SUBMISSION

VERSION 1.1

7 FEBRUARY 2025

HABILIS

SUBMISSION ON THE COMMERCE ACT 1986 REVIEW: THE STRUCTURAL FAILURE OF COMPETITION POLICY IN AOTEAROA

HABILIS NEW ZEALAND LIMITED

This submission is made by Kent Duston, Principal Consultant and Managing Director of Habilis New Zealand Limited.

Habilis NZ is a social investment and economic development consultancy based in Tamaki Makaurau Auckland. We provide economic and social investment analysis, advice and guidance to central and local government, iwi, NGOs and the private sector across the country, with a focus on regional Aotearoa New Zealand. The business has been undertaking this work since 2015.

We have a strong interest in competition because we believe that open and efficient markets can bring substantial benefits to whānau. But Aotearoa is suffering from too many oligopolies extracting our national wealth, which in many cases is exported and used to enrich overseas shareholders – and in our work in regional Aotearoa, we see these adverse effects every day.

We have therefore engaged with the Commerce Commission on a number of matters, including the banking market study, the Foodstuffs merger, and the NZ Post/PBT Couriers acquisition, amongst others. It has not been a pleasant experience – and we think there are structural changes necessary in how the Commission functions.

However, we are optimistic that with some improvements, the Commission can once again become the effective regulator the nation needs.

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Privacy of natural persons

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CONTENTS

The Commerce Commission is the most expensive agency in the public sector – not because of its expenditure, but because of the tens of billions of dollars its poor decisions are costing the economy.

In his recent State of the Nation speech, Prime Minister Christopher Luxon emphasised the Government's focus on competition:

> Too often we see reports of Kiwis getting a raw deal because of a lack of competition. In banking, energy, retail, construction and groceries. I'm up for action.

Thanks in part to the Commerce Commission's work on market studies, we can begin to put numbers to the raw deal for Kiwis:

- The Australian-owned banks are collectively extracting $3.5 billion a year in unearned profits
- The supermarket duopoloy is stinging consumers nearly $500 million in excessive margins
- The electricity gentailers are receiving $4.2 billion more a year in profits than is justified.

In these sectors alone, consumers are being fleeced to the tune of $8.2 billion every year – more than $150 million per week. It's impoverishing whānau and businesses and the entire nation.

We have laws that regulate the activities of companies to ensure they don't abuse their market power, primarily in the form of the Commerce Act 1986. But what we don't have is an effective regulator that enforces those laws, and brings an end to the raw deals.

The Commerce Commission is tasked with giving effect to the Commerce Act – but as the lamentably long list of profiteering oligopolies shows, it is entirely ineffective in this role. In fact, the Commission has been the primary architect of most of the oligopolies that are now holding back our economy.

The Commerce Commission routinely approves mergers and acquisitions that later result in excessive market power, doing so in the banking and grocery sectors in particular. And it sits idly by while the resulting oligopolies abuse their market power to the detriment of consumers – despite the raw deal the Prime Minister describes, the Commission has not taken legal action against a major corporate for abuse of market power in nearly 15 years.

The poor performance of the Commission is entirely surprising, given the clear direction it has received from its Minister, Andrew Bayly, and the effective governance from the Commissioner, Dr John Small. And while there are improvements that can be made to the Commission's legislative powers, its current lack of action over competition issues is not a direct result of legislative shortfalls.

Rather, the Commission is suffering from operational and leadership failures. It seems to think its role is not to solve competition problems, but merely to supervise the dysfunction in our economy.

These operational failings are exacerbated by a strong thread of institutional cowardice: despite exhortations from its Minister to be a brave litigator, the Commission returned 50% of its legal budget in FY2023/24 as it simply didn't spend it. The Commission seems to have a very strong bias in favour of writing reports rather than prosecuting corporate malfeasance.

There are areas of the Commission that are operating effectively, such as the Telecommunications Commissioner and the market studies team, to name just two.

But the high quality work being produced by the market studies team underlines the degree of leadership failure at the Commission – six months after the study into personal banking identified an excessively profitable oligopoly and widespread consumer harm, nothing has been done to address the *prima facie* market abuse that is allowing the four Australian-owned banks to reap excessive profits from New Zealanders.

The failures of the Commission are costing the country dearly: around $10 million a day in unjustified banking profits continue to flow to international shareholders, with no sign the Commission ever intends to staunch the flow.

The impacts are easy to see, and in this paper we detail a number of them. And the root causes of the Commission's failures are likewise easy to identify – the exclusion of consumers as stakeholders, a high degree of regulatory capture by the mergers and acquisitions industry, significant shortfalls in analytical capabilities, poor risk analysis, and engagement failures.

We are strong supporters of free and competitive markets, and the foundational requirements for efficient markets include clear rules and effective regulation. The systemic failures of the Commission are depriving us of that second essential component. To state the obvious, this isn't good enough.

We are recommending significant changes to the Commission:

1. A complete review and overhaul of the leadership structure of the Commission
2. An independent review of the culture, operational performance and structure of the organisation
3. An overhaul of risk management, delegations, ethical standards and engagement approaches
4. The creation of a Management Board, reporting to the Commissioners
5. The creation of a consumer voice function and its embedding within decision making
6. An independent review and complete overhaul of the methodological basis for decision making about markets in Aotearoa.

Despite these wide-ranging and structural recommendations, we reiterate our unqualified support for the Commissioner, Dr John Small.

However, as stakeholders in much of the work undertaken by the Commission, we have no confidence in the Chief Executive, Adrienne Meikle, and remain concerned about the ethical lapses and regulatory capture that has occurred under her leadership.

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Current competition policy is badly failing Aotearoa. From banking to supermarkets, building supplies to electricity, there is overwhelming evidence of oligopoly behaviour and dysfunctional markets.

The discussion paper for the review gives the impression that competition is mostly effective in Aotearoa, but both the OECD assessments and reviews of specific markets give lie to this contention. There are widespread issues with uncompetitive markets dominated by oligopolies, which are causing significant and lasting harm to the nation.

This state of affairs is the direct responsibility of the Commerce Commission, which is failing in its central duty to promote competition for the long-term benefit of consumers. Over the last 20 years, the Commission has failed to give effect to its legislative obligations in two areas:

- It has failed to prevent undue consolidation in key markets, and has midwifed the formation of oligopolies by approving mergers and acquisitions that should never have proceeded, and
- It has taken no material action to constrain or unwind the resulting oligopolies, giving *carte blanche* to companies to indulge in undue enrichment at the expense of consumers.

While there are indeed some issues with the Commerce Act itself – which we will address in this paper – the core of the problem is the structural under-performance of the Commerce Commission over an extended period.

The Commission's failures have a number of distinct factors:

1. The Commission does not regard consumers – the people and organisations that make up markets – to be legitimate stakeholders, so the consumer viewpoint has been expunged from consideration of mergers and acquisitions, and in the resulting calculus of effects.
2. The Commission is suffering from a very high degree of capture by the mergers and acquisitions industry, has a revolving door of staff that circle between the Commission and the competition law firms that benefit from light-handed regulation, engaging in practices to the benefit of the mergers and acquisitions industry that are ethically concerning.
3. The over-reliance on a competition law viewpoint means the Commission's analysis of competition issues is consistently poor, subjective rather than objective, and shows little evidence of the quantitative analysis that should be used to inform better quality decisions on mergers and acquisitions.
4. The failure to conduct effective analysis stems in turn from outdated methodologies and ineffective risk assessment, with an emphasis on process rather than outcome.

Each of these aspects is discussed in more depth later in this paper.

In its Economic Survey in May 2024, OECD sounded the alarm about the lack of competition in Aotearoa New Zealand, and the negative impacts on our wealth and productivity.

The OECD is not normally regarded as a hotbed of left-wing ideology, and has typically been in favour of open economies, deregulation and privatisation. But even the OECD is now stating in very direct language that Aotearoa is suffering from uncompetitive oligopolies and a lack of effective regulatory response. This goes to the heart of the Commission's leadership and organisational failures:

> Fostering competition in New Zealand markets not only requires specific efficient sectoral regulation and/or structural intervention. It would also benefit from a clearer and reinforced overall policy framework, including more central agency competition policy analysis with a wider perspective, as well as greater cooperation between competition policymakers, regulators and consumer protection agencies and sometimes greater coherence of legislation and case law. This is particularly true for digital markets, which require new and better regulations.

Obviously, the Ministerial-directed review of the Commerce Commission is intended to progress this agenda. However, it is apparent there are leadership and organisational shortfalls in the Commission that are impeding any meaningful progress.

For instance, as per earlier OECD recommendations, s36 of the Commerce Act was strengthened in a 2022 amendment to provide greater enforceability and higher penalties. This amendment had strong cross-party support, so the Commission has a clear political mandate; however, the powers remain completely unused. This is not because of a lack of corporate malfeasance that justifies regulatory intervention; rather, there is a persistent issue of timid and ineffective leadership, and a strong culture within the Commission of institutional cowardice.

