Submission Form

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

We welcome your feedback

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

Please make your submission as follows:

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

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

Release of Information

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

Privacy statement

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

Use and release of information

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

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

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

Personal information

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

Contacting you about your submission

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

Viewing or correcting your information

We may share this information with other government agencies, in line with the Privacy Act 2020 or as otherwise required or permitted by law. This information will be securely held by MBIE. Generally, MBIE keeps public submission information for ten years. After that, it will be destroyed in line with MBIE's records retention and disposal policy. You have the right to ask for a copy of any personal

information you provided in this submission, and to ask for it to be corrected if you think it is wrong. If you'd like to ask for a copy of your information, or to have it corrected, please contact MBIE by emailing competition.policy@mbie.govt.nz.

Submission information

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

Release of information

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

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

I would like the parts of my submission highlighted in yellow to be kept confidential on the grounds that making available of the information would be likely unreasonably to prejudice the commercial position of the person that is the subject of the information.

[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?* Anna Ryan
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.
	Lane Neave
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.

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?
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?
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
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.
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?

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.
	Beneficial arrangements are regularly deterred, for a variety of reasons. Uncertainty regarding the application of the Commerce Act is a key issue. For example: - The repeal of the IP exemptions in the Commerce Act in 2022 has cast doubt on the legality of common restrictions in IP licensing arrangements. It has also highlighted the fact that the Commerce Act currently hampers parties to legally settle IP disputes on reasonable commercial terms. - Cartel provisions only fall within the collaborative activities exemption if they are "reasonably necessary for the purpose of the collaborative activity". In consultation on the exposure draft Commerce (Cartels and Other Matters) Amendment Bill, concerns were raised that the 'reasonable necessity test' could result in the Commission second-guessing businesses' commercial decisions (see cabinet-paper-commerce-act-amendments-cartels.pdf at para 41). MBIE considered, however, that the Commission would likely look towards the United States' approach in respect of its ancillary restraints framework. Under the United States' framework, when considering whether an agreement is 'reasonably necessary', "Agencies consider whether practical, significantly less restrictive means were reasonably available…but do not search for a theoretically less restrictive alternative that was not practical given the business realities". MBIE's expectation that the Commission would align with the United States' approach as to what is 'reasonably necessary' has not played out, however. Instead, the test as outlined in the Commission's Competitor Collaboration Guidelines and applied in the *Anytime NZ Ltd* [2022] NZCC clearance decision is that the Commission will "consider the available alternatives that would enable the parties to pursue their collaboration and protect the collaborative interest". This creates considerable uncertainty regarding the extent to which the Commission might be prepared to substitute its own views for those of the parties, as to the 'reasonable necessity' of the cartel provisions. Another problem is that the collaborative activity clearance regime is underutilised, with the Commerce Commission having only received one application since the regime was introduced in 2018. One issue is that the regime currently requires the Commission to confirm both that: (a) the criteria for the collaborative activity exemption are met and the parties will therefore not breach section 30; and

(b) the proposed arrangement will not have the purpose, effect or likely effect of substantially lessening competition in a market, in breach of section 27.

In order to conduct section 27 analysis, it is necessary for the Commission to disclose a certain amount of information to the market about the proposed collaborative activity. This makes the collaborative activity clearance regime unattractive in many cases, as the initiatives are often commercially sensitive, particularly in the early stages. Confidentiality [redacted] Dropping the section 27 analysis from the Commission's assessment would also carry the benefit of reducing the timeframe for processing applications.

The utility of the collaborative activity clearance regime has also been significantly eroded by the approach adopted by the Commission in its Competitor Collaboration Guidelines (at para 138) and in *Anytime NZ Ltd* [2022] NZCC 22 (at para 31) that "if a party joins an agreement that has been given clearance, the agreement is considered to be a new agreement and therefore no longer has the benefit of clearance". For collaborative arrangements concerning industry associations or franchise networks, or other arrangements where it would be desirable for new members to join over time, this restrictive interpretation has negated much of the benefit of obtaining a collaborative activity clearance.

A further issue is simply that the Commerce Act does not provide a wide-enough range of tools to facilitate beneficial collaborations. An authorisation is often the only avenue available to parties who wish to engage in an obviously beneficial collaboration, where the initiative does not constitute a "collaborative activity". When learning that an authorisation is the only option, many businesses tread the well-trod path of:
(1) disbelief - "but this initiative is clearly in the public interest!";
(2) denial – "surely there must be some way of doing this that wouldn't involve having to obtain an authorisation"; and
(3) dismay – "what a ridiculous outcome",
before filing their plans in the 'too hard' basket. In recent years it has been particularly disappointing to observe a number of industry-led initiatives fall by the wayside that have been specifically targeted at improving outcomes for consumers, improving sector resilience, and tackling environmental, social or sustainability challenges. I would also note that given the cost, time and work associated with seeking an authorisation, even when clients that have the means to seek an authorisation, they often choose to focus instead on lobbying for industry-specific legislative solutions.

Finally, the NZD$36,800 Commerce Commission filing fee is a significant barrier for parties considering an authorisation. In Australia, the filing fee is AUD$7,500 and if paying the fee would cause hardship, the ACCC may waive all or part of the fee.

