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'*

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Submission information

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

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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.

We understand the effectiveness of the "current merger regime" to encompass:

- The law relating to merger control (statute and case law);
- The Commerce Commission (**Commission**)'s views on, and application of, the law;
- The Commission's processes and procedures.

We consider that, in line with overseas jurisprudence, economic thinking, and guidelines,[1] the law on the substantial lessening of competition (**SLC**) test is **generally** "fit for purpose".

The SLC test is an economic test which can be interpreted by the courts and has flexibility to evolve.[2] We do not generally see a need for reform, noting that the principles applied in most jurisdictions are similar. Nor do we see a need to exactly harmonise wording with the Australian legislation.[3]

New Zealand has operated a relatively benign merger control regime which has permitted higher levels of market concentration. This may reflect the dual challenges of New Zealand having both small and remote markets. The authorisation process provides a useful mechanism for applying a (modified) total welfare test enabling economies of scale and scope to be recognized for otherwise anti-competitive mergers.

Due to the concentrated nature of the New Zealand economy, oligopolistic market structures are common. Not all of these markets are anti-competitive or create concerns, but some may require a greater degree of scrutiny.

Concerns have been expressed about a small group of strategically important "**uncompetitive concentrated industries**":

- The Productivity Commission has previously concluded that "[…] *there are some industries where measured competition has consistently been relatively*

[1] For example, the US FTC & DOJ 2023 merger guidelines: Antitrust Division | 2023 Merger Guidelines | United States Department of Justice.

[2] We see this with the increased sophistication of the Commission approach and guidelines (for example, the Merger and Acquisition Guidelines, which we note are under review). We note concerns which have manifested in the Commission's guidelines include concentration, non-horizontal mergers, competition between platforms and demand-side (buyer-side) market power concerns (eg the *Moana* clearance and the *Foodstuffs* decline).

[3] Australian legislative drafting is sub-optimal and often overly prescriptive. More importantly, different legislative wording has not in our experience been an impediment to following Australian guidance nor the Single Economic Market.

weak: mining, supermarket, grocery stores and specialised food retailing, financial and insurance services, auxiliary finance and insurance services, and rental and hiring services (except real estate) […] *finding relatively strong competition in any industry does not rule out the existence of competition problems*".[4]

- The OECD has recognised that NZ markets with weak competition include retail grocery, banking and electricity markets.[5]
- *"Prime Minister Christopher Luxon has told his ministers to take any action necessary to improve competition in critical sectors such as banking, energy, and groceries"* [6]
- Minister Andrew Bayly's expressed concern that *"Over recent years reforms to promote competition have focused on sector-specific investigations followed by complex sectoral interventions in matters such as retail groceries, retail fuel, and residential building supplies."* and "*More effective competition settings can avoid the need for future complex regulatory interventions after harm to competition and the economy has already been done."* [7]

Uncompetitive concentrated industries are those where there are/may be:

- Few dominant firms
- High barriers to entry
- Clear market boundaries
- No close substitutes
- Purchasers without market power.

Rather than broader changes to the Commerce Act, (which could inefficiently raise compliance costs with limited benefits), the concerns expressed by the government, OECD and Productivity Commission may be better addressed through a targeted ex ante set of powers for these uncompetitive concentrated industries, governing both Part 2 (Restrictive Trade Practices) and Part 3 (Business Acquisitions) of the Commerce Act 1986 (**Act**). The Act has previously had targeted rules for 'sensitive industries'.[8]

We comment on procedural aspects of the merger regime under **Question 6** and more broadly on additional issues under **Question 30**.

[4] New Zealand Productivity Commission, *Competition in New Zealand: highlights from the latest data - Research Note 2019/3*, August 2019. Authors: Aaron Schiff and Harkanwal Singh. Page 27.
[5] See OECD Economic Surveys: New Zealand 2024.
[6] https://www.interest.co.nz/public-policy/131593/prime-minister-christopher-luxon-unveils-new-investment-agency-and-hints. See also: *"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 "*: Economic growth the key to better days ahead | Beehive.govt.nz
[7] Cabinet paper *Competition Settings – Opportunity to Review New Zealand's Competition Settings to Lift Productivity*, 25 September 2024, paragraphs 8 & 9.
[8] See section 50 and schedule 1 of the 1986 version of the Commerce Act, which previously imposed a higher standard (i.e. clearance/authorisation was mandatory) for any merger or takeover proposal within a specified class of activities.