It is apparent from the s36 amendment that more legislative powers are not the solution to the Commission's unwillingness to perform its essential regulatory role; rather, major organisational reform is required.

Aotearoa New Zealand does not have competitive markets in key sectors of the economy, resulting in direct harm to consumers and businesses, and long-term negative impacts across all economic activity.

Over the last few years, the Commerce Commission has undertaken a series of market studies into the performance of different sectors of the economy – including building products, supermarkets and banking. These market studies have largely been seen as a response to consumer and political concerns about excessive market power and excessive profitability.

The market study process is well entrenched in overseas regulators, and the quality of the work being produced by the Commission's market studies team has been very good.

The market studies themselves do not paint a pretty picture: they conclude there has been the formation of excessively profitable oligopolies in key sectors of our economy, to the detriment of consumers. In all cases, the unjust appropriation by oligopoly companies runs into the tens of billions of dollars. On the following page we detail the impacts of the lack of competition in just the banking sector alone.

The Commission is a direct contributor to these extensive economic harms in two major ways:

The Commission seems incapable of making rational informed decisions about mergers and acquisitions, relying on poor quality subjective commentary and insufficient economic analysis, and thus approving mergers that should be declined

Having fostered uncompetitive markets and encouraged the formation of oligopolies, the Commission refuses to take action under the Commerce Act to mitigate the harms and restore competitive pressure.

In effect, the Commission fails to perform its statutory role in two key areas of competition law – not because there is a lack of legislative effectiveness or political will or effective governance, but because of the leadership and operational failures within the organisation. The root causes and likely remedies are explored later in this document.

While the Commission's market studies are very good summations of the issues and the harms in key markets, they are entirely coy about the role of the Commission in creating the very oligopolies they are now documenting.

To highlight three specific examples:

1. In 2003 the Commerce Commission approved the acquisition of the National Bank by ANZ, reducing the number of banks from five to four, creating a single bank with 40% of the market. There is a straight line to be drawn from this decision to the entrenchment of the Australian-owned banks, their dominance of the market and the resultant multi-billion dollar harms to consumers and the economy.
2. In 2002 the Commerce Commission stood idly by as Progressive Enterprises purchased Woolworths and reduced the number of supermarket chains from three to two, resulting in the entrenchment of our current excessively profitable grocery duopoly, whose excessive margins and poor product provision cause the significant harms to suppliers and consumers detailed in the Commission's market study.
3. In 2022, the Commission approved the acquisition of some ITM building supplies companies by Fletcher Distribution, despite a market study into the lack of competition in the building products industry being underway at the time. How further consolidation was meant to improve competition in an already overly-concentrated sector is left as an exercise for the reader.

Reading the clearance documents for each of these poor quality decisions is an entertaining stroll through some truly magical thinking; for instance, the assertion that a merger of ANZ and National Bank would not be anti-competitive because a new banking startup would imminently arise from the supermarket sector. As should be evident to all, this never occurred.

None of this history of the Competition Branch of the Commerce Commission acting against our national interests is traversed in the various market studies; it's as if oligopolies form by some Act of God, and are not explicitly midwifed by an underperforming agency that should know better. This underlines the fact that the Commission is incapable of learning any lessons from its past, because it's intent on denying its complicity in the problems.

The Australian-owned banks are taking double the profits required by their shareholders, and are inflicting deadweight losses of $6-$10 billion on our economy every year.

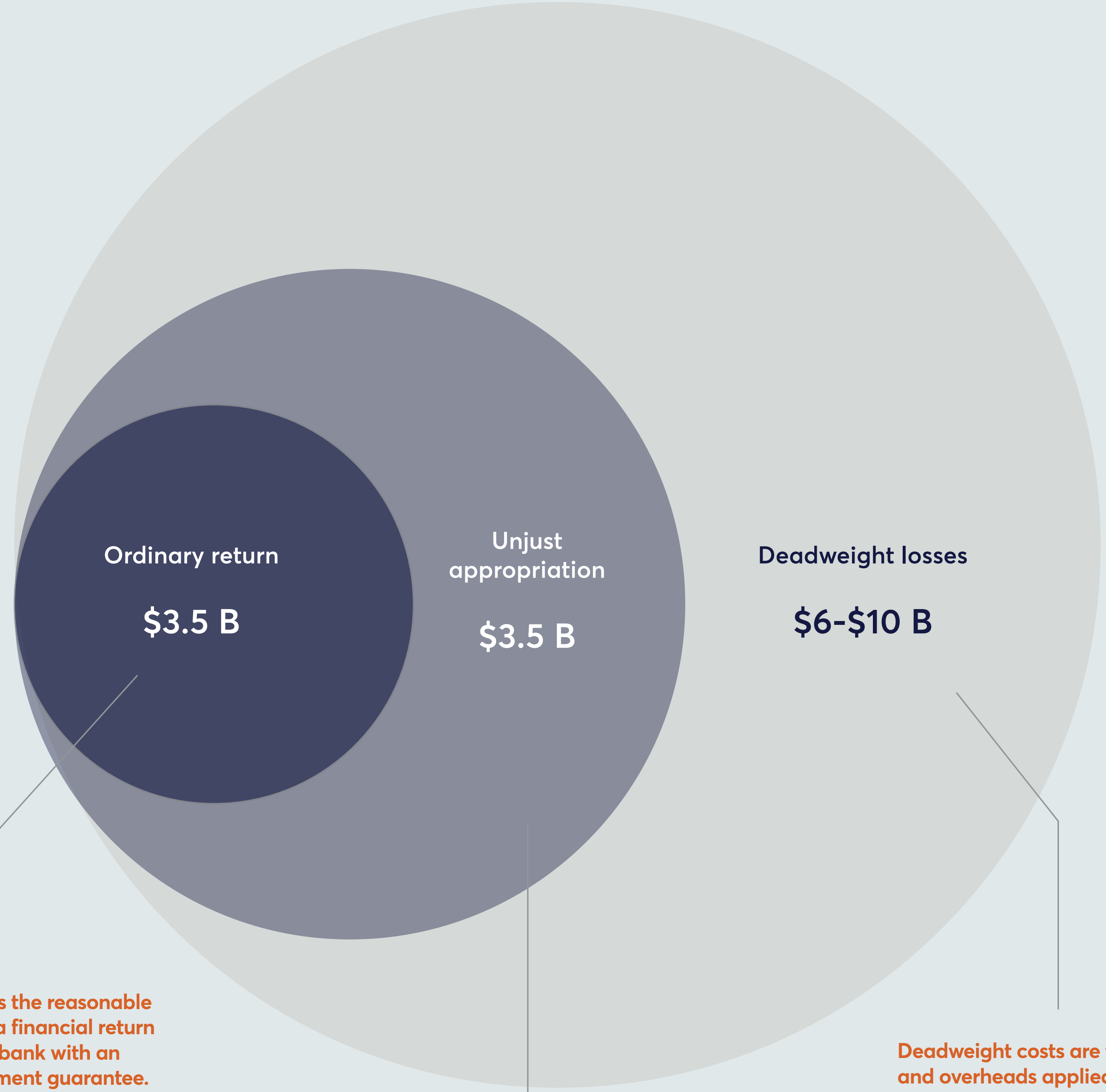
As the Commission's market study into personal banking identifies and as the OECD notes in its Economic Survey, the Australian-owned banks are an excessively profitable oligopoly due to the approval of mergers and resultant market concentration, and the unwillingness of the Commission to take action under the Commerce Act to prevent the abuse of market power.

As is clear from financial returns, the Australian-owned banks are extracting about $7 billion a year, or twice the return expected by prudent investors such as international pension funds. The technical term for this excessive profit is "unjust appropriation" – it is profit that has not been earned by superior performance in a competitive market, but has simply been taken through the exercise of excessive market power, unchecked by the Commission.

And because none of the Australian-owned banks are listed on the NZX, practically all of the $7 billion in profits is sent overseas. This makes the Australian-owned banks one of the largest exporters in the country – although they are exporting our national wealth and making us poorer, rather than exporting the primary produce and software and rocket launches that make us richer.

The process of sending our national treasure to Australia imposes deadweight losses on the entire economy. Independent economic analysis has identified $6-$10 billion in inefficiencies that come from not recycling the bank profits within New Zealand, along with the systemic inefficiencies – the sand in the gears, as it were – that comes from the bloated Paywave fees and the high interest rates and the 0% interest on transaction accounts and the lack of access to business finance.

These direct and deadweight losses adversely affect every part of our economy, and it is clearly a Commerce Commission responsibility to address them. And as we note on the following page, the impacts are not merely financial.



The fair return is the reasonable expectation of a financial return from a low-risk bank with an implicit government guarantee.

