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?* Privacy of natural persons
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. Foodstuffs North Island Limited and Foodstuffs South Island Limited
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:

7 February 2025

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TARGETED REVIEW OF THE COMMERCE ACT 1986 – FOODSTUFFS' SUBMISSION TO MBIE DISCUSSION PAPER

Introduction

1 Foodstuffs North Island (**FSNI**) and Foodstuffs South Island (**FSSI**) (together, **Foodstuffs**) welcome the opportunity to submit to the Ministry of Business Innovation and Employment (**MBIE**) on the December 2024 "Promoting competition in New Zealand – A targeted review of the Commerce Act 1986" discussion paper (**Discussion Paper**). Foodstuffs and its members support a regulatory framework that provides certainty, clarity, and promotes efficient markets for the long-term benefit of all New Zealand consumers.

Key Submissions

2 Foodstuffs' key submissions on selected topics in the Discussion Paper are set out below. Schedule One contains responses to the relevant questions posed in the Discussion Paper.

Mergers

Reform of the substantial lessening of competition test

3 Foodstuffs' view is that the substantial lessening of competition test should only be changed if there is a clear benefit arising from the changes. As noted in the Discussion Paper, the legal test for a substantial lessening of competition has been in place since 2001 and is accordingly well understood by market participants and their advisors. Change creates uncertainty and risks chilling merger activity that is pro-competitive and benefits the long-term interests of consumers.

4 Accordingly, Foodstuffs submits that maintaining the status-quo for the legal test is the preferred option.

5 More specifically:

5.1 Mergers are a key part of a well-functioning, competitive and innovative market economy. Accordingly, in the absence of competitive harm to consumers, mergers should be permitted. It is essential that the legal test strikes an appropriate balance between fostering innovation and efficiency, and competition concerns.

5.2 Applying New Zealand case law, the current substantial lessening of competition test provides sufficient flexibility and tools to address the concerns raised in the Discussion Paper. For example, the test for whether a substantial lessening of competition is "likely" appropriately captures the scenario of proposed acquisition of an emerging competitor. An acquisition which materially "entrenches" market power to the long-term detriment of consumers would already be regarded as breaching the current legal test.

5.3 Similarly, with regard to creeping acquisitions, the current forward-looking test already allows consideration of previous acquisition activity and associated aggregation of market power when assessing the competitive effects of a subsequent merger. In the Australian context, there is uncertainty as to how the three-year look back will apply in practice.

5.4 Simply codifying existing positions risks creating uncertainty without a corresponding benefit. While there may be benefits from aligning with Australia in the competition space, these benefits are less evident where the changes are untested. In Foodstuffs' view, it would be premature to simply make changes for the sake of alignment, particularly before the impact of those changes have been assessed in the Australian context. Laws also need to be tailored to the local environment, context and market conditions.

5.5 What is critical is that the existing test is applied in a consistent, principled and in a way that is facts based.

6 Finally, as noted by MBIE, the substantial lessening of competition test is now set out consistently throughout the Commerce Act. Changing the legal test only in the merger context would give rise to uncertainty as to the application of the substantial lessening of competition test to anticompetitive behaviour with very broad application to all activities undertaken by New Zealand businesses. If the changes were to be rolled out beyond the merger provisions (which has not been the approach taken in Australia), significant further work and analysis will be required.

Substantial degree of influence

7 Foodstuffs agrees that merger analysis becomes more complicated in the context of partial acquisitions. There is a balance to be struck between the certainty created by a brightline test and the inevitable complexity in developing and applying that test in practice. Foodstuffs' perspective is that the existing approach taken by the Commission brings the appropriate focus on the substantive competition impacts of a partial acquisition rather than whether a brightline test has been technically satisfied. There is also a risk of importing legal tests from other areas or jurisdictions where there may be different policy considerations.

