Submission Form

The Ministry of Business, Innovation and Employment invites feedback on its Discussion Paper *'Promoting competition in New Zealand – A targeted review of the Commerce Act 1986'*

We welcome your feedback

This is the Submission Form for responding to the Discussion Paper released by the Competition Policy team at Ministry of Business, Innovation and Employment (MBIE) 'Promoting competition in New Zealand – A targeted review of the Commerce Act'. The Ministry of Business, Innovation and Employment welcomes your comments by **5pm 7 February 2025**

Please make your submission as follows:

1. Please see the full Discussion Paper to help you have your say. There is also a summary version.
2. Please read the privacy statement and fill out your details under the 'Submission information' section.
3. Please fill out your responses to the questions in the tables provided. Your submission may respond to any or all of the questions. Questions which we require you to answer are indicated with an asterisk (*). Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. If you would like to make other comments not covered by the questions, please provide these in the 'General Comments' section at the end of the form.
4. If your submission contains any confidential information, please:
    a. State this in the cover page and/or in the e-mail accompanying your submission.
    b. Indicate this on the front of your submission (eg, the first page header may state "In Confidence").
    c. Clearly mark all confidential information within the text of your submission.
    d. Set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (OIA) that you believe apply.
    e. Provide an alternative version of your submission with confidential information removed in both Word and as a PDF, suitable for publication by MBIE.
5. Before sending your submission please delete this first page of instructions.
6. Submit your submission by:
    a. Emailing this form as both a Microsoft Word and PDF document to the Competition Policy team at competition.policy@mbie.govt.nz; or
    b. Posting your submission to:
    Competition Policy team
    Ministry of Business, Innovation and Employment
    15 Stout Street
    PO Box 1473
    Wellington 6140

Please direct any questions that you have in relation to the submissions process to competition.policy@mbie.govt.nz.

Release of Information

Please note that submissions are subject to the OIA and the Privacy Act 2020. In line with this, MBIE intends to upload copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission unless you clearly specify otherwise in your submission. MBIE will take your views into account when responding to requests under the OIA and publishing submissions. Any decision to withhold information requested under the OIA can be reviewed by the Ombudsman.

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Your submission will become official information, which means it may be requested under the Official Information Act 1982 (OIA). The OIA specifies that information is to be made available upon request unless there are sufficient grounds for withholding it.

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To support transparency in our decision-making, MBIE proactively releases a wide range of information. MBIE will upload copies of all submissions to its website at www.mbie.govt.nz. Your name, and/or that of your organisation, will be published with your submission on the MBIE website unless you clearly specify you would like your submission to be published anonymously. Please tick the box provided if you would like your submission to be published anonymously i.e., without your name attached to it.

If you consider that we should not publish any part of your submission, please indicate which part should not be published, explain why you consider we should not publish that part, and provide a version of your submission that we can publish (if we agree not to publish your full submission). If you indicate that part of your submission should not be published, we will discuss with you before deciding whether to not publish that part of your submission.

We encourage you not to provide personally identifiable or sensitive information about yourself or others except if you feel it is required for the purposes of this consultation.

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All information you provide will be visible to the MBIE officials who are analysing the submissions and/or working on related policy matters, in line with the Privacy Act 2020. The Privacy Act 2020 includes principles that guide how personal information can be collected, used, stored and disclosed by agencies in New Zealand. Please refrain from including personal information about other people in your submission.

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MBIE officials may use the information you provide to contact you regarding your submission. By making a submission, MBIE will consider you to have consented to being contacted, unless you clearly specify otherwise in your submission.

Viewing or correcting your information

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Submission information

*(Please note we require responses to all questions marked with an *)*

Release of information

Please let us know if you would like any part of your submission to be kept confidential.

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because [Insert text]

[To check the boxes above: Double click on box, then select 'checked']

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

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

Responses to questions

The Competition Policy team welcomes your feedback on as many sections as you wish to respond to, please note you do not need to answer every question.