This is estimated at around $3.5B per annum for all four Australian-owned banks (ANZ, ASB, BNZ, Westpac)

Unjust enrichment is the excessive profit generated by abuse of market power and regulatory failure.

This is estimated at a further $3.5B per annum for all four Australian-owned banks (ANZ, ASB, BNZ, Westpac) based on international benchmarks

Deadweight costs are the friction and overheads applied to our economy by the expensive and inefficient Australian banks.

This is estimated at $6-$10B per annum in adverse economic effects by independent economists

In the midst of a cost of living crisis – when banks have been increasing their profits – families continue to be subjected to forced sales, with dire results for their mental wellbeing.

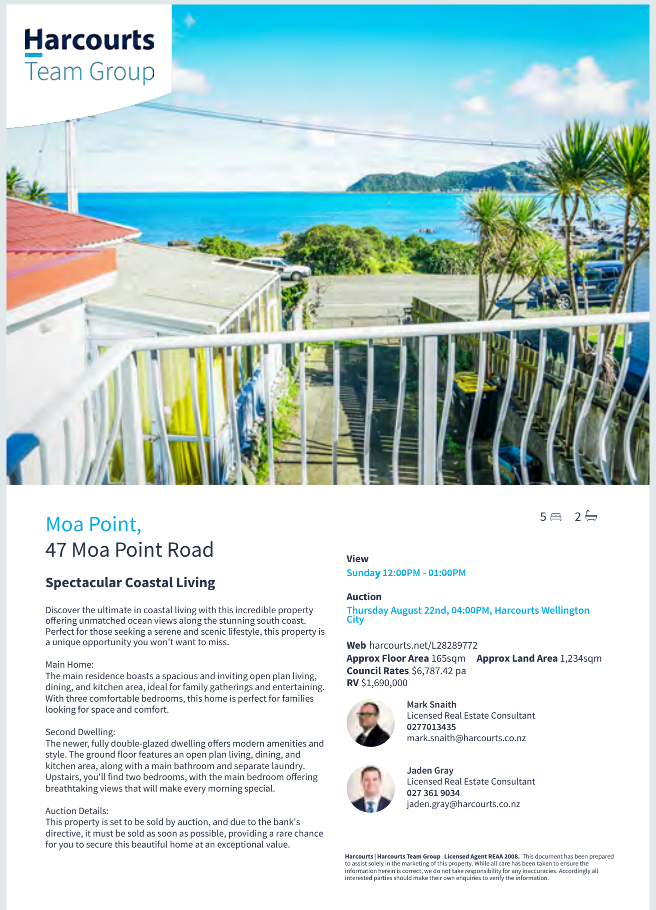
Dan Hone took his own life on the grounds of Parliament on Sunday 11th August 2024.

It was reported in the media that he was in despair over the forced sale of his mother's property at 47 Moa Point Road, Wellington. Property records show that TSB Bank holds the mortgage over that property, which it has done since 2011, and sale information stated that "The Bank has ordered that the owner must sell."

It is further reported in the media that the overdue portion of the debt owed to the bank was $40,000, against a property valuation of approximately $1.6 million. The article states that "Hone had paid $5,000 towards the debt, but was unable to stop an auction planned for 22 August, and had "lost hope".

It is clearly unacceptable that a person such as Mr Hone – described as "really loving, caring family person" has been driven to despair and to self-harm by the actions of TSB Bank, over a debt of a few tens of thousands of dollars. It is simply reprehensible that the profitability of the bank has been put ahead of the wellbeing of a fellow New Zealander.

It is not clear from public records whether TSB Bank proceeded with the sale of the property. However, what is clear is that Mr Hone is no longer with his whānau due to the actions of the bank.



In conjunction with the Financial Markets Authority, the Commerce Commission provided guidance to lenders regarding supporting customers in financial difficulty in September 2023. There is no evidence the Commission has ever acted to give effect to the guidance.

The purpose of the guidance letter was to set out a series of reasonable expectations about how lenders should behave to assist borrowers struggling under high interest rates. And the letter identified exactly the effects documented at left:

> The potential impacts of Kiwis getting into financial difficulty are not just monetary; it can affect the wellbeing of the individual, the household and the wider community.

While we are still awaiting the results of some Official Information Act requests, it appears from the Commission's website and the media that exactly no action has ever been taken to monitor or encourage compliance with the guidance. It seems highly likely that the issuance of the letter was the sum total of the Commission's actions on behalf of hard-pressed borrowers, at a time of deep and enduring recession and historically high debt burdens.

In the context of Mr Hone's despair over what is a small debt to TSB Bank and his subsequent decision to end his life, the Commission's inaction is reprehensible. TSB Bank was clearly a recipient of the letter, yet there is scant evidence it deviated from its standard policies in any way when considering whether to force a sale of the family home at Moa Point Road. Certainly, it appears no-one from the Commission ever picked up the phone or sent an email to ensure the guidance was being followed.

While it would be unreasonable draw a direct line between the Commission's inaction and Mr Hone's decisions, it is very difficult to escape the conclusion that an organisation which regards the sending of a single letter as an adequate response to a major debt crisis is fully complicit in the adverse outcomes that result. The Commission needs to go and take a long, hard look in the mirror, and ask itself whose interests it's really acting in.

In 2024, the Commission declined two mergers – and this was the first time it had done so in an unbroken run of 80 consecutive approvals stretching back to 2018.

As is apparent to everyone in the country, the Commission has an entirely permissive approach to mergers and acquisitions. Its declining of the Serato merger in 2024 brought to an end the Commission's record-setting run of approvals since March 2018 – some 80 separate transactions in a row were approved. This record stands in stark contrast to every other competition regulator in the OECD, as it amounts to a decline rate of less than 2.5%.

And as we have noted, the Commission's full-throated endorsement of every single merger that crosses its desk has resulted in the formation of extensive and pernicious oligopolies – in banking, fuel, supermarkets, building products, and more.

There are fundamental issues with how the Commission runs the mergers and acquisitions assessment process, as follows:

1. The applicants are able to take as much time as necessary to prepare their documentation. However, submitters who have concerns about the proposed transaction must read, evaluate and respond to the various steps in the process within extremely short timeframes – in most cases, the submission window is only two weeks long. This is intentionally exclusionary of any dissenting views.
2. The Commission bends over backwards to protect the confidentiality of applicants, to the detriment of all other parties. The Commission provides heavily redacted documents to the public that exclude all metrics – such as market share – which makes it impossible to conduct any independent third party analysis of the impacts of the transaction.
3. While the Commission meets regularly with the applicants to discuss aspects of the transaction, it never does so with consumer advocates. In all the various transactions we have provided submissions on, we have never been offered the opportunity to discuss our analysis or concerns with staff. This is deliberately exclusionary.
4. The Competition branch does not acknowledge submissions or most correspondence, and does not reply to the majority of email; any material over and above the heavily redacted documents on the Commission's case register must be requested via OIA, which means they will not arrive in time to meet the Commission's own short submission timelines.
5. The Commission does not apply the public interest test under s9(1) of the Official Information Act, and has no policies guiding staff on its application.

In short, the Commission regards the applicants as being the sole stakeholder in the process, and prioritises the maintenance of a good working relationship with the legal fraternity and their clients over all other factors.

And as its track record shows, the Competition branch is now little more than a rubber stamp, behaving as the mere regulatory implementation arm of the mergers and acquisitions industry.

The OECD notes its concern with the use of outdated methodological thinking in the Commission's approach to assessing mergers and acquisitions:

> Merger control has been the subject of intense international cooperation for the past two decades with substantial work carried by the OECD under the recommendations of its Council (OECD, 2005). Since the antitrust revolution in the United States (Bork, 1978), courts and antitrust authorities around the world have extensively relied on the "consumer benefit test" when assessing the impact of mergers and acquisition; as such, they were likely to be approved if they led to a net welfare gain for the consumer. Faced with the balance of decreasing competitive pressures but increased economies of scale passed on to consumers, courts have approved mergers somewhat easily.
>
> However, this approach and the consumer benefit test have been questioned in recent years. Alternative standards have been proposed (OECD, 2023e): a "total welfare" standard reflecting better consumers and producers – which the NZCC can already apply as part of its authorisation procedures (but not for clearance); a "citizen's welfare" standard that would also better take into account their interest as workers; or a "protecting competition" standard that would favour competition for its own sake, above and beyond social welfare to tackle corporate power.

There is negligible evidence that the Commission has begun to grapple with these issues, let alone applied more up-to-date methodologies to its consideration of transactions. In fact, there seems to be strong evidence that the Commission's competition tests are even more simplistic than the OECD paints, and are based solely around the accretion of market share.