Assets of business

8 Part 3 of the Commerce Act is entitled "business acquisitions". Extending the scope of Part 3 to any "assets" without reference to a "business" risks capturing business-as-usual transactions that are, themselves, simply part and parcel of a competitive process.[1] In Foodstuffs' view, this creates unnecessary complexity, and as a minimum, some form of carve-out would be required, as is the case under the Australian Competition and Consumer Act 2010.

9 With regard to the acquisition of land, the development of the right store in the right location and at the right time is instrumental to the delivery of Foodstuffs' retail grocery service offering for customers. This is inherently a competitive process involving significant capital and planning. As the Commerce Commission noted in its 2024 Annual Grocery Report, this is very different to buying and holding on to properties without any specific plans for its use or development (i.e. "land banking"). Foodstuffs does not buy land to prevent competition or for the purpose of capital gain.

Mergers outside the clearance process

10 We agree that the voluntary clearance regime is working well in New Zealand and that it is not necessary to implement a formal notification regime, either generally or for businesses that are

[1] Noting that the provisions of the relevant contract and any associated conduct would be subject to Part 2 of the Act.

over a certain size or have substantial market power.[2] With regard to the proposal to add to the Commission's powers to block or call-in anti-competitive mergers, our view is that the existing tools available to the Commission are sufficient to achieve the purpose of the Commerce Act. Participants are very aware that the Commission has increased its enforcement activity and willingness to take steps where it becomes aware of a potential merger giving rise to competition concerns. The potential penalties and costs associated with proceeding with a merger in the face of Commission objections is a material deterrent.

Behavioural undertakings

11 Foodstuffs is open to allowing the Commission to consider behavioural undertakings when assessing the effects of a potential merger that, properly analysed, does not otherwise meet the competition test. Foodstuffs agrees that the circumstances in which behavioural undertakings are accepted to mitigate competition concerns from a merger is likely to be limited, as is the case in overseas jurisdictions. There is a clear compliance burden for both the regulator, and the parties subject to the undertaking.

Anticompetitive conduct

Beneficial collaboration

12 Foodstuffs' experience is that it has been able to participate in a range of beneficial collaboration under the current Commerce Act settings (for example, sustainability initiatives and emergency response to Covid-19).

13 However, Foodstuffs is generally supportive of exploring further options to facilitate beneficial collaboration.[3] This could include the ability to notify the Commission of a proposed collaboration, which is then authorised, unless the Commission objects within a particular time period.

14 At a minimum, it would be beneficial for the clearance regime that is available for contracts, arrangements or understandings to be extended to allow the Commission to assess any contract, arrangement or understanding for breach of the Commerce Act. Currently, the clearance regime only applies to a collaborative activity that contains, or may contain, a cartel provision.

Concerted practices

15 Foodstuffs does not engage in any form of coordinated conduct that is designed to avoid competition or otherwise amounts to tacit collusion between competitors. This is the case irrespective whether there is technically any "understanding" as defined by the Courts.

16 If it is considered that there is a "gap" which needs to be addressed, Foodstuffs agrees with MBIE that it is important that any solution does not inadvertently capture and chill pro-competitive and beneficial collaboration. Linking any prohibition to a substantial lessening of competition, as is the case in Australia, may be helpful in this regard.

Industry Codes and rulemaking powers

17 Foodstuffs' view is that any further industry specific regulation should be carefully assessed on a case-by-case basis and require primary legislation. Market intervention of the type contemplated by industry codes should be rare and respond to a clear failure of general competition law to address relevant competition concerns. This is best achieved via the existing market study power and subsequent application of the democratic process, including

[2] In practice, such businesses are more likely to use the Commission's courtesy notification process where there is any competition risk identified

[3] Noting that section 184 of the Grocery Industry Competition Act 2024 already contemplates that the Minister may by regulation exempt collective negotiation from sections 27 and 30 of the Commerce Act. No changes would be required in this regard.

the rigour of select committee scrutiny, to assess the costs and benefits of regulatory intervention.