Mergers	
Issue 1 – the substantial lessening of competition test	
1.	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.
2.	What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.
3.	Has the 'substantial lessening of competition' test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.
4.	Should the 'substantial lessening of competition' test be amended or clarified, including for: a. Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services? b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? c. In relation to just the merger provisions or wherever the test applies in the Commerce Act? If so, how? Please provide reasons.
	I support an amendment to the merger test to allow for the cumulative effect of a series of acquisitions over the last 3 years. The purpose of such an amendment would be to minimise the risk of firms staggering a series of proposed acquisitions in an effort to avoid the application of s47. While the Australian amendment relates to a series of acquisitions for the same good or services, that approach to defining the amendment may be too restrictive. A series of acquisitions could in theory have an overall anti-competitive effect even

	if the acquisitions are at different functional levels of the market and involve different products or services. For example, say that company ABC in the market for the manufacture of widgets proposes to a) do an acquisition of a competing manufacturer of widgets followed by b) an acquisition of a supplier of a key input used in the manufacture of widgets followed by c) an acquisition of an important customer in the market for the sale of widgets. The combined impact of the acquisition may be substantial even though not all the acquisitions relate to the same market and at least acquisition (b) actually involves different goods or services (the input product being a component used in the manufacture of widgets, rather than a widget itself). In my view, any amendment relating to a series of acquisitions over a three year period should only relate to the SLC test under s47. A similar amendment would not be required to the SLC test in ss 27, 28 and 36. There are already appropriate provisions for the combining of conduct for the purpose of ss 27, 28 and 36. These are contained in ss 3(5), 3(6) and 3(7).
5.	How important is it for the 'substantial lessening of competition' test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
Issue 2 – Substantial degree of influence	
7.	Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.
8.	Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.

Issue 3 – Assets of a business	
9.	Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?
	Yes, the term "*assets of a business*" is unclear, and this gives rise to some uncertainty in practice. For example, does fishing quota amount to assets of a business even when the quota is being issued for the first time? In my view, the issue of regulatory rights should be considered to be assets that should be considered to fall under s 47. That is consistent with the approach of the Commission which has considered the issue or transfer of regulatory rights (such as fishing quota) to fall under s47. In my view, the Commission was correct to take that approach. The purpose of s47 could be undermined if it does not capture the situation where a market participant ends up with a large proportion of the regulatory rights required to compete in a particular market. Amending the term "*assets of a business*" is necessary to avoid ambiguity on this issue. I am aware of at least one case in the High Court where legal advisers have argued that regulatory rights do not amount to "*assets of a business*". Further, there is at least one decided case where a judge has suggested that the acquisition of land falls under s27 (which is only possible if the acquisition does **not** fall under s47 as a result of s46)- *Commerce Commission v NGB Properties Ltd* [2023] NZHC 2005 at [47]. With respect, I consider that the view of the judge in that case was incorrect. However, the finding of the judge demonstrates the ambiguity in the law. Section 47 should therefore be amended so that the section simply refers to the acquisition of assets. The reference to "*of a business*" should be deleted. There should be clarity and consistency of how the acquisition of assets should be dealt with. All such acquisitions should be treated as potentially falling under s47. That would mean that all acquisitions of assets: 1 can be the subject of an application to the Commerce Commission for clearance under s47; 2 will be subject to the s47 test only, and will not be considered under s27; 3 will therefore only be prohibited when their effect or likely effect is to substantially lessen competition (and not when they only have an anti-competitive purpose, as an anti-competitive purpose is only relevant under s27 and not under s47); 4 are treated the same, regardless of whether the assets are already part of an existing business, or are assets not currently used in connection with a business (such as bare land, or fishing quota or other regulatory rights issued by the Crown for the first time). The potential competitive implications of an acquisition of important assets can be the same regardless of whether the assets are already being used as part of a business.
10.	If you consider there is a problem, how should the phrase be amended? For example, by: a. referring simply to "assets"? or

