Submission Form

The Ministry of Business, Innovation and Employment invites feedback on its Discussion Paper *'Promoting competition in New Zealand – A targeted review of the Commerce Act 1986'*

We welcome your feedback

This is the Submission Form for responding to the Discussion Paper released by the Competition Policy team at Ministry of Business, Innovation and Employment (MBIE) 'Promoting competition in New Zealand – A targeted review of the Commerce Act'. The Ministry of Business, Innovation and Employment welcomes your comments by **5pm 7 February 2025**

Please make your submission as follows:

1. Please see the full Discussion Paper to help you have your say. There is also a summary version.
2. Please read the privacy statement and fill out your details under the 'Submission information' section.
3. Please fill out your responses to the questions in the tables provided. Your submission may respond to any or all of the questions. Questions which we require you to answer are indicated with an asterisk (*). Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. If you would like to make other comments not covered by the questions, please provide these in the 'General Comments' section at the end of the form.
4. If your submission contains any confidential information, please:
    a. State this in the cover page and/or in the e-mail accompanying your submission.
    b. Indicate this on the front of your submission (eg, the first page header may state "In Confidence").
    c. Clearly mark all confidential information within the text of your submission.
    d. Set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (OIA) that you believe apply.
    e. Provide an alternative version of your submission with confidential information removed in both Word and as a PDF, suitable for publication by MBIE.
5. Before sending your submission please delete this first page of instructions.
6. Submit your submission by:
    a. Emailing this form as both a Microsoft Word and PDF document to the Competition Policy team at competition.policy@mbie.govt.nz; or
    b. Posting your submission to:
    Competition Policy team
    Ministry of Business, Innovation and Employment
    15 Stout Street
    PO Box 1473
    Wellington 6140

Please direct any questions that you have in relation to the submissions process to competition.policy@mbie.govt.nz.

Release of Information

Please note that submissions are subject to the OIA and the Privacy Act 2020. In line with this, MBIE intends to upload copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission unless you clearly specify otherwise in your submission. MBIE will take your views into account when responding to requests under the OIA and publishing submissions. Any decision to withhold information requested under the OIA can be reviewed by the Ombudsman.

Privacy statement

Your submission will become official information, which means it may be requested under the Official Information Act 1982 (OIA). The OIA specifies that information is to be made available upon request unless there are sufficient grounds for withholding it.

Use and release of information

To support transparency in our decision-making, MBIE proactively releases a wide range of information. MBIE will upload copies of all submissions to its website at www.mbie.govt.nz. Your name, and/or that of your organisation, will be published with your submission on the MBIE website unless you clearly specify you would like your submission to be published anonymously. Please tick the box provided if you would like your submission to be published anonymously i.e., without your name attached to it.

If you consider that we should not publish any part of your submission, please indicate which part should not be published, explain why you consider we should not publish that part, and provide a version of your submission that we can publish (if we agree not to publish your full submission). If you indicate that part of your submission should not be published, we will discuss with you before deciding whether to not publish that part of your submission.

We encourage you not to provide personally identifiable or sensitive information about yourself or others except if you feel it is required for the purposes of this consultation.

Personal information

All information you provide will be visible to the MBIE officials who are analysing the submissions and/or working on related policy matters, in line with the Privacy Act 2020. The Privacy Act 2020 includes principles that guide how personal information can be collected, used, stored and disclosed by agencies in New Zealand. Please refrain from including personal information about other people in your submission.

Contacting you about your submission

MBIE officials may use the information you provide to contact you regarding your submission. By making a submission, MBIE will consider you to have consented to being contacted, unless you clearly specify otherwise in your submission.

Viewing or correcting your information

We may share this information with other government agencies, in line with the Privacy Act 2020 or as otherwise required or permitted by law. This information will be securely held by MBIE. Generally, MBIE keeps public submission information for ten years. After that, it will be destroyed in line with MBIE's records retention and disposal policy. You have the right to ask for a copy of any personal information you provided in this submission, and to ask for it to be corrected if you think it is wrong. If you'd like to ask for a copy of your information, or to have it corrected, please contact MBIE by emailing competition.policy@mbie.govt.nz.