18 Rather than attempting to develop additional regulatory frameworks under the Commerce Act, Foodstuffs endorses a focus on facilitating the process of competition in markets, including by removing or reducing regulatory barriers to entry. Foodstuffs' view is that the prospect of further industry specific regulatory frameworks may themselves be a barrier to entry, and risk deterring entry, expansion and innovation for the benefit of consumers.

Confidential information

19 Foodstuffs agrees that appropriate safeguards to protect sensitive commercial information is critical to the operation and function of the Commerce Commission. To date, the status quo has provided Foodstuffs with the confidence to share a very significant amount of information on a voluntary basis. However, Foodstuffs notes that the Australian Competition and Consumer Act 2010 expressly prohibits disclosure of protected information by the ACCC, subject to a range of exceptions, including disclosure required by its Freedom of Information Act.[4] Inclusion of a similar, express provision may assist with giving parties greater confidence when sharing confidential information to the Commission.

20 Foodstuffs favours exploring this approach rather than seeking to amend the section 100 order regime, which in its view is not currently fit for purpose.

Further information

21 Thank you again for the opportunity to submit on the Discussion Paper. Please contact the writer with any queries. Foodstuffs looks forward to working with MBIE and other stakeholders as the reform progresses.

Yours faithfully,

Privacy of natural persons

Julian Benefield
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[4] Section 155AAA Consumer and Competition Act.

SCHEDULE ONE – FURTHER SUBMISSION ON KEY ISSUES AND TOPICS

QUESTION NUMBER	QUESTIONS POSED	FOODSTUFFS' RESPONSE
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.	A certain and objective legal test for blocking a merger should be at the heart of any effective merger regime. Foodstuffs' view is that, appropriately applied, the current legal test provides sufficient flexibility and tools to address the concerns raised regarding the regime in the Discussion Paper.
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.	Mergers are a key part of a well-functioning, competitive and innovative market economy. Wrongfully blocking a merger is detrimental to the long-term interests of consumers, including through loss of potential innovation and efficiency gains.
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.	This would require detailed analysis of a significant number of mergers since 2001 which has not been undertaken by Foodstuffs.

QUESTION NUMBER	QUESTIONS POSED	FOODSTUFFS' RESPONSE
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.	For the reasons set out in paragraph 5, Foodstuffs' view is that the substantial lessening of competition test does not need to be amended or clarified in the manner proposed.
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.	As discussed in paragraph 5, Foodstuffs' view is that while there may be benefits from aligning with Australia in the competition space, these benefits are less evident where the changes are untested. Laws also need to be tailored to the local environment, context and market conditions.
6	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?	The current substantial lessening of competition test appears to strike the appropriate balance. As with all legal tests, this must be applied objectively.
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.	Foodstuffs' view is that the current legal test of "substantial degree of influence", as elaborated on in the *NZ Bus* decision, sufficiently captures the broad circumstances in which a firm may influence the activities of another.

QUESTION NUMBER	QUESTIONS POSED	FOODSTUFFS' RESPONSE
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.	As submitted in paragraph 7, Foodstuffs agrees that merger analysis becomes more complicated in the context of partial acquisitions. However, Foodstuffs' view is that a brightline test of whether a party has a substantial degree of influence (and assessing whether that test has been met) may displace the focus and analysis on the substantive competition issues at play.
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?	Foodstuffs' view is that, as it stands, the definition of "assets of a business" is sufficiently clear to capture transactions that are, and ought to be, regulated by the merger provisions of the Commerce Act.
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?	Foodstuffs' view is that the status quo definition be retained to avoid inadvertent and unintended capturing under the merger regime of business-as-usual transactions that are part of the competitive process.
Issue 4 – Mergers outside the clearance process		
11	What are your views on how effectively New Zealand’s voluntary merger regime is working?	We agree that the voluntary clearance regime is working well in New Zealand and that it is not necessary to implement a formal notification regime, either generally or for businesses that are over a certain size or have substantial market power.
12	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.	Foodstuffs perspective is that the combination of the existing Commerce Act and the Commission's recent focus on non-notified mergers provides appropriate deterrents for parties considering mergers giving rise to competition concerns.

