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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.

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[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?* Donal Curtin
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 Please note this will not be published with your submission.* Privacy of natural persons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 Please note this will not be published with your submission.* Privacy of natural persons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. Economics New Zealand Ltd

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.
	Overall I think it is effective, though I agree that the 'lookback' reviews the Commission has carried out do suggest some modest overreliance on likelihood of post-merger entry/expansion. I also note the OECD's point that it would be helpful to have independent lookback reviews. I agree that both 'creeping' and 'killer' acquisitions were worth revisiting in this review
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.
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.
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.
	I do not agree that the status quo is the best option. Looking at potential improvements, 4(a) in the consultation document looks at a potential way of address creeping acquisitions that with the benefit of hindsight have proved to be cumulatively anti-competitive. I'm not sure why a three year lookback timeframe has been specified: the conduct could well have occurred over a longer period. To take an example, suppose a company with 60% market share 10 years ago made a 1% of market share purchase every other year for a decade,

	taking its market share to 65%. The concern is that, while each one on its own looked unexceptionable at the time, at the end point it becomes apparent that competition has suffered (eg from consumer groups reporting that they now feel a meaningful contraction in consumer choice). A three year timeframe may not capture the full flavour of the harm. And why shouldn't the Commission division considering the merger look back at the full historical picture, especially if, as the consultation document says, s3(7) of the Act already allows them to? And do they even need s3(7) to be able to come to a pro-consumer view on how we got to where we now are? A creeping acquisition tripwire isn't the worst idea in the world, but I wonder if it is really necessary. On the other hand option 4(b), "To clarify and make explicit in the Commerce Act that the 'substantial lessening of competition test' includes 'creating, strengthening, or entrenching a substantial degree of market power in a market'" looks a good idea from several perspectives. It helps deal to the 'killer acquisition' issue (likely relying on the 'entrenchment' limb), which I think is likely to become more relevant over time as digital processes (eg in 'open banking') become more important. And it further aligns us with Australia, which is a self-evident benefit. Personally I would extend the 'creating, strengthening or entrenching' wording to wherever it applies in the wider Commerce Act. The same issues are liable to be in play in non-merger contexts.
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.
	Highly important. Not just for the obvious benefit of business certainty for firms operating in both markets but also because there will be efficiencies from a body of common jurisprudence around an identical test, and because it will facilitate cross-appointees from the two Commissions to work together on issues using the same framework
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	There has been quite extensive discussion overseas (particularly in the US) about whether merger control had been too weak, in the sense that it leaned to Type 2 errors (allowing anti-competitive mergers). From memory the US authorities have, for example, looked back at hospital mergers and in the light of post-merger outcomes have felt that the risks of an accrual of market power had been underestimated. I do not have any strong feelings about whether our regime has a lean towards Type 1 or Type 2 errors: if pressed, I would say it feels broadly in the right place.
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.

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.
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?
	No.
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?
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	I agree with your assessment in the consultation document that "the current voluntary merger regime is working well" (p18). It is true that we don't know what we don't know, and that there could be undetected anti-competitive mergers. But NZ is a small country with a low degree of separation between any two parties, word gets round, and I think it more likely that there genuinely have been few undetected mergers. It's true that the Commission has been more active recently with s47 merger investigations but a large majority warranted no further action
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.

	No as stated above. Two s47 judgements and a s47 settlement since 2008 (and likely since earlier than that) does not suggest a pressing policy issue
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.
	I am attracted by both (a) and (b), less so (c). (a) The stay and/or hold power will fill a gap that was originally designed to be filled by the now defunct 'cease and desist' power which the Commission formerly had. The rationale for that power was that injunctions tended to be difficult for the Commission to obtain. I'm not sure what the hurdle was – whether it was the difficulty of establishing a serious legal or factual issue, or courts' inclination in fairness to the party being injuncted to let the normal dispute process run its course – but it appears is that successful injunctions were few and far between. This left a response timeliness gap for potentially anti-competitive mergers, and time tends to be of the essence. Once business units have been combined, redundancies have occurred, and premises and equipment relocated or rationalised, it can be very difficult to roll back to the status quo. As they say of these circumstances, you can't unscramble an omelette. Hence the introduction of the 'cease and desist' regime to enable timely prevention in the first place. 'Cease and desist', however, was over-restrictively designed, and in practice proved to be no easier than the injunction route: it got used once, from memory, and was then rightly abolished as an overengineered waste of space. It now looks as if we're back to recognising that the Commission needs a good-faith but rapid response tool in its kitbag, and that is the right place to land. (b) A call-in provision would provide a useful intermediate step rather than launching a s47 investigation after the event. It might also be helpful to the merger parties themselves who may innocently not have realised that their proposal raised competition issues. (c) I am dubious about this option. Companies with substantial market power, or large companies, are unlikely to consummate mergers without coming to the attention of the existing Commission market monitoring: they will already be on its radar and in any event are likely to be sufficiently prominent for third parties, in the media for example, to publicise. A lower level of mandatory notification threshold risks generating what is likely to be largely pointless paperwork for the Commission to process. And I am especially sceptical of the value of designating named companies, which seems to me an arbitrarily intrusive option.
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?
	Absolutely yes, as the OECD also recommends. As the review consultation document makes clear, New Zealand is now an outlier in not accepting behavioural undertakings, and this oddity means that mergers which pass scrutiny in other undertaking-accepting countries risk being declined here, with resultant consumer detriment. The consultation document cites the apposite example of Reckitt Benckiser in 2015. I support the second option of amending the Act to allow accepting undertakings, which will have the added benefit of aligning ourselves further with the Australian regime. I am not impressed by arguments alleging that undertaking design is complex or unduly expensive. The Commission regularly and successfully makes far more complex calls (eg in Part IV or other sectoral regulation, or in calculating potential net benefits of an authorisation, or quantifying dynamic efficiency benefits) and I do not expect the costs (which in any event could plausibly be charged back to the parties under the terms of a behavioural undertaking) to be likely to be burdensomely significant.
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.
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?
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
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?
	The diagram on p28 of the consultation document says it all. There is a space where tacit collusion can occur in NZ in a way that would not be allowed in all the jurisdictions we normally compare ourselves with. I support the option of aligning with Australia's position on concerted practices, on the twin bases that it is the right thing to do on its own merits and that it further aligns our two jurisdictions. The third option (designing a series of customised prohibitions) is undesirable. As the consultation document notes, it risks chilling pro-consumer collaboration, and in any event it could well become an exercise in whack-a-mole.
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?
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.

	(a) Yes (b) Yes I'd add that we already de facto have ventured down the industry code route in at least three areas (eg obligations on Fonterra on how to treat its suppliers under DIRA, telco codes under the Telecommunications Act, and a grocery supply code under the Grocery Industry Competition Act). If that's where we're headed, primary legislation sector by sector looks like a very inefficient and slow process, especially given the pressures on the Parliamentary timetable process. I would replicate mutatis mutandis Part IVB of the Australian Act.
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?
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?
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
	This is self-evidently a good idea. It makes no sense to have inconsistent access to types of injunction from one Commission-administered Act to the next.
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.

26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
	They all look sensible and worth implementing.
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
Any other issues	
30.	Are there any other issues that you would like to raise?
General Comments:	

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.