	b. should the definition of "assets" in the Commerce Act be further refined?
	Just by referring to "*assets*" as discussed in the answer to the previous question.
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	I consider the voluntary merger regime works well except for one matter of practise. That is the Commission practise to release *reasons* for a clearance decision some considerable time after it announces whether it will clear a merger or decline clearance. That approach should be changed. Persons affected by a clearance decision cannot properly decide whether to appeal or seek judicial review (combined with an application for interim injunctive relief preventing the transaction if a person is opposing a transaction that has been given clearance) without knowing the reasons for a decision. Secondly, as some judges have often said, a decision-maker will sometimes change their view as to outcome when preparing their reasons for a decision. The process of judicial or administrative decision-making includes the preparation of reasons as a vital part of arriving at the appropriate result. That is particularly the case with analytically difficult decisions involving mixed questions of law and economics (as in the case of clearance decisions under s47). Providing reasons after the event is therefore inappropriate, and runs the risk that incorrect decisions are arrived at, with subsequent reasons being treated as a pure justification of the already predetermined result rather than an essential part of actually arriving at the correct result.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
13.	What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options: a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.

	I would support the Commission having a stay and/ or hold separate power, perhaps combined with the power to *require* the acquirer/ purchaser of assets or shares to apply for clearance if the Commission is not satisfied (within a relatively short time period) as to the extent of competitive impact of a merger. I do not at this stage support a mandatory notification power above certain monetary or market share thresholds. That may require firms to incur unnecessary expense applying for clearance when there is in fact no real competitive impact from a transaction.
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?
	No, the Commission should not be able to accept behavioural undertakings in the context of a clearance or authorisation application relating to a merger. Behavioural undertakings are almost always an unsatisfactory way of dealing with structural changes to a market that adversely impact on competition. If the ability to accept behavioural undertakings was introduced this would likely lead to some mergers getting through that result in irreversible adverse market changes, with the behavioural undertakings likely being demonstrated some years later to be insufficient to address all aspects of the anti-competitive impact of the market change. Enforcement of any behavioural undertakings is also difficult, and would in my view put a costly and onerous obligation on the Commission. It is a strength of NZ merger law that behavioural undertakings cannot be accepted by the Commission.
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.
	Yes. Beneficial arrangements are commonly deterred by 1) the uncertainty of application of the cartel provisions (and the exceptions to them), and 2) the width of the expanded (since 2017) definition of cartel provisions. Examples are widespread but include: a) Common provisions in franchising arrangements eg the price band provision in the Anytime Fitness collaborative activity clearance application intended to ensure that the franchisor could preserve high levels of quality in the franchise chain- see *Anytime NZ Ltd* [2022] NZCC 22 b) Reasonable settlements of litigation to settle enforcement of IP disputes- see my published article with Earl Gray- "*Commerce Commission v Moola* – Lost Opportunity, Chilling Effect and The Need For Reform" (2023) 10 NZIPJ 103

	c) IP licensing arrangements where IP is only licensed within certain geographical areas, or for certain fields of use, or to certain quantitative limits- see my published article- "Intellectual Property and the Prohibition on Cartel Conduct in New Zealand Competition Law" (2024) 31 NZULR 113 d) Land covenants which do not adversely impact on a market as a whole but can be argued to restrict supply by another competitor (eg the owner of a wind farm puts a height restriction on adjacent land which is acquired by a competitor who wants to use the land for its own wind farm)- see my seminar paper for the NZLS property law conference- 'Land Covenants and the Commerce Act- Enforcement of Covenants, and Overreach and Misapplication of Competition Law' NZLS Property Law Conference (June 2024) Other examples could be given. The problems largely arise from 1) the overly wide definition of "*restricting output*" as part of the expanded definition of cartel provision in force from 2017 2) too restrictive an approach by the Commission to application of the collaborative activity exception.
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?
	The definition of "*restricting output*" (as part of the definition of cartel provision in s30A) is very wide and might be better repealed, leaving the most significant anti-competitive restrictions on supply to be covered under s30 in those cases where they have a likely impact on price, or under s27 if they have an anti-competitive impact in the market as a whole. The main problem with collaborative activity exception is probably not the way it is worded, but the restrictive interpretation of the exception by the Commerce Commission.
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	I would support the introduction of notification regimes and class exemptions as discussed on page 26 of the discussion paper. The discussion paper refers for example to the ACCC having a notification process for certain classes of collective bargaining arrangements, and also notes that the ACCC has issued a class exemption for small businesses to collectively bargain. Such a class exemption would be useful in New Zealand as well and would avoid the need to bring an expensive and very time-consuming application for authorisation to approve such a collective bargaining arrangement (as in *New Zealand Tegel Growers Association Incorporated* [2022] NZCC 30).
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?

