

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>Suzanne Chetwin</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 Please note this will not be published with your submission.*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 Please note this will not be published with your submission.*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 type="checkbox"/> Individual (skip to 8) <input checked="" 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 checked="" 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>Grocery Action Group Inc (GAG)</p>

9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.
	<input type="checkbox"/> Law Firm <input type="checkbox"/> Consumer organization <input type="checkbox"/> Consultancy <input type="checkbox"/> Think-Tank <input checked="" 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:

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.	<p>What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.</p> <p>The current merger regime is clearly not working. For example, the Commerce Commission’s Market Study into our supermarkets in 2022 found we pay more for our groceries than just about anywhere else in the world and the supermarkets are too profitable for a market that is truly competitive. The fact that the commission can only look at a “significant lessening of competition” as the test for accepting or declining merger applications is too narrow. The correlation between these facts and the steady merging of our supermarkets into two major players, the noted lack of competition among banks and the building industry product supply industry illustrate how poor the merger rules have proved to be in ensuring there is competition and fair pricing.</p>
2.	<p>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.</p> <p>It would likely maintain competition in the market area by keeping limits on the market power of incumbents. That would likely keep downward pressure on prices. There can be exceptions when a merger works to the benefit of consumers but these are rare. Currently the Commission has declined the Foodstuffs North and South Island merger proposal (under appeal). One of the reasons for blocking the merger was the significant lessening of competition for suppliers, which would result in lesser choice and higher prices for consumers. If the merger rules had contained tests for consumer benefit, the Commission would have had an easier route to declining. In any situation where monopolies, duopolies or monopsony’s exist, the consumer loses.</p>
3.	<p>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.</p> <p>The test does not work well. Witness the supermarkets’ situation. The Commerce Commission itself tried to block earlier mergers but was overturned by the Privy Council on a technicality. But creeping mergers in all kinds of industries (banks, building industry, energy companies beggars belief. In the 1980s there were five or six large supermarket chains. Foodstuffs then was a genuine co-operative of grocery store owners. Then there were two Foodstuffs companies in the North Island and two in the South each operating separately and not collaborating. Their retail stores could buy directly from manufacturers and growers if they could get a better deal</p>

	<p>than from their own warehousing. Their New World, Pak'nSave and Four Square stores operated independently and they competed.</p> <p>Then the four regional Foodstuffs companies merged to three then two, and recently they attempted to merge into one which has been blocked by the Commerce Commission but is being appealed.</p> <p>Along the way Foodstuffs North Island has become a private company with its supermarket owner lessees running franchises. And somehow they keep alive the idea they are still a cooperative.</p>
4.	<p>Should the 'substantial lessening of competition' test be amended or clarified, including for:</p> <ol style="list-style-type: none"> 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? Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? In relation to just the merger provisions or wherever the test applies in the Commerce Act? <p>If so, how? Please provide reasons.</p>
	<p>Yes most certainly to a) and b) and in any case whether a) and b) are clarified and/or amended our law in New Zealand must be aligned with Australia's.</p> <p>For c) as well, the most immediate way forward and the most helpful to consumers and business alike will be if New Zealand aligns with Australia as a matter of urgency.</p>
5.	<p>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.</p>
	<p>Extremely important!! It's importance cannot be overstated. New Zealanders feel enough like the poor cousin. Without at least consumer protections as good as those in Australia the disparities will only widen. Some of our biggest businesses – supermarkets, banks, have head offices in Australia. Alignment means easier access to both markets, with both playing by the same rules.</p>
6.	<p>How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?</p>
	<p>Clearly the ever reducing evidence of competition in our markets – especially supermarkets – demonstrates unequivocally our current merger regime is far too passive and weak.</p> <p>In fact the question misses the mark. If a merger is assessed as to be likely to result in more market power for the participants and/or higher costs et al for consumers, there is absolutely no balance that should be struck between too much, or not enough intervention. The Commerce Act exists to protect the rights of consumers.</p>

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.
	No. The test should replace the word ‘substantial’ with ‘any’ degree of influence’ We need to get real about issues like this. In this context the wriggle room allowed by the word ‘substantial’ is vast. No degree of influence should be allowed. The Commerce Commission should also look at a “consumer benefit” test, which would squarely reflect that consumers must benefit from companies being able to merge.
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.
	Yes. It should be amended to provide criteria – the clearer the law the better the outcome. And it would help reduce the Commerce Commission workload.
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?
	Assets of a business are usually thought of as tangible whereas many are intangible. An amendment should include assets to expressly include for example all forms of intellectual property.
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"> referring simply to “assets”? or should the definition of “assets” in the Commerce Act be further refined?
	Add possible inclusions eg ‘including all intellectual properties’ and there may well be other refinements needed to strengthen and clarify
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand’s voluntary merger regime is working?

