consumer.

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**SUBMISSION on Promoting competition in New Zealand – A targeted review of the Commerce Act 1986**

## 1. Introduction

Thank you for the opportunity to make a submission on the targeted review of the Commerce Act (the Review). This submission is from Consumer NZ, an independent, non-profit organisation dedicated to championing and empowering consumers in Aotearoa. Consumer NZ has a reputation for being fair, impartial and providing comprehensive consumer information and advice.

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## 2. Comments on the Consultation

Our comments addressing specific questions from the Review are set out below.

As a general comment, we are supportive of the Review and agree that dynamic markets are critical to economic productivity and the welfare of New Zealanders.

Unfortunately, recurring features of many key markets in the New Zealand economy include, high prices, low innovation, poor customer service and limited consumer choice due to high levels of market concentration, the market power of entrenched incumbents and barriers to entry or expansion.

These observations are repeated themes in recent Commerce Commission (the Commission) market studies. Thanks to these studies competition law and policy is increasingly no longer just of interest to academics, economists and lawyers. New Zealanders are more aware of the negative impacts of uncompetitive markets on them personally, and the economy generally.

The fact the supermarket sector is now openly referred to in negative terms as a duopoly in the media and by the general public (whether this is technically accurate or not), demonstrates the lift in public awareness that certain market structures are damaging to consumer welfare and should be addressed if they exist and, ideally, should not be permitted in the first place.

While the New Zealand public bears the brunt of poor competition outcomes, embarrassingly, New Zealand is also being singled out in international commentary as one of a small handful of countries where market concentration is leading to weaker pressure on larger businesses to innovate, seek efficiencies and provide better services and lower prices to consumers[1]. This is reputationally damaging to New Zealand, especially as the Government moves to encourage more international investment.

The OECD recently described these features of the New Zealand economy as 'handicaps' and put New Zealand on notice that to offset these features it needs to ensure competition policy is in line with international best practice.

It is clear from observing the state of many of our key markets that the Commerce Act, and the merger regime in particular, has historically been too permissive in allowing sectors to consolidate through creeping acquisitions (building products sector) or through mergers taking place

[1] https://www.oecd.org/en/publications/oecd-economic-surveys-new-zealand-2024_603809f2-en.html

outside the clearance regime (supermarket sector) and not being followed up with (at a minimum) a post-merger investigation.

While the introduction of market study powers has helped 'shine a light' on these issues and counter the 'New Zealand is too small for real competition narrative', in many cases, identifying the problem has come too late. Entrenched structural issues are extremely difficult to unwind, even when barriers to entry or expansion are reduced or sector-specific regulatory regimes introduced.

Concentration and market power issues have been identified by the OECD, repeatedly highlighted in Commission market studies and observed every day by ordinary supermarket shoppers, bank customers, airline passengers and electricity users. New Zealand's competition regime should be geared to preventing these issues before they occur.

It is timely that the Review discusses the need to modernise the Commerce Act so that it can support the market studies and merger regimes more fully and to enable the Commission to be more flexible and responsive to competition issues as it becomes aware of them.

## 3. Comments on specific questions in the Review

### Issue one – the substantial lessening of competition test

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

The existing voluntary merger regime works well for the most part, however it is highly dependent on the Commission having the resource and depth of talent to deploy the right expertise on applications (often at short notice). The Commission needs to be able to follow up on mergers that proceed outside the regime or where clearance is granted but mitigating factors put forward by applicants turn out to be false or overstated (see comments below).

As a general observation, it is our view that the substantial lessening of competition (SLC) test is imperfect, but, with the right guardrails in place, is workable, subject to the comments on administration of the regime below.

There will always be an inherent fallibility in a 'point-in-time' assessment of a merger, regardless of the test applied. This is

particularly true in markets where the Commission does not have the benefit of a market study increasing the depth of its understanding in the relevant market. Accepting this fallibility, we support officials exploring how this imperfect test can be balanced with other measures to ensure the Commission has powers to follow up on mergers, that with the fullness of time, eventually result in a SLC.

We note also that, as the test is imperfect, there are many grey areas left to the Commission itself to fill in, based on the evidence it is presented with. Resources available to applicants can tip the balance of the scope and quality of the evidence the Commission receives and will unavoidably have an impact on whether the merger regime is administered in a pro-business or pro-consumer (pro-competition) manner.

While the Commission must consider the long-term interests of consumers, it does not, nor should it, represent consumers, in the same way it does not represent the interests of businesses. The Commission sits appropriately in the middle. It is odd therefore, that the existing regime has evolved to enable significant input from parties representing the interests of applicants and their competitors, but fails to meaningfully support input from consumers or their representatives.

Given the vast resources available to many applicants to present evidence in support of a merger, we consider the regime could benefit from formally requiring greater consultation with consumers participating in the relevant markets (or their representatives with relevant expertise) as clearance applications are assessed[2].