For instance, in the assessment of the NZ Post/PBT Couriers acquisition, there was easily-accessible academic research showing the adverse effects from horizontal integration in the freight sector in Europe, which was directly applicable to the transaction. There is no evidence the Commission found the requisite research paper, evaluated the methodology it described, or undertook any of the necessary quantitative analysis. The determination for the acquisition makes no reference to any of the factors regarded as material by the researchers.

We made multiple submissions as part of this transaction, but were never contacted by the Competition branch about any of the issues we raised. Their staff seem the most intellectually incurious people we've ever encountered in the public sector.

The Commission approved the acquisition of PBT Couriers by NZ Post on the basis it would not substantially lessen competition, yet the adverse effects were in evidence just a few months later.

In November 2023 NZ Post sought approval to acquire the PBT Couriers business via application to the Commission.

There were widespread concerns from the industry about the loss of specialist wholesale courier services that the smaller courier companies depend on, which was one of the key services provided by PBT Couriers. And there was concern that NZ Post would withdraw services from other companies if the acquisition was given the green light.

Habilis NZ Ltd put multiple submissions to the Commission pointing out the competition impacts on the industry, in a number of areas:

- The removal of one of the lowest-priced courier companies from the market, with adverse impacts on consumers
- The contraction of the market for independent courier drivers, resulting in some drivers being forced to exit their businesses
- The adverse logistical and pricing impacts on smaller courier companies that used PBT Couriers for linehaul services.

Our submissions covered these issues in some detail; however, the Commission denied us access to key information that would have enabled us to conduct quantitative modelling of the impacts, such as market share data. Email requests were declined, and OIA requests would not be actioned within the short consultation periods allowed by the Commission.

The reason given by the Commission for declining data requests is that applicants provide the information confidentially, and that the Commission is at pains to preserve a good and open working relationship with the mergers and acquisitions sector. We note this maintenance of good relations with the industry is not a statutory requirement, while promoting competition for the long-term benefit of consumers most certainly is.

We were never offered any opportunity to discuss the transaction with Commission staff.

In the absence of being able to conduct the quantitative analysis ourselves, we supplied the Commission with the research paper from Delft University which modelled the exact scenario in the freight industry in Europe; the paper contains the required methodology and equations necessary to do the analysis.

The Commission did not undertake any quantitative analysis, and the decision paper is a masterclass in entirely subjective reckons.

Despite consumer concerns, the Commission approved the acquisition in April 2024. The discussion at right describes the adverse impacts for the industry and consumers that occurred in the market within a few months of the transaction being approved.

The primary beneficiaries of the transaction were Waterman Capital, the private equity owner of PBT Couriers, and NZ Post. Both consumers and the rest of the courier industry have suffered ongoing negative consequences.

Within a few months – in some cases, before the Commission had even released its final determination report – the following adverse events had occurred as a result of the acquisition proceeding:

1. Around 200 of PBT Couriers independently contracted drivers had their courier runs cancelled, with little likelihood of finding an alternative contract in what is now a diminished market. In some cases they have lost their livelihoods and must exit the industry.
2. Some PBT specialist services for smaller courier companies have been withdrawn and are no longer offered, such as oddly shaped or oversized parcels. The smaller courier companies have had to find alternative suppliers, and from our understanding all alternatives have been more expensive than the PBT Couriers service.
3. Smaller courier companies have had to seek other providers for linehaul services and reorganise their logistics as a result, at considerable cost. This has eroded margins for smaller companies whilst increasing margins for larger companies.
4. We understand that NZ Post has stated to some smaller courier companies that it will only honour the PBT pricing until the middle of 2025, and has set the expectation that prices will rise, to the benefit of NZ Post but the detriment of the smaller companies.
5. NZ Post has raised its prices to retail customers by up to 30% in some instances.

It is clear that the Commission's decision has narrowed the availability of services, reduced the number of market participants, raised prices for intermediaries and consumers, and forced some independent contractors out of business. How this equates to "not substantially lessening competition" when self-evidently a lessening of competition and adverse consumer impacts has occurred in multiple markets is left as an exercise for the reader.

It is also noteworthy that this transaction bears all the hallmarks of regulatory capture: the applicants benefited financially, were able to keep their information confidential throughout the entire process, and were able to keep third parties from providing any countervailing analysis.

The Commission appears to make no connection between the theoretical construct of a market and the real-world people and organisations that consume products and services.

As we all know, markets are made up of both buyers and sellers – however, as the NZ Post/PBT Couriers case study shows, only one of these parties is regarded as a legitimate stakeholder by the Commission when considering mergers and acquisitions.

When assessing the impact of a proposed transaction, the Commission seeks the views of the applicants plus any other market participants it thinks may have a view, or who volunteer a perspective through the consultation process. All of these organisations are sellers in the market, in one form or another; very few of them are buyers.

This is an intentional policy decision by the Commission; there is negligible mention nor any active consideration of "consumers" as an affected group or as legitimate stakeholders in the process contained within the MAGs. Further, the review of the MAGs that is currently underway does not contemplate any review of this policy setting.

In effect, consumers are regarded as an amorphous and passive mass by the Commission, who have negligible agency and who can be regarded as merely the subject on which market participants act.

The Commission does not contain within its structure any role that appears to advocate for consumers or to represent a consumer viewpoint. Consumer advocacy organisations are not routinely engaged with by the Commission in the context of mergers and acquisitions. And where consumer advocacy organisations wish to engage over specific transactions, they are largely excluded from the process by:

- Not being provided with the information necessary to conduct any independent analysis or even to make a fully informed submission, such as basic market share data
- Being held to unreasonably short consultation windows that make it nearly impossible to conduct any quantitative analysis or in-depth assessment
- Being expected to conduct analysis to the same level of quality and detail as the submitters, without the resources or financial capabilities to do so.

There is a systemic and deeply entrenched anti-consumer bias within the Commission, which manifests as consumer advocates being expected to produce high-quality analysis on short timeframes for free, whilst being denied access to the relevant data.

And as there is no consumer advocate within the Commission, we have no confidence that the organisation has either the capability or interest in providing a consumer-focused counterpoint to its determination to rubber-stamp mergers and acquisitions.

The policies and actions of the Commission are intentionally exclusionary of consumer perspectives, as the following correspondence from Grant Barrott, Insights & Intelligence Manager, demonstrates.

As a consumer advocacy organisation, we raised concerns about our exclusion from access to key data in the NZ Post/PBT Couriers acquisition. Mr Barrott's response encapsulates what is clearly part of long-standing Commission policy to exclude consumers from any material analysis of the impacts of the transaction:

> "The nature of the Commission's process means that the general public is not privy to the full suite of information and evidence that the Commission collects in the course of its assessment. In publishing its public statements and calling for submissions, the Commission therefore does not expect – and is not seeking – complete independent assessments from third parties of the likelihood that the transaction will substantially lessen competition in any market."

The Commission seems to hold the position that the public is not entitled to know the full details of the transaction, as it is the Commission as regulator that is the decider of all matters, and that further analysis of the information provided by the parties is not only unnecessary but entirely unwelcome.

It is clear that the only way consumers can assess the validity of the Commission's assessments and decisions about mergers and acquisitions is *post facto*; that is, we can only evaluate whatever flights of fancy took the Commission down the path of approval after a transaction has occurred. This is hardly equitable, and hardly in the best interests of consumers, given that the Commission has singularly failed to protect our interests over the last 20 years.

There is strong evidence that the Commission's analysis and decision processes have been extensively captured by the mergers and acquisitions industry, to the detriment of consumers.

There are a number of areas where the views of the sector are clearly taking precedence over the interests of the nation. These include:

- Prioritising the confidentiality of applicant information over the public interest
- Passive acceptance of submitter views about the definition and dynamics of the market
- Failing to provide public accountability for its merger decisions
- Providing privileged access to the industry to shape the very guidelines they operate under.

Inappropriate confidentiality

The Commission places the confidentiality of the mergers and acquisitions industry and its clients above the public interest as a matter of policy, and refuses to provide detailed information about mergers and acquisitions and the likely market effects to third parties.

As is noted in the NZ Post/PBT Couriers case study, the Commission refused to release even the most summary information about the market shares in the courier industry, making it impossible to conduct any independent analysis. It routinely cites commercial confidentiality as the reason for withholding essential information, whilst in our view significantly exceeding the limits of the withholding grounds in the Official Information Act.

As our OIA requests have demonstrated, the Commission does not have any policies or procedures for considering the public interest test under s9(1) of the OIA, and we have seen no evidence that the Commission considers the public interest in any objective way. Public interest does not appear to be a material consideration when assessing the release of information, which is consistent with the Commission's exclusion of consumers as valid stakeholders.

While the Commission has powers under various Acts to issue Compulsory Notices and require the supply of information – section 98 of the Commerce Act, section 47G of the Fair Trading Act, and section 113 of the CCCF Act – these powers are seldom used. As the table shows, they have not been used at all since mid-2021, under any of the relevant legislation.

