Submission information

*(Please note we require responses to all questions marked with an *)*

Release of information

Please let us know if you would like any part of your submission to be kept confidential.

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

N/A

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

Personal details and privacy	
1.	I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue* [To check the boxes below Double click on box, then select 'checked'] ☒ Yes ☐ No
2.	What is your name?* Amanda G. Lewis
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 Please note this will not be published with your submission.* Privacy of natural persons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 Please note this will not be published with your submission.* Privacy of natural persons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. Coalition for App Fairness
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.
	N/A
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.
	N/A
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.
	N/A
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.
	N/A
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.
	N/A
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	N/A
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.
	N/A
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.
	N/A
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?
	N/A
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?

	N/A
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	N/A
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	N/A
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.
	N/A
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?

	N/A
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.
	N/A
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?
	N/A
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	N/A
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	N/A
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?
	N/A
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?
	N/A
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.
	Yes, industry codes or rules could be helpful in achieving both a. and b. CAF strongly believes that the current competition regulation regime is insufficient to address the harmful conduct of digital platforms with a gatekeeping role, such as Apple and Google which exercise complete control over app distribution on iOS and Android devices through the operation of the App Store and the Play Store, respectively. On balance, we support a designation and mandatory code of conduct model, which is more akin to the Digital Markets Unit (DMU) regime in the United Kingdom (UK) than the Digital Markets Act (DMA) regime in Europe, as long as steps are taken to ensure it can be implemented quickly. Notably, regardless of the mechanism, speed of enactment and implementation are critical factors in addressing harmful conduct in the mobile app ecosystem. There is effectively a global consensus that (1) significant harms already exist and continue to have adverse effects on consumers and businesses; and (2) current competition tools are known to be insufficient to address these significant, ongoing harms. Industry codes and rules, once they are in place, have the advantage of providing clarity and flexibility. • Clarity: Once the codes and rules are in place, the platforms within their scope will have to comply with a predefined list of dos and don'ts that would ideally apply to certain subcategories of digital platforms (e.g., app

	stores). This is one shortcoming that we have seen with respect to the DMA, where the law was enacted quickly, the high-level rules are clear, but there is nevertheless a lot of work still to be done to decide precisely what the high-level rules will mean in practice in the specific circumstances of each gatekeeper's activities. • Flexibility: Industry codes and rules enable detailed rules to be tailored to the specific requirements of a particular subcategory of digital platforms (e.g. app stores). It also enables those rules to be updated efficiently by the regulator as time goes on, which is important as tech regulation is still in its early stages and one would expect regulators to learn a lot in the first few years. CAF believes a model like Australia's proposed new digital competition regime could offer a promising path forward in New Zealand, as well, to address the threat that dominant platforms present to open markets and competition in the country's mobile app ecosystem. This is only true, however, if the primary legislation and subsequent industry-specific codes of conduct and rules can be swiftly enacted and implemented. The Australian proposal for service-specific codes appears to offer a good middle ground between the European Union's (EU) standardized approach across all platform types and the UK's company-specific model. Prescribing general obligations in legislation and specific requirements in codes enables the legislature to dictate the boundaries of the regime, while preserving the expert regulator's ability to design the complex requirements relating to each gatekeeper service. It therefore strikes a good balance between certainty and flexibility. The ability to consider and update the rules regularly without needing to go back to the legislature and ask for the legislation to be updated is also a significant benefit of Australia's proposed approach.
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?
	Industry codes or rules should focus on addressing competition issues in digital markets to level the playing field, remove unfair barriers to growth, and unlock lower prices and higher quality for consumers. Many New Zealand businesses depend on access to the digital economy to operate successfully on a day-to-day basis, including the mobile app economy. Despite the central role digital markets play in the New Zealand economy for businesses and consumers, the problems of monopoly power and barriers to entry in these markets have gone largely unaddressed. App marketplaces are critical gateways through which consumers engage with the digital world, yet Apple and Google continue to operate their app stores in ways that have led to significant harm to competition and consumers. Numerous reports have demonstrated existing harms and the need for regulation in this domain, including the Australian

Competition and Consumer Commission's (ACCC) second interim report of their Digital Platform Services Inquiry, which focused on app marketplaces.[1]

At this point, many jurisdictions have already enacted legislative and regulatory reforms to help fix the broken mobile app ecosystem or, like Australia, are in the process of doing so. The regimes in different jurisdictions vary in their approach to suit their differing legal traditions, but it is remarkable how similar they are in substance. There is a great benefit in the disparate economies of the world moving forward together so that there can be a level playing field for innovative tech companies to thrive in a global market.