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.
	We find it difficult to identify pro-competitive or otherwise beneficial mergers that were declined clearance. Over time, only approximately 10% of mergers have been declined clearance.[9] Perhaps, the *NZME/Fairfax* authorisation may have resulted in stronger/better media, but Stuff's continued existence may suggest otherwise.[10] Additionally, while the Commission's decision to decline *Sky/Vodafone*[11] on balance seemed correct at the time, the deal may have offered benefits had behavioural undertakings been available to the Commission. Potential harms of blocking mergers could include the loss of efficiencies (scale/scope), potentially for export-related businesses. Recently it was suggested that the proposed *AlphaTheta-Serato* acquisition only had *de minimis* effects in New Zealand and that this would adversely impact the local "start-up" ecosphere.[12] We do not know if it was de minimis or not, but it appears that the disappointed vendor's public comments have upset some businesses, and we are aware of some parties (wrongly, in our view) seeking to relocate their assets to other jurisdictions to enable an "exit strategy".[13] We consider that a de minimis threshold may have been able to address these issues and assist the Commission in its analysis, whether or not it concluded that de minimis criteria was met.[14]
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.
	Considering the concerns surrounding uncompetitive concentrated industries, examples of where the merger regime (but not necessarily the substantive SLC test) may have "failed" could include: • No apparent scrutiny of the Foodstuffs Upper & Lower North Island merger, particularly given the earlier history.[15] o In addition the Commission does not appear to have closely considered whether the arrangements between the two separately owned Foodstuffs North Island and South Island entities and whether these contain cartel

[9] Based on the Commerce Commission's case register which shows that 64 out of 695 merger applications have been declined since 1991. See: https://comcom.govt.nz/case-register.
[10] Commerce Commission, *NZME Limited; Fairfax New Zealand Limited*.
[11] *Vodafone Europe B.V.;Sky Network Television Limited* [2017] NZCC 1.
[12] Matthews Law, Commerce Commission Declines First Merger Since 2018 - The Alphatheta / Serato Merger.
[13] In that instance the proposal had been referred for an in-depth investigation by the UK Competition Markets Authority, and it seems that there were legitimate vertical/horizontal concerns in New Zealand. See: https://www.gov.uk/cma-cases/alphatheta-slash-serato-merger-inquiry.
[14] We have previously submitted to the Commission in favour of adopting a de minimis threshold. See our *Submission on the proposed review of Mergers and Acquisitions Guidelines*, 23 July 2024 at [25].
[15] Stuff.co.nz, *Foodstuffs merges North Island arms*

	provisions. Parties have previously raised concerns with the Commission regarding this. • Vertical and other acquisitions in grocery by (now) regulated grocery retailers (**RGRs**) including by Foodstuffs North Island (eg *Leigh Fisheries*[16]). o We note Woolworths is currently applying for clearance to acquire food manufacturer/supplier Beak & Johnston.[17] • Clearance being granted for ANZ to acquire the National Bank, and various other acquisitions made by banks.[18] • Clearance for *IAG/Lumley* in 2014,[19] and other insurance mergers/acquisitions made by insurers. • Various acquisitions by electricity generators of retail customers, including the clearance for Mercury to acquire Trustpower's retail business[20] o We note the current clearance application by Contact Energy to acquire Manawa Energy.[21] Commendably we see the Commission's ex-post merger review reports as a useful tool for review and improvement, including, for example, the *Ingenico Group SA/Paymark* review.[22] We see that Commissioners are having regard to the SLC test in the Act (which incorporates the consumer welfare test) and the benefits of dynamic competition.
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.
	We do not see a general need for change. As noted, we consider that generally the SLC test works well, and we have seen convergence from Australia on substantive matters. If any changes are considered necessary, we consider that the changes **should be targeted or limited to uncompetitive concentrated industries**, where there are concerns about incumbent behaviour that could have disproportionate effects (for example, strategic conduct such as removing an "option" for a new entrant or creating a stronger **"**moat" increasing barriers to entry).