While there is an argument that information should be obtained collaboratively in the first instance, it seems unlikely that there has not been a single instance in nearly four years where the Commission's decision making could have benefited from information the applicants were unwilling to share.

Financial Year	Section 98 notices issued
2018-19	2
2019-2	4
2020-21	4
2021-22	0
2022-23	0
2023-24	0
Total	10

Passive acceptance of applicant views

The primary test for mergers and acquisitions is whether the transaction will result in a substantial lessening of competition in any market. Applying the test requires the Commission to first define the market – and in almost all cases, it simply copies and pastes the market definition provided by applicants.

The decision about market definition is foundational to the subsequent assessment of effects, so a passive agreement with the applicants definition will inevitably shape the assessment of the market effects. The Commission's acceptance of the applicants definition biases the process in favour of approval.

In the case of the NZ Post/PBT Couriers transaction, we highlighted to the Commission that there were other markets – such as the market that exists for courier contractor services – that needed to be considered. There is no evidence from the determination document or other papers that the Commission paid the slightest attention to this market, and it sided with the applicants by claiming it was irrelevant – despite the strong evidence of harm.

Further, the Commission does not undertake or commission any work to take the opposing view to applicants, in stark contrast to practically every other OECD country. The Commission does not undertake any material economic modelling of mergers, and relies predominantly on the reasoning and rationale provided by the applicants.

Lack of public accountability

The Commission does not provide any public accountability for its approval of mergers. There is no obligation in law for the Commission to provide reasoning for the approval of a merger, and in some cases it simply doesn't do so – there are approvals from 2023 that have never had any explanatory document provided.

Further, where it does deign to document its rationale, in every case this is supplied more than 20 working days after the decision, which means that the time limit for injunctive challenge of the Commission's decision has expired. This appears to be a deliberate tactic from the Commission to provide certainty for applicants and further exclude the public from challenging its decisions.

Privileged access

Mergers and acquisitions are assessed using the Mergers and Acquisitions Guidelines (MAGs), which are currently under review. The following page details the ethically suspect process the Commission has used to provide closed access to the review process for the mergers and acquisitions industry.

The Commission is reviewing the Mergers and Acquisitions Guidelines, and has conducted closed consultation with the mergers and acquisitions industry in a manner that raises significant ethical red flags.

The Commission commenced a review of the MAGs in August 2022, and this process has moved slowly since then due to other workload pressures at the Commission.

The Commission is seeking to update the Guidelines to make them more useful in digital markets and to bring them into line with international best practice within other competition regulators.

As the foregoing notes, the Commission has a long and illustrious track record of approving mergers and acquisitions that cause significant and lasting harm to consumers, as evidenced in the grocery, banking, electricity, fuel and other major sectors of the economy. And the Commission also has a long and illustrious track record of failing to take action to limit or unwind any of the oligopoly markets it has engendered, as evidenced in the grocery, banking, electricity, fuel and other major sectors of the economy.

The MAGs guidelines lie at the heart of the Commission's approval of mergers and acquisitions that are demonstrably not in our national interest. Revision of the MAGs is likely to have far-reaching impacts on the approval or otherwise of mergers and acquisitions, and consumers – the people and organisations that make up the market as defined by the Commerce Act 1986 – therefore have a pressing interest in the scope, form and outcomes of the review.

However, the Commission has engaged in closed non-public consultation with the mergers and acquisitions industry and with other public sector agencies about the scope and intent of the MAGs review, without notifying any other interested parties about the activity.

The Commission has intentionally excluded all consumer bodies from the shaping of the scope and intent of the review, and the consultation materials and opportunities for input into the scope and form of the review provided to the mergers and acquisitions industry have not been provided to any of the organisations that represent the interests of consumers.

The actions of the Commission in conducting a closed consultation solely with the mergers and acquisitions industry has been deliberate, and the approach taken has the support of senior management within the Commission.

While the process has yet to be completed and there will apparently be an opportunity for the public to have input into the revised MAGs, some cursory consultation theatre at the end of the process does not result in the same equality of access the mergers and acquisitions industry has benefited from.

Instead, the Commission has conducted the sum total of its consultation to date with the legal firms and economics consultancies that have the most to gain financially from streamlined and easy approval of mergers and acquisitions, to the likely ongoing detriment of consumers.

The approach the Commission has taken to the review of the MAGs is clearly concerning from an ethical standpoint, as the industry has been invited to help shape the form of the review.

As the Commission's letter to the closed group of industry participants on 10 June 2024 notes:

> The Commission is inviting comments from interested parties by Friday 12 July 2024 **on the issues we should consider** when updating the Guidelines. The Commission will then consider developing draft Guidelines for consultation later this year.

The highlight is ours.

Following some OIA requests, it is apparent that there was no consideration of consumer groups as participants in the closed consultation – but there was some consideration of major companies as contributors, although this was not pursued. This highlights the level of regulatory capture that has occurred in the Commission, with a single-minded focus on receiving input from the organisations that financially benefit from the approval of mergers and acquisitions.

This also underlines our point about consumers not being seen as valid stakeholders by the Commission. From the admittedly redacted documents and emails we have received, there is no evidence that anyone at the Commission – in the project team, the mergers team, the steering group formed for the purpose, or the various management groups – considered the omission of consumer groups as being worthy of comment. Consumers have not been deliberately omitted; they are simply irrelevant and invisible in the Commission's thinking.

The purpose of the closed consultation was to gain input from the industry as to the scope and form of the review. Subsequent consultation with the public – after the revised MAGs have been developed – would be solely about the content of the revised guidelines, and once again consumer advocates would be attempting to respond reactively to a predetermined scope that had already been agreed with the mergers and acquisitions sector, presumably on the typically short timeframes normally provided by the Commission.

Prima facie, this appears to be a corrupt practice.

There is scant evidence that the Commission conducts any meaningful quantitative or economic analysis as part of its competition assessments, instead relying on subjective commentary.

In September 2024 the Commission declined the merger of Foodstuffs North Island and Foodstuffs South Island, after a full 10 months of consideration.

What's notable about the final determination document is that – despite the structural nature of the merger and its wide-ranging impact on every family in the country – it was almost entirely devoid of any quantitative economic assessment. Instead, the document is written as if it was a legal opinion.

This is consistent with almost every other determination, and underlines the degree to which the perspectives of competition lawyers have come to totally dominate the Commission's analysis. But it is not a helpful lens to view every single merger and acquisition, and forces too much of the debate about the merits or otherwise of a transaction into the murky and entirely subjective realm of legal opinion.

Given the nature of the grocery sector, it can be modelled as a network in a straightforward way, and the network effects of horizontal consolidation assessed by running alternative scenarios. This is the approach we proposed to the Commission in the NZ Post/PBT Couriers acquisition.

The reason a modelling approach is sometimes more robust is that there is a wealth of academic research available to show market impacts can be made visible and the impacts explicit – which is the polar opposite of the he-said/she-said arguments the Commission currently uses.

As noted, during the NZ Post/PBT Couriers merger, we easily located an academic paper that modelled the impacts of horizontal integration in the European freight sector – which was directly applicable to the application. We drew it to the attention of the Commission but were ignored for our trouble.

We have seen little evidence that the Commission has suitably-qualified staff able to understand and model the impacts of different scenarios in (say) markets primarily governed by network effects, even though these issues are becoming increasingly material for competition. If these people are present in the Commission, we have seen no evidence of their contributions in any of the analysis or determinations in the last 18 months.

Instead, we have the continuation of the Commission's current approach: subjective assessment by competition lawyers, resulting in near-automatic approval of transactions.

Much of the Commission's senior staffing now seems to be comprised of competition lawyers, who lack the skills and capabilities to make high quality decisions about the economic and social impacts of their decisions on consumers.

Competition lawyers are necessary in the Commission, but they are not trained in economic analysis nor quantitative modelling nor in social impact analysis; they are not general purpose analysts. As a result, they are making poor decisions that are having adverse impacts across the economy. This is for two reasons:

» Lawyers are trained to look to precedent as the touchstone for future decisions. This is pervasive in the profession, but largely assumes that the canon of settled law can inform all future determinations, with adjustments as required for new legislation. As a result, the past is over-weighted against the future, yet all the implications of the decisions are felt in the future, where precedent is of no assistance.

» Lawyers are not trained to assess risk outside of the narrow confines of the legal system. As a result, the wider economic and societal risks of poor decision making and the resultant market dysfunction are not accurately or adequately taken into account. This is discussed in more depth on the following page.

This is not a beat-up on competition lawyers, but it is a reflection on the poor hiring and operational practices within the Commission. It is clear that the range of views and perspectives within the Commission is too narrow – it excludes consumers, wider economic impacts, the likely future trajectory of digital markets, network effects, and much more. If the Commission spends any time at all considering these matters and assessing the implications of academic research in the field of economics, exactly none of it is visible in its merger and acquisition decision making.