In terms of what should be included in the industry codes or rules, or possibly in primary legislation, for that matter, CAF believes they should contain at least the following obligations and prohibitions that are necessary to address Apple's and Google's monopolistic behaviour in the mobile app ecosystem. These obligations and prohibitions reflect CAF's "App Store Principles,"[2] which aim to unlock the benefits of competition for consumers and ensure that app developers can compete in a fair environment:

- ***Obligation to allow the use of alternative app distribution channels.*** Consumers must have a free choice in where they download apps—through the gatekeeper's app store, a third-party app store or on a website. Gatekeepers must be barred from banning or otherwise impeding the use of third-party app stores and direct downloads, including through punishing fee structures.

[1] *See, e.g.*, Australian Competition & Consumer Commission, Digital platform services inquiry: Interim report No. 2 – App marketplaces (Mar. 2021), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf; UK Competition & Markets Authority, A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce (Dec. 2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf; Staff of Subcomm. on Antitrust, Commercial and Admin. L. of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets (Oct. 2020), https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf; UK Competition & Markets Authority, Online platforms and digital advertising: Market study final report (1 July 2020), https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf; UK Competition & Markets Authority, Mobile ecosystems: Market study final report (10 June 2022), https://assets.publishing.service.gov.uk/media/63f61bc0d3bf7f62e8c34a02/Mobile_Ecosystems_Final_Report_amended_2.pdf; Australian Government—The Treasury, Unlocking digital competition: Report of the Digital Competition Expert Panel (Mar. 2019), https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf; Stigler Ctr. for the Study of the Economy and the State, The University of Chicago Booth School of Business, Stigler Committee on Digital Platforms: Final Report (2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, European Comm'n, Competition policy for the digital era (May 2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en.

[2] *See* Coalition for App Fairness, *Our Vision for the Future*, https://appfairness.org/our-vision/ (last visited 13 Feb. 2025).

- ***Obligation to allow app developers to communicate directly with their users for legitimate business purposes.*** Mobile app developers must be able to communicate directly with consumers about offers, discounts, and other features both within an app or through any other channel without any restrictions, including fees, by the gatekeeper.

- ***Prohibition of mandating the use of ancillary services (e.g., in-app payment systems) offered by Apple or Google.*** Mobile app developers must be able to offer the payment options of their choice for in-app purchases, whether it's Apple's or Google's payment options or a third-party payment solution. And when a third-party payment solution is used, the gatekeepers must be barred from imposing an excessive or unwarranted fee.

- ***Obligation to allow access to the app store and operating system features on fair, objective, reasonable, and non-discriminatory terms.*** Developers should not be blocked from the platform or discriminated against based on a developer's business model, how it delivers content and services, whether it competes in any way with the app store owner, or as retribution.

- ***Obligation to provide timely access to the same interoperability interfaces and technical information made available to Apple's and Google's own apps.*** All mobile app developers should have timely access to the same interoperability interfaces and technical information that the app store owner makes available to its own developers. Gatekeepers cannot reserve special privileges for their own internal teams and cannot make gratuitous changes to interfaces and raise rivals' costs. Gatekeepers should provide app developers with timely access to data generated by end-users in the developers' app.

- ***Obligation to implement a fair, transparent, and non-discriminatory app review process.*** Gatekeepers must end arbitrary and unexplained exclusions or failures to approve app store content and app updates.

- ***Prohibition placed on app store and/or operating system providers from engaging in self-preferencing of their own apps or services or interfering with users' choice of preferences or defaults.*** Mobile ecosystem gatekeepers should be barred from self-preferencing their own apps or services or interfering with users' choice of preferences or defaults.

- ***Prohibition of the use of app developers' data by app store providers to compete with the app developer.*** A developer's data and other non-public business information or intellectual property should not be used by the mobile ecosystem gatekeeper to compete with the developer—a practice often referred to as sherlocking.

- ***Obligation to be transparent about the rules and policies applicable to the app stores.*** Apple and Google should provide access to their app stores at transparent, fair, and non-discriminatory conditions.