Ultimately consumers feel the impact of mergers that lessen competition (whether substantially or not), often irreversibly. Greater consumer participation in the merger process would have the added benefit of engaging citizens in a process that will, in many instances, impact them for years to come.

[2] To do this effectively, the Commission or MBIE may need to support consumer representatives to develop or maintain a degree of competition expertise and support the resource and time that would be required to participate in the process.

Inevitably, the Commission's institutional approach to merger analysis will change over time as its members, the markets under analysis and the law, change. This is useful in keeping the Commission's decision making fresh and flexible enough to adjust to changing market dynamics.

However, accepting that there are benefits to this flexibility, we see a risk that the Commission may find itself unhelpfully bound by previous merger decisions, even though, through a contemporary lens, historic decisions may be considered too permissive (or the opposite). This is particularly true where it has become clear over time that the purported benefits arising from a merger have been demonstrably overstated by the applicants.

With a heightened public awareness of the importance of competition issues, when applying the substantial lessening of competition test, the Commission must be more than a rubber stamp in the eyes of consumers. This is a delicate balancing act. For example, while the depth of analysis brought about through market studies may have encouraged the current Commission to be more sceptical of the benefits put forward by parties in support of their applications in recent merger decisions, the Commission risks public criticism and ongoing litigation if it deviates too far from previous decisions made by less sceptical, or less well-informed Commission decisions.

The existing regime allows the Commission to balance the interests of all parties. However, if officials have seen good examples of other regimes safeguarding and promoting the consumer voice, they would be worth following up on. Consumer NZ is happy to discuss this point further with officials and provide a view on how an improved regime could support the independent consumer voice being heard more clearly and on an even footing with well-resourced applicants and other parties

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?**

This is case specific. If the regime is working well, the impact of blocking a merger should be pro-competitive and encourage unsuccessful

applicants to innovate and find alternatives to merging to maintain the success of their businesses.

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

   The test has been a mixed bag. A clear recent example of the effectiveness of the test is the Commission's decision to decline the proposed merger between Foodstuffs North Island and Foodstuffs South Island[3] which would have doubled down on many of the competition issues identified in the Commission's market study into the sector and those readily apparent to supermarket shoppers across the country.

4. **Should the substantial lessening of competition test be amended or clarified**

   a. **Creeping acquisitions**
      We strongly support measures to address creeping acquisitions. The most obvious example of the detrimental impacts of creeping acquisitions in New Zealand is the grocery sector and it is heartening to see the Commission taking a tougher line with participants in this sector in recent applications.

      We support aligning the Commerce Act with the proposed Australian position whereby acquisitions in the recent history of the acquiring party can be taken into account when assessing a merger application. However, we consider three years to be too short to adequately assess the impact of an historic merger on competition and suggest extending the period to at least five years.

   b. **Entrenchment of market power**
      We strongly support prohibiting the acquisition of nascent competitors that would entrench market power or otherwise substantially lessen potential competition in the future.

[3] Noting that this decision is set to be appealed.

c. **In relation to all provisions in the Commerce Act**
To support understanding, consistent decision-making and certainty for businesses, we support a consistent approach to the SLC test across the Commerce Act.

5. **Alignment with Australia**

Given the large number of businesses operating in New Zealand that are subsidiaries of Australian owned companies or operate under the same brand across both jurisdictions, it makes sense to align Australian and New Zealand competition law, where this works for consumers in both jurisdictions.

In our observation, even though Australian consumer groups consider competition outcomes in key markets like aviation, banking and supermarkets are bad in Australia, they are worse in New Zealand due to higher levels of concentration. Any alignment must take into account the fact that New Zealand is a smaller economy with lower population centres and is therefore less able than Australia to entice new entrants from abroad.

6. **How effective is the current merger regime in balancing the risk of not enough versus too much intervention in markets?**

See comments elsewhere in this submission and in particular the submission that the Commission needs to be adequately resourced to follow up on mergers that proceed outside the clearance regime, or where, in the fullness of time, benefits submitted by merger applicants turn out to be false or demonstrably overstated.

## Issue two – Substantial degree of influence

7. **Discussion**

We are supportive of providing greater clarity in the Commerce Act on when an arrangement confers a substantial degree of influence and are in favour of the wording proposed in Australia:

*"…that provide control or the ability to materially influence acquired businesses or are capable of affecting the competitive structure of a market."*

8. **Should the Commerce Act be amended to provide further clarity?**

We agree the Commerce Act should be amended to provide more clarity than it currently does, but do not favour a prescriptive approach based on market share as this type of approach could lack the requisite flexibility and nuance to appropriately assess arrangements in the range of markets to which it could be applied.

## Issue three – assets of a business

9. **Is the term 'assets of a business' unclear?**

We support clarifying the definition of assets of a business so the merger regime is engaged as appropriate when assets are transferred between businesses.

10. **How should the phrase be amended**

We agree with the consultation document that the simplicity of the Australian approach is preferable, with a broad definition of asset and a focus on the substance of what is be acquired or disposed of, rather than the legal form. We consider this will become increasingly important over time as assets such as data holdings or rights to access data, become the subject of more transfers between businesses.