[16] FMCG Business, *Foodstuffs secures independent seafood company*.
[17] Commerce Commission, *Woolworths seeks clearance to acquire Beak & Johnston*.
[18] Commerce Commission, *ANZ Banking Group (New Zealand) Ltd; The National Bank of New Zealand Ltd*.
[19] Commerce Commission, *IAG (NZ) Holding Limited; Lumley General Insurance (N.Z.) Limited*.
[20] Commerce Commission, *Mercury NZ Limited; Trustpower Limited's retail business*
[21] Commerce Commission, *Contact Energy Limited; Manawa Energy Limited*
[22] Commerce Commission Ex-post merger review report 2023/24.

	A range of conduct can cause harm beyond mergers/acquisitions. Under existing law, competitive impact is required for there to be an SLC. In *New Zealand Bus Ltd & Infratil Ltd v Commerce Commission*, Wilson J described the impact as '*minor*' but still found a substantial lessening of competition. [23] In practice, the Commission's traditional approach to merger analysis (considering "unilateral" and "coordinated" effects) and its application of the counterfactual test may have made it more difficult for the Commission to decline anti-competitive mergers, although recent determinations from the current Commission indicate more critical analysis.
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.
	We understand arguments for amending for further harmonisation but consider this unnecessary. Except for Australia's recent changes on creeping acquisitions and nascent competitors,[24] substantively the law is largely the same, with the courts treating it as such. This is generally useful for multijurisdictional and trans-Tasman matters and has not been an impediment to the Single Economic Market (**SEM**). In its recent merger reforms, Australia has clarified that lessening competition includes creating, strengthening or entrenching a substantial degree of power in a market. We consider this is already caught by New Zealand law, noting the Commission's Mergers and Acquisitions Guidelines (**MAG**) provide that "*the* [SLC] *test captures the creation, preservation and enhancement of market power*".[25] Further, we see risks and impracticalities with excessively prescriptive drafting, which can lead to bad/inflexible law and/or cause a court to infer a change in meaning is intended although that was not the case. We note that differences in Australia's drafting style, federal structure and market structures mean there are necessary limitations to copying the Australian legislation.

[23] New Zealand Bus Limited & Infratil Limited v Commerce Commission [2007] NZCA 502 Wilson J at [270]: *"More particularly, pre-acquisition competition between NZ Bus and Mana in tendering for a small number of routes is of itself sufficient to establish that substantial (in the sense of real) lessening of competition would result.* At [272]: *"On the present facts, only very minor lessening of competition would result and the consequent detriment would be modest"*.

[24] In Australia, monetary thresholds have been structured to capture serial / nascent acquisitions. The ACCC **may** take into account cumulative effect of serial acquisitions involving the same goods and services that are same/substitutable/competitive with each other. See the Australian Treasury's paper: *Merger reform for a more competitive economy: Government response to consultation*.

[25] NZ Commerce Commission, Mergers and acquisitions Guidelines, May 2022, footnote 31.

6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?

General views

Our primary position is that striking the right balance comes down in large part to the practices adopted by the people. Good competition law requires a strong competition regulator, which takes a proactive approach and is prepared to bring proceedings on the right matters that make a difference. Cases tend to provide better guidance than "black letter law".[26] We support the separate governance review in ensuring the Commission has the requisite operational support/processes.[27]

The Commission has, over recent years refined practices by:

- Making informal approaches workable and acknowledging this in the MAG;[28]
- Adopting a more proactive market monitoring process for non-notified mergers which has been highly effective; and
- Taking or threatening to take more enforcement action.[29]

That said, the government may consider that in uncompetitive concentrated industries there may need to be greater scrutiny of both mergers and conduct (including contracts).