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.

I would like my submission (or identified parts of my submission) to be kept confidential because [Insert text]

[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?* Mark Williamson, Daniel Street
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. DLA Piper NZ

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:

DLA Piper New Zealand
Level 15
PwC Tower
15 Customs Street West
Auckland 1010
PO Box 160
Auckland 1140
New Zealand
T: +64 9 303 2019
dlapiper.com

Competition Policy Team
Building Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
WELLINGTON 6140

By email
competition.policy@mbie.govt.nz

Your reference

Our reference
1040060

7 February 2025

Targeted review of the Commerce Act 1986 – DLA Piper New Zealand's submission to MBIE discussion paper

Introduction

1 Thank you for the opportunity to submit to the Ministry of Business, Innovation and Employment's (**MBIE**) December 2024 discussion paper "Promoting competition in New Zealand – A targeted review of the Commerce Act 1986" (**Discussion Paper**).

2 This submission is on behalf of DLA Piper New Zealand and does not necessarily represent the views of its clients or other offices of DLA Piper.

Issue 1 – the substantial lessening of competition test

What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.

3 Our view is that the current merger regime has generally been effective in achieving the purpose of the Commerce Act, namely, the promotion of competition for the long-term benefit of consumers.

4 This is because:

4.1 The substantial lessening of competition test allows a forward-looking analysis to consider levels of competition with and without a merger. This approach is consistent with other jurisdictions and appears to provide an appropriate framework to assess any competitive harm of a merger.

4.2 The elements of the legal test are well-established and understood by practitioners and market participants. This provides a strong foundation for mergers to be assessed at a preliminary stage for competition concerns (reducing the administrative burden on the Commission with respect to merger review).

4.3 The courts' interpretation of what is "likely", together with the guidance regarding what is a "substantial" lessening of competition, provides sufficient tools for the Commission/courts to block a merger where there is objective evidence of competitive harm.

4.4 The voluntary notification process appears to be working well, as noted by MBIE.

5 In our view, a key component of an effective merger regime is independent, objective analysis by the Commission (based on sound economic evidence) when performing its adjudicatory functions.

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.

6 In all developed economies, mergers are a critical part of a well-functioning market economy. The ability of owners/firms to transfer shares or assets of a business provides key incentives for innovation and promotes efficiency. Absent competitive harm, there is a presumption in a market economy that mergers will benefit consumers in the long-run, through the operation of market-forces.

7 So, the likely impact of blocking a merger will depend on whether or not the assessment of competitive harm is "correct" – both where the bar is set and how the test is then applied in practice. If the Commission correctly block a merger on the basis of competitive harm, then the likely impact on consumers in the long-run should be positive. However, conversely, if the bar is set too low (and/or the test is not rigorously applied), then blocking a merger will, in the long-run, adversely impact consumers and deprive them of the merger benefits.

8 It follows that considerable care must be taken in framing the competition merger test. Changes should only be made where there is clear understanding of the need for the change and its impact.

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.

9 With any competition test, there will be differing views as to whether any given merger should or should not have been approved, particularly with the benefit of hindsight. Merger analysis is inherently an attempt to predict the future. However, in our view, since the test was introduced, it has been reasonably effective in preventing mergers that, on the information reasonably available at the time, were likely to materially harm competition. It is true that only a relatively small number of applications for clearance are declined by the Commission. However, as well as those mergers that have been subject of Commission scrutiny, it is important to acknowledge that a material number of mergers are considered by practitioners at the outset of any proposal and rejected on the basis that they are of material competition risk.

10 A few additional observations:

10.1 Retrospective analysis of an approved or declined merger is a complex exercise. The analysis should be one of economic substance, rather than impressionistic and/or anecdotal commentary.

10.2 Just because markets *could* be more competitive, it does not follow that mergers in that market were "wrongly" decided. For example, the factors at play in determining the Commission's analysis and conclusions in a market study are by necessity different to those involved in an ex ante review of a merger.