Issue 7 – Anti-competitive concerted practices	
19.	What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?
	The Act is sufficient. However, there is uncertainty over arrangements for information exchange between competitors. The relevant case law is nearly 40 years old (*Re New Zealand Medical Association* (1988) 1 NZBLC (Com) 104,369 (Commerce Commission Decision 220, 13 September 1988); *Insurance Council of New Zealand (Inc)* Commerce Commission Decision 240, 13 October 1989. There is not any recent comprehensive Commerce Commission guidelines to indicate what forms of pricing information exchange would now be considered to substantially lessen competition under s27, or perhaps even amount to an arrangement likely to control or maintain price in breach of s30. Up to date guidance is required rather than restrictive price signaling legislation.
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?
	No. The Australian prohibition on concerted practices arose because of an unduly restrictive approach taken by the Australian courts to when there was held to be an "arrangement or understanding" in place. Situations (such as in the cases involving raising of petrol pump prices) where the facts seemed to clearly show an understanding between the parties to maintain prices were nevertheless held by the Australian courts to not give rise to an understanding- see for example *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794. With respect, the outcomes in some Australian cases of that kind are hard to understand. However, we have not seen in New Zealand a similar failure by the New Zealand courts to find the existence of an arrangement or understanding where that is justified. A law change to introduce a prohibition on concerted practices is not required in New Zealand, and would risk over enforcement of competition law.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	

21.	Do you consider that industry codes or rules could either: a. Fill a gap in the competition regulation regime or b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.
	Yes. There are some markets where one market participant has control over a key input that is required for competition in downstream markets and relying on ss27 and 36 is most unlikely to be adequate to ensure competitive downstream markets.
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?
	Access on reasonable terms to key data, IP or assets required to compete in downstream markets.
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
	I disagree with the suggestion on page 34 of the discussion paper that injunctions are a cost-effective mechanism for addressing anti-competitive conduct or mergers. As discussed further below, the costs and risks involved (including the need to give an undertaking as to damages) are often out of the reach of small market participants. Some thought should be given to whether the Commission should be given "*stop order*" powers similar to those of the Financial Markets Authority. That would certainly be useful in the context of the Fair Trading Act eg for misleading conduct or other unfair trade practices. See my article "The Viagogo case- The difficulties of seeking interim injunctive relief against an overseas defendant" LawTalk, April 2019 The appropriateness of such a power is perhaps less clear in relation to the Commerce Act given the greater complexity involved in assessing whether there is a Commerce Act breach.