Procedural considerations - timing

While the statutory timeframe for considering a merger clearance has been extended to 40 working days,[30] in practice this deadline is not even met in less than half of non-complex mergers.[31] Consistent with more complex theories of harm and greater concerns about oligopolies, the average time for a decision has progressively increased over time.[32] The open-ended nature of timing for "complex" mergers is in our view too uncertain and unsatisfactory.

We recommend:

- Considering an expanded timeframe, if necessary, with separate and prescribed timeframes for phase 1 (cleared with no Statement of Issues (**SOI**) or Statement of Unresolved issues (**SOUI**)); and phase 2 (SOI / SOUI).

[26] As do internationally accepted economic theories of harm - there is remarkable convergence in approach despite quite different regimes in different jurisdictions, perhaps due to the ICN's work.

[27] We note the 16 January 2025 New Zealand Herald article *Sir Brian Roche spells out what's wrong with the public service* and wonder if some of those comments may apply here.

[28] See footnote 158 of the NZCC Mergers and acquisitions Guidelines 2022

[29] For example, the Commission recently filing proceedings against Alderson Logistics Limited, previous High Court decision against *Objective Corporation Limited* where it received a $1.54M penalty in breach of s 47 CA, and the Commerce Commission's 2024/25 Enforcement and compliance priority areas.

[30] Section 66, Commerce Act 1986.

[31] We estimate that since 2017, only 19 of the 42 non-complex merger applications were decided within the statutory timeframe (excludes withdrawn applications). Non-complex mergers as those which were cleared without the Commission publishing a Statement of Issues.

[32] NZCC, Merger determinations and enforcement statistics.

	o Consequently, aligning with the system in the EU and Australia that a clearance is deemed granted if no final determination is met in the prescribed time frame (a "long stop" date).[33] We consider this may get the balance better – the Commission could still "stop the clock", decline or suggest that it might decline a merger if more time is not granted. Slow merger processes can be a reason why transactions do not proceed, which has the potential to negatively impact the New Zealand economy. ***Procedural considerations – written decisions*** We have some concerns about the Commission's practice to not to delay providing its written reasons, in some cases for several months. Reasons for a decision should be issued at the time the decision is made or very shortly thereafter. The lack of timely written reasons for a decision has significant consequences, including: • Preventing parties from assessing the prospects for an appeal in a timely manner and impacting the statutory timeline for an appeal (the time for which runs from the date a decision is made). • Negating the value of an appeal, as the decision will have been acted on and in practical terms may be hard to reverse. • Undermining confidence in the Commission's decision-making process, as there may be a perception that the written reasons do not in fact reflect the reasons why the decision was made at the time, especially if there is a considerable delay between the publication of the decision and the publication of the written reasons.
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.
	Yes. The "substantial degree of influence" (**SDI**) test was traditionally an important part of section 47 when the prohibition related to unilateral (single firm) market power. The purpose was to capture all parties within the same group and those with sufficient influence (ie interconnected and associated parties). We consider that sections 47(2) and (3) of the Act (and thus the SDI test) are legacy and not needed for the application of the SLC test which instead looks at likely market impacts.

[33] See Article 10 of EU Merger Regulation: *Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.* See also section 51ABZI(2) *Commission deemed to make determination at end of determination period* of the recently passed Australian Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024.

	In practice, the Commission still uses this test and arguably takes a conservative approach (tending to group all interconnected and associated persons as a matter of caution). Arguably this overstates levels of coordination, but it has in practice appeared to work.
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.
	No. We consider that all the relevant circumstances in which a firm may have SDI are captured by the SLC test, which forms part of the economic analysis and factual matrix of each matter. Introducing bright-line rules or a more legal approach is not needed. We consider doing so would result in more difficulties than using a factual analysis.
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?
	No. The current section 47 test is sufficiently clear. However, we are concerned that the Commission's previous interpretations have resulted in its incorrect application and created ambiguity. Inconsistently with past practice and guidelines, the Commission in *Commerce Commission v NGB Properties Limited* (*NGB*) argued that an acquisition could be considered either a contract under section 27 or an acquisition under section 47, which would allow it to argue an anti-competitive purpose rather than effects. We consider it unfortunate that this approach was taken, as it has resulted in obiter from a High Court judge suggesting there can be ambiguities as to when section 27 or section 47 applies.[34] With respect to his Honour, in our view this approach is incorrect, and may wrongly steer the Commission and courts in future. This raises the broader issue of independent oversight of the Commission where it diverges from its usual approach / a clear line of authority, particularly in litigation. Further, this illustrates the risk that settled cases become de-facto case law. Regardless of whether the Commission obtains additional powers, there may be some benefit in greater scrutiny or oversight of the Commission. A fast-track appeal mechanism could be something to consider (which we discuss under **Question 30**).