	Removing Apple's and Google's ability to distort competition in these ways would help innovative firms to thrive, to the benefit of New Zealand consumers, entrepreneurs, and the growth of the economy.
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?
	In New Zealand, like anywhere else in the world, committed and focused enforcement will be key in order to make a real difference for consumers and innovators. Despite legislation, litigation and other competition measures in many markets around the globe, very little has changed yet for consumers. They are still denied the benefits of lower prices, innovation, and being able to choose between services. App developers pay crippling fees and new app stores have yet to gain meaningful traction because Apple and Google continue to erect barriers to competition. Unsurprisingly, the companies that control access to mobile devices are not willing to give up their power without a fight. If gatekeepers are able to escape the rules, they will do so, and the harms arising from their conduct will persist. There is a long history of competition law processes being abused by well-resourced firms to delay authorities' decisions and the implementation of remedies to the detriment of consumers and innovation. Considering this, if New Zealand opts for an industry code and rules approach, the legislature must give careful thought to designing a workable process for the regulator to draft the codes in a timely and efficient manner. CAF supports designing the empowering provisions in the Act to (1) expedite a mobile app ecosystem industry-specific code being fully in force; and (2) ensure that the gatekeeper platforms cannot obstruct and delay by exploiting any required processes or consultations to their advantage.
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
	Yes. Ex ante regimes such as the EU's DMA, the UK's Digital Markets Competition and Consumers Act (DMCC), the Japanese Act on Promotion of Competition for Specified Smartphone Software (the "Smartphone Act") all provide for significant enforcement powers, including substantial fines for non-compliance. But experiences with the DMA have shown that even in the case of ex ante legislation, the challenge is to create an effective framework with rules and consequences that prevent Apple and Google—the two Big Tech companies controlling the app ecosystem—from circumventing the law and push them to change their behaviour.

	Given the history of gatekeepers delaying and avoiding pro-competition regulation, we recommend that New Zealand pay particular attention to the issue of non-compliance enforcement. Any approach chosen to update its competition law should encompass an effective implementation and enforcement regime providing for the availability of strong sanctions and injunctions powers, including the power to set performance requirements. CAF agrees that the inability of the court to order performance injunctions in relation to Part 2 conduct is currently a major gap in the tools to remedy competition harms. Performance injunctions would be critical to address efforts by Apple and Google to engage in malicious compliance, as they have repeatedly done in other jurisdictions. The circumstances identified in the consultation paper as to when such injunctions could be useful, and may in fact be necessary, are present when it comes to mobile app ecosystems and ensuring compliance from Google and Apple: these firms have substantial market power, are likely to engage in malicious compliance, and monetary penalties or damages have thus far proven ineffective.
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.
	N/A
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	N/A
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	CAF offers the following views regarding confidentiality and the protection of commercially sensitive information: • The regulator charged with adopting and enforcing competition legislation, codes of conduct, or rules in digital markets will need the full legal ability to share information with, and receive it from, overseas regulators provided that the need to do so is reasonably related to the its functions and it is satisfied, acting reasonably, that the overseas regulator will protect the confidentiality of business secrets to a broadly equivalent standard. • Based on CAF's experience, including communications with its own members, we believe it is vital to recognize the very real fear of economic

	retaliation that many businesses, of all sizes, have when it comes to companies with monopoly power such as Apple and Google.[3] For this reason, many market participants who are gravely concerned with these gatekeeper platforms' conduct in the mobile app ecosystem may nonetheless choose not to raise concerns with the Commission. As such, CAF supports providing third parties with robust confidentiality protections regarding their identity and commercially sensitive data.
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
	N/A
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
	N/A
Any other issues	
30.	Are there any other issues that you would like to raise?
	N/A

[3] The U.S. House of Representatives Judiciary Digital Markets Report described this fear of retaliation as follows: "Unfortunately, some market participants did not respond to substantive inquiries due to fear of economic retaliation. These market participants explained that their business and livelihoods rely on one or more of the digital platforms. One response stated, 'Unfortunately, [the CEO] is not able to be more public at this time out of concern for retribution to his business,' adding, 'I am pretty certain we are not the only ones that are afraid of going public.'" Another business that ultimately declined to participate in the investigation expressed similar concerns, stating, 'We really appreciate you reaching out to us and are certainly considering going on the record with our story. . . . Given how powerful Google is and their past actions, we are also quite frankly worried about retaliation.'" *See* Staff of Subcomm. on Antitrust, Commercial & Admin L. of the H. Comm. on the Judiciary, 117th Cong., 2d Session, Investigation of Competition in Digital Markets (July 2022), at 27.

General Comments:
CAF is an independent non-profit organisation, comprising more than 80 members who represent mobile app developers of all sizes.[4] CAF members operate in many countries worldwide and serve consumers on every continent. It was founded to advocate for freedom of choice and fair competition across the mobile app ecosystem. CAF's vision is to ensure a level playing field for businesses relying on platforms like the Apple App Store and the Google Play Store to reach consumers and a consistent standard of conduct across the app ecosystem

Thank you

We appreciate you sharing your thoughts with us. Please find all instructions for how to return this form to us on the first page.

[4] Coalition for App Fairness, *Coalition Members*, https://appfairness.org/members/ (last visited 7 Feb. 2025).