To use an analogy: putting competition lawyers in charge of competition policy and implementation is rather like putting the accounts team in charge of the nuclear reactor. While the bills will get paid on time, that's of little consolation when the real risk being managed is the potential radioactive contamination of entire countries.

The Commission fails to take account of the risks to the wider economy from its decisions, instead prioritising organisational reputation ahead of societal impact.

One of the effects of a lawyer-dominated Commission is that the primary risks being managed are legal in nature; that is, the risk that the Commission will lose in court if a decision is challenged. However, this is not a consequential risk for the rest of the country.

As we've noted previously in this document, the Commission's decisions are resulting in tens of billions of dollars of adverse economic impacts to Aotearoa New Zealand each year. And given the organisation's apparent delight in rubber-stamping yet more acquisitions that are not in our national interest, the bill for consumers and businesses is set to increase.

Whether or not the Commission loses a specific determination in court has negligible impact on this invidious state of affairs – which indicates that the Commission is paying attention to exactly the wrong things.

The real risk to Aotearoa is that the Commission will approve a merger or acquisition that is indeed anti-competitive and which leads to the formation of yet another oligopoly, to join the lamentably long list of our current looters. To state the obvious, this will likely inflict many billions of dollars of very real and very tangible economic damage on the nation and its people – and in that context, whatever the legal costs are for the Commission in fighting grumpy applicants in court are a mere rounding error.

The Commission would also do well to remember it is a regulator, not a market participant. If it occasionally gets a decision wrong and has it reversed by the courts, then it can ask Parliament to clarify the law and ensure the same problem doesn't repeat. The cross-party support for the 2023 amendments to s36 are a vivid illustration of the degree of political consensus that already exists for consumers getting a fair deal.

However, the complete misunderstanding of what the actual risks are to the nation is causing the Commission to be a cowardly and ineffective regulator. We were sufficiently concerned about this that we wrote an opinion piece about the subject, which is reprinted overleaf.

There is a significant question mark over the revolving door that seems to exist between the Commission and the competition law firms that are beneficiaries of a favourable regulatory regime for mergers and acquisitions.

As noted previously, there are very significant ethical concerns about the degree to which competition law firms are being allowed to shape Commission rules, particularly when consumer voices are being excluded as a matter of policy.

In this context, we think there are real issues with the "alumni effect" – that is, the residual loyalty that sometimes exists between a regulator and their former colleagues in commercial firms. Aotearoa New Zealand is a small place, and many of the people in senior roles in the Commission previously worked alongside and studied with the lawyers who now represent applicants. The fact that the MAGs review has been exclusively focused on law firms to the exclusion of other voices shows how pervasive this effect is.

Normally, this would be able to be managed because of the diversity of perspectives within the Commission; however, the elevation of former competition lawyers to the majority of senior roles within the organisation seems to have resulted in a form of group-think, where legal arguments dominate all else. As noted, there is negligible evidence of economic or econometric thought in any of the determinations, and the documents themselves most closely resemble a legal opinion.

This effect intertwines with the mis-estimation of risk in a particularly unhelpful way. If there are indeed residual loyalties from the alumni effect, then opposing applicants – some of whom may be former colleagues – both in determinations and subsequently in court will carry a good deal of social awkwardness. This can be misinterpreted, so the Commission may end up deciding it doesn't want the "risk" of losing in court, when in fact it's just the uncomfortable feeling from opposing a firm they enjoyed working in and a former colleague they still like and respect.

All of these implications can be managed, but as the MAGs review demonstrates, there are concerning signs the Commission is not doing so.

In August 2024 the following opinion piece was published in The Post, lamenting the Commission's institutional cowardice.

The conviction of Google as a monopolist by a US court could never happen in New Zealand thanks to the timidity of the Commerce Commission, says Kent Duston of the Banking Reform Coalition.

Last week the unimaginable happened: Google was convicted of being a monopolist by a US court. The judge found they'd been using their market power to unfairly restrict competition, which made them profits they weren't entitled to.

The court ruling underlines how pervasive and far-reaching Google's reach has become, and should begin to usher in an era of better-behaved and less predatory tech giants.

And the US Department of Justice's historic victory against one of the biggest companies on the planet is thanks to the leadership of the fire-breathing Jonathan Kanter, the head of the Antitrust Division. He's rightly being celebrated by pro-competition advocates across the planet.

Reportedly, on Kanter's first day on the job, he addressed his gathered lawyers and asked them to raise their hands if they'd never lost a case. It was a canny trap: as the proud, victorious DOJ lawyers thrust their arms into the air, Kanter quoted James Comey, who did the same thing on his first day as District Attorney for the Southern District of New York: "You people are the chickenshit club."

Kanter and Comey's point is that a prosecutor who never loses a case is a prosecutor who only goes after easy targets, and leaves the worst offenders untouched.

So under Jonathan Kanter the Department of Justice found its mojo, fought the hard case against Google, and won. But this kind of major victory for consumers has little chance of ever happening in New Zealand.

Here, the Commerce Commission fills the same role as the Antitrust Division of the DOJ: it's meant to break up monopolies, make sure markets work effectively, and defend all us consumers from the depredations of predatory corporations. It's an important role, but one which the Commission has all but abandoned.

Our economy is now dominated by oligopolies, small groups of large companies that are extracting excessive profits from captive markets. Whether it's the ridiculous price of Gib board, the cost of the bag of groceries at the supermarket, the inflated credit card and mortgage interest rates, the sky-high Paywave fees, or the upwardly-mobile power prices, whole sections of our economy are now expensive and dysfunctional and immensely profitable for the handful of companies that control them.

So we'd assume the Commerce Commission would be doing exactly what Jonathan Kanter has done: going after the banks and the supermarkets and the electricity companies, dragging them into court, fining them for their abuses of market power, breaking them up, and getting markets working again. But we'd be wrong about that.

Instead, the Commerce Commission's lawyers are going after cleaning companies in Christchurch and used car dealers. It's only taking cases it knows it will win, when (like the cleaning company) they can't afford lawyers, or when they've already admitted guilt.

Even Commerce Minister Andrew Bayly is imploring the Commission to get stuck in, saying he wants them to be a "courageous litigator", and to be more ambitious and take on more risky cases. In response, the Commission returned half its annual legal fund, unspent.

And it's not like the Commerce Commission doesn't have the tools. More than a year ago, the Commission was handed new powers in s36 of the Commerce Act – but they haven't used them once; it looks like they haven't even been taken out of the wrapper.

The poster child for the Commission's timidity is last week's $3.25m settlement with Foodstuffs over anti-competitive land covenants, which had been going on for years.

To make the obvious point, the Commission's own market study into the grocery sector said that the incumbents – Foodstuffs and Woolworths – were likely making around $430 million a year in unjustified profits, and that the companies were an effective duopoly. The study also noted that supermarket prices were too high, which won't come as a surprise to anyone who's recently survived a trip through the checkout.

So if we assume half of that (conservatively estimated) $430 million in excess profits goes to Foodstuffs, then the $3.25m fine is a mere 1.5% of their haul, something they'll rake in from us poor consumers in about 5.5 days. That's not a penalty – it's just the cost of doing business.

It looks awfully like the Commission went for a symbolic wet-bus-ticket fine, rather than risking a showdown in court with a rich and undoubtedly lawyered-up corporation.

It's pretty clear there's a wide, deep and very rich vein of institutional cowardice at the Commerce Commission. Instead of championing fair markets and robust competition, and taking action against the big end of town when it breaks the rules, the Commission is relentlessly punching down. If you're a badly behaved cleaning company, you should be quaking in your boots – but if you're an entrenched oligopolist systematically looting the economy to the tune of billions of dollars a year, you can rest easy, and perhaps pay a nominal fine now and then.

The Commerce Commission is doing exactly what Jonathan Kanter and James Comey thinks is the mark of a second-rate regulator: only taking the easy cases.

The Commission has all the tools it needs; an ample budget, a Minister that's cheering it on, and – particularly in the form of the Chair, Dr John Small – Commissioners who are prepared to back the big calls. So the overly-timid executives and managers and lawyers at the Commission need to summon their courage and step up the big leagues.

And this needs to happen fast. The country can no longer afford the billions of dollars in economic damage from these oligopolies – and we have little use for a timid and ineffectual regulator that seems determined to stay a lifetime member of the chickenshit club.

Engaging with the Commission is an exercise in frustration, governed by an unresponsive agency, arbitrary and tight deadlines for consultation periods, and a lack of substantive responses.

