

53 For example, restricting output can be triggered where:

53.1 parties that are competitors reach an agreement that has the effect of reducing overall output, but where the reduction in output is a mere minor or ancillary effect and not relevant to the purpose of the agreement (30A(3)(c)). This issue can arise with arrangements that focus on ethical or environmentally friendly approaches to production and supply, which may naturally result in lower production. We understand New Zealand's prohibition captures more conduct than Australia's in this respect, and the Australian approach may be a useful model. That is, in Australia, a price fixing agreement must have the purpose or effect of price fixing; in relation to other forms of cartel conduct the provision must have the requisite purpose (see Australia Competition and Consumer Act 2010 (Cth), section 45AD),[10] and

53.2 parties that are competitors share domestic production capability for goods that are partly imported and partly produced locally agree to reduce production. The parties would trigger the prohibition even if the agreement has no effect on either party's overall output and thus the output in the market (section 30A(3)(a)).

It is also worth remembering that triggering the previous version of section 30 required there to be the potential for upward pressure on price. While we appreciate and agree with the reasons the provision was updated and amended, we consider this aspect was a useful filter for distinguishing benign and potentially anti-competitive conduct.

54 By capturing such conduct, would-be collaborators are faced with the challenge we have outlined above at paragraph 50. That is, they trigger the prohibition and must work through the application of the collaborative activity exception. The need to conduct this exercise has a deterrent effect on their conduct in a scenario where there is no upside for competition in ensuring the requirements of the collaborative activity exception are met – the conduct is inherently benign and may be beneficial. In our view, with several years of the application of the prohibition behind us, there is a good case for the scope to be narrowed.

55 Secondly, we support the continued evolution of guidance, education and case law to improve our collective understanding of the collaborative activity exception and its ambit. We consider embedding good law through these steps will allow parties to be more confident to pursue beneficial collaborations.

Question 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?

56 Please see our response to Question 15 as to what we observe to be the key challenge. We do not object to exceptions being provided for within the Act, if considered desirable and to increase certainty, but do not have experience of any particular classes that would fall into this category.

Question 17: What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

57 Make explicit in the Commerce Act that the Commission has a role in issuing guidance: while guidance has a role to play (see paragraph 55), it faces some challenges. That is, to prevent guidance from limiting the flexibility to consider new conduct, it typically (and understandably) adopts a conservative position and therefore does not significantly advance certainty and clarity.

58 We do not support elevating the status of guidance given the nature of the Commission's role – we consider there remains merit in separation of rule-making from the body charged with interpreting and enforcing the rules and for the reasons given above there is not a compelling reason to override that separation here.

59 Empower the Commission, on its own initiative, to issue binding rules that create a safe harbour from the prohibitions: as above, we do not consider it appropriate for the Commission to adopt a rule-making role. Further, we consider there is scope for limiting the ambit of the prohibition generally, as proposed above, which may partly address the concern.

60 Introduce a statutory notification regime for specified classes of arrangements: we agree it is useful to provide opportunities to engage with the Commission, in a constructive rather than enforcement-led manner, and obtain comfort as to how arrangements will be treated. To that end, we are open to supporting a voluntary notification regime for specified types of conduct.

61 Empower the Commission, on its own initiative, to make class exemptions: as above, we do not consider it appropriate for the Commission to adopt a rule-making role. Further, we consider there is scope for limiting the ambit of the prohibition, as proposed above, which may partly address the concern.

62 Provide an exception for small business from the Commission fee payable to apply for authorisation: we do not ourselves have evidence that the fee for authorisation is a material deterrent (particularly given the significant other costs involved in complying with the Commission's process). However, we support such an exception if evidence suggests the fee operates as a deterrent.

Question 18: If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?

63 Not relevant.

Issue 7 – Anti-competitive concerted practices

Question 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?

64 We agree, conceptually, with MBIE's understanding of the "gap" a concerted practices prohibition would be aiming to fill. In our experience, the gap is not material. That is because, as MBIE explains, the threshold for a Court to make a finding that an "understanding" exists is low.[11] Sharing competitively sensitive information where the parties' purpose is to limit competition creates such a high risk of an understanding arising (including in both of the examples MBIE provides) that it deters conduct that would be covered by a concerted practices prohibition. In our view, such conduct is, and is well known to be, high-risk.