10.3 Our experience is that pre-2001 (when New Zealand had the dominance test for merger review), there was a general groundswell of expert opinion that the "bonecrushing dominance" required under the New Zealand context was an aberration and needed to be changed. We do not detect the same level of consensus with regard to any change to the substantial lessening of competition test.

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.

11 In summary, our view is that the current substantial lessening of competition test remains fit for purpose. If it is considered that the test does not need to be amended or clarified as per (a) and (b), then we would favour waiting for the equivalent changes to bed-in in the Australian context. This would provide businesses and advisers with greater certainty as to the precise impact of the relevant changes.

12 With regard to creeping acquisitions, in our competition analysis, when applying the current test, we would ordinarily have regard to the competitive effect of past mergers when assessing the market power of the entity prior to any merger (irrespective of when the mergers took place). Similarly, we would regard a merger that materially entrenches market power as one that is properly regarded as substantially lessening competition in a market (on the basis that a reduction in competition and an increase in market power are two sides of the same coin).

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.

13 Generally speaking, we favour alignment where possible to assist with certainty and promote a single economic market. However, this does need to be considered on a case-by-case basis. Alignment with Australia is particularly valuable where there is a body of Australian experience to draw on. This is not currently the case with regard to the changes to the substantial lessening of competition test.

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

14 As discussed above, we consider that the current merger regime strikes the right balance in terms of risk of intervention.

Issue 2 – Substantial degree of influence

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.

15 In our experience, the current test is sufficiently flexible to capture the circumstances in which a firm may influence the activities of another.

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.

16 On balance, we would favour leaving the current regime which provides a broad, competition focused test for when a business influences or controls another. A well-drafted and considered definition could be provided in the Act but, by their nature, tests of control/influence always have an element of uncertainty so as to capture a range of different structures, contexts and arrangements.

Issue 3 – Assets of a business

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?

17 We regard "assets of a business" to be sufficiently clear to indicate that the focus of section 47 is on the acquisition of a collection of assets that form part of a business (which is defined in the Act). This is consistent with the heading of the section, which is "business acquisitions". This clearly delineates section 47 from anticompetitive practices and, importantly, from the usual process of competition which may involve the acquisition of goods/other property.

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?

18 See above.

Issue 4 – Mergers outside the clearance process

What are your views on how effectively New Zealand's voluntary merger regime is working?

19 We agree with MBIE's view that the New Zealand voluntary merger regime is working well.

20 We comment as follows:

20.1 New Zealand has an experienced and specialist group of competition lawyers and economists who are well placed to provide clients with an assessment of competition risks following from a merger. These practitioners act as gatekeepers in terms of advising parties not to proceed with mergers that have significant competition issues (thereby reducing taxpayer-funded review and enforcement costs).

20.2 The ability of parties to informally approach the Commission outside the clearance process provides a useful tool for acquirers and also gives the Commission an opportunity to undertake an initial competition assessment of the relevant merger.

20.3 Any mandatory notification regime inevitably shifts the focus of parties away from the substantive competition risks and towards a technical assessment of whether the notification regime has been triggered. Also, it is likely to result in consideration of merger applications that have no underlying competition issues but have nonetheless crossed the notification threshold.

20.4 Further, the Commission's guidance including the concentration guidelines provides a valuable starting point as to when a merger requires engagement with the Commission (without being a straitjacket).

21 One key positive feature of the New Zealand merger regime is its simplicity. Accordingly, we would not favour industry or firm specific notification regimes. In practice, firms in the industries of the type which might be selected for such regimes are aware of the level of scrutiny by the Commission and take appropriate steps accordingly when considering potential mergers.

Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.

22 In our view, the monitoring role performed by the Commission together with the gatekeeping role of practitioners discussed above provides the appropriate level of comfort regarding non-notified mergers. In our experience, mergers of a scale and nature that have a material impact on New Zealand markets are appropriately self-assessed and regulated by the regime.