## Issue four – Mergers outside the clearance process

11. **Views on the voluntary merger regime**

See comments under issue one. We support the proposal that the integrity of the voluntary merger regime would benefit from the Commission having more resource and greater ability to address non-notified mergers.

Similarly, periodic reviews of merger decisions to test the rationale provided by applicants and whether the purported benefits of the merger have been realised would be useful and instructive for the Commission and the regime as a whole.

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?**

As a general comment, we support increasing the Commission's range of tools to investigate and stop potentially anti-competitive mergers.

As noted above, prevention should be preferred over attempts to unwind or mitigate the negative impacts of mergers that should not have been permitted in the first place, as demonstrated by the current state of the grocery sector. We note again the difficulty of unwinding mergers that have proceeded and resulted in a substantial lessening of competition (whether notified and cleared, or otherwise). Many anti-competitive effects will be irreversible. It is therefore important that the Commission has the tools to pause mergers in progress, investigate the likely impacts and determine whether the merger should be allowed to proceed.

a. **A stay and/or hold separate power**
   We see this as a speedy, efficient and low-cost mechanism for the Commission to pause ongoing mergers, while further inquiries are made into the potential competition impacts of the merger. In many cases we anticipate this power being deployed as a useful initial step before the exercise of a call-in power, requiring firms to go through the clearance regime.

b. **A call-in power**
   We strongly support introducing a call-in power in appropriate circumstances.

   The alternative is to rely on post-merger investigation, which puts a greater resource burden on the Commission to detect and investigate deals where the damage to the competitive landscape may already be irreversible.

c. **A mandatory notification power for designated companies**
   We support the idea that the Commission could impose an obligation on participants in certain sectors of the economy to notify it of any acquisitions.

   We agree that this power should be complemented by the Commission's market studies function as is the case in Germany. However, we note that to realise the value in a mandatory notification power which is dependent on a market study having been conducted, the Commission will need to be

resourced to expand its market study programme, which, to date, has only covered four sectors and is currently dormant, notwithstanding the long line of sectors that have significant competition issues and warrant market studies (for example electricity generation/retail and aviation).

## Issue five – Behavioural undertakings

**12. Should the Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?**

We agree that behavioural undertakings are an inferior mechanism to structural undertakings and should be carefully assessed before being accepted.

Nonetheless, we support the ability of the Commission to accept behavioural undertakings in appropriate circumstances, however caution that any such undertakings require careful monitoring, which places a resource burden on an already stretched and under-resourced Commission. In many circumstances, monitoring compliance with behavioural undertakings will be a lengthy and ongoing process. As noted in the discussion document, merger parties will have commercial incentives to behave contrary to the letter and spirit of undertakings, a risk that increases over time as staff change and the institutional memory of the merger process fades.

At a practical level, behavioural undertakings may need to be timebound, or risk losing relevance over time as markets evolve. We suggest introducing the ability for firms to apply to have behavioural undertakings amended, should the dynamics of a market change over time and it can be clearly established that a behavioural undertaking is no longer relevant or maintaining the effect it was originally intended to bring about.

Additionally, we sound a note of caution that, in the same way that the benefits of a proposed merger can be overstated or even misrepresented by merger applicants, the impacts of behavioural undertakings are similarly vulnerable and should be carefully scrutinised before a merger is allowed to proceed based on the undertakings being provided.

## Issue seven – Anti-competitive concerted practices

**19. What are you views on whether the Commerce Act adequately deters forms of tacit collusion between firms that is designed to lessen competition between them?**

The most obvious form of tacit collusion that is the source of regular consumer concern is 'price following', most notably in fuel retail. Recent incidents of anomalous petrol pricing in Thames hit the media and eventually resulted in the Commission writing to fuel companies in the region warning them that competition amongst fuel companies in Thames has not been as strong as the Commission would expect in a competitive market. Again, the Commission was able to take this stance with clarity because it has the benefit of a market study in the fuel sector. This underlines the value of market studies and should be seen as an encouragement for undertaking more studies in other problematic markets.

Thankfully, fuel companies in Thames reacted to the Commission's approach (and also the widespread public outrage and extensive media coverage of their comparatively high pricing) and reduced prices to a more "competitive" level. Nonetheless, the circumstances leading to this price following incident, could easily repeat themselves in other regions and in other markets. In the absence of an overt agreement or understanding on price the Commerce Act permits this level of 'tacit collusion', to the detriment of consumers.

**20. Should concerted practices be explicitly prohibited? What would be the best way to do this?**

We support the idea of prohibiting concerted practices that substantially lessen competition and aligning New Zealand's competition law with the Australian prohibition. We support a broader approach to the issue that focuses on the impacts to competition in the relevant market, rather than focusing on behaviour that involves only current or potential competitors.

Thank you for the opportunity to provide comment.

*ENDS*