

## 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.	<p>I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue*</p> <p>[To check the boxes below Double click on box, then select 'checked']</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
2.	<p>What is your name?*</p> <p>Ernie Newman</p>
3.	<p>Do you consent to your name being published with your submission?*</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
4.	<p>What is your email address? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
5.	<p>What is your contact number? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
6.	<p>Are you submitting as an individual or on behalf of an organisation?*</p> <p><input checked="" type="checkbox"/> Individual (skip to 8) <input type="checkbox"/> Organisation</p>
7.	<p>If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation.</p> <p><input type="checkbox"/> Yes, I am authorised to make a submission on behalf of my organisation</p>
8.	<p>If you are submitting on behalf of an organisation, what is your organisation's name? Please note this will be published with your submission.</p> <p></p>

9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.
	<div> <input type="checkbox"/> Law Firm           <input type="checkbox"/> Consumer organization           <input type="checkbox"/> Consultancy           <input type="checkbox"/> Think-Tank           <input type="checkbox"/> Advocacy group           <input type="checkbox"/> Business/Private Firm           <input type="checkbox"/> Contractor/SME           <input type="checkbox"/> Registered charity           <input type="checkbox"/> Non-governmental organisation           <input type="checkbox"/> Academic Institution           <input type="checkbox"/> Central government           <input type="checkbox"/> Iwi, hapū or Māori organisation           <input type="checkbox"/> Academic/Research           <input type="checkbox"/> Other. Please describe:         </div>

## 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.
	Abysmal. Look around you – we suffer a pandemic of market failure which has changed the fabric of New Zealand society. To a degree the cause is global, but nevertheless the solution is national. This review could not be more timely.
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.
	Show me any merger that has benefitted consumers. Even the merger of dairy interests that created Fonterra arguably came at a substantial cost to consumers, with the benefits being captured by industry interests. Dispersed ownership and control are nearly always the consumer's friend.
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.
	No. Despite the learned legal arguments mergers nearly always constitute a cost to consumers. As an example look at the conversion of Foodstuffs North Island Ltd from a (decentralised) cooperative to a (centrally governed) private company – while apparently outside the scope of the Act this had a massive negative impact on consumers.
4.	Should the 'substantial lessening of competition' test be amended or clarified, including for:
	<ol style="list-style-type: none"> <li>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?</li> <li>Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)?</li> <li>In relation to just the merger provisions or wherever the test applies in the Commerce Act?</li> </ol> <p>If so, how? Please provide reasons.</p>

	<b>Any</b> lessening of competition is bad. The test has become a playground for lawyers using semantics of the law to defeat the sound practical arguments of the economists who are best placed to make these judgements. The test should be removed or the word “substantial” replaced with “significant.”
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.
	Some alignment with Australia is desirable for pragmatic reasons BUT our new law needs to be stronger than theirs. Why would we copy a country that is suffering an epidemic of market failure like ourselves? We have an opportunity to inject some new thinking and lead the world in practical, robust consumer protection that restores the workable balance we enjoyed in earlier times. Both countries have spent too much time listening to the protests of very large entrenched businesses, and too little listening to SMEs and consumers.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	Zero out of ten – look around you!
<b>Issue 2 – Substantial degree of influence</b>	
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.
	Again the word “Substantial” (“of considerable importance, size or worth”) could be replaced with “Significant (“the quality of being worthy of attention, importance.”)
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/c
<b>Issue 3 – Assets of a business</b>	
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/c
10.	<p>If you consider there is a problem, how should the phrase be amended? For example, by:</p> <ol style="list-style-type: none"> <li>referring simply to “assets”? or</li> <li>should the definition of “assets” in the Commerce Act be further refined?</li> </ol>
	n/c
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand’s voluntary merger regime is working?
	A dismal failure – look at your mortgage, grocery and energy bills!
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	<p>Yes. Again the transition of Foodstuffs North Island from a cooperative to a private company provides a useful example of a massive and far reaching structural change that took place out of public view.</p> <p>All proposed mergers should be published on an accessible register. This would bring them to the attention of the wider community who may see reasons to reject them that are not immediately obvious to regulators.</p>
13.	<p>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:</p> <ol style="list-style-type: none"> <li>A stay and/or hold separate power</li> <li>A call-in power</li> <li>A mandatory notification power for designated companies.</li> </ol>

	A mandatory notification power for ALL companies, perhaps with the ability to apply to the Commission for exemption if notification would cause undue harm.
<b>Issue 5 – Behavioural undertakings</b>	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
	Behavioural remedies seldom work as a solution to structural problems. There should probably be a power to accept them but their use should be rare.
<b>Anticompetitive conduct</b>	
<b>Issue 6 – Facilitating beneficial collaboration</b>	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
	No
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?
<b>Issue 7 – Anti-competitive concerted practices</b>	
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?
	Tacit collusion has become endemic in New Zealand to the point of bordering on corruption. Observations in the banking and supermarket industries shows this. Epic fail for the Commerce Act.
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?
	Yes it should. The best deterrent would be for the penalties to apply to the firms’ officers individually, rather than to the company where they are often shrugged off as just a cost of being in business.
<b>Code or rule-making powers and other matters</b>	
<b>Issue 8 – Industry Codes or Rules</b>	
21.	Do you consider that industry codes or rules could either: <ul style="list-style-type: none"> <li>a. Fill a gap in the competition regulation regime or</li> <li>b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.</li> </ul>
	Possibly, but they are rarely effective. For example, it is hard to see much benefit to consumers from the Commission’s grocery wholesale code.
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?
<b>Issue 9 – Modernising court injunction powers</b>	
24.	Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons
<b>Issue 10 – Protecting confidential information</b>	
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?



<b>Issue 11 – Minor and technical amendments to the Commerce Act</b>	
28.	What are your views on these proposed technical amendments to the Commerce Act?
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand’s competition law?
<b>Any other issues</b>	
30.	Are there any other issues that you would like to raise?
	An overarching principle should be to get these issues out of the hands of lawyers and left to economists and market experts to make the judgements.
<b>General Comments:</b>	



## 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.