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?
	Consistent with the submissions of the Law Society's Intellectual Property Law Committee on the Commerce Amendment Bill 2021 (Commerce-Amendment-Bill-IP-exceptions-30-4-21.pdf), my view is that it was incorrect to repeal the IP exemptions and they should be reinstated and extended to cover settlements of IP disputes on reasonable commercial terms. Whether a cartel provision is 'reasonably necessary' for the purposes of the collaborative activities exemption should be assessed in a manner consistent with the United States' approach to ancillary restraints. Given that the Commission has adopted a different approach, the best approach may be to address this through adding a definition into section 31 of the Commerce Act as to what "reasonably necessary" means. The collaborative activity clearance regime should only require the Commission to assess section 30, and leave parties to self-assess on section 27. This would make the regime more attractive to prospective applicants, as the Commission could more easily process applications confidentially. The Commerce Act is currently silent on whether the Commission can grant a clearance for a collaborative activity where the parties can change over time. This was clearly the intention when the collaborative activity clearance regime was introduced, as franchise agreements were always considered to be a prime example of collaborative activities that would be capable of relying on the collaborative activity exemption and the ability to seek clearance (see paras 76 – 79 of Anytime NZ Limited's submissions on the Statement of Issues dated 22 December 2021 - Commerce Commission - Anytime NZ Limited). Currently, however, the Commission's position is that if the parties to the collaborative activity change, the clearance will be invalidated. In formulating this view, the Commission noted the absence of a provision equivalent to section 58B(2) of the Act, which allows the Commission to grant authorisations for an arrangement even if the parties change over time. I submit that an equivalent provision to section 58B(2) of the Commerce Act be added in respect of collaborative activity clearances.
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	I support the introduction of new legislative tools aimed at reducing barriers to beneficial collaboration. I echo the concerns noted in the Review document that the current Commission processes can be slow and costly. Tools aimed at addressing these issues are to be welcomed. I endorse the proposals to introduce a statutory notification regime for specified classes of arrangements, and to empower the Commission to make class exemptions. In my view, these initiatives (in combination) would go a considerable way towards reducing the current barriers to beneficial collaborations. I consider

	the two initiatives as complementary and encourage the adoption of both, as Australia has done. I note that in Australia, a class exemption for collective bargaining was introduced in 2021. This is an excellent example of an initiative that, if adapted for New Zealand conditions, would quickly realise significant efficiencies. For example, at the time that the collective bargaining class exemption was introduced in Australia, six Australian chicken grower associations held authorisations for collective bargaining. Since the introduction of the class exemption, no authorisations have been sought by grower associations for collective bargaining – instead, 10 of the 109 collective bargaining notices that have been lodged with the ACCC since 2021 relate to chicken growers. The New Zealand chicken growing industry is structured similarly to Australia, and the two largest grower associations have been authorised by the Commerce Commission to conduct collective negotiations. Significantly, one of these two authorisations is due to expire in 2027. If New Zealand introduced a class exemption for collective bargaining that could be utilised by New Zealand chicken grower associations, instead of reapplying for authorisation, the grower association could simply lodge a collective bargaining notice with the Commission. This would result in a very significant saving of time, cost and resources, both for the association and the Commerce Commission. I also support the proposal to provide an exemption for small businesses from the Commission fee payable to apply for authorisation under the Commerce Act. While the parties would still have to meet the cost of applying for the authorisation, this would at least remove one significant hurdle. I also encourage the adoption of the Australian approach, where the Commission would also have a residual discretion to waive the fee in whole or in part on a case-by-case basis. Given that the fee is set at $36,800, this flexibility is warranted.
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?

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?
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.
	I support the use of industry codes. Currently, there are limited options for addressing sector-specific competition issues and often no obvious way to resolve entrenched issues and longstanding concerns. Mandatory industry codes, monitored and enforced by the Commerce Commission, may effectively address problems such as misuse of market power and obtaining access to essential facilities and inputs on reasonable commercial terms. Industry codes would almost certainly be a more efficient and appropriate response than developing primary legislation as it would provide a specific, clear and accessible pathway to address industry-specific competition issues. Lane Neave has two clients in particular whose ability to compete in their respective markets has been severely hampered by an inability to gain access to essential inputs (facilities and data, respectively) on reasonable commercial terms, and a lack of viable options for addressing this. They both strongly support the use of industry codes as a means of addressing sector-specific competition issues.
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?
	In industries where parties need to contract with each other, and there is an imbalance of bargaining power, default contractual terms and a binding dispute resolution regime. In industries where businesses need access to facilities, data, intellectual property, or assets to compete in downstream markets, access on reasonable commercial terms and a binding dispute resolution scheme in the event agreement cannot be reached /or in the event of breach.

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?
	Mandatory industry codes will only be useful tools if there is a clear and accessible process for reaching agreement that an industry code of conduct should be prescribed. It is vital that there is a simple pathway for industry participants to safely advocate for the introduction of an industry code, including clarity on who they should submit a request to, the process the recipient to follow in response to the request, and clarity as to whose agreement would be needed in order for it to progress.
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
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?

Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
Any other issues	
30.	Are there any other issues that you would like to raise?
General Comments:	

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.