[34] *Commerce Commission v NGB Properties Ltd* [2023] NZHC 2005 at [47].

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?
	a. Referring simply to "assets" could have benefits considering *NGB*. b. We do not consider there is a need to define "assets" further.
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	We consider the voluntary process to be working well. The voluntary process is a function of the Commission's practice, which can change over time. We expect that the workstream focusing on Commerce Commission governance arrangements could result in better support for Commissioners in effective and efficient decision-making.[35] We commend the Commission for the effectiveness of the informal notification regime.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	No, with the potential exception of uncompetitive concentrated industries.
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.
	a. A stay and/or hold separate power: We do not consider this necessary. **b. A call-in power:** We do not consider this would make a material difference.

[35] See *Workstream One: Commerce Commission governance arrangements* in Competition Settings Review Release of Discussion Document Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986.

	c. **A mandatory notification power for designated companies:** We consider mandatory notification powers would likely only be beneficial where they are targeted to uncompetitive concentrated industries.[36] Any targeted notification regime would need clear criteria. The merger regime should otherwise remain voluntary.
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?
	Yes. We consider that behavioural undertakings will be particularly beneficial for non-horizontal mergers. As the expert body, the Commission should have broad jurisdiction to accept both behavioural and divestment undertakings and should be able to decide when and how to receive them. This would bring us into line with other leading international jurisdictions, including Australia, and we have consistently submitted on the benefits of allowing the Commission to accept behavioural undertakings.
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. The cartel provision prohibitions are excessively broad, capturing most competitor agreements, including many which are benign and/or procompetitive. Conversely, the exceptions are excessively narrow. This uncertainty is coupled with the fact that the Commission ceased its streamlined authorisation process, which Australia has now adopted for collaborations.[37]

[36] For example, the ability of the German Bundeskartellamt to impose mandatory notifications where it is satisfied that a merger within an identified sector may significantly restrict competition (Page 19 of the Discussion Paper).

[37] See chapter 5.4 of ACCC's Sustainability collaborations and Australian competition law: A guide for business.

	A notable example is the decline of Anytime NZ Ltd's collaborative activity clearance application, despite the Commission expressing a preliminary view that competition was unlikely to be substantially lessened.[38] In our view, this did not reflect well on New Zealand competition law in practice and has deterred companies from seeking clearance for collaborative activities. Other examples where the Act may deter beneficial agreements include environmental/sustainability initiatives, joint bids and franchise structures. While these reforms were intended to focus on substance over form,[39] in our view this is not the case, with the focus landing on the type of business model instead.
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?
	We consider the key design issue is the overreach of cartel provision prohibitions, the underreach of exceptions, and the apparently conservative application of these tests by the Commission, which we submit should form part of this review. The collaborative activity exception should arguably be broad enough to allow for beneficial collaboration. However, based on *Anytime*, we see a real risk that courts would interpret the exception narrowly, particularly given that courts will defer to the Commission as the expert body. Wider interpretation of the exceptions is needed, noting that New Zealand does not benefit from 'anti-overlap' provisions for cartel provisions like Australia.[40]
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	We consider the ultimate issue lies in the design flaw of the cartel prohibitions as described above, and this should be the primary focus. However, we have considered the following options: 1. **Make explicit in the Commerce Act that the Commission has a role in issuing guidance on the interpretation of provisions of the Act:** No. The Commission is an investigation/enforcement body, and, given the overreach of the cartel prohibitions, the Commission has tended to take a conservative approach with its guidance. Guidance on when the Commission will/will not take enforcement action will provide more certainty than issuing guidance on interpretation of the law. Commission guidance should not be given any legal weight.