65 Importantly, the Commerce Act also prohibits "attempts" to contravene the prohibition on cartel provisions, meaning conduct can be captured even where an understanding does not result. An "attempt" is likely to be available in a range of circumstances including, potentially, the example of the Australian turf breeder company.

66 Conversely, removing the requirement for an "understanding" creates significant enforcement uncertainty for parties and risks over-capturing conduct and deterring benign conduct.

[11] Notably, Article 101 of the Treaty on the Functioning of the European Union refers to "agreements" and "decisions of associations" but does not include an equivalent concept to "understanding" as that term appears in our Commerce Act. The concept of a concerted practice in European Union law therefore covers a lot of the same ground that would be addressed under our law as an "understanding".

Question 20. Should 'concerted practices' (eg, when firms coordinate with each other with the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?

67 As set out above, we consider New Zealand's broadly drawn and principled prohibition would not benefit from the addition of a concerted practices prohibition. Furthermore, delineating the boundary between a concerted practice and mere conscious parallelism is difficult. The uncertainty around the scope of the concerted practice prohibition places an unreasonable compliance burden on market participants. However, if concerted practices are to be introduced, we consider the best option would be to follow Australia and prohibit concerted practices only where they would have the effect of substantially lessening competition, to help limit over-capture.

68 For completeness, do not support a bespoke prohibition (and prefer a concerted practices prohibition) e.g. on information exchange, which we consider would be likely to have flow-on effects that would need to be dealt with to avoid over-capture, such as those MBIE outlines.

Issue 8: Industry Codes or Rules

69 In general competition is more effective at driving efficiencies and positive consumer outcomes than regulatory intervention. In markets that are workably competitive, therefore, we think Government should be reluctant to intervene in the competitive process by specifying industry codes. Conversely, regulatory intervention (including industry codes or rules) is warranted where:

69.1 markets cannot function effectively without a rule-making function (for example financial markets and the electricity market, which include various types of rule-making functions to enable markets to function); or

69.2 there is a lack of competition, and no prospect of competition in future.

70 In those cases where regulatory intervention is warranted:

70.1 we endorse the legislative principles established by the Legislation Design and Advisory Committee (LDAC) as a good starting point for designing regulatory interventions;

70.2 it is important when designing regulatory interventions to be clear about the costs, benefits and trade-offs of intervention, as well as the information asymmetry that regulators and policy-makers will inevitably face. One of the downsides of code-making is it has a tendency to stifle competition and innovation by preventing market participants from pursuing new commercial models or raises barriers to the introduction of new products or services. In our experience, regulatory interventions often go awry because the problem is not clearly defined, the design of the intervention is not properly thought-through, or the trade-offs involved in the regulatory design are not sufficiently understood. Regulatory interventions also inevitably impose both public and private

costs. Regulators and policy-makers tend to recognise the public costs of intervention but are less likely to acknowledge the – usually greater – private costs of compliance;

70.3 as a matter of institutional design, we think there are risks in the Commerce Commission undertaking both code-making and enforcement of the competition regime. There is a tension between those two roles. Confidence in the Commission would be undermined if market participants perceived that the Commission's response to unsuccessful competition enforcement action was to simply write codes to arrive at the same result. We consequently have a preference for code-making to be principally a function of Parliament through primary or secondary legislation.

Issue 9: Modernising court injunction powers

71 We do not believe there needs to be any adjustment to what the Commerce Act says about injunctions. We worry that "performance requirements" represent mandatory injunctions that may inappropriately cast the Court in a supervisory role. We think it best that the Commission rely on the Court's flexible inherent jurisdiction to meet the interests of justice in any given case. The Commission is free to seek "performance requirements" as things stand under Part 7, Sub-part 3 of the High Court Rules. No change needed or desirable.

Issue 10: Protecting confidential information

Question 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

72 In our experience, the Commission takes seriously the principle of public availability and seeks to publish as much as it can. At the same time, the Commission appears to have ample power to protect from disclosure information that is, for example, genuinely commercially sensitive. We do not consider any strengthening of the Commission's ability to withhold information is required.


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