	It's weak. When companies merge or take over parts of another business and do not seek Commerce Commission clearance, the delay before the consequences begin to impact markets can be months if not years down the track by which time substantial damage can be done.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	Yes – why would a business not notify its proposed merger? To conceal something perhaps? Setting up a publicly accessible register could help.
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> <ul style="list-style-type: none"> a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.
	C) seems optimal to apply to our supermarket duopoly.
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?
	How is the Commerce Commission expected to assess behavioural changes they say they would undertake? They may help at the margin. If accepted, they must be mandatory and subject to early, and regular review.
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?
	Clearly there is tacit collusion between Food Stuffs South Island and Foodstuffs North Island - they have agreed not to compete in each other’s Island, even though the two organisations are entirely unlike each other. We need wording in the Commerce Act to criminalise such behaviour.
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 of course .The Commerce Act should expressly forbid practices of the sort, with penalties spelt out.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	<p>Do you consider that industry codes or rules could either:</p> <ul style="list-style-type: none"> 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.
	Where industry codes assist to make business practices transparent and made public then yes for sure though they are a small stop gap measure and may do little to remedy the lack of competition issue. Regulations that sit under the Grocery Industry Competition Act 2023, perform a useful purpose. But if the primary legislation is not strong enough the secondary regulations and codes cannot do their job.
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

	Yes– we can’t leave it to those under scrutiny to set their own performance standards. As above mandatory reporting and review should be part of performance requirements.
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.
	The overriding objective of the Commission must be to rule in the consumers benefit. From a consumer/advocate perspective it is hard to know what you don’t know. Powerful and well-resourced applicants may well present so-called commercially sensitive information to the Commission. The Commission itself must be sufficiently resourced to enable it to make proper decisions regarding what is confidential and what isn’t. The principle of open submissions should be strongly upheld.
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?

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:	
<p><i>Submission on 'Promoting competition in New Zealand – A targeted review of the Commerce Act'.</i></p> <p>By the Grocery Action Group (GAG) which was set up to bring down the prices of groceries for all New Zealanders.</p> <p>This review is of extreme importance to New Zealand's future in this time of a cost of living crisis.</p> <p>Paul Romer, the Nobel Award winning economist (2018), is credited with the quote "A crisis is a terrible thing to waste." We should certainly be taking heed what with the manifold crises New Zealand is facing.</p> <p>The crises include the cost of living, (especially grocery prices), and housing (eg building materials), as well as in banking and energy, with the common factor in each market of these being a demonstrable lack of competition.</p> <p>Fortunately Mr Romer's work and others like him have pointed out where we might look for policies to address our market failures, policies which would focus on, the establishment and maintaining in our markets of more stringent rules or regulations to compel the need for far more intense competition. He showed, for instance, how economic forces such as competition can function as a driver of long term economic growth. Indeed they govern the willingness of business to adopt new ideas and innovation.</p>	

He also foresaw how knowledge can function as a driver of long term economic growth, the sort of growth we see in the likes of the gigantic US corporations such as Google, Microsoft, Meta et al, the sort of growth based not on resources and land at all, but on harnessing technical progress. Admittedly, those tech giants have become monopolies themselves but the point remains, competition promotes innovation.

In brief, to flourish, markets need competition like plants need water, not only to ensure consumers get the best prices and service but also for business to thrive and to sustain our economic wellbeing. Such is the importance of this review of the Commerce Act.

Paul Romer built on the work of an earlier Nobel Economics Award winner, Robert M. Solow (1987) whose work from the 1950s established beyond debate the overriding importance of innovation ('technical progress') in achieving economic growth. For instance in 1957 Mr Solow calculated about 80 percent of the economic growth in US output per worker was attributable to technical progress. (Technical change is said to include invention, innovation and the diffusion of technical processes).