[38] *Anytime NZ Limited* [2022] NZCC 22 at [94].
[39] Commerce Commission Competitor Collaboration Guidelines, January 2018 at [72], [97], [102] and [113].
[40] See, for example, section 45AR of the Australian Competition and Consumer Act 2010.

	2. **Empower the Commission, on its own initiative, to issue binding rules that create a safe harbour from the prohibitions:** We see benefit in this. Safe harbours are needed given the overreach of the law. However, any power conferred on the Commission to issue binding rules should not result in anything falling outside of the safe harbours automatically being considered illegal. 3. **Introduce a statutory notification regime for specified classes of arrangements:** We would see benefit in this if notification would give protection to otherwise potentially prohibited behaviour (ie it may be workable where an automatic exemption from per se prohibitions is granted, but the regulator is still able to raise concerns about substantive competition issues). This may be complex in practice, and we cannot comment further without details, noting the risk of chilling effects given the Commission's current conservative approach. 4. **Empower the Commission, on its own initiative, to make class exemptions:** We are largely in support of broadening the ability for collaboration without risking breaches in the law. This can work well in practice & has in the EU with its block exemption regulations.[41] We note collaboration can be beneficial and is often necessary to face large scale challenges such as climate change/transitioning to net zero.[42] Again, any conduct falling outside of class exemption criteria should not automatically be deemed prohibited by the Commission. 5. **Provide an exception for small business from the Commission fee payable to apply for authorisation:** While we would welcome this, we consider the main solution lies with the Commission's process, approach and timeliness of written decisions. The Commission should be a nimble organisation that can move quickly on smaller/simpler matters.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	As we have touched on above, our key points are as follows: • The design flaw is the overreach of cartel provision prohibitions and the underreach of exceptions.

[41] European Commission, Block Exemption Regulations.

[42] For example, the EU has a block exemption relating to sustainability agreements in the agricultural sector.

	• This also ultimately comes down to the practices adopted by the people (ie how the Commission is interpreting the law, which has been conservative in the past). We are optimistic the governance arrangement review will address this.
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?
	We consider that "arrangement" and "understanding" under Part 2 of the Act should be broad enough to adequately capture tacit collusion. Further, a person making an "attempt" to contravene Part 2 of the Act is subject to pecuniary penalties, acting as a further form of deterrence.[43] We recognise the risks of concerted practices in uncompetitive concentrated industries but wonder if the government's concerns would be better addressed by a broader focus on those industries.
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?
	We do not consider there is evidence that warrants a broad prohibition for 'concerted practices'. In our view, considering the concerns highlighted by the Minister, the issue is more about capturing conduct that would fall under 'conscious parallelism'/'mere parallelism' in uncompetitive concentrated industries.[44] As above, any concerted practice could likely be addressed as falling under an "arrangement", "understanding", or "attempt" under the Act.

[43] Section 80, Commerce Act 1986.
[44] See figure at page 28 of the Discussion Paper.

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.
	Rather than more industry codes, given the Minister's stated concerns, we wonder if empowering the Commission with a standard set of remedies/tools limited to identified uncompetitive concentrated industries may be more beneficial. The details and process of such remedies/tools would need to be considered in depth (including consideration of remedies offshore) but could include: • Non-discrimination rules • Obligations to supply • Structural/operational/accounting separation • Lines of business restriction And at the government level: • Sponsoring competition eg Fibre • Changing regulatory settings Another possible tool is the ability to recommend divestiture.[45] The OECD's observed that "[…] *the NZCC does not have the power to perform market investigations – in contrast with competition authorities in the United Kingdom, Mexico, Iceland and Germany – with the power to determine and enforce structural or behavioural remedies. A test of the market studies process will come when the government's response to a NZCC-initiated study is debated in Parliament*."[46] Vertical/horizontal disaggregation could be dealt with separately following review.[47]