QUESTION NUMBER	QUESTIONS POSED	FOODSTUFFS' RESPONSE
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.	Foodstuffs' view is that the existing tools available to the Commission are sufficient to achieve the purpose of the Commerce Act. Participants are very aware that the Commission has increased its enforcement activity and willingness to take steps where it becomes aware of a potential merger giving rise to competition concerns. The potential penalties and costs associated with proceeding with a merger in the face of Commission objections is a material deterrent.
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?	Foodstuffs is open to allowing the Commission to offer behavioural undertakings for mergers that, when properly analysed, do not otherwise meet the competition test. Foodstuffs' view is that the circumstances in which behavioural undertakings are accepted to mitigate competition concerns are likely to be limited, as is the case in overseas jurisdictions. Behavioural undertakings should be used sparingly (and only in circumstances where an undertaking would mitigate competition concerns) to avoid compliance burdens for both the regulator, and the parties subject to the undertaking.
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.	As discussed at paragraph 12, Foodstuffs has been able to undertake and participate in a range of beneficial collaborative activities under the current settings. However, Foodstuffs recognises that it has the benefit of access to specialist legal advice to ensure that any collaboration does not raise competition concerns.

QUESTION NUMBER	QUESTIONS POSED	FOODSTUFFS' RESPONSE
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?	Foodstuffs is generally supportive of exploring further options to facilitate beneficial collaboration.
17	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?	Foodstuffs supports a modified option 3, under which any collaborative activity could be notified, and the Commission would have to object and call-in the arrangement if it had concerns on competition or public benefit grounds. Foodstuffs is also supportive of exploring Options 1 and 2 as these could increase certainty for businesses and consumers.
18	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?	Foodstuffs sees certainty and flexibility as key design features of any new proposal 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?	Foodstuffs' view is that from a practical compliance perspective "tacit collusion" between firms and competitors has been adequately captured by the broad interpretation given to "understanding" by the Courts.
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?	Foodstuffs' view is that prohibitions on concerted practices, to the extent that they need to be addressed, should not inadvertently capture and chill pro-competitive collaboration. In this regard, it may be helpful for any inclusion of concerted practices to the Commerce Act being subject to a competition test.

QUESTION NUMBER	QUESTIONS POSED	FOODSTUFFS' RESPONSE
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.	Foodstuffs' view is that the tools available to the Commerce Commission under the Commerce Act are sufficiently wide and flexible to address competition concerns in all sectors and markets. Specific intervention by way of bespoke industry regulation should be done rarely, and through primary legislation (and therefore subject to the resulting democratic processes, procedure and scrutiny).
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?	As above, Foodstuffs' view is that industry codes created under the Commerce Act are not necessary. In any event, specific market intervention of the type contemplated should be done on a case-by-case basis, and after careful analysis and consultation with participants and stakeholders.
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.	Foodstuffs' view is that, as currently calibrated, the Commission's approach to confidential information appropriately balances the concerns of public availability with protecting the confidential information of parties. As noted at paragraph 20, under the status quo, Foodstuffs has voluntary disclosed a significant amount of commercially sensitive information.
26	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.	Foodstuffs' notes that the Australian Competition and Consumer Act 2010 expressly prohibits disclosure of protected information by the ACCC, subject to disclosures required by law. Such an approach could be explored in New Zealand to give parties greater certainty/confidence when sharing confidential information with the Commission.
27	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?	Foodstuffs' view is that section 100 orders are not currently fit for purpose. Foodstuffs submits that exploring an approach like that of Australia would be preferable to strengthening the section 100 regime.