Mr Solow demonstrated that economic growth consisted of two components: the first could be attributed to the growth in wage labour and capital – and the second was productivity. Productivity is the measure of efficiency with which resources such as labour, capital and land are used to produce goods and services. It's this efficiency lever by which we achieve increases in the productivity that New Zealand is desperately short of. Because economists agree that ultimately, increases in productivity are the only way to achieve higher living standards. (J. Schumpeter et al)

In brief, it's no stretch at all to state more innovation will deliver higher productivity thereby rescuing our economy, and the way to achieve more innovation is through more intense market competition.

(As a significant foot note to this, economist Clayton Christensen has said: "Disruptive innovations are critical to long term success in business."

But we don't have to reach back into the 1950s to appreciate the history of economic growth and innovation, a history New Zealand seems blithely ignorant of. On February 4 this year, Lina M. Khan, chair of the US

Federal Trade Commission until a few days ago, wrote the following in the New York Times. The article is worth quoting at length.

“When Chinese artificial intelligence firm DeepSeek shocked Silicon Valley and Wall Street with its powerful new A.I. model, Marc Andreessen, the Silicon Valley investor, went so far as to describe it as “A.I.’s Sputnik moment.” ... Mr. Andreessen wasn’t calling on the federal government to start a massive new program like NASA, which was our response to the Soviet Union’s Sputnik satellite launch; he wants the U.S. government to flood private industry with capital, to ensure that America remains technologically and economically dominant.

“As an antitrust enforcer, I see a different metaphor. DeepSeek is the canary in the coal mine. It’s warning us that when there isn’t enough competition, our tech industry grows vulnerable to its Chinese rivals, threatening U.S. geopolitical power in the 21st century.

Although it’s unclear precisely how much more efficient DeepSeek’s models are than, say, ChatGPT, its innovations are real and undermine a core argument that America’s dominant technology firms have been pushing — namely, that they are developing the best artificial intelligence technology the world has to offer, and that technological advances can be achieved only with enormous investment — in computing power, energy generation and cutting-edge chips. For years now, these companies have been arguing that the government must protect them from competition to ensure that America stays ahead.

“But let’s not forget that America’s tech giants are awash in cash, computing power and data capacity. ...America’s tech giants have seemingly been challenged on the cheap.

“After companies like Google, Apple and Amazon helped transform the American economy in the 2000s, they maintained their dominance primarily through buying out rivals and building anticompetitive moats around their businesses.

“On the other hand, the government’s decision to enforce antitrust laws against what is now AT&T Inc., IBM and Microsoft in the 1970s through the 1990s helped

create the market conditions that gave rise to Silicon Valley's dynamism and America's subsequent technological lead. America's bipartisan commitment to maintaining open and competitive markets from the 1930s to the 1980s — a commitment that many European countries and Japan did not share — was critical for generating the broad-based economic growth and technological edge that catapulted the United States to the top of the world order.

"While monopolies may offer periodic advances, breakthrough innovations have historically come from disruptive outsiders, in part because huge behemoths rarely want to advance technologies that could displace or cannibalize their own businesses. Mired in red tape and bureaucratic inertia, those companies usually aren't set up to deliver the seismic efficiencies that hungry start-ups can generate.

"The recent history of artificial intelligence demonstrates this pattern.

"At the Federal Trade Commission, I argued that in the arena of artificial intelligence, developers should release enough information about their models to allow smaller players and upstarts to bring their ideas to market without being beholden to dominant firms' pricing or access restrictions. Competition and openness, not centralization, drive innovation.

"Enforcers and policymakers should be wary. During the first Trump and then the Biden administrations, antitrust enforcers brought major monopolization lawsuits against those same companies — making the case that by unlawfully buying up or excluding their rivals, these companies had undermined innovation and deprived America of the benefits that free and fair competition delivers. Reversing course would be a mistake.

"The best way for the United States to stay ahead globally is by promoting competition at home."

(Stop Worshiping the American Tech Giants, By Lina M. Khan, NY Times, 4/2/2025)

If we in New Zealand were wealthier we might be able to harness just the wage labour and capital part of the productivity equation as we have done in the past, by importing capital. Today is different because, as we have

noted, economic growth for the past two decades or so has been driven mostly by the acquisition and harnessing of knowledge- based technology.

If we were somehow wealthier too, the issues facing us might be more manageable. Unfortunately we haven't saved enough to stem our downward economic growth trajectory and now the limitations on our choices are multiplying, resulting in those market crises.

We place the blame for this squarely on the lack of market competition. In sectors such as supermarkets the lack of competition resulted in them consolidating monopoly or duopoly power.

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.