[45] See, for example, Lina Khan's *The Separation of Platforms and Commerce*, which highlights the importance of divestments (eg structural separation) as a useful tool that should be used by regulators. Lina Khan supports the return of divestment powers (citing historical use in the US eg AT&T) in the modern context to address potential and ongoing harms in concentrated industries where oligopolies (such as digital platforms) enjoy the exercise of market power to undermine competition without effective constraint as result of the ineffectiveness of current antitrust agency tools (such as behavioural remedies).
However, the idea of forced break-ups remains controversial, especially in newer fast-moving industries – see Herbet Hovenkamp's critique of breakups (for digital enterprises): Why Breakups Aren't the Best Way to Curb Tech Monopolies - Knowledge at Wharton

[46] OECD Economic Surveys: New Zealand 2024, page 54.

[47] See, for example, *Provisional supermarket divestment cost benefit analysis and proposed next steps*.

	We consider this may address competition issues in uncompetitive concentrated industries more appropriately than industry codes.
22.	If you think that industry codes or rules could fill a gap, what class of matters or rules could be included in an industry code or rules?
23.	If the Commerce Act is amended to provide for the making of industry codes or rules, what matters would be important to consider in the design of the empowering provisions in the Act?
	Clear criteria would be needed regarding who this applied to and how the process worked. Further, a fast, limited appeals process with a specialist overview body is needed (see **Question 30**).
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
	We do not see that there is a particular need to amend the provisions of the Act, noting that: • the Court has the power to make an order directing a person to comply with an enforceable undertaking (section 74C); and • the Court has broader powers to make such orders as appropriate where a party to the proceedings has suffered loss or damage (section 89). If there was to be a targeted regime for uncompetitive concentrated industries, the design of the regime would need to include consideration what enforcement powers the Commission and/or the courts required as part of that regime.

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.
	No. In our view, the Commission's current approach to confidentiality does not strike the right balance and confidential information is not being sufficiently protected. Confidentiality concerns are a serious impediment to information being provided to the Commission. We are aware of a number of parties who have chosen not to provide submissions or information to the Commission because of concerns that the Commission will disclose confidential information. This is particularly the case where parties with SMP are involved and smaller players fear repercussions or retaliation. This can lead to the Commission making decisions without full access to information, and make it easier for parties seeking statutory immunity to obtain a clearance. Conversely, parties seeking clearance from the Commission often claim confidentiality over key details regarding the counterfactual. This makes it difficult for the Commission to test the counter-factual and for those seeking to challenge a merger. The current approach creates information asymmetries, which favour incumbents or those applying for clearance.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	We do not believe that changes to the Act are necessary, but we would like to see a change of approach. The Commission has the tools to protect confidential information under the OIA (in particular it can withhold information if the release of confidential information would be likely to prejudice the supply of similar information in the future – this is already happening) and in the Act by way of s100 orders and section 106(7). Despite the ability to withhold confidential information, we have experienced instances in which, despite our objection, confidential information has been released to individuals (and in some cases direct competitors).