We have engaged in a number of interactions with the Commission, particularly in relation to the banking market study, the Foodstuffs merger, and the NZ Post/PBT Couriers acquisition. In all cases, there are common themes and concerns about engagement failures:

- Emails and submissions to the Commission are extremely unlikely to be acknowledged, let alone replied to. It is never clear whether messages and documents have been received, let alone read and considered, outside of automated responses.
- Virtually none of the Commission's staff will respond to direct email messages. Our experience over the last 18 months is that senior staff – including the Chief Executive – are almost universally unresponsive, with the notable exception of Dr Small.
- Formal consultation processes are always run with extremely short timelines; in the case of mergers and acquisitions, typically two weeks. This reflects our view that the Commission is only engaged in consultation theatre to comply with statutory requirements, and that constrained timelines demonstrate a strong level of predetermination in outcomes.
- Submissions are not acknowledged nor any of the matters raised in them addressed by the Commission. Particularly in the case of submissions on acquisitions, it is extremely unlikely that any of the points of view presented by submitters will be directly addressed.
- Meetings are never available with Commission staff to discuss the substantive matters raised in submissions. We have never met any Commission staff outside Dr Small and the market studies team; as far as we can tell, the entire Competition branch is hermetically sealed off from the rest of Aotearoa New Zealand.
- The Commission never offers the slightest feedback about submissions, so it is never clear how our contributions to important competition debates can be improved. We have no idea if the Commission is expecting more information, less information, or is simply expecting us to simply go away and stop bothering them.

In short, the Commission is at pains to disengage from any debate or challenge. And in this respect, it is probably the most insular and worst-performing agency in the entire Public Sector, which is particularly concerning given its decisions affect every single New Zealander.

The ongoing debacle over the acquisition of FinTech startup BlinkPay by the Bank of New Zealand is a salutary lesson in how the Commission has become insular and disengaged from the very people that it is supposed to be serving.

In early November 2024 BNZ announced that it was acquiring Fintech startup BlinkPay. This is deeply concerning from the perspective of competition policy in the banking sector, as it appears to set a precedent for incumbent banks to snuff out emerging competition by simply acquiring newcomers, a risk highlighted in the OECD report.

So we wrote to the Commission on 8 November 2024, expressing our concerns and asking for an evaluation of the transaction. In our letter, we set out the grounds for why we thought this was a poor outcome for competition in the banking sector. Our letter was not acknowledged by the Commission, nor was any substantive response forthcoming.

On Christmas Eve, we received an email from the Commission asking us to provide more in-depth analysis of the transaction – which we took exception to, as we believe it's the job of the competition regulator to assess competitive impacts, not private sector organisations. As has been the case in the past, Dr Small stepped in to provide some more background – something that should have been done by the operational staff.

The Commission's email proposed a meeting to discuss our concerns, and we suggested some dates in the New Year; however, no invitation or follow-up has ever occurred, and it is now our view that the offer of a meeting was merely symbolic and staff had no intention of proceeding with it.

In good faith we compiled a much more detailed document over the Christmas holiday break, outlining the competition issues including the economic context and a key academic paper for how the transaction should be assessed. We emailed this to the Commission on 7 January 2025, but as is always the case, we received no acknowledgement or substantive response.

Having heard nothing for a month, we sent a grumpy email to CE Adrienne Meikle and Dr Small, seeking some explanation for the lack of communication and response. Ms Meikle replied – the first time we've ever heard from her – and said Dr Small would provide a response in the near future; quite why the Commissioner is having to lead the engagement process on what is clearly an operational inquiry is not clear.

However, at the time of writing we have had no substantive response from the Commission in nearly three months, nor do we have a date for when this might occur.

We are encouraged by the strong direction from Minster Bayly and the clear and effective governance from Dr John Small – but we think there are serious questions about the adequacy and effectiveness of the organisational leadership.

It seems entirely bizarre that the Commission has long-standing cross-party consensus on the necessity for effective competition, a supportive and engaged Minister, and an effective and committed Commissioner – yet is still failing in its primary functions, with little sign of improvement. Clearly, this review arises from the growing concern that the Commission is not fit for purpose.

While there are improvements that can be made to its legislative environment, it is abundantly clear that the primary issues with the Commission stem from poor leadership; specifically:

1. The Chief Executive is failing to demonstrate a commitment to improving competition by disciplining rogue oligopolies, and is instead focused on BAU activity to the detriment of the agency's core function.
2. The senior executive team is overweighted in competition lawyers, who are exhibiting either a high level of regulatory capture by the profession, or a high level of tolerance for the regulatory capture of more junior staff.
3. There are substantial and glaring gaps in skills and capabilities within the Commission, such as econometric analysis, specialist knowledge of network effects and emergent technologies, and even basic commercial knowledge about the structure and operation of the New Zealand economy. The CE and executive team seem unaware of these shortfalls.
4. Within these challenges lies a culture of arrogance and complacency, where the Commission clearly seems to think it is doing a good job, despite the overwhelming evidence to the contrary. This comes from executive insularity, a lack of experiential diversity within the executive team, and a lack of critical awareness and self-examination by the Commission's leadership team.
5. The cultural problems – such as putting the Commission's reputational risk ahead of all other concerns – have been allowed to percolate throughout the organisation, as management and operational teams model the behaviours from the executive.
6. The result is an alarming level of insularity and group think, and a reliance on outdated and simplistic economic theory. This does not enable the Commission to address emerging challenges or a changing world, as demonstrated by the BlinkPay transaction.

These issues are the direct responsibility of the Chief Executive, and it is time for a clear-eyed evaluation of her performance in the role.

Our recommendations relating to leadership and culture are as follows:

1. Reviewers should engage with the Public Service Commissioner to discuss the substandard performance of the Chief Executive, with a view to developing a way forward for improved leadership of the Commission, in compliance with the appropriate legal and policy obligations.
2. Reviewers should require an independent culture and operational review of the Commission, with a particular focus on whether the structure of the agency is fit for purpose in light of the Minister's expectations and the evolving nature of competition in digital markets. Where necessary, the Commission should then make changes to its structure to make it more agile and fit for purpose, with a particular focus on the Competition branch.
3. As part of the culture and operational review, an independent assessment of roles, responsibilities, skills and capabilities should be undertaken. This should focus on whether the widespread appointment of competition lawyers with a relatively narrow skill-set is appropriate for such a wide range of roles in the Commission, and whether a greater diversity of qualifications, skills and experience is more appropriate to enable the organisation to fulfil its statutory obligations.
4. As part of the culture and operational review, an independent assessment of the performance of the Competition branch should be undertaken. The scope should include the calculation of the wider economic costs and benefits of the mergers it has approved over the last decade, and the benchmarking of its process and outcome performance against other OECD regulators.
5. Reviewers should require an independent review of how risk is assessed and managed within the Commission, with a view to aligning the internal perceptions of risk with the external realities experienced by New Zealanders, and updating the organisation's risk management methodology accordingly.
6. Reviewers should ask the Public Service Commission to independently review and evaluate the ethically challenged MAGs review process, and require that the Commission implement all the PSC's recommendations as a matter of urgency.

There are concerning signs that the Commissioner is being forced into operational decision making as the organisation "delegates upwards", and we think a more robust governance approach will help.

In our experiences with the Commission over the last 18 months, it is apparent that Dr Small is highly capable and very committed to the role of Commissioner; working alongside the Minister, he has proven himself to be an agent of change for the Commission, albeit impeded by poor operational leadership.

However, it is becoming evident that Dr Small is increasingly being drawn into matters that are properly the purview of the Chief Executive, and which should never need to be the responsibility of the Commissioner. This looks suspiciously like the CE and the executive delegating upwards, rather than taking responsibility for making decisions and taking actions on their own recognizance.

Based on the longevity of the Commission and the largely unchanging nature of its role within the machinery of government, it seems unlikely that the CE or executive team have insufficient or unclear delegated authority; it seems much more likely that the individuals concerned are simply not exercising their delegated authority. This explanation is consistent with the culture of risk mis-assessment.

The resultant blurring of operational governance and the Commissioners collective role as an inquiring body is unhelpful. The Commissioners require some distance from the operational matters of the organisation in order to inquire and direct, and it is clear this is not occurring.

We therefore propose a new Management Board between the CE and the Commissioners, tasked with the operational governance matters that are not properly part of the inquiry function.

For instance, the Management Board should deal with the issues of organisational culture and structure, and provide the governance over how the Commission achieves the goals set out for it.

The Commissioners should act as the Supervisory Board to whom the Management Board reports, and should direct strategy and what interventions the Commission undertakes. This separates governance into two components:

- The Commissioners/Supervisory Board sets out what the Commission is to achieve
- Operational governance addresses the mechanisms by which the goals defined by the Commissioners are achieved.

We believe this will bring much more clarity to the Commission's governance arrangements, and prevent the upwards delegation that is currently afflicting Dr Small and undoubtedly some of the other Commissioners.