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.

23 From a practical perspective, well-advised parties contemplating a merger proceed on the basis that if a merger gives rise to competition concerns, the Commission will investigate and currently has sufficient powers to stop or ultimately unwind the merger. There is also the risk of significant pecuniary penalties and personal liability. Our experience has been that faced with an objection or concern by the Commission, parties are understandably reluctant to "roll the dice" and take steps which could ultimately prove very costly and disruptive if the Commission's concerns are validated. The *New Zealand Bus* decision provides a useful cautionary tale in terms of proceeding with a merger where the Commission has raised material concerns.

24 Accordingly, it is unclear to us the scale of the benefit which will result from granting the Commission further powers beyond their existing toolkit. If it is considered necessary to grant such powers, we comment as follows on the specific options raised:

24.1 **A stay and/or hold separate power:** In our view, the interim injunction process provides the appropriate mechanism to achieve this. Giving the Commission a unilateral right to suspend completion or implementation of a merger without judicial scrutiny would be a significant step and need to be carefully considered.

24.2 **Call-in powers**: We would have no fundamental objection to this power as it mirrors what currently occurs in practice in any event. The Commission would need to exercise the powers sparingly and with care to ensure it did not undermine the voluntary nature of the clearance process.

24.3 **Company-specific mandatory notification power**: As discussed above, we would not support this option.

Issue 5 – Behavioural undertakings

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

25 Generally, we are in favour of allowing the Commission to accept behavioural undertakings to address concerns with proposed mergers. This is because it will align New Zealand with overseas merger regimes. More importantly, it will provide a further tool in the regulatory toolbox to limit the risk to competition for appropriate transactions.

26 In terms of the circumstances in which the Commission should be able to accept behavioural undertakings, these should not be prescriptively set out in the Act, but rather, left to the discretion of the Commission on a case-by-case basis. In practice, we would expect the Commission to take a cautious approach to behavioural undertakings, and it would be unlikely that the granting of such undertakings would, in themselves, form the justification for granting a clearance for an otherwise anti-competitive merger. It is likely that such undertakings would result in incremental benefits to consumers, contributing to the overall assessment of the competitive impact of the merger.

Issue 6 – Facilitating beneficial collaboration

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

27 Our clients have shared with us their concerns around the potential competition law risks associated with sustainability collaborations. We consider that many large corporates are experiencing a "chilling effect" which is limiting meaningful action responding to climate change. There exists a belief that "competition" and economic growth will always be given primacy over sustainability objectives. For example, the most meaningful sustainability collaborations, such as collective boycotts or joint decisions to require suppliers to provide inputs that meet certain sustainability requirements, would often require an authorisation.

28 It is necessary to recognise that the most challenging sustainability collaborations are those that are proposed to overcome situations of market failure where the Government has not yet intervened (or chosen not to intervene).

29 The current barriers we often hear are the time, cost, uncertainty, and publicity of obtaining a clearance or authorisation. There exists a general scepticism that the necessary comfort from the Commerce Commission could be provided quickly.

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?

30 We consider that statutory provision for classes of beneficial collaboration is unlikely to be an effective solution in the long term. Sustainability collaborations are often fact and sector specific. In a rapidly developing area, any statutory provisions are likely to be either too generic or outdated quickly. A more effective solution is for the Commerce Commission to be empowered to issue class exemptions as necessary.

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

31 We agree that a variety of regulatory options are required to resolve the chilling effects of competition law on beneficial collaborations. On the options proposed:

31.1 We consider that guidance from the Commission is beneficial and entities' reliance on that guidance should be a factor in any subsequent proceeding where potential conduct is questioned. However, the Commission's guidance should not be given a greater status or be binding on entities or the courts. That approach could lead to "overreach" and new requirements which should have instead gone through proper legislative reform processes.

31.2 We agree that the ability for the Commission to create safe harbours may be of assistance (subject to the Commission consulting on any proposed safe harbours).