	The Commerce Act did for a while include provisions allowing the Commission to make cease and desist orders. However, the process for this was quite unwieldy (for example allowing for cross-examination when that is not even required when seeking an injunction in the High Court). I consider that it may be worth considering introducing a simpler procedure allowing the Commission to act quickly to make stop orders in relation to obviously anti-competitive practices, perhaps combined with a right for affected parties to then seek urgent review by the High Court of any stop order made by the Commission. An example where this might be useful is where a dominant firm clearly misuses its market power in a way that will likely mean the exit from the market of a small but growing competitor. The small competitor is unlikely to have the resources to be able to apply to the Court for injunctive relief. Commerce Act applications for injunction are not simple and would likely require the incurring of legal costs of at least $50,000. This may well be out of the reach of a small competitor. An application for interim injunction would also require the giving of an undertaking as to damages, a major risk for a small competitor and one that it may not have the capacity to take in the absence of a strong balance sheet. The small competitor would no doubt also face a heavy-hitting legal response by the dominant firm. The Commerce Commission may be somewhat better able to take on such a case but the Commission still has many competing demands for its (limited) resources. If the misuse of market power appears to the Commission to be a clear breach of s36, the ability of the Commission to make a stop order may be a more timely, cost-efficient and effective remedy than requiring an application to the High Court for injunctive relief.
Issue 10 – Protecting confidential information	
25.	Do you consider that the Commission effectively maintains the balance between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability? Please provide reasons or examples.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?

	Section 100 has in my view been incorrectly interpreted by the Commission and the Courts. Section 100(1) allows confidentiality orders to be made in relation to information given to the Commission. The Commission (and the Court of Appeal) have interpreted this as allowing the Commission to make confidentiality orders in relation to questions that the Commission asks in interviews- *Commerce Commission v Air New Zealand Ltd and Others* [2011] NZCA 64, [2011] 2 NZLR 194 (CA) at [90] and [115]). With respect, that is an incorrect interpretation. It may be that the Commission *should* be able to require interviewees to keep confidential the questions put to them because that is necessary to preserve the integrity of the Commission's investigation. However, if MBIE and Parliament agree that it is the case, s100 should be amended to achieve that, rather than relying on an interpretation of s100 which cannot be justified on its plain words.
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
	I agree that the Commission should be able to grant a collaborative activity clearance that applies to future parties who might join an agreement. The Commission suggested in the *Anytime Fitness* case that it did not have the power to do that. I consider that the Commission was not correct in that assessment. However, the Commission having taken that position, a law change is required. Parliament in adopting the collaborative clearance procedure explicitly suggested that the procedure would be useful in the case of franchises- see the Commerce Select Committee's final report of 13 May 2013 on the Commerce (Cartels and Other Matters Bill) at page 7. However, with most franchise networks franchisees come and go frequently. Therefore, it is important that any clearance decision be able to apply to, and protect, new franchisees who become part of an arrangement. If that is not the case any clearance decision given in respect of a franchise arrangement is likely to lack utility.
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
	The Act should be amended to allow private parties who are affected by an anti-competitive merger (in breach of s 47) to apply to the High Court an order that the parties to the merger divest assets. Currently, in the case of an anti-competitive merger s85 only allows the Commerce Commission to seek an order for disposal of assets. This limitation to s85 seems to have been based on the original s81 of the Australian Trade Practices Act 1974 which limited applications for divestiture orders to the Attorney-General or Trade Practices Commission (now ACCC). (The remedial provisions in the Commerce Act 1986 were originally based on those in the Australian Trade Practices Act 1974.)