	We do not believe the Commission's current approach of releasing confidential information to counsel and experts subject to a confidentiality undertaking adequately protects confidential information. Providing confidential information on a counsel-only basis and subject to onerous confidentiality undertakings is problematic because: • There is a real risk of breach that is difficult to establish or enforce and the Commission does not monitor compliance. • It puts lawyers in a difficult position in relation to their professional obligations to their clients. The advice to a client will change based on the confidential information received, and in fact the confidential information may inadvertently be disclosed in the process of providing advice. • The more people who have access to the information, the more risk of disclosure (whether deliberate or inadvertent). Confidentiality undertakings should be used sparingly and only if there are strongly public policy grounds to disclose the information to the person in question. Different considerations should also apply in respect of providing documents to experts as opposed to lawyers on the basis of confidentiality undertakings, as experts are not subject to the same professional obligations as lawyers. We would like to see the Commission review its approach to OIA requests and shift the balance towards protection of confidential information. Further, a fast, limited appeals process with a specialist overview body is needed (see **Question 30**).
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	We would be supportive of this. Previously, the Commission was robust in protecting parties making confidential submissions and there was good use of section 100 orders.
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?
	Substantial Market Power (SMP) We commend MBIE for its work thus far and understand it generally has questions about merger control, anti-competitive conduct and codes for rulemaking among other issues. However, in our view, the Minister's concerns appear to largely relate to conduct/contracts/acquisitions of parties with SMP. We appreciate that section 36 of the Act was only recently reviewed by MBIE.[48] However, the Minister's and government's concerns with uncompetitive industries suggest greater scrutiny of s36 may be required. Section 36 of the Act is not consistent with some jurisdictions. Legislation in Australia, the EU, the UK and Canada all explicitly contemplate that more than one party may possess market power, while section 36 does not.[49] This has however been acknowledged in the Commerce Commission's Misuse of Market Power Guidelines.[50] There are concerns in certain uncompetitive concentrated industries where parties argue they cannot have market power because they are constrained by one or two strong competitors. One solution could be to deem market players in certain uncompetitive concentrated industries as having SMP. This could potentially allow the Commission to focus on the conduct of those competitors (including acquisitions and relevant contracts) rather than SMP arguments. ***Appeal rights*** Given the complexity and potential broadening of the scope of Commission powers, we recommend MBIE also considers balancing such changes with greater oversight / rights to appeal the Commission's decisions (eg a fast-track limited rights to appeal to an independent appeal tribunal). This would bring New Zealand in line with other jurisdictions (including Australia) which offer fast-track appeal processes of some of the competition regulator's decisions (although we would not necessarily consider

[48] MBIE, *Review of section 36 of the Commerce Act and other matters*.

[49] Australia: Section 46(7), Competition and Consumer Act 2010, EU: Article 102, Treaty on the Functioning of the European Union, UK: Section 18, Competition Act 1998, Canada: Section 79(1)(a) Competition Act R.S.C., 1985, c. C-34.
We note that the definition of "*person*" under the Commerce Act is quite broad and is defined as including *"any association of persons whether incorporated or not".* See section 2 (Interpretation), Commerce Act 1986.

[50] Commerce Commission, Misuse of Market Power Guidelines, March 2023 at [41].

overseas models should be copied without proper weight to New Zealand's smaller scale and need for speed and efficiency).

A fast-track appeal right would be particularly useful in relation to merger decisions, beneficial collaborations, and OIA decisions made by the Commission.

Lobbying/transparency/standdown periods

The OECD has commented that:[51]

> *New Zealand is not close to the frontier of international best practice in terms of regulating lobbying and/or cooling off periods between the public and the private sector, which does not foster a level playing field; there is some scope to enhance lobbying and other regulations on public officials and ensure that they are applied evenly.*

The lack of rules and transparency around lobbying was also a factor in New Zealand dropping out of its top 3 position in the latest Corruption Perceptions Index (**CPI**)[52] for the first time since 2012.

The OECD recommended the introduction of tighter standards against lobbying and conflicts of interest[53] and Transparency International NZ (**TINZ**) recommended the establishment of a clear lobbying code of practice (to address conduct) and creating better lobbying transparency.[54]

In our view, clear rules and transparency around lobbying and conflicts of interest would be beneficial for encouraging competition in New Zealand.

General Comments:

[51] OECD Economic Surveys: New Zealand 2024, page 51.

[52] The CPI is updated annually with the aim of monitoring and providing a comprehensive global ranking of public sector corruption. New Zealand placed fourth with its score dropping from 85 to 83. Previously New Zealand (alongside Denmark) was considered a world leader for many years as the 'least corrupt' nation globally. See: https://www.transparency.org.nz/corruption-perceptions-index. See also, Radio New Zealand, *New Zealand slips further down global corruption list*, 12 February 2025.

[53] OECD Economic Surveys: New Zealand 2024, page 77.

[54] See TINZ review of New Zealand, *An assessment of the effectiveness of anti-corruption institutions in New Zealand in deterring, detecting and exposing corruption*.