Our recommendations relating to governance are as follows:

1. Despite our less-than-stellar experiences with the Commission over the last 18 months, we reiterate our complete confidence in Dr Small as a highly capable, knowledgeable and effective Commissioner.
2. Reviewers should require an independent review of delegations within the Commission, to ensure that authority is being both delegated and exercised effectively. Where there is evidence of delegation but not effective exercise, appropriate training, mentoring and performance management should be undertaken to ensure all staff understand and are compliant with the decision-making obligations of their roles.
3. Reviewers should strongly consider the creation of a Management Board, reporting to the Commissioners, tasked with overseeing the operational aspects of the Commission and removing the current workload of the Commissioner around what are clearly operational matters.

There is strong evidence the Commission is well out of step with international regulators when it comes to its understanding of markets, particularly digital markets and those with strong network effects.

As the recent approval of the NZ Post/PBT Couriers acquisition and the current debate about BlinkPay demonstrate, the economic analysis methodologies that underpin the Commission's decisions are decades out of date. As such, the country is suffering adverse effects that the Commission seems unable to recognise, let alone model.

As we have pointed out earlier in the document, there is an unfortunate confluence of effects: too many competition lawyers with an inordinate affection for precedent, insufficient analytical capability, and a focus on compliance with statutory timeframes rather than the quality of results. This state of affairs desperately needs to change, and two steps are required:

1. The methodological basis for the understanding of markets and how they function in a networked and digitally enabled world needs to be updated
2. The changes to methodology need to be reflected in the structure, roles and responsibilities within the Commission.

We think an independent and tertiary-led review of the methodologies used by the Commission is essential. Even with improvements to management, governance, and legislative powers, if the Commission continues to cling to outdated Chicago School models for how markets work, then Aotearoa New Zealand will continue to suffer adverse effects.

It is important that this review not be done internally due to the insular nature of the Commission and the current level of group think; and it is important that the review is based on sound research and the latest economic thinking about digital markets and network effects. It will be unhelpful if there is ideological capture of the process – as has occurred with the Regulatory Standards Bill – so a broad church of economic and social thinkers is required.

Once the methodology has been reviewed and redeveloped, it needs to be widely promulgated to provide certainty to market participants, and mechanisms put in place to periodically review it – we propose a decadal cycle.

The second requirement – that the methodologies are given effect at the operational level – are equally important. We see the primary challenge being the need to ensure there are staff with suitable qualifications and expertise, that their roles are properly defined, and that their knowledge and insights are effectively integrated into decision making.

The integration of the methodological review with the culture and operational review is therefore critical.

Our recommendations relating to methodological review are as follows:

1. Reviewers should require an independent review of the Commission's methodological basis for assessing mergers, acquisitions, competitive effects, and the definition of markets, in order to understand the gaps between the Commission's decision making framework and current economic thinking, with particular emphasis on benchmarking against other OECD regulators. We propose this review is led by a New Zealand tertiary institution.

2. Reviewers should require the redevelopment of the Commission's methodological framework to ensure it is fit for purpose and appropriate for Aotearoa New Zealand in the 21st Century, led by the tertiary institution and supported by independent analysis. The resulting framework should be published to inform all market participants about how the activities of markets will be assessed.

3. Reviewers should require a decadal review of the methodological framework to ensure it remains aligned with economic research and societal expectations, again led by suitable tertiary institutions and supported by independent analysis.

4. Reviewers should require the methodological review informs the culture and operational review, so the skills and capabilities necessary to give effect to the improved market evaluation and assessment approach are properly embedded in the roles and responsibilities and reporting lines within the Commission.

5. Reviewers should require a mechanism is in place for the methodological review to inform possible future legislative change, if alterations to statutory powers or other aspects of the Commerce Act and related legislation are required.

The Commission needs to take immediate and substantial steps to focus on consumers as key stakeholders, and provide mechanisms for effective engagement and participation.

A primary failing in the Commission's performance has been its complete disregard for consumers, and the clear assumption that we are merely a passive group with neither agency nor material contributions. This is egregiously wrong.

The fundamental issue is that the Commission sees itself as the primary advocate for the consumer – without having any concept of who consumers are or what their best interests might be. And in taking this position, the organisation is claiming the role of both adjudicator and defender at the same time.

In practice, the Commission only acts as adjudicator, which leaves a glaring gap in how consumer interests are represented. In the current approach, consumer advocates are expected to work for free, to very tight timelines, without access to data, and with no channel to interact with the Commission. This is deeply prejudicial.

The Commission needs to take the following steps as a matter of urgency:

- Assign responsibility for consumer perspectives to one of the executive team, preferably as a specific and defined role rather than an additional responsibility
- Provide transparent and efficient outbound information and data channels to consumer advocates, using the public interest test under the OIA as the framework, to ensure there can be independent assessment of all the proposals that affect consumers
- Develop and implement effective consumer engagement channels, with a strong focus on inbound communication and kōrero, integrated with standard Commission business processes
- Ensure consumer-centric methodological analysis is undertaken for mergers, acquisitions, market studies, where necessary supported by the funding of independent assessment and review by consumer advocates, in the same way as occurs in other OECD countries
- Adjust consultation timelines to correct the large imbalances of power that exist between applicants and consumer advocates, and to allow those who are opposed to a specific transaction to be able to assemble and make their case
- Undertake post-transaction hui with consumer advocates to improve the understanding on both sides about how the outcome was arrived at, and to ensure there are effective feedback mechanisms for the Commission.

Based on its current leadership, culture and track record, we expect the Commission to be deeply opposed to these changes.

Our recommendations relating to consumers are as follows:

1. Reviewers should require the creation of the role of consumer advocate as a direct report to the CE and a full member of the executive team, with consumer advocates consulted on the scope and intention of the position.
2. Reviewers should require that the CE develop and maintain a stakeholder register that includes the full range of interested and affected parties for the Commission's work, and that stakeholder engagement is prioritised in the work plan of the CE and the executive team.
3. Reviewers should require that the necessary changes to business processes to ensure consumer perspectives are incorporated into the decisions of the Commission are documented and given effect in the leadership and culture review and the subsequent structural and role changes.
4. Reviewers should require that the Commission undertake a review of all its submission processes and timelines with a view to ensuring consumer advocates are provided with equitable opportunities to engage with the Commission's work plan.
5. Reviewers should require that the Commission create policies and processes to ensure the public interest test in s9(1) of the Official Information Act is applied rigorously to all requests for information, including information that has been provided by applicants.
6. Reviewers should require that the Commission fully review and update all its engagement and communication policies and practices, to ensure staff understand the necessity to acknowledge and reply to communications, to interact with stakeholders, and to provide equitable access to Commission staff, information and processes.
7. Reviewers should require that the Commission undertake post-transaction hui for all material mergers and acquisitions, covering the full range of stakeholders including the mergers and acquisitions industry, and implement a process of continuous improvement to give effect to learnings from these hui.

There are both operational and methodological changes that may require legislative enablement, but decisions about specific legislative changes should be taken once the reviews are complete.

The focus of the discussion paper is stated as a targeted review of the Commerce Act; however, as we have shown in this paper, mere legislative fiddling will not address the leadership, cultural, methodological nor structural issues with the Commission.

As the OCED notes, the changing nature of markets and competition does produce a requirement for the evolution of Aotearoa's legislative framework. We are supportive of this.

However, we think there is a danger of putting the cart before the horse, in that the Commission is barely using its statutory powers today; as the s36 amendment shows, the ambition of lawmakers has substantially outrun the timidity of the Commission. So greater legislative authority will be of limited value until reform of the organisation has occurred, and it starts making use of the powers it already has.

In parallel, there is a very pressing need for a root-and-branch review of the Commission's methodological framework, which is decades out of date. Assuming this occurs in the manner we have proposed, it will result in a fit-for-purpose framework for thinking about markets and competition, in a way that reflects the changing digital and interconnected world we live in.

It seems highly likely that the methodological review will highlight legislative gaps and opportunities, and that material change to the Commerce Act and other relevant legislation may well be required to allow the Commission to operate effectively using the improved methodology.

So we are proposing that legislative change is not undertaken at this time, but is pursued as a sensible next-steps outcome of the methodological review. On that basis, the methodological review should include the scope for legislative change, and suitably experienced officials should participate in the review to ensure there is effective knowledge sharing about the constraints of the current legislation and the possibilities for how it can be evolved in the future.

In the interim, we do not believe there is much merit in legislative tinkering for its own sake; a piecemeal approach to amendment without a clear methodological roadmap will be costly and messy and produce uncertain outcomes, which will benefit neither the Commission nor market participants.

Our recommendations relating to legislative change are as follows:

1. Reviewers should require that the possibility of legislative change is incorporated into the scope of the methodological review, under the assumption that some methodological improvements may not be viable until legislative change has been made.
2. Reviewers should invite suitably experienced senior officials to participate in the methodological review, to provide information and guidance regarding existing legislation and the feasibility of any required changes to existing law.
3. Reviewers should recommend that piecemeal legislative tinkering is not undertaken at this time, as there is poor certainty of the value of the outcomes.