	However, the limitation on who can seek a divestiture order no longer exists in the Australian legislation. Section 81 of the Competition and Consumer Act 2010 now allows the ACCC "*or any other person*" to seek an order for divestiture of shares or assets acquired in breach of s50 (the equivalent to s47 of the Commerce Act). Unfortunately, New Zealand policy makers do not appear to have picked up on this change to the Australian legislation and adopted the change in New Zealand. The fact that private parties could enforce the Act as well as the Commission was always considered an important part of the Act that ensured its effectiveness in promoting competition. The Court should not lack the power to construct a remedy that would effectively negate a serious breach of the Commerce Act even though it may be a private litigant that is bringing enforcement action rather than the Commission. There is some precedent for the Courts making orders under the Commerce Act that will require parties to dispose of assets where that is necessary to achieve a more competitive market situation. For example, in *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463 at 536 the High Court made an order under s89 requiring a party to give up the rights to one half of the gas in the Kapuni gas field. The *Kapuni* case was a case brought by a private party rather than by the Commission. It was a case brought relating to a contract substantially lessening competition in breach of s27 rather than a merger substantially lessening competition in breach of s47. However, if such a remedy is appropriate for a breach of s27 it should also be an appropriate remedy for breach of s47. To ensure that our law allows for such a remedy for breach of s47 then it is important to amend s85 to clarify that orders for disposal of assets acquired in breach of s47 can be sought on the application of the Commission "*or any other person*". As indicated above that would also ensure that our legislation is consistent with s81 of the Australian Act.
Any other issues	
30.	Are there any other issues that you would like to raise? 1)The collaborative activity clearance procedure should be simplified so that it allows the Commission to just confirm that the collaborative activity exception applies to protect against a breach of s30, without the need for the Commission to also consider whether s27 applies to the arrangement. That would substantially simplify the procedure under a collaborative activity clearance application as the Commission would not need to do extensive market research to determine whether there is a lessening of competition in the market as a whole. Parties would be left to self-assess on whether they were in breach of s27 (as would be the case now if they did not apply to the Commission at all). The fact that market research would not be required by the Commission under such a simpler clearance regime would also make it more possible for the Commission to consider collaborative activity clearance applications on a confidential basis. This in turn would make it more realistic for parties to consider applying for clearance. For example, parties to a commercially sensitive joint venture that is just starting up will currently not be willing to apply for clearance if market analysis is required by the Commission and therefore the commercially sensitive joint venture will necessarily be subject to public scrutiny (as the Commission makes market inquiries).

The parties to such a commercially sensitive joint venture may simply decide not to proceed with the joint venture at all because they are not willing to risk being in breach of the cartel laws and the criminal offence provision in s82B).
If, however, market analysis is not required for a clearance application, and the application can be conducted under confidentiality, then the parties may well be willing to apply for clearance.
2)The repeal of the Intellectual Property (IP) exceptions in ss45 and 36(3) in 2023 was ill advised.
Until its repeal s45 provided a limited exception to Part 2 of the Commerce Act (including in particular ss 27 and 30 of the Act) in relation to provisions which authorised acts which would otherwise have been prohibited by statutory intellectual property rights (such as patent or copyright rights). Section 45 was particularly important in relation to restrictive provisions in IP licenses.
Until its repeal s36(3) provided that the enforcement of IP rights did not amount to the misuse of market power. Section 36(3) would have been particularly important if it has been retained given the change in s36 in 2023 to prohibit actions by firms with substantial market power which had the effect or likely effect of substantially lessening competition. This meant that from 2023 it was arguable that a firm with substantial market power might breach s36 by:
*bringing enforcement action against a party breaching the firm's IP rights (if that had the effect of substantially lessening competition in a market), or
*refusing to license its IP to another party (again if that had the effect of substantially lessening competition in a market).
The holders of IP rights must be able to exploit and enforce those rights. If they cannot do so then the incentive to innovate that is encouraged through the conferral of IP rights is substantially diminished.
The IP exception in s45 should be reintroduced (though I would suggest that the exception only protect against breaches of s30, not against breaches of 27).
The reintroduction of the s45 exception would ensure that holders of IP rights could lawfully exploit their rights through limited licensing of those rights without breaching s30. For example, the holder of IP rights might do this by giving a license of IP to a competitor that just relates to a particular geographic area, or that just allows use of the IP for a particular field of use (eg licensing fruit picking technology for use in picking avocados but not for picking kiwifruit) or that just allows use of the IP to produce a certain quantity of products (but not more than that).
Those are all examples of restrictive licensing that currently risk breaching s30 and potentially amounting to an offence under s82B. These examples of restrictive IP licensing are common and reasonable uses of IP rights which should not be considered illegal. They would be protected by s45 if that exception was still in force.
For further details relating to this issue see New Zealand Law Society "Submission to the Economic Development, Science and Innovation Select Committee on the Commerce Amendment Bill 2021", 30 April 2021 and my article Intellectual Property and the Prohibition on Cartel Conduct in New Zealand Competition Law" (2024) 31 NZULR 113
The IP exception in s36(3) should also be reintroduced although its wording would need amendment. The wording suggested in the New Zealand Law Society submission to the Select Committee was as follows:
"(3) A person does not contravene s36(1) by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of s45(2), in New Zealand.