31.3 A notification and call-in regime may be of assistance. For that regime to be successful, market participants must not propose activities which are clearly objectionable, and the Commission must have the courage to not intervene, rather than "call-in" matters out of an abundance of caution.

31.4 We are supportive of class exemption powers for the Commission.

31.5 We have no objection to a waiver of authorisation fees for small businesses.

32 In addition:

32.1 it would be beneficial to extend the clearance regime to all contracts, arrangements, and understandings, not just those involving cartel provisions;

32.2 guidance on how sustainability benefits and broader public goods will be taken into account in the net public benefit test for authorisations would be welcomed. In particular, in situations where the value of proposed sustainability collaborations are gained outside of the market where businesses are competing;

32.3 we consider change should not just be left to prosecutorial or enforcement guidelines. Market participants would not receive the necessary comfort to overcome chilling effects if they just have to rely on a decision by the Commission not to take enforcement action; and

32.4 we welcome the Commission's open-door policy around sustainability collaborations. For that open-door policy to be successful, we consider it would be beneficial for the Commission to have a specialist internal task force, similar to the ACCC, for sustainability issues. An open-door policy gives an opportunity for a confidential triage and pre-assessment of potential collaborative activity.

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

33 Providing flexibility with the maximum degree of certainty should be at the heart of the design of the relevant options discussed above.

Issue 7 – Anti-competitive concerted practices

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?

34 Our view is that the breadth of the concept of an 'understanding' combined with the very serious consequences of Commission enforcement provide an adequate deterrent to problematic forms of tacit collusion.

35 This view is supported by our experience with delivering compliance training to clients over many years. In practice, such training always covers problematic forms of behaviour that might be regarded as tacit collusion (for example, sharing information without a legitimate business purpose).

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?

36 As discussed above, our view is that the existing regime provides sufficient deterrent to prevent firms coordinating for the purpose or effect of harming competition. If it is felt necessary to provide for a specific prohibition, then we would favour the adoption of the Australian regime.

Issue 8 – Industry Codes or Rules

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.

37 Since the introduction of the Commerce Act in 1986, New Zealand has generally reaped the benefits of our principles-based competition law, which applies across industries as opposed to sector-specific competition issues. As a matter of principle, we do not favour sector-specific competition laws, including those introduced via industry codes or rules. To the extent that there is a clear need for sector-specific regulation (for example, because there is a natural monopoly), this should be subject to the scrutiny of Parliament and the democratic process.

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?

38 As above.

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?

39 If the Commerce Act was amended in this way, the key matter would be the threshold for the development and introduction of such industry codes or rules. The regime would need to require that the benefits of such codes or rules clearly outweigh the detriments and costs from increased regulation.

Issue 9 – Modernising court injunction powers

Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons

40 In our experience, courts dislike setting performance requirements which in turn require ongoing monitoring and also create a need for parties to return to court in the event of variations. Accordingly, any proposal of this type should be carefully considered.

Issue 10 – Protecting confidential information

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.

41 In our experience, generally, the Commission effectively maintains the balance between protecting commercially sensitive information and meeting its legal obligations. However, clients do from time to time raise concerns about the protection of confidential information.

What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.

42 It may be desirable to adopt the approach set out in the Australian Competition and Consumer Act 2010 that expressly prohibits disclosure of protected information by the ACCC, subject to a range of exceptions, including disclosure required by its Freedom of Information Act.[1]

43 As noted above, this does not reflect that the New Zealand Commission does not adequately protect confidential information, rather, it is to provide greater comfort to commercial parties providing such information.

What are your views on strengthening the confidentiality order provisions in s 100 of the Act?

44 We favour the approach above as opposed to attempting to deal with the issue via the s 100 process (s 100 appears to be no longer fit for purpose).

Further information

45 Thank you for the opportunity to submit, and please let us know if you have any questions or require further information.

Yours sincerely

Privacy of natural persons

Mark Williamson
Partner

Daniel Street
Partner

Privacy of natural persons

DLA Piper New Zealand

DLA Piper New Zealand

[1] Section 155AAA Consumer and Competition Act.