(4) Without limiting s36(3), a refusal by a person to license the use of a statutory intellectual property right shall be considered enforcement of that right."
The justification for this exception, and rationale for this wording, is discussed in detail in the New Zealand Law Society submission.
3) However, the reintroduction of the former IP exceptions in s45 and 36(3) are insufficient to sufficiently protect the enforcement of IP rights. This is as the result of the introduction in 2017 of the "*restricting output*" limb of the prohibition on cartel provisions.

The consequence of that expansion of the cartel conduct prohibition is that it becomes potentially unlawful for holders of IP to agree with a competitor who is infringing the holder's IP right that the infringing competitor will no longer produce or supply infringing product.

A party with IP rights can usually bring court proceedings to enforce its IP rights against someone who is infringing that IP (subject to the possible application of s36 discussed above, if the IP rights holder has substantial market power).

However, while most such court proceedings are the subject of settlement before trial, that can be a problem if the settlement involves the infringing party agreeing to no longer produce or supply the infringing product. If the parties to the settlement are competitors (or even just potential competitors) the settlement agreement is likely to be considered a "*restriction of output*" falling within the expanded prohibition of cartel conduct in s30.

That this is the case is confirmed by the High Court decision in *Commerce Commission v Moola.co.nz Ltd* [2021] NZHC 3423. For a more detailed discussion of the case, and of the problems with settlement of IP disputes under the expanded definition of cartel conduct, see John Land and Earl Gray "*Commerce Commission v Moola* – lost opportunity, chilling effect and the need for reform" (2023) 10 NZIPJ 103.

Sir Robin Jacob, distinguished former intellectual property judge, has commented that if IP settlement agreements are treated as automatically anti-competitive there is a "*real danger of deterring bona fide settlements*". He comments that the consequence may be to require "*litigation to the death*"- see Robin Jacob "Competition Authorities Support Grasshoppers: Competition Law as a Threat to Innovation" in Robin Jacob *IP and other things: a collection of essays and speeches* (Hart Publishing, 2015) at 220.

The good faith settlement of litigation is usually regarded as being in the public interest, but such settlement will be discouraged if the parties to the settlement can be accused of having engaged in cartel conduct in breach of s30 (and possibly a criminal offence under s82B).

This issue can only be addressed by one of two potential reforms.

One option is to remove the definition of "*restricting output*" from the definition of cartel provision.

	The second option is to add a new exception to the prohibitions on cartel conduct in the Commerce Act (s 30, and the offence provision in s 82B) which would provide that those prohibitions would not apply to provisions in settlements of IP litigation which prevented or restricted the production, supply or acquisition of goods or services prohibited by a statutory IP right. This was the new exception suggested by Earl Gray and myself in the article referred to above. If such an exception was introduced, this would ensure that settlements of IP disputes would only breach the Commerce Act if they actually had an anti-competitive effect. The relevant provisions of the settlement agreement could still be found to breach s 27 of the Commerce Act if as a matter of fact they had an anti-competitive effect. That is closer to the approach taken in other jurisdictions including the approach taken in the United States in *1-800 Contacts, Inc v Federal Trade Commission* 1 F 4th 102 (2d Cir 2021) and the US Supreme Court decision in *Federal Trade Commission v Actavis Inc* 570 US 136 (2013).

General Comments:

Thank you

We appreciate you sharing your thoughts with us. Please find all instructions for how to